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SUPREME COURT DISENGAGEMENT FROM STATE CRIMINAL
PROCEDURE: THE CASE OF STONE V. POWELL

A Dissertation
Presented for the
Doctor of Philosophy
Degree
The University of Tennessee, Knoxville

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George Larry Mays
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ABSTRACT

The purpose of this study is twofold: (1) to analyze the United States Supreme Court decision of Stone v. Powell, 428 U.S. 465, 96 S. Ct. 3037, 49 L.Ed. 2d 1067 (1976), and its place in the development of federal habeas corpus doctrine, and (2) to address the question of whether Stone v. Powell has had significant impact on the highest level of state appellate courts.

Two methods were utilized to assess the impact of Stone v. Powell. First, an analysis was undertaken of some of the most important habeas corpus cases decided by the United States Supreme Court. These cases arose from the habeas corpus provisions of the Judiciary Act of 1789 and subsequent expansions and contractions of habeas corpus jurisdiction. This case analysis has been supplemented by a review of pertinent secondary material by legal scholars and social scientists.

In addition, the research includes analysis of a survey sent to every member of the highest appellate court hearing criminal appeals in each of the fifty states. For comparison, the study includes analyses of the state appellate decisions rendered since 1976 in which Stone v. Powell was

cited. This comparison provides a check between what judges say, formally in their written opinions, and what they say when surveyed confidentially.

This study is important to social scientists for two reasons. First, it serves to expand the limited research done on state courts. Secondly, it provides a look at changing federal-state court relations in light of the "new federalism."

The major finding of the research was that Stone v. Powell can be viewed along two dimensions: a narrow, substantive dimension of applying the case as merely a Fourth Amendment exclusionary rule decision, or along a broader, policy dimension of judicial federalism. Both the case analyses and the survey results revealed that state supreme courts have not moved into the criminal procedure areas vacated by the United States Supreme Court.

Although the Burger Court has opened the way for expanding influence and importance by state supreme courts, these courts have applied the Stone v. Powell decision along the narrow, substantive dimension of Fourth Amendment exclusion. Thus, state supreme courts have not assumed the position of coequal partners with the federal courts in assuring adequate and appropriate disposition of federal claims.

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CHAPTER I

SUPREME COURT INVOLVEMENT IN STATE CRIMINAL PROCEDURE

The purpose of this study is to address the question of whether the United States Supreme Court decision in Stone v. Powell¹ has had significant impact on the highest level of state appellate courts.² Impact is used in this analysis to signify changes in state criminal procedure and/or workloads resulting from the Stone decision.

Impact may include changes in the number or types of cases accepted for review by state supreme courts,³ increases or decreases in workloads, or changes in the methods of handling cases accepted for review. The latter may encompass expectations of better case preparation and presentation by attorneys, adherence to proper criminal procedure by trial judges, or closer scrutiny of cases by state appellate tribunals.

Accompanying this examination is an inquiry into the

¹428 U.S. 465 (1976).

²See Appendix A for the official designation of these courts.

³The generic use of the term will be employed throughout this research.

Burger Court's supposed "retrenchment," with reference to state criminal procedure. Retrenchment, or disengagement, denotes a self-imposed scaling down of Supreme Court activity.⁴ Many observers feel that by this disengagement, the Burger Court has returned to a traditional concept of federalism, in contrast with the initiatives of the Warren Court, thus allowing the highest state appellate courts greater latitude in establishing their own guidelines for the administration of criminal justice.

This "traditional" view of federalism calls attention to the distinction between the functions and operations of the federal and state courts and thus emphasizes a two-tiered judicial system--separate, but interrelated. This is essentially the approach to federalism taken by the authors of the Judiciary Act of 1789.⁵ The compromises

⁴See, for example, Gene Goldenberg, "The Burger Court Decade," Knoxville News-Sentinel, 15 April 1979, p. B-1; 16 April 1979, p. 13; and 17 April 1979, p. 13. Also, "Recent Decisions," 15 Duquesne Law Review 543 (1977) and Stephen Wasby, Continuity and Change: From the Warren Court to the Burger Court (Pacific Palisades, Ca. : Goodyear Publishing Co., 1976), p. 199.

⁵See David W. Neubauer, America's Courts and the Criminal Justice System (North Scituate, Mass. : Duxbury Press, 1977), p. 45 and Julius Goebel, History of the Supreme Court of the United States: Antecedents and Beginnings to 1801 (New York : Macmillan Co., 1971), pp. 457, 458.

struck in drafting that seminal legislation were aimed at creating a federal (national) judicial system and identifying its relationships with existing state courts. The Act recognized a degree of overlapping jurisdiction between federal and state judicial systems, neither being totally subservient to the other.⁶ The ultimate authority of the Supreme Court in matters of federal law implicit in the Supremacy Clause of the Constitution was, however, reflected in Section 25 of the Judiciary Act which gave the federal courts the authority to reverse state laws and constitutions when they were in conflict with United States laws and the United States Constitution.⁷

Some Supreme Court observers believe that the Court under Chief Justice Burger has been more cognizant of the concept of federalism and thus more deferential to state courts. If, then, the Supreme Court under Chief Justice Burger has been more willing to uphold the decisions of state appellate courts, one should ask the questions:

⁶Neubauer, America's Courts and the Criminal Justice System, pp. 49-50.

⁷Henry J. Abraham, The Judicial Process, 3rd ed. (New York : Oxford University Press, 1975), p. 306.

(1) what does this portend for federal-state court relations, federalism and comity issues, and (2) what impact will Stone v. Powell, and similar decisions, have on state court criminal proceedings and workloads. Even more broadly stated, what are the implications of Supreme Court disengagement from an area such as criminal procedure that it has closely supervised for nearly twenty years?

In order to answer these questions it is necessary to look at the concept of federalism and to see the important part it has played in federal-state court relations. Additionally, in laying the groundwork for this research, one must be concerned with the Supreme Court's involvement in the nationalization of the Bill of Rights and its role in establishing "appropriate" levels of justice.

The Concept of Federalism

Laurence Tribe says that federalism is most appropriately viewed as an "institutional interdependence . . . that best summarizes the American ideal of protecting liberty by fragmenting power."⁸ He warns, however, that the "Supreme

⁸Laurence H. Tribe, American Constitutional Law (Mineola, N.Y. : Foundation Press, 1978), p. 17.

Court has not fully articulated the conception of federalism."⁹ Therefore, in order to more fully illuminate the concept, federalism will be viewed along two closely related dimensions: comity and judicial integrity. These Tribe calls "respecting the individual autonomy of state judicial systems" and "preserving the integrity of state law" respectively.¹⁰

Comity

All definitions of comity focus on the same point: that "federal courts will exercise sound discretion before intervening in the decisions of state courts."¹¹ Tribe says that comity is the "fundamental premise of judicial federalism" and it provides that

. . . since both federal and state courts have a duty to enforce the Constitution, there is no constitutional basis, in the absence of some infirmity in the state judicial process itself, for preferring federal courts to state courts as adjudicators of federal constitutional claims.¹²

⁹Ibid., p. 147.

¹⁰Ibid.

¹¹Paul Warr, "Federal Habeas Corpus Review: Alive or A Wake?" 3 Journal of Contemporary Law 338 (1977).

¹²Tribe, American Constitutional Law, p. 148.

Giving respect to the decisions of other courts extends not only to the initiation of a suit, as suggested by Tribe, but it is also relied on "to preclude federal review of the state decision once it has been made."¹³ Thus, federal courts, including the Supreme Court, have traditionally been reluctant to intervene in state criminal proceedings.¹⁴

Judicial Integrity

The second dimension of judicial federalism, that of judicial integrity, is closely linked to comity. Judicial integrity involves the exclusion of the Supreme Court from providing definitive answers in controversies solely involving state laws. Thus, the Supreme Court will not intervene in cases where no federal question is present. It should be apparent, however, that over the past two decades the Court has made its own determinations of the presence or absence of federal questions, especially in appeals involving state criminal defendants.¹⁵ Therefore, the Supreme

¹³ Journal of Contemporary Law at 343.

¹⁴ Thus, the Warren era can be viewed as one departing from a number of "traditional" legal doctrines.

¹⁵ For an extended discussion of judicial integrity see Tribe, American Constitutional Law, pp. 119-29, 147.

Court "seeks to limit the occasions on which federal courts, in the process of constitutional adjudication, may construe ambiguous state law."¹⁶ The obvious reason for this tendency is that

. . . federal interpretations of state law do not bind the states, [and] it is always possible that a federal construction of ambiguous state law will turn out to be incorrect.¹⁷

Judicial integrity, therefore, encompasses notions of wide latitude in decision-making for both state and federal courts. It becomes a shorthand reference for autonomy and noninterference, with each court system respecting the "realm" of responsibility of the other. As Henry Glick admonishes:

State supreme courts are not simply duplications of the national court at a lower level of the judicial hierarchy . . . they are distinctive institutions which are integral parts of the state political and legal systems.¹⁸

It has appeared to many that the distinctions of jurisdiction and function between state and federal courts became blurred after 1960. This was especially so because of the

¹⁶ Ibid., p. 147.

¹⁷ Ibid.

¹⁸ Henry R. Glick, Supreme Courts in State Politics: An Investigation of the Judicial Role (New York : Basic Books, 1971), p. 5.

federal habeas corpus rulings and increased nationalization of criminal defendant rights by the United States Supreme Court under Chief Justice Earl Warren. In this research, the concept of federalism is not limited to criminal justice or habeas corpus rulings, but rather federal habeas corpus serves as an important illustration of the issues of federalism. Habeas corpus is important, then, because in no other area of criminal procedure has the "friction" between the federal judiciary and the state judiciaries been more apparent.

Friction Caused by Federalism

Judicial federalism in America refers to a dual court system characterized by the "existence of two sets of courts, state and federal, with authority to adjudicate questions of state and federal law."¹⁹ State courts are primarily charged with hearing state offenses and federal courts are concerned with matters of federal law. However, state court judges are additionally responsible for supporting the United States Constitution and other federal laws and rights, and federal

¹⁹Gerald Gunther, Cases and Materials on Constitutional Law (Mineola, N.Y. : Foundation Press, 1975), p. 1605.

judges are involved in state court proceedings by means of appeals from state prisoners.

With overlapping jurisdictions and responsibilities, the conflict between state courts and federal courts seems almost inevitable. As was noted many years ago by a group of experts on judicial administration:

. . . the differences in the view which state and federal courts respectively take as to the law applicable to the same case result in irritation which has somewhat impaired the usefulness of the federal courts in some localities.²⁰

When a Supreme Court is judicially active and interventionist, like the Warren Court, the problem of "friction" between federal and state courts is exacerbated. As Paul Warr notes:

The Warren Court did not speak in terms of "discretion," "comity," and "federalism." Indeed, if any attitude was expressed toward the workings of the state and lower federal courts at all, it was one of mistrust of their ability to construe constitutional concerns correctly.²¹

One possible result of this "friction" and mistrust is that

²⁰ Charles W. Eliot, Moorfield Storey, Louis D. Brandeis, Adolph J. Rodenbeck, and Roscoe Pound, "Preliminary Report on Efficiency in the Administration of Justice," in Judicial Administration: Text and Readings, eds. Russell R. Wheeler and Howard R. Whitcomb (Englewood Cliffs, N.J. : Prentice-Hall, 1977), p. 54.

²¹ 3 Journal of Contemporary Law at 341.

. . . even when the United States Supreme Court does make a major decision which is to serve as a policy guideline of the lower courts, state courts may seek ways of avoiding the application of the high court's rulings to their own cases.²²

Thus, in order to "remind" state courts of their rulings and intentions, the Supreme Court may decide a series of cases in which it articulates and refines a number of messages or cues to state appellate courts.

Supreme Court Cues on "Appropriate"

Levels of Justice

The period of Supreme Court history delineated as the "Warren era" saw federal court intervention in at least four areas of cases where state courts were served notice concerning what was expected of them. During this time the Supreme Court sent "cues," some subtle some not so subtle, back to state appellate courts concerning what was viewed as "appropriate" levels of justice. The four areas addressed here by no means cover the broad sweep of Supreme Court activity, but these areas received widest attention because of conflicts arising between the federal judiciary and state judiciaries or political systems.

²²Glick, Supreme Courts in State Politics, p. 6.

The four areas are: racial segregation, reapportionment, First Amendment rights, and the rights of state criminal defendants. The last of these four areas is of utmost concern in this research.

Warren Court Activity

The Warren Court era was marked by a willingness to take on tough, unpopular issues. Among these were cases such as Brown v. Board of Education,²³ striking down the over half-century old doctrine of "separate but equal" as applied to education in the public schools.²⁴ The Warren Court also addressed the question of legislative reapportionment in cases such as Gomillion v. Lightfoot,²⁵ Baker v. Carr,²⁶ Wesberry v. Sanders,²⁷ and Reynolds v. Sims.²⁸ In the area of First Amendment rights the Warren Court heard cases dealing with

²³347 U.S. 483 (1954).

²⁴Plessy v. Ferguson 163 U.S. 537 (1896).

²⁵364 U.S. 339.

²⁶369 U.S. 186 (1962).

²⁷376 U.S. 1 (1964).

²⁸377 U.S. 533 (1964).

civil rights demonstrations,²⁹ the burning of draft cards,³⁰ defacing the flag,³¹ libel,³² and obscenity.³³

Although Supreme Court cases in the previously mentioned areas have affected the lives of millions of people, the final area dealing with the rights of criminal defendants, has had by far the greatest impact on criminal procedure in state court systems. This area, therefore, has proven to be a point of irritation to state trial and appellate courts.

Expansion of Habeas Corpus Review

To adequately understand Warren Court activity and influence in the area of criminal procedure, one must understand the method frequently utilized by the Court to supervise state criminal procedure: the writ of habeas corpus.

²⁹Edwards v. South Carolina 372 U.S. 229 (1963), Cox v. Louisiana 379 U.S. 536 (1965), Brown v. Louisiana 383 U.S. 131 (1966), and Adderly v. Florida 385 U.S. 39 (1966).

³⁰United States v. O'Brien 391 U.S. 367 (1968).

³¹Street v. New York 394 U.S. 576 (1969).

³²New York Times Co. v. Sullivan 376 U.S. 254 (1964).

³³Roth v. United States 354 U.S. 476 (1957), Ginzburg v. United States 383 U.S. 463 (1966), and Jacobellis v. Ohio 378 U.S. 184 (1964).

Although habeas corpus review had been expanded by Congress and the Supreme Court during the entire history of the Court, no period of expansion is equal to that of the Warren era.

Beginning in 1961 with Mapp v. Ohio,³⁴ the Supreme Court expanded its intervention in state criminal procedure cases. This expansion reached its broadest application in the 1963 cases of Townsend v. Sain³⁵ and Fay v. Noia.³⁶

In Townsend v. Sain the Supreme Court, by means of federal habeas corpus, examined the weight of evidence presented in a state criminal trial and ordered a new evidentiary hearing. The conviction against Townsend had resulted from an allegedly involuntary confession obtained by use of a "truth serum." The Supreme Court ruled that this confession would not square with voluntariness guidelines under the Due Process Clause of the Fourteenth Amendment. The Court additionally held that the federal district court erred in not delving further into the matter.

³⁴367 U.S. 643 (1961).

³⁵372 U.S. 293 (1963).

³⁶372 U.S. 391 (1963). See also, Henry v. Mississippi 379 U.S. 443 (1965).

Townsend v. Sain was followed by Fay v. Noia in which the Supreme Court ruled that state habeas corpus petitioners did not have to exhaust state remedies in order to appeal to the federal courts for relief. Fay v. Noia marked an era where state prisoners could call into account many state procedures and where federal courts would be involved in unprecedented supervision of state criminal cases.

This application of federal habeas corpus gave state prisoners, in effect, a dual channel of appeal. Thus, if a state criminal petitioner was unsuccessful in having his case heard on a writ of certiorari, he need only renew his efforts via the habeas corpus route, thereby increasing his chances of having a state conviction overturned.

Given this broadening of habeas corpus jurisdiction, it becomes important to look at the substantive issues with which the Warren Court dealt in the area of criminal defendants' rights.

Rights of Criminal Defendants

Questions concerning the rights of indigent criminal defendants go to the very heart of the American legal system. Notable among the decisions of the Warren Court dealing with

the rights of indigent defendants are: Griffin v. Illinois,³⁷ granting the right to be furnished a transcript of the trial for purposes of appeal; Gideon v. Wainwright,³⁸ expanding the right to assistance of counsel in state trials; Douglas v. California,³⁹ recognizing the right to counsel on appeal; and Miranda v. Arizona,⁴⁰ applying the privilege against self-incrimination and the right to assistance of counsel to custodial police interrogations. The overriding message to state trial and appellate courts was that for justice to be done, a defendant had the right, and thus should have the opportunity, to be represented by an attorney until final disposition of the case.⁴¹

During the period from 1961 to 1968, near the end of the Warren era, the Supreme Court dealt with other issues relating to the rights of criminal defendants. Among these issues were: the exclusion of illegally obtained evidence

³⁷351 U.S. 12 (1956).

³⁸372 U.S. 335 (1963).

³⁹372 U.S. 353 (1963).

⁴⁰384 U.S. 436 (1966).

⁴¹Absent, of course, a knowing and intelligent waiver of that right.

(Mapp v. Ohio);⁴² incommunicado interrogations (Escobedo v. Illinois and Miranda v. Arizona);⁴³ confrontation of witnesses in state trials (Pointer v. Texas);⁴⁴ damaging pre-trial publicity (Sheppard v. Maxwell);⁴⁵ speedy trial (Klopfer v. North Carolina);⁴⁶ lineup procedures and pre-trial identification (United States v. Wade);⁴⁷ and the right to jury trials in state criminal cases (Duncan v. Louisiana).⁴⁸ In these cases the Supreme Court addressed both the form and the content of state trial and appellate proceedings.

Given the high level of visibility and activity of the Supreme Court between 1953 and 1969, the Warren years, one is compelled to ask what happens to state courts when the Supreme Court disengages from an activist position, as it

⁴²367 U.S. 643 (1961).

⁴³378 U.S. 478 (1964) and 384 U.S. 436 (1966) respectively.

⁴⁴380 U.S. 400 (1965).

⁴⁵384 U.S. 333 (1966).

⁴⁶386 U.S. 213 (1967).

⁴⁷388 U.S. 218 (1967).

⁴⁸391 U.S. 145 (1968).

did in Stone v. Powell.⁴⁹

Research Methodology

The research upon which this study is based is designed to gauge the impact and implications of Stone v. Powell,⁵⁰ limiting federal court jurisdiction for writs of habeas corpus involving state prisoners. Another step will be taken in addressing these concerns from the perspective of state appellate courts, for these courts will ostensibly be the beneficiaries of decisions like Stone v. Powell.

Two methods will be utilized to assess the impact of Stone v. Powell. First, an analysis of some of the most important habeas corpus decisions rendered by the United States Supreme Court will be undertaken. This analysis will cover cases arising under the Judiciary Act of 1789 and subsequent changes in the Supreme Court's habeas corpus jurisdiction, whether initiated by the Court or imposed by Congress. This case analysis will be supplemented by a review of pertinent secondary materials. This material will encompass the professional literature by legal scholars and social

⁴⁹428 U.S. 145 (1968).

⁵⁰*Ibid.*

scientists bearing generally on habeas corpus jurisdiction and specifically on Stone v. Powell.

Secondly, the research will include as an integral part of the analysis a short, mailed survey sent to every member of the highest appellate court hearing criminal appeals in each of the fifty states (N=312).⁵¹ These judges are obviously in pivotal positions from which to view the impact of the Stone v. Powell decision in their states and in their respective courts.

For a point of comparison, in addition to the survey, the study will also include analysis of the state appellate decisions rendered since Stone v. Powell, covering the years 1976 to 1979, in which Stone was cited. The cases utilized will be those found in Shepard's United States Citations (1976 through April 1979) and cited in the regional case reporters (N=72) (See Appendix B). This comparison should provide a check for consistency between what the judges say in their written opinions and what they say when surveyed confidentially.

⁵¹There are 322 state "supreme court" judges in the United States, but in the states of Oklahoma and Texas the Courts of Criminal Appeals are the courts of last resort in criminal matters (See Appendix A). Thus, the discrepancy of ten in the number of judges actually surveyed.

A study of this nature is important to social scientists for a number of reasons. First, it is aimed at expanding "the relatively small amount of research which has been done on the state courts."⁵² One reason for the limited research in this area is the difficulty in obtaining statistical information on the workloads of state courts.⁵³

Secondly, this study should be viewed as an assessment of shifting federal-state court relations. When the United States Supreme Court disengages from an area such as habeas corpus supervision, do state supreme courts fill the void and in turn pass responsibility downward? Henry Glick, for one, indicates that this may not be the case since

Some state supreme courts may have little influence on the decisions of the trial courts because the high court has limited rule-making power or because the judges view their role as limited only to reviewing the specific cases which come before them.⁵⁴

Ultimately we must seek to determine whether Stone v. Powell has increased or decreased the workload of the

⁵²Glick, Supreme Courts in State Politics, p. 5.

⁵³U.S. Justice Department, Law Enforcement Assistance Administration, State Court Caseload Statistics: The State of the Art (Washington, D.C. : U.S. Government Printing Office, 1978), pp. 4, 12.

⁵⁴Glick, Supreme Courts in State Politics, p. 156.

highest state appellate courts, or perhaps federal courts granting habeas corpus petitions, and whether state supreme court judges feel compelled to assure "full and fair litigation" standards. If this complusion does exist, or if it is perceived to exist, the Burger Court may have formulated an alternative to the openended, interventionist role played by the Warren Court in the supervision of state criminal cases.

Two factors seem to be motivating the Burger Court's disengagement in the criminal procedure area. On the substantive side, the Court seems less inclined to hear, and certainly disinclined to expand, Fourth Amendment cases involving the exclusionary rule. Justices Powell and Rehnquist and Chief Justice Burger have expressed doubts as to the efficacy and appropriateness of the exclusionary rule articulated in Mapp v. Ohio.⁵⁵

Secondly, Chief Justice Burger's administrative propensities toward reducing the federal courts' workloads seem to dictate a preference for limiting the number of appeals by state prisoners. By tightening jurisdiction on federal

⁵⁵367 U.S. 643 (1961).

habeas corpus petitions, the Burger Court has demonstrated its desire for state appellate courts to shoulder an increasing load in settling "federal" questions. This should mean that state appellate courts will have wider discretion substantively and procedurally, and will have less federal court supervision. If this is indeed the case, state appellate courts will be the beneficiaries of a new judicial federalism. Thus, cases like Stone v. Powell may have a significant impact on criminal justice because of the United States Supreme Court and state supreme courts acting in concert to expand state court influence and importance.

CHAPTER II

SUPREME COURT IMPACT

Impact studies, in general, have sought to answer questions about the efficacy of certain institutions in our society. In this broad context, major constitutional decisions of the United States Supreme Court have attracted the attention of a growing number of scholars since the landmark school desegregation cases of the 1950s.¹ Thus, after twenty-five years of legal and social science research, judicial impact analysis has emerged as a significant field of inquiry.²

In this setting, it is the purpose of this research to determine the impact of the 1976 United States Supreme Court case of Stone v. Powell³ on state appellate courts and their procedures. This case nominally dealt with the issue of application of the Fourth Amendment exclusionary rule, but had

¹Brown v. Board of Education (I) 347 U.S. 483 (1954) and Brown v. Board of Education (II) 349 U.S. 294 (1955).

²James P. Levine, "Methodological Concerns in Studying Supreme Court Efficacy," in Compliance and the Law, eds. Samuel Krislov, et al. (Beverly Hills, Ca. : Sage Publications, 1972), p. 99.

³428 U.S. 465 (1976).

the broader implication of severely limiting the opportunities for federal habeas corpus relief on the part of state prisoners. In the broadest sense, the analysis is aimed at determining the implications of Supreme Court disengagement from criminal procedure areas that have been closely supervised by the federal courts.

What is Impact?

Impact may be viewed as the "ultimate result" of a Supreme Court decision.⁴ However, one must be warned that the full meaning of impact goes far beyond this simplistic definition. A number of subtleties and hidden traps exist in impact studies.

Wasby warns that there is a distinction between "outputs" and "outcomes"--a term used synonymously with impact.⁵ Outputs are the official pronouncements of the United States Supreme Court by way of its decisions, rules, and orders.

⁴Stephen L. Wasby, The Impact of the United States Supreme Court (Homewood, Ill. : Dorsey Press, 1970), p. 243.

⁵Stephen L. Wasby, "The Supreme Court's Impact: Some Problems of Conceptualization and Measurement," in Compliance and the Law, ed. Samuel Krislov, et al. (Beverly Hills, Ca. : Sage Publications, 1972), p. 129; also in Stephen L. Wasby, The Impact of the United States Supreme Court, pp. 22-42.

Distinct from the outputs, however, are the outcomes or the ultimate consequences of the decisions rendered by the Court. It should be obvious very early that a given output or decision may produce widely divergent, contradictory, and unintentional outcomes or impacts. Therefore, "the relations between decisions and outcomes are probabilistic rather than deterministic."⁶

Impact, then, is taken to mean the result or effect, immediate or long-range, of a Supreme Court decision.⁷ That result might be freedom, imprisonment, or retrial for a criminal defendant. The result or impact might also be monetary gain or loss, or a change in business practice. For lower federal and state courts, the result of a criminal case might mean rehearing the case or correcting their rules of criminal procedure to conform to guidelines enunciated by the Supreme Court. The result or impact of a case will therefore mean different things, depending upon the type of case under consideration or the types of parties involved in the case.

In analyzing the impact of a United States Supreme Court case on state supreme courts, major importance should be

⁶Levine, "Methodological Concerns in Studying Supreme Court Efficacy," p. 105.

⁷Ibid., p. 100.

accorded to resulting changes in workloads; changes in jurisdiction, differences in the kinds of cases heard; and changes in intercourt relations, especially the relations between federal and state courts.

This definition presents two problems to those engaged in research involving the United States Supreme Court. First, impact studies generally are ex post facto and, therefore, may not provide the researcher with "before" and "after" pictures.⁸ Secondly, some have lamented that it is difficult to know in advance the importance of many Supreme Court cases. This makes it "easy to miss the significance of many Supreme Court decisions" until some time after the cases are decided and reported.⁹ Unless a case receives national attention prior to the Supreme Court's decision, it may be difficult to tell whether or not the case will be significant or produce any far-ranging consequences.

For the above reasons, it seems prudent for this research to follow the course which suggests that "researchers should wait for some period of time to transpire before

⁸Wasby, The Impact of the United States Supreme Court, p. 245.

⁹Herbert Jacob, Law, Politics, and the Federal Courts (Boston : Little, Brown and Co., 1967), p. 163.

assessing" the impact of a decision.¹⁰ The problem still remains that

by looking at the result rather than [the] process, we have tended to examine situations where impacts were more or less obvious, or where noncompliance was equally evident.¹¹

Stephen Wasby, in his studies on Supreme Court impact, asserts that two concepts need to be delineated and differentiated: compliance and impact.¹² Compliance, Wasby maintains, has been studied by political scientists much longer than has impact. Compliance is the more narrowly focused of the two concepts and deals with the degree of obedience to a decision. This makes compliance fairly easy to identify.¹³

Impact, the broader of the two concepts, is much more difficult to assess since the limited scope of some Supreme Court decisions means that their impact may be negligible, unidentifiable, or perhaps forestalled. Given this specification of impact, Levine characterizes four different types

¹⁰Levine, "Methodological Concerns in Studying Supreme Court Efficacy," p. 105.

¹¹Wasby, The Impact of the United States Supreme Court, p. 244.

¹²Wasby, "The Supreme Court's Impact," pp. 133-139.

¹³Ibid., p. 133.

of outcomes or impacts possible from a Supreme Court decision. These he calls:

- 1) Specific implementation
- 2) Hierarchical control
- 3) Political impact
- 4) Social consequences

Specific implementation is concerned with the responses or reactions of lower court judges to the specific orders of the United States Supreme Court.¹⁴ This essentially is what Wasby calls compliance. Hierarchical control occurs when lower federal courts and state courts consider Supreme Court decisions to be "authoritative statements of law."¹⁵ Political impact addresses the question of responsiveness of other, non-judicial governmental officials to Supreme Court decisions.¹⁶ And, finally, social consequences are the "broadest and most diffuse of all effects" dealing with "how, if at all, the fabric of society is affected."¹⁷ With these types of outcomes possible, it appears that judges are more likely to

¹⁴Levine, "Methodological Concerns in Studying Supreme Court Efficacy," p. 100.

¹⁵Ibid., p. 101.

¹⁶Ibid., pp. 101-102.

¹⁷Ibid., p. 102.

conform to higher court decisions given the possibility of review and reversal of their decisions and actions.

For purposes of this study, the first two of these possible outcomes--specific implementation and hierarchical control--are most important. That is, what changes take place in lower court procedures as a result of Supreme Court decisions? And how much, if any, hierarchical control does the United States Supreme Court exert over state appellate courts?

In dealing with the concept of impact, perhaps the most difficult issue of all is the time element involved. If there are both immediate and long-range consequences, at what point does the "impact" occur? It may not be possible to answer this question. But it seems likely, as Wasby notes, that the farther removed in time one is from the decision, the less distinguishable or distinctive the impact of the decision.¹⁸ By the same token, impact may not appear until some time has elapsed after the decision has been rendered. Thus, rather than dealing with discrete time elements, impact studies may be most concerned with what could be considered a zone of impact. This "zone" would extend from the time a

¹⁸Wasby, "The Supreme Court's Impact," pp. 144-145.

decision became publicized until it was no longer cited, commented upon, or considered important.

Why Impact Studies?

Given the above specification of the concept of impact, one is compelled to ask the question: why undertake impact studies dealing with the United States Supreme Court?

Wasby says that generally impact studies are case studies of particular decisions.¹⁹ Thus,

. . . the typical case study deals with a topic of some controversiality and, after an exegesis of the law and policy behind it, compares this indication of what practices ought to be with what in fact happens.²⁰

Decisions rendered by the Supreme Court are assumed to have a certain magnitude and influence about them. For this reason "it is assumed . . . that the decisions of [Supreme Court] judges are far reaching."²¹ And that they also

¹⁹Ibid., p. 131.

²⁰Jerry N. Clark, Keith O. Boyum, Samuel Krislov, and Roger C. Shaefer, "Compliance, Obedience, and Revolt: An Overview," in Compliance and the Law, eds. Samuel Krislov, et al. (Beverly Hills, Ca. : Sage Publications, 1972), p. 31.

²¹Theodore L. Becker, ed. The Impact of Supreme Court Decisions -- Empirical Studies (New York : Oxford University Press, 1969), p. 3.

"influence certain areas of social behavior, and for that reason they attract the attention of social scientists."²²

Miller asserts that impact analysis is important because these studies allow "insight to be gained into the operative rules about law, the rules of how law acts in the social milieu."²³ Impact studies are important, then, because they give social scientists a "method of ascertaining the causal connection between judicial decision and social change."²⁴

It should be recognized that the connection between the judicial decision, the Supreme Court's output, and the social or judicial change, the outcome or impact, may be somewhat tenuous. Levine supports this position by saying that

in discussing Supreme Court efficacy we are dealing with an indirect causal relationship in that other factors intervene between the initial cause and the ultimate effect.²⁵

²²Ibid.

²³Arthur S. Miller, "On the Need for 'Impact Analysis' of Supreme Court Decisions," in The Impact of Supreme Court Decisions, ed. Theodore L. Becker (New York : Oxford University Press, 1969), p. 14.

²⁴Ibid., pp. 14-15.

²⁵Levine, "Methodological Concerns in Studying Supreme Court Efficacy," p. 105.

The uncertainty of the causal relationship has prevented the emergence of a "theory" of judicial impact. This uncertainty of relationship has also been reflected in an uncertainty in research methodology. So that

even when political scientists became directly and openly concerned with impact, they were not sure where to start, and early work was largely descriptive and of the case-study variety.²⁶

Even with its inherent limitations, "the case study may, in many situations, continue to be our tool, but it must be used to illuminate theory, not for its own sake."²⁷ This research is aimed at providing further illumination in the search for a theory of judicial impact.

Although the "Supreme Court [may not be] as powerful as both its friends and critics often assume," its symbolic importance makes it a valuable point of study.²⁸ And, impact studies, whether they are case studies or not, provide scholars with another instrument with which to "zero in on or 'triangulate'" analyses of Supreme Court efficacy.²⁹

²⁶Wasby, The Impact of the United States Supreme Court, p. 245.

²⁷Ibid.

²⁸Levine, "Methodological Concerns in Studying Supreme Court Efficacy," p. 121.

²⁹Ibid., p. 117.

Areas of Study

Several different areas of study dealing with Supreme Court impact have been undertaken. As mentioned before, most of these studies have dealt with critical decisions rendered by the Supreme Court and the attendant reactions to those decisions.

Clark, Boyum, Krislov, and Shaefer suggest that

One of the prime difficulties in dealing with impact is that the decisions of the Supreme Court are part of the general milieu in which later events take place and part of a set of multiple causes of such events.³⁰

Most of the areas dealt with in impact studies address criticisms of the Supreme Court in "terms of the likely effects (or non-effects) of its recent decisions."³¹ Most of these studies are of the case study variety, and

Though rigorous empirical study is not characteristic, the reapportionment, right to counsel, exclusionary rule, school prayer, desegregation decisions, among others, have been particularly productive of this sort of criticism.³²

Impact studies, therefore, have been concentrated in the areas of "criminal law and procedure" and "fundamental Constitutional issues."³³

³⁰Wasby, "The Supreme Court's Impact," p. 137.

³¹Clark, et al., "Compliance, Obedience, and Revolt," p. 32.

³²Ibid.

³³Ibid.

Notable among the "fundamental Constitutional issue" studies are those dealing with: obscenity and censorship, religion and school prayer, flag salutes, reapportionment, and desegregation. Obscenity and censorship cases are typical of the First Amendment cases brought before the Supreme Court.³⁴

Impact studies in the areas of religion, school prayer, Bible study, and flag salutes have been undertaken frequently. Among these have been the studies of William Beaney and Edward Beiser,³⁵ Robert Birkby,³⁶ Ellis Katz,³⁷ William Muir,³⁸ and Frank Sorauf.³⁹

³⁴James P. Levine, "The Supreme Court and Sex Censorship: A Study of Judicial Efficacy," in The American Political Arena, eds. Joseph Fiszman and Gene Poschman (Boston : Little, Brown and Co., 1970).

³⁵William Beaney and Edward Beiser, "Prayer and Politics: The Impact of Engel and Schempp on the Political Process," 13 Journal of Public Law 475-503 (1964).

³⁶Robert Birkby, "The Supreme Court and the Bible Belt: Tennessee Reaction to the Schempp Decision," Midwest Journal of Political Science 10 (August 1966) : 304-319.

³⁷Ellis Katz, "Patterns of Compliance with the Schempp Decision," 14 Journal of Public Law 396-408. (1965).

³⁸William K. Muir, Prayer in the Public Schools: Law and Attitude Change (Chicago : University of Chicago Press, 1976).

³⁹Frank J. Sorauf, "Zorach v. Clauson: The Impact of a Supreme Court Decision," American Political Science Review 53 (September 1959) : 777-791; also in Herbert Jacob, Law, Politics, and the Federal Courts (Boston : Little, Brown and Co., 1967), pp. 179-194.

"Criminal law and procedure" impact studies have dealt with such concerns as: admissions and confessions, the rights of juveniles, the right to counsel, application of the Fourth Amendment exclusionary rule, and wiretapping decisions. Among the studies in these areas are those of Norman Lefstein, Vaughan Stapleton, and Lee Teitelbaum (juveniles);⁴⁰ Anthony Lewis (the right to counsel);⁴¹ David Manwaring (the exclusionary rule);⁴² Walter Murphy (wiretapping);⁴³ and Neal Milner,⁴⁴ Otis Stephens,⁴⁵ and Michael Wald, et al. (confessions).⁴⁶

⁴⁰Norman Lefstein, Vaughan Stapleton, and Lee Teitelbaum, "In Search of Juvenile Justice: Gault and its Implementations," 3 Law and Society Review 491-562 (1969).

⁴¹Anthony Lewis, Gideon's Trumpet (New York : Random House, 1964).

⁴²David Manwaring, "The Impact of Mapp v. Ohio," in The Supreme Court as Policy-Maker, ed. David Everson (Carbondale, Ill. : Southern Illinois University, 1968), pp. 1-43.

⁴³Walter F. Murphy, Wiretapping on Trial: A Case Study in the Judicial Process (New York : Random House, 1965).

⁴⁴Neal A. Milner, The Court and Local Law Enforcement: The Impact of Miranda (Beverly Hills, Ca. : Sage Publications, 1971).

⁴⁵Otis H. Stephens, The Supreme Court and Confessions of Guilt (Knoxville, Tn. : University of Tennessee Press, 1973).

⁴⁶Michael Wald, Richard Ayers, David Hess, Mark Schantz, and Charles Whitebread, "Interrogations in New Haven: the Impact of Miranda," 76 Yale Law Journal 1519-1648 (1967).

These studies vary in length from short articles to books, and vary in place of publication from social science journals and law reviews to university and commercial presses. Likewise, the impact studies mentioned vary somewhat in their degree of empiricism and methodological sophistication. Additionally, these studies have as their foci impact upon certain groups (the police, the general public, or school officials), institutions (Congress or state government officials), or geographical areas (the South, for example).

One gap in impact studies is readily apparent, that of Supreme Court impact on state courts. This is not to suggest, however, that no work has been done in this area. One relatively early impact study dealing with state courts was Walter F. Murphy's article "Lower Court Checks on Supreme Court Power."⁴⁷

Murphy's article, clarifying the relationship between the Supreme Court and its decisions, and the actions of lower court judges is, in reality, what might be called a reverse impact study. Murphy examines the ways in which lower court

⁴⁷American Political Science Review 53 (December 1959) : 1017-31; also in The Impact of Supreme Court Decisions -- Empirical Studies, ed. Theodore L. Becker (New York : Oxford University Press, 1969), pp. 65-75.

judges can, and will, alter the effect of Supreme Court decisions, or how they can undermine or minimize the impact of a decision. Thus, Murphy says that

The Supreme Court typically formulates general policy. Lower courts apply that policy, and working in its interstices, inferior judges may materially modify the High Court's determinations.⁴⁸

What Murphy failed to do in his study, however, was to assess the changes occurring in the lower court policies and procedures as a result of a Supreme Court decision, when the decision is one with which the judges agree.

Writers in all types of impact studies generally agree that Supreme Court decisions normally do not result in sudden, overwhelming societal or judicial changes. Compliance with Supreme Court mandates may take years, as with Brown v. Board of Education,⁴⁹ or it may be accomplished almost overnight, as with the Nixon tapes case.⁵⁰

In all areas of impact study, then, the Supreme Court decision should be seen as one element leading to change, but by no means the only element. The Supreme Court affects

⁴⁸Walter F. Murphy, "Lower Court Checks on Supreme Court Power," p. 66.

⁴⁹347 U.S. 483 (1954).

⁵⁰United States v. Nixon 418 U.S. 683 (1974).

changes in the total judicial picture including its own environment or, as Wasby notes, "the impact of the Court has an impact on the Court."⁵¹

More often than not, the relationship between lower courts and judges and the Supreme Court is characterized as one of antagonism. The clear implication is that Supreme Court decisions may have little or no effect on state appellate courts because state court judges have a variety of means for diffusing the impact of a decision.

Herbert Jacob says that state courts can "either ignore the Supreme Court ruling or evade it by finding against the winner of the Supreme Court appeal on different grounds."⁵²

Rather than ignoring a Supreme Court ruling, more often state appellate courts react to those rulings by modification of rules and procedures. They may also exhibit explicit, articulated refusals to change. Two examples of the latter response have been noted and often commented upon. The first such response was from the 1958 Conference of State Chief Justices. Led by a group of Southern judges, state supreme

⁵¹Wasby, "The Supreme Court's Impact," p. 145.

⁵²Herbert Jacob, Justice in America: Courts, Lawyers, and the Judicial Process (Boston : Little, Brown and Co., 1965), p. 193.

court chief justices officially castigated the justices of the United States Supreme Court for "confusing their own policy views with constitutional commands."⁵³

A second example of lower court response to Supreme Court decisions has been seen in the actions of the Judicial Conference of the United States which has "endorsed [a] bill to reverse Supreme Court decisions allowing relatively liberal opportunities for state prisoners to seek habeas corpus in federal courts."⁵⁴

It should be noted that whatever "control" the Supreme Court exerts over lower courts, there is a basic differentiation between federal and state courts. That is,

Under its power as supervisor of the administration of federal justice, the Supreme Court can set more exacting standards for lower courts of the United States than for state tribunals.⁵⁵

Inherently, then, the link between the Supreme Court and lower federal courts is stronger than the link between the Supreme Court and state appellate courts. As Murphy notes:

⁵³Murphy, "Lower Court Checks on Supreme Court Power," p. 67. See also, Murphy, p. 68 and Wasby, The Impact of the United States Supreme Court, p. 196.

⁵⁴Murphy, "Lower Court Checks on Supreme Court Power," p. 70.

⁵⁵Ibid., p. 69.

"State court judges do not follow the U.S. Supreme Court's rulings automatically, regardless of the existence of the supremacy clause."⁵⁶

Even though the Supreme Court exercises less direct supervisory control over state appellate courts, this does not mean that state court judges will view Supreme Court decisions with utter disregard. Judges from both systems are subject to the "cult of the robe," meaning that

. . . no matter how fierce their inter-court rivalries, common possession of this magic sets judges apart from the rest of men and gives them interests and outlooks as judges.⁵⁷

Summary

Supreme Court impact studies have been widely published during the past twenty-five years. These studies fall into basically two categories: constitutional issues centered around the First Amendment, and criminal procedure issues dealing with Amendments 4, 5, 6, and 8.

From these impact studies two concerns have emerged.

⁵⁶Wasby, The Impact of the United States Supreme Court, pp. 196-197.

⁵⁷Murphy, "Lower Court Checks on Supreme Court Power," p. 69.

First,

. . . the decisions of the [Supreme] Court, far from producing uniform impact or automatic compliance, have varying effects--from instances in which no action follows upon them to a wide degree of compliance (usually under-reported), resistance, and evasion.⁵⁸

This issue deals with the substance of impact studies. A second concern, however, has been with the research methodology of impact studies. As Wasby has noted

. . . we do not yet have many studies carried out with prior specification of variables or statements of hypotheses. In other words, our identification of variables (and hypotheses) has been ex post facto.⁵⁹

He does suggest, however, that this is "legitimate in exploratory stages of research, in which most of our work is located."⁶⁰

In surveying the impact literature of the past twenty-five years, it becomes apparent that one area has not been well researched: that of Supreme Court impact on state appellate courts. Murphy's study, and those similar to it, which addressed some of the issues and relations between the Supreme Court and state appellate courts, did not adequately deal with the issue of compliance. This was especially true of cases

⁵⁸Wasby, The Impact of the United States Supreme Court, p. 243.

⁵⁹Ibid., p. 245.

⁶⁰Ibid.

well received by state appellate courts, as distinguished from highly controversial rulings. More studies of this kind should be undertaken.

In an attempt to fill the existing gap, this study deals with the institutions most often directly affected by Supreme Court decisions: the state appellate courts. While some research has been done on lower court compliance, especially with controversial decisions, little has been written that addressed the question of what happens when the United States Supreme Court and state supreme courts act in concert to expand the influence of the latter. The present study represents an effort in this direction.

CHAPTER III

DEVELOPMENT OF HABEAS CORPUS REVIEW

To appreciate the significance of Stone v. Powell,¹ it is useful to trace the historical development of the writ of habeas corpus in the United States. This development has followed an erratic course of expansion and contraction in habeas corpus jurisdiction by both Congress and the Supreme Court. The Supreme Court's current inclination toward disengagement from earlier efforts to reform law enforcement (efforts symbolized by such decisions as Mapp and Miranda) is reflected in part in its recent narrowing of habeas corpus jurisdiction.

Article III of the United States Constitution made no specific provision for the issuance of writs of habeas corpus. This writ, called by Jefferson the "great writ of liberty,"² was protected under Article I, Section 9 of the Constitution from infringement except in cases of rebellion, invasion, or threat to public safety.

¹428 U.S. 465 (1976).

²Charles Fairman, History of the United States Supreme Court: Reconstruction and Reunion 1864-88 (New York : Macmillan Co., 1971), p. 440.

The writ itself means "having the body" and is an instrument whereby a court can compel ministers of the state to produce an individual being incarcerated, and to show cause of commitment and the reason the individual's detention should be continued. Habeas corpus, then, provides the judiciary with a means for keeping in check the executive's exercise of police powers.

Although dealt with in two pieces of legislation subsequent to the Constitution, and the subject of numerous United States Supreme Court decisions, the writ of habeas corpus remains very loosely defined and rests primarily on its English common law origins. The greatest importance of the writ of habeas corpus is that within the federal system of government it provides a means of collateral review--pursuing judicial relief in both the state and national court systems. Thus, no matter what changes have occurred in federal habeas corpus jurisdiction, the writ has always been a potentially important means for the administration of justice.

Statutory Development

To expand and clarify Article III, Congress drafted and passed the Judiciary Act of 1789.³ Julius Goebel, in his

³"An Act to establish the Judicial Courts of the United States" 1 Stat. 73.

volume on Supreme Court history, says that this act infused life into Article III.⁴

Section 14 of the Judiciary Act specifically deals with the writ of habeas corpus. In this section, developed by a Senate "judiciary" committee that was disposed to a national court system, provisions were made for:

- 1) The courts of the United States to have the power to issue writs of habeas corpus
- 2) Justices of the Supreme Court and judges of the district courts to have habeas corpus powers
- 3) The writ to extend to prisoners in custody "under color of the authority of the United States, committed by a federal court."⁵

The last provision is the most important in terms of the scope of this study, for it limits federal habeas corpus inquiry to the federal courts and to federal prisoners. This has been a source of controversy, especially for state court judges, throughout the history of our legal system.

During the drafting and debate over the Judiciary Act of

⁴Julius Goebel, History of the Supreme Court of the United States: Antecedents and Beginnings to 1801 (New York : Macmillan Co., 1971), p. 457.

⁵Ibid., p. 478.

1789, it was apparent that the federalists desired a national court system developed along hierarchical lines. It was their contention, for example, that state courts should serve as merely inferior federal courts. This system would serve as a check on parochialism and provincialism. The idea was not to survive very long with anti-federalists, lead by Richard Henry Lee, seeking to retain local autonomy over state court systems.⁶ Therefore, the final document that emerged from the Senate committee has been called an "instrument of reconciliation" between the federalists and anti-federalists.⁷

One anti-federalist provision was that the writ of habeas corpus would not be used by federal judges to supervise state court activity. This did not mean, however, that the federal courts had no control whatsoever over state court proceedings and appeals. A state prisoner could appeal to the federal courts by pressing federal claims and by writs of error and certiorari.

The historical development of federal habeas corpus review falls into four time periods: (1) from the Judiciary Act of 1789 to the close of the Civil War; (2) from early

⁶See, for example, Goebel, pp. 457-60, 478-82.

⁷Ibid., p. 458.

Reconstruction to the Warren era; (3) the Warren era (1953-69); and (4) the post Warren era.

With one major exception, from 1789 to 1863 federal habeas corpus jurisdiction lay as fairly unfertile soil for those who would expand federal court jurisdiction, or for those who would restrict it. The major exception to this was the action of President Lincoln who, within weeks of the attack on Fort Sumter, acted in his capacity as commander-in-chief to suspend the privilege of "the writ of habeas corpus in several areas, and caused the arrest and military detention of persons suspected of treasonable practices."⁸ This he did in fulfillment of his constitutional mandate to "take care that the Laws be faithfully executed."⁹ Congress subsequently approved the action of President Lincoln when on March 3, 1863 it voted to suspend the privilege of habeas corpus under Article I, Section 9 of the Constitution.¹⁰

⁸C. Herman Pritchett, The American Constitutional System, 2nd ed. (New York : McGraw-Hill, 1967), p. 62. See also, Carl B. Swisher, History of the Supreme Court of the United States: The Taney Period 1836-64 (New York : Macmillan Co., 1974), pp. 841-876.

⁹Constitution of the United States, Article II, Section 3.

¹⁰Pritchett, The American Constitutional System, pp. 61-62. The action of President Lincoln did not go unchallenged by the courts, however, as noted in Chief Justice Taney's opinion in Ex parte Merryman 17 Fed. Cas. 144 (1861).

The suspension of the privilege of habeas corpus by President Lincoln was followed by the appointment of military governors, thus imposing martial law in the rebel territories. Offenses, even those that were "federal" offenses, committed in these territories could not be appealed through the federal civilian court system above the circuit court level. The Supreme Court sidestepped the constitutional issue of military government, which was expanded under Reconstruction. With the major exception of the Milligan ruling,¹¹ the question of the suspension of habeas corpus went unchallenged until 1867.

On February 5, 1867 Congress amended the Judiciary Act of 1789. This amendment provided that the appeals process for writs of habeas corpus would follow the now familiar route of district court to circuit court and circuit court to the Supreme Court. Also added was a provision that limited district and circuit court judges to hearing habeas corpus causes only within their jurisdictions.

In March of 1868 Congress considered a bill to expand Supreme Court jurisdiction to cases involving customs and revenue officers. To this bill was attached an amendment repealing the Supreme Court's appellate jurisdiction granted

¹¹Ex parte Milligan 4 Wall. 2 (1866).

under the Habeas Corpus Act of 1867. By October of 1869 the Supreme Court had found a way to respond to this curtailment of its jurisdiction by Congress. In the case of Ex parte Yerger,¹² the Court exercised habeas corpus jurisdiction under the repealed Act of 1867.¹³ As a result of the repeal of the Habeas Corpus Act of 1867, Congress had left habeas corpus review only open to the district and circuit courts. Under this system of review, district and circuit court judges greatly expanded their jurisdictions, often to the inclusion of prisoners held under the auspices of state authority.¹⁴

Not only was Congress active in delineating the jurisdiction of the Supreme Court during and after the Civil War, especially during Reconstruction, but this assertion of constitutional prerogative has continued. Sensing the impending clash between the federal and state judiciary mechanisms, Congress restored habeas corpus review authority to the Supreme Court in 1885. Charles Warren says that "the right of appeal had been held in abeyance for seventeen

¹²8 Wall. 85 (1968).

¹³Charles Warren, The Supreme Court in United States History (Boston : Little, Brown and Co., 1924), p. 213.

¹⁴Ibid., p. 409.

years," since the repeal of Supreme Court jurisdiction in 1868.¹⁵

The House Judiciary Committee's report on the 1885 Act recognized that the absence of Supreme Court jurisdiction would ". . . bring the two judicial systems into serious and powerful conflict unless the State Courts tamely submit to be shorn of the jurisdiction they have exclusively exercised since the Government existed. . . ." ¹⁶

To more fully understand the relationship that has existed between the national and state judicial systems, it is necessary to look at the changes that have occurred in federal habeas corpus jurisdiction. These changes have occurred not only because of the actions of Congress to expand or contract the Supreme Court's powers, but also because the Court itself has decided cases influencing its own jurisdiction.

Succession of Supreme Court Cases

This review should not be taken to be a complete listing of United States Supreme Court habeas corpus decisions. Neither will there be an extensive recitation of the essential,

¹⁵Ibid.

¹⁶Ibid., p. 410.

substantive aspects of the cases included. Rather, this summary and analysis is intended to show the changing attitudes and policies of the Supreme Court in the area of review or supervision of state courts through application of the writ of habeas corpus.

Judiciary Act of 1789 to Close of the Civil War

One of the earliest United States Supreme Court cases arising under the habeas corpus provisions of the Judiciary Act of 1789 was that of Ex parte Watkins,¹⁷ where Tobias Watkins had been incarcerated after being sentenced by a circuit court. His appeal, by writ of habeas corpus, was denied on the grounds that this method could not be used to circumvent the Supreme Court's lack of jurisdiction in criminal cases.¹⁸ The issue essentially was whether the Supreme Court was being asked to use habeas corpus as an exercise of its appellate jurisdiction. The question was, could a petitioner appeal directly to the Supreme Court by means of habeas corpus? In rendering its decision, the Supreme Court held that the judgment of a federal court of appropriate

¹⁷28 U.S. 193 (1830).

¹⁸Fairman, History of the United States Supreme Court, p. 444.

jurisdiction could not be attacked by means of habeas corpus.¹⁹

Early Reconstruction to the Warren Era

The Civil War brought on a sequence of habeas corpus cases beginning with Ex parte Milligan.²⁰ Lambdin Milligan was charged with conspiracy, treason, and insurrection for plotting the freeing of Confederate prisoners held in Ohio and Indiana during the Civil War. Because of the nature of the charges, Milligan and his co-conspirators were tried before military tribunals rather than in the federal, civilian courts of Indiana. All of the defendants were found guilty and subsequently appealed their cases on writs of habeas corpus based on the lack of a jury trial. Justice Davis, in delivering the opinion for the Supreme Court, stated in sweeping language that the laws of war "can never be applied to citizens of states which have upheld the authority of the government, and where the courts are open and their process unobstructed."²¹ Therefore,

No usage of war could sanction a military trial there for any offense whatever of a citizen in civil life, in

¹⁹ See, especially, *Fay v. Noia* 372 U.S. 391 (1963).

²⁰ 4 Wall. 2 (1866).

²¹ 4 Wall. 121.

nowise connected with the military service.²²

Justice Davis noted that there rightly existed a provision for the suspension of the writ of habeas corpus and that martial law could be properly utilized. He hastened to add, however, that

Martial law can never exist where the courts are open, and in the proper unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war.²³

In conclusion Davis noted that "suspension of the privilege of the writ of habeas corpus does not suspend the writ itself."²⁴ The courts must decide whether a criminal defendant is extended the writ or not. Thus,

Habeas corpus may not be suspended and citizens subjected to military justice except in areas where armed hostilities have made enforcement of civil law impossible.²⁵

One of the most significant Civil War-related cases was that of Ex parte McCardle.²⁶ McCardle dealt with issues concerning military governments and trials. The Habeas Corpus

²²4 Wall. 121-22.

²³4 Wall. 127.

²⁴4 Wall. 130-31.

²⁵Laurence H. Tribe, American Constitutional Law (Mineola, N.Y. : Foundation Press, 1978), p. 277n.

²⁶7 Wall. 506 (1869).

Act of 1867 had provided for appeals for prisoners held in violation of federal laws. Military prisoners were specifically excluded from these provisions,²⁷ and as Tribe notes ". . . there is no Article III judicial review . . . of most questions of law decided by military courts."²⁸

McCardle was a newspaperman from Mississippi who had been tried and jailed by a military court for articles printed in his newspaper that were critical of the military government and governor. The federal government's case rested on the argument that the Habeas Corpus Act of 1867 was directed at prisoners held by states, and that military prisoners were specifically excluded from habeas corpus appeals.

Before the Supreme Court could rule on McCardle, and indirectly on the constitutionality of Reconstruction, Congress repealed the Habeas Corpus Act of 1867. Even though it was presumed that this repeal would apply to future cases, the Supreme Court ruled that the repeal removed its jurisdiction from the McCardle case.

Chief Justice Salmon P. Chase delivered the opinion for the court in McCardle. In his opinion he noted that the

²⁷Glendon Schubert, Constitutional Politics (New York : Holt, Rinehart, and Winston, 1960), p. 279.

²⁸Tribe, American Constitutional Law, p. 43.

first point of concern was that of jurisdiction. Chief Justice Chase held that Congress had the power to extend Supreme Court jurisdiction or to exempt cases from the Court's jurisdiction. By the action of Congress, then, "the provision of the act of 1867, affirming the appellate jurisdiction of this court in cases of habeas corpus is expressly repealed."²⁹

Chase recognized that there was some question concerning the effect of the repeal of habeas corpus jurisdiction over cases filed prior to the repeal. He held that on two prior occasions the Supreme Court has ruled that "no judgment could be rendered in a suit after the repeal of the act under which it was brought and prosecuted."³⁰ This being the case, the Chief Justice held that the Supreme Court could not "proceed to pronounce judgment in this case for it has no longer jurisdiction of the appeal."³¹

In the same year that it heard the McCardle case, the Supreme Court decided Ex parte Yerger.³² The Yerger case, like McCardle, dealt with a petitioner held in military

²⁹7 Wall. 514.

³⁰Ibid.

³¹7 Wall. 515.

³²8 Wall. 85 (1868).

custody in Mississippi. Also like McCardle, Yerger's petition for habeas corpus had been dismissed by the federal district court. However, unlike McCardle, Yerger did not base his appeal on the Habeas Corpus Act of 1867. His petition was based on the Supreme Court's habeas corpus jurisdiction granted under the Judiciary Act of 1789.

In its decision, the Supreme Court, for all intents and purposes, invalidated the Act of 1868 removing its habeas corpus review powers. The Court relied on its review powers granted originally under the Judiciary Act of 1789, but sidestepped the critical issue of the legality of military rule and detention under Reconstruction. However, "before the Court could rule on the merits, Yerger was released from military custody."³³

The case of Tennessee v. Davis³⁴ expanded federal court powers by upholding a Congressional act which provided for transferring cases from state to federal courts when the cases involved charges against federal revenue agents. Additionally, soon after the Davis case, the Supreme Court, by denying habeas corpus, extended its jurisdiction to cover state judicial

³³Gerald Gunther, Cases and Materials on Constitutional Law (Mineola, N.Y. : Foundation Press, 1975), p. 53.

³⁴100 U.S. 257 (1880).

officers. The Court in Ex parte Virginia³⁵ asserted that equal protection decisions did not apply merely to "states" but also extended to official agents of the states.

Relying on the Yerger, Davis, and Virginia cases, the Supreme Court expanded its habeas corpus jurisdiction in such cases as Ex parte Siebold,³⁶ involving voting rights under the Fifteenth Amendment to the Constitution. This decision broadened enforcement of legislation dealing with federal crimes, such as ballot box stuffing in Congressional elections, to include actions against state officials.³⁷

Thus, the 1880 term of the Supreme Court saw an increased receptiveness to appeals based on habeas corpus claims, both in traditional areas such as fair trials, and in newly emerging areas such as voting rights. Basically, therefore, the Supreme Court carried forward the tenets of the Yerger decision until 1885 when Congress reinstated the habeas corpus appeal route originated in 1867 and repealed in 1968.³⁸

³⁵100 U.S. 339 (1880).

³⁶100 U.S. 371 (1880).

³⁷Warren, The Supreme Court in United States History, p. 372.

³⁸Fairman, History of the United States Supreme Court, p. 583.

In the case of Ex parte Royall,³⁹ the Supreme Court issued its potentially most explosive habeas corpus edict. Here the Court held that federal courts had the power to release a state prisoner held unconstitutionally even prior to trial. However, the Court ruled that ". . . ordinarily the federal court should stay its hand on habeas pending completion of the state proceedings."⁴⁰

The next major habeas corpus case was that of Frank v. Mangum.⁴¹ In this case the petitioner had been convicted in a Georgia court on a charge of murder. In a trial atmosphere with strong overtones of anti-Semitism and the imminent threat of a lynchmob, the jury could not help but return a verdict of guilty.⁴² At this point, Charles Fairman suggests, it became irrelevant whether the prisoner was in federal or state custody.⁴³ The primary criterion for federal review became whether an individual

³⁹117 U.S. 241 (1886).

⁴⁰See also, Cook v. Hurt 146 U.S. 183, and Justice Brennan's opinion in Fay v. Noia 372 U.S. 418 (1963).

⁴¹237 U.S. 314 (1915).

⁴²The defendant was in fact lynched after the Supreme Court decision was handed down.

⁴³Fairman, History of the United States Supreme Court, p. 1426.

. . . was convicted on a confession involuntarily extracted, whether he was denied the right to counsel, whether the jury was fairly selected, whether the evidence against him was obtained by unlawful search and seizure, and whether he was not allowed adequate facilities to seek a review.⁴⁴

In short, the question presented by Frank v. Mangum was whether habeas corpus review could be used by the Supreme Court as a means of recognizing the right to a fair trial in a state court. Although the Supreme Court accepted the case based on habeas corpus considerations, it denied Frank's plea citing his opportunity to challenge the conviction in an "impartial tribunal"--namely, the state supreme court.

The concept of federalism decreased in importance as federal courts preempted state court decisions. Thus, in Moore v. Dempsey,⁴⁵ the Supreme Court granted habeas corpus relief to a state prisoner in order to insure a "fair trial." Here the prisoner had been convicted and sentenced to death under the threat of mob action. This threat made the trial merely a formality.⁴⁶ Although this case closely paralleled Frank v. Mangum, the majority opinion of Frank was largely repudiated.

⁴⁴Ibid.

⁴⁵261 U.S. 86 (1923).

⁴⁶Gunther, Cases and Materials on Constitutional Law, p. 511 and Tribe, American Constitutional Law, p. 513.

The period of time intervening between Frank and Moore saw somewhat of a philosophical shift on the Supreme Court. Justice William Brennan, in Fay v. Noia,⁴⁷ asserted that habeas corpus was not as important before 1916 as afterward since many appeals were taken to the Supreme Court by right on writs of error. However, with the increasing usage of the Court's discretionary jurisdiction, by writ of certiorari, habeas corpus increased in importance after Moore v. Dempsey.

In the case of Waley v. Johnston,⁴⁸ the Supreme Court delivered a per curiam decision in which it held that the petitioner had grounds to appeal his conviction on charges of kidnapping. Waley's contention was that although he had pleaded guilty, he had done so under considerable duress.

The Court, in its opinion, emphasized the appropriateness of the habeas corpus appeal since the writ

. . . extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his [the appellant's] rights.⁴⁹

Although this opinion could be viewed as expansive, in reality

⁴⁷372 U.S. 413 (1963).

⁴⁸316 U.S. 101 (1942).

⁴⁹316 U.S. 104-5.

it exemplifies a particularized form of ruling since the Supreme Court was far from throwing open its habeas corpus jurisdiction.

In Ex parte Hawk,⁵⁰ the petitioner had been confined to the Nebraska State Penitentiary upon his conviction for murder. Hawk had unsuccessfully applied for habeas corpus relief both in federal and state courts and, thus, brought his appeal to the United States Supreme Court after having previously been denied certiorari.

Hawk's basic contention was that the Nebraska court had forced him to trial so rapidly that his right to the assistance of counsel was impaired in a capital case. He also asserted that knowingly perjured evidence was utilized by the prosecution at his trial.

In hearing this case, the United States Supreme Court denied the petition for habeas corpus relief on the grounds that Hawk had not adequately exhausted the state remedies available to him. The per curiam decision stated that:

Ordinarily an application for habeas corpus by one detained under a state court judgment of conviction for crime will be entertained by a federal court only after all state remedies available, including all appellate remedies in the state courts and in this Court by appeal or writ of certiorari, have been exhausted.⁵¹

⁵⁰321 U.S. 114 (1944).

⁵¹321 U.S. 116-17.

This standard was expanded by the holding that

. . . where resort to state court remedies has failed to afford a full and fair adjudication of the federal contentions raised . . . a federal court should entertain his [the appellant's] petition for habeas corpus, else he would be remediless.⁵²

Many Supreme Court observers believed that the case of Brown v. Allen⁵³ afforded the Court the opportunity to clarify its habeas corpus jurisdiction. But, when the opinions were written, the Court had divided into four distinct groups.⁵⁴ In this case a state defendant's habeas corpus appeal was dismissed, whereupon he petitioned the United States Supreme Court for review by way of a writ of certiorari. The Supreme Court denied certiorari and the case was appealed again, by writ of habeas corpus, to the federal district court. Each stage of the federal court system had decreed that the case did not merit further federal action. This meant that by following this route of appeal, the case had appeared twice before the United States Supreme Court. Justice Jackson's opinion held that allowing dual channels of appeal would "not only burden our own docket and harass the state

⁵²321 U.S. 118.

⁵³344 U.S. 443 (1953).

⁵⁴Schubert, Constitutional Politics, p. 113.

authorities but it makes a prisoner's legitimate quest for federal justice an endurance contest."⁵⁵

The same year that Brown v. Allen was decided a new period of Supreme Court history began. Earl Warren assumed the Chief Justiceship of the Supreme Court and held the position for sixteen years.

The Warren Era (1953-69)

The real period of interest during the Warren years is that of the early 1960s. Prior to this the Supreme Court's decisions, though tending in large part to expand habeas corpus review, were highly particularized. However, two 1963 cases marked a shift to a broader definition of habeas corpus review.

The case of Townsend v. Sain⁵⁶ questioned the voluntary confession guidelines previously articulated by the Supreme Court. In this case the "police administered a drug to the defendant for purposes of relieving his drug withdrawal pains; the officers were [allegedly] unaware of its 'truth serum'

⁵⁵Ibid., p. 114.

⁵⁶372 U.S. 293 (1963).

qualities."⁵⁷ Given this situation it was highly unlikely that the resultant confession could have met the Supreme Court's voluntariness criterion.

Townsend, the petitioner, was convicted of murder and sentenced to die. After he had exhausted all of his state remedies, he applied to the federal district court for relief via habeas corpus alleging that he had been convicted on a confession obtained while he was under the influence of a "truth serum."

The United States Supreme Court, in an opinion written by Chief Justice Earl Warren, ruled that the state courts and the federal district court erred in not establishing the voluntariness, or lack thereof, of this confession. Warren maintained that the federal courts were obliged to grant an evidentiary hearing because the facts of the case remained in dispute.⁵⁸

Chief Justice Warren clearly articulated his position with regard to state courts in saying that

Even where the procedure employed does not violate the Constitution, if it appears to be seriously inadequate

⁵⁷Frank Miller, Robert Dawson, George Dix, and Raymond Parnas, Cases and Materials in Criminal Justice Administration (Mineola, N.Y. : Foundation Press, 1976), p. 639.

⁵⁸372 U.S. 312.

for the ascertainment of the truth, it is the federal judge's duty to disregard the state findings and take evidence anew.⁵⁹

Here, although Warren supported federal court intervention, the final issue was not the merit of the habeas corpus petition, even though the case was heard under such a petition, but rather the procedural error of the district court in not granting an evidentiary hearing. Townsend v. Sain did, however, lay the groundwork for the case that was to mark habeas corpus jurisdiction at its broadest.

Fay v. Noia⁶⁰ delineated the Supreme Court's most expansive interpretation of federal habeas corpus supervision of state criminal proceedings. This decision established precedent whereby a state prisoner could by-pass exhausting state remedies.⁶¹ Laurence Tribe maintains that the Fay decision

. . . signaled the lack of respect by federal courts for state procedures and at least potentially encouraged litigants in state courts not to worry about whether they had complied with state rules.⁶²

In approaching state procedures in this manner, the Supreme

⁵⁹372 U.S. 316.

⁶⁰372 U.S. 391 (1963).

⁶¹See Also, Henry v. Mississippi 379 U.S. 443 (1965).

⁶²Tribe, American Constitutional Law, p. 128.

Court increased its pressure on state courts, thus reducing autonomy and increasing resistance.⁶³

Noia had been convicted, in New York, of a murder committed during a robbery, and was subsequently sentenced to life imprisonment. The evidence against Noia, and two co-defendants, consisted entirely of confessions. The two co-defendants were eventually released after appeals showed their confessions to be coerced.

Noia's writ of habeas corpus was denied by the federal district court on the grounds that he failed to exhaust his state remedies. The United States Supreme Court, in an opinion written by Justice Brennan, overturned that dismissal. Justice Brennan asserted that there has historically been "respectable common-law authority for the proposition that habeas [corpus] was available to remedy any kind of governmental restraint contrary to fundamental law."⁶⁴ Thus,

. . . it would appear that the Constitution invites, if it does not compel . . . a generous construction of the power of the federal courts to dispense the writ conformably with common-law practices.⁶⁵

⁶³Ibid., p. 129.

⁶⁴372 U.S. 405.

⁶⁵372 U.S. 406.

Brennan maintained that considerations of federalism no longer governed in cases such as this since the Judiciary Act of 1867 and subsequent federal statutes have extended federal habeas corpus jurisdiction to state prisoners.⁶⁶ Thus, jurisdiction is "conferred by the allegation of unconstitutional restraint and is not defeated by anything that may occur in the state court proceedings."⁶⁷

Flanders and Goldman summarize the impact of Fay v. Noia by saying that

As a result of the Supreme Court's decision . . . procedural hurdles for state prisoners seeking post-conviction relief were dramatically reduced. This change in court policy put an especially heavy burden on the district courts in reviewing petitions for post-conviction relief. The courts of appeals in turn shouldered heavy responsibility for supervising the increased demand for post-conviction remedies.⁶⁸

The Post-Warren Era

If the cases of Townsend v. Sain and Fay v. Noia⁶⁹

⁶⁶14 Stat. 385-86 and 28 U.S.C. 2241 et. seq. respectively.

⁶⁷372 U.S. 426.

⁶⁸Steven Flanders and Jerry Goldman, "Screening Practices and the Use of Para-Judicial Personnel in a U.S. Court of Appeals," in Judicial Administration: Text and Readings, eds. Russell R. Wheeler and Howard R. Whitcomb (Englewood Cliffs, N.J. : Prentice-Hall, 1977), p. 246.

⁶⁹372 U.S. 293 and 372 U.S. 391 (1963).

exemplify the Warren Court's approach to the question of habeas corpus jurisdiction, then Francis v. Henderson,⁷⁰ and later Stone v. Powell,⁷¹ provide similar boundary markers for the Burger Court.

In Francis, the petitioner who had been convicted of murder in Louisiana, appealed his conviction after six years imprisonment on the ground that the grand jury that indicted him was illegally constituted--that is, grand jury impanelment had systematically excluded Negroes from service.

The Court's holding was that habeas corpus was an appropriate avenue through which to seek relief, but that the petitioner had failed to make a "timely challenge" to his conviction. Tribe summarizes the case by saying that

. . . Francis v. Henderson held that a habeas applicant must show cause for failure to comply with a state ruling requiring that any challenge to grand jury composition be made before trial and must further show actual prejudice as a result of the grand jury composition ⁷²

Justice Stewart held that the doctrines of comity and federalism require the same considerations for overturning state convictions as are required for overturning federal

⁷⁰425 U.S. 536 (1976).

⁷¹428 U.S. 465 (1976).

⁷²Tribe, American Constitutional Law, p. 129.

convictions. Thus, the petitioner would be required to show not only that the grand jury was illegally constituted, but also that this composition actually worked to his detriment.

It becomes apparent, then, that the Burger Court has moved away from the expansive interpretation represented by the Warren Court decisions of Townsend v. Sain and Fay v. Noia.⁷³ This movement, although basically incremental, gained in momentum during the mid-1970s and culminated with the decision of Stone v. Powell.⁷⁴

Summary

Expansion of the Supreme Court's habeas corpus jurisdiction proceeded slowly from the Judiciary Act of 1789 until the 1960s. Rulings originating with the Habeas Corpus Act of 1867 generally expanded the Court's supervisory power over state criminal procedure cases, but the greatest proliferation in the criminal segment of appellate activity began with the Mapp decision in 1961.⁷⁵ As a result of the Warren Court's receptiveness to the appeals of criminal defendants, the

⁷³372 U.S. 293 and 372 U.S. 391 (1963).

⁷⁴428 U.S. 465 (1976).

⁷⁵367 U.S. 643.

number of petitions for federal habeas corpus relief filed by state prisoners increased from 541 in 1952 to 7500 in 1969.⁷⁶

The reversal of the trend toward expansion of habeas corpus jurisdiction has not come quickly, and decisions like Francis v. Henderson⁷⁷ should not be viewed as ends in themselves, but instead as the primary building blocks in the Burger Court's search for a new judicial federalism. If any one case could be considered the Burger Court's capstone, relative to issues of criminal procedure and attitudes toward federalism, it would be the case of Stone v. Powell.⁷⁸

Legal scholars point to Stone v. Powell as an obvious "retrenchment" by the Burger Court in the area of criminal procedure.⁷⁹ Those individuals who have supported the expansive view of habeas corpus expounded during the Warren era maintain that Stone v. Powell erased decisions like Fay v. Noia⁸⁰ going back more than a decade. Some have even suggested that the case destroys the stability of well established

⁷⁶Warr, "Federal Habeas Corpus Review: Alive or A Wake?" 3 Journal of Contemporary Law 331 (1977).

⁷⁷Ibid.

⁷⁸428 U.S. 465 (1976).

⁷⁹"Recent Decisions," 15 Duquesne Law Review 549 (1977).

⁸⁰372 U.S. 391.

criminal procedure and even impliedly overrules Mapp v. Ohio.⁸¹ Mapp, decided by the Warren Court, applied the federal exclusionary rule, postulated in Weeks v. United States,⁸² to state court search and seizure cases. This application of the Fourth Amendment by way of the Fourteenth Amendment opened a new area of state criminal procedure to scrutiny by the federal courts. Thus, Mapp provided the substantive grounds upon which Stone v. Powell was decided.

With this perspective in mind, it is now necessary to analyze the case of Stone v. Powell and to contrast it procedurally with the Supreme Court's previous landmark of Fay v. Noia.

⁸¹367 U.S. 643. See, for example James H. Lokey, "Circuits Split over Application of Stone v. Powell's 'Opportunity for Full and Fair Litigation'," 30 Vanderbilt Law Review 888 (1977) and David W. Hammer, "Federal Habeas Corpus Relief is Barred for State Prisoners' Fourth Amendment Claims," 8 Texas Tech Law Review 454 (1976).

⁸²232 U.S. 383 (1914).

CHAPTER IV

THE CASE OF STONE V. POWELL

One way to assess the significance of any Supreme Court decision is to note the number of specific references made to the case in subsequent court decisions and in law reviews and journals. On these bases alone Stone v. Powell¹ stands as one of the most important decisions rendered by the Burger Court. Since the case was decided in 1976 there have been approximately: seventy-five law review citations, including articles, comments, and case notes;² ninety state appellate court citations;³ and 260 federal court citations.⁴ Thus, from a strictly quantitative standpoint Stone can be view as an influential case.

Philosophical Considerations: The Legal Perspective

Stone v. Powell created a hailstorm of comments and

¹428 U.S. 465 (1976).

²See, Index of Legal Periodicals (New York : H. W. Wilson Co., 1976-79).

³Shepard's Citations (Colorado Springs, Col. : McGraw-Hill, 1976-78, 1979).

⁴Ibid.

criticisms from the legal community. Since the decision, law reviews and bar journals have been replete with reflections on the implications of Stone v. Powell.

The generation of law students and legal scholars raised under the influence of the activist, interventionist Warren Court is generally critical of the obvious "retrenchment" of the Burger Court.⁵ The Stone decision is viewed by these individuals as ending the expansion of habeas corpus jurisdiction,⁶ and as shaking the stability of well established, federal criminal procedure.⁷

The "comments," "recent decisions," and "case notes" sections of law reviews reflect the generally negative reactions to Stone v. Powell. Typical of such reactions is a comment appearing in the Texas Tech Law Review within a few months of the Stone decision.⁸ The author asserted that by its majority opinion, the Supreme Court had intruded into the arena of

⁵"Recent Decisions," 15 Duquesne Law Review 549 (1977).

⁶Thomas Kilbane, "Stone v. Powell: Scope of Habeas Corpus Restricted," 10 John Marshall Journal of Practice and Procedure 401 (1977).

⁷"Recent Decisions," 30 Vanderbilt Law Review 883 (1977).

⁸David W. Hammer, "Federal Habeas Corpus Relief is Barred for State Prisoners' Fourth Amendment Claims," 8 Texas Tech Law Review 446ff. (1976).

Congressional prerogatives. This argument could be expanded, of course, to say that if contracting habeas corpus jurisdiction by the Burger Court usurped Congressional authority, expanding the Supreme Court's jurisdiction, as in Fay v. Noia,⁹ would do the same thing.

Another commentator also decried the Stone decision by saying that the

. . . decision in Stone is against the long trend of holdings extending to federal courts the "last say" with respect to questions of federal law, the inadequacy of state procedures to raise and preserve federal claims, and the concern that state judges may be unsympathetic to federally created rights.¹⁰

One law student said that the Stone decision "cast doubts on the vitality of the exclusionary rule" and that removing expectations of federal collateral attack would lead state courts to be "less conscientious in their application of the exclusionary rule."¹¹ The critical point for most who commented on Stone v. Powell was the clear implication that the decision undermined Mapp v. Ohio.¹²

⁹372 U.S. 391 (1963).

¹⁰"Case Developments," 20 Howard Law Journal 238 (1977).

¹¹10 John Marshall Journal at 401, 415.

¹²367 U.S. 643 (1961).

The substantive issue in Stone v. Powell, like Mapp v. Ohio, was application of the Fourth Amendment exclusionary rule. Mapp provided for the exclusion of illegally obtained evidence in state courts. Thus, the procedural importance of Stone is often overshadowed by fears of less zealous application of the exclusionary rule by the Burger Court.

Attitudes toward the Stone decision are obviously reflective of generalized attitudes toward the Supreme Court. Therefore, weighing against the largely negative reactions of many law students is an article written by Paul Warr.¹³ Warr's argument was delineated along the lines of distinction between the Warren Court and the Burger Court. Warr says that

The Warren Court did not speak in terms of "discretion," "comity," and "federalism." Indeed, if any attitude was expressed toward the workings of the state and lower federal courts at all, it was one of mistrust of their ability to construe constitutional concerns correctly.¹⁴

Therefore, the pervasive attitude toward state and lower federal courts during the Warren era was viewed as one of distrust. Conversely, during the Burger tenure, the Supreme Court, through its opinions, has been increasingly "tolerant and

¹³Warr, "Federal Habeas Corpus Review: Alive or A Wake?"
3 Journal of Contemporary Law 341 (1977).

¹⁴Ibid.

respectful to state courts."¹⁵ This increased tolerance and respect should lead to "an increased trust of the Burger Court in state court determinations regarding constitutional matters."¹⁶

One way to further illuminate the legal environment within which Stone v. Powell was decided, then, is to contrast the philosophies of the Warren and Burger Courts.

The Warren Court v. The Burger Court

Reference has already been made to the differences in the views of legal scholars and law students relative to the decision rendered in Stone v. Powell. These differences basically fall along two dimensions--those supportive of the Warren Court model and those supportive of the Burger Court model. Stephen Wasby characterizes the Warren Court as representing a "due process model" while the Burger Court represents a "crime control model."¹⁷ These models Wasby borrows from Herbert Packer. Packer says that the due process model resembles an

¹⁵Ibid. at 342.

¹⁶Ibid. at 343.

¹⁷Stephen L. Wasby, Continuity and Change: From the Warren Court to the Burger Court (Pacific Palisades, Ca. : Goodyear Publishing Co., 1976), p. 199.

obstacle course where the presumption of innocence is maintained throughout and the premium is on eliminating errors in the process of adjudication. The crime control model, on the other hand, places the greatest emphasis on standardized, routine procedures and efficiency (swiftness and finality in disposing of matters). This model, Packer says, operates on a presumption of guilt and most closely resembles an assembly line.¹⁸

The Warren Court

If Wasby's distinction holds true, and the Warren Court operated as a due process model, Archibald Cox maintains that it did so because of "state defaults, both legislative and judicial."¹⁹ Cox says that the Supreme Court under the Chief Justiceship of Earl Warren was actively interventionist because a "majority of states failed to act [reform their criminal procedure] despite a long period of warning."²⁰ Philip

¹⁸ Herbert L. Packer, "Two Models of the Criminal Process," in Rough Justice: Perspectives on Lower Criminal Courts, ed. John A. Robertson (Boston : Little, Brown and Co., 1974), pp. 136-152.

¹⁹ Archibald Cox, The Warren Court (Cambridge, Mass. : Harvard University Press, 1968), p. 87.

²⁰ Ibid.

Kurland says that

An "activist" Court is essentially one that is out of step with the legislative or executive branches of the government. It will be "liberal" or "conservative" depending upon which role its prime antagonist has adopted.²¹

Harold Spaeth characterizes Warren Court activism in somewhat different terms. Spaeth says that the Warren Court was considered activist because of

. . . the inclusion of more portions of Amendments IV - VIII into the due-process clause of the Fourteenth Amendment than the decisions of all its predecessor Courts combined.²²

Prior to Earl Warren becoming Chief Justice, the Supreme Court had already considered cases dealing with states' criminal procedure and with racial segregation, but the Court was not moving very rapidly into those areas.²³ However, during the 1950s and 1960s, the Warren Court broadly expanded its involvement, especially in the area of criminal procedure.²⁴

²¹Philip B. Kurland, Politics, the Constitution, and the Warren Court (Chicago : University of Chicago Press, 1970), p. 17.

²²Harold Spaeth, The Warren Court (San Francisco : Chandler Publishing Co., 1966), p. 290.

²³Robert G. McCloskey, "Reflections on the Warren Court," in Law, Politics, and the Federal Courts, ed. Herbert Jacob (Boston : Little, Brown and Co., 1967), p. 178.

²⁴H. Ted Rubin, The Courts: Fulcrum of the Justice System (Santa Monica, Ca. : Goodyear Publishing Co., 1976), p. 31.

This meant that

. . . the states were required to provide meaningful post-conviction remedies, and federal habeas corpus was available where a state had proved deficient.²⁵

Notable among the Warren Court cases dealing with the rights of criminal defendants were:

- 1) Mapp v. Ohio²⁶--extending application of the exclusionary rule to the states.
- 2) Gideon v. Wainwright²⁷--extending the assistance of counsel to state court defendants in non-capital cases.
- 3) Escobedo v. Illinois²⁸--prohibiting the police from conducting incommunicado interrogations of suspects in the absence of requested counsel.
- 4) Miranda v. Arizona²⁹--prohibiting the use of confessions obtained during custodial interrogations, in the absence of appraisal of procedural rights and their "knowing and intelligent waiver."

²⁵Kurland, Politics, the Constitution, and the Warren Court, p. 77.

²⁶367 U.S. 643 (1961).

²⁷372 U.S. 335 (1963).

²⁸378 U.S. 478 (1964).

²⁹384 U.S. 436 (1966).

- 5) Kent v. United States³⁰ and In re Gault³¹--extending many procedural protections to juvenile court proceedings.
- 6) Duncan v. Louisiana³²--granting a federal constitutional right to trial by jury in state criminal cases.

Finally, Anthony Lewis adds that the Warren Court's activism was most notably displayed in the criminal procedure area by the case of Fay v. Noia. Lewis says that this case gave the Court the grounds for determining the constitutionality of a state prisoner's incarceration, even though the prisoner had not adequately exhausted his state remedies.³³

Many other cases could be mentioned to demonstrate the Warren Court's extensive scrutiny of state criminal procedure, but these serve as illustrations of some of the areas in which the Supreme Court exercised surveillance over state courts.

The Warren Court has been characterized as creating a revolution in criminal procedure.³⁴ By developing "broad

³⁰383 U.S. 541 (1966).

³¹387 U.S. 1 (1967).

³²391 U.S. 145 (1968).

³³Anthony Lewis, "Earl Warren," in The Warren Court: A Critical Analysis, eds. Richard H. Saylor, Barry Boyer, and Robert E. Gooding, Jr. (New York : Chelsea House, 1969), p. 23.

³⁴See both Cox, The Warren Court, p. 74 and Wasby, Continuity and Change, p. 200.

rules" with "wide application,"³⁵ the Warren Court had considerable discretion in determining criminal procedure for state courts. This discretion was witnessed by decisions in "new" areas of defendants' rights, such as those dealing with juveniles, and areas in which the Warren Court expanded its influence, such as the application of federal habeas corpus.

The Burger Court

A frequently used term describing the Burger Court's disengagement in the areas of state criminal procedure supervision is "retrenchment."³⁶ However, the word should not be tossed around carelessly since two obvious meanings become apparent.

In one sense retrenchment can be taken to mean reactionary, that is regression in the face of progressive trends in jurisprudence or in society generally. A second meaning, however, seems equally plausible. Here retrenchment could mean not regression per se, but rather deflection; not abandoning areas of constitutional protection, but shifting responsibility for supervision to another level--for example, from the federal courts to the state courts.

³⁵Wasby, Continuity and Change, p. 199.

³⁶15 Duquesne Law Review at 549.

In the second sense, the picture painted by Wasby of the Burger Court's retrenchment is one of undermining, but not overruling precedents of the Warren Court.³⁷ Rubin says that the

. . . Burger Court . . . has made substantial retreat from the advances of its predecessor as to the rights of criminal defendants, but it has forged ahead on some of the same track.³⁸

The disengagement of the Burger Court in the area of criminal procedure seems to be a part of the Court's larger philosophy of judicial restraint. This deference to state courts is probably based on a "confidence in the ability of state courts to interpret and apply [the] fourth amendment adequately."³⁹ Thus, the Burger Court has "found sufficient deterrence of illegal police conduct within the state judicial system."⁴⁰

The restraint or deference of the Burger Court has extended beyond its relationships with other courts. Wasby

³⁷Wasby, Continuity and Change, p. 199.

³⁸Rubin, The Courts, p. 14.

³⁹David J. Foshee, "Limitation Placed on Federal Habeas Corpus Jurisdiction in Fourth Amendment Cases -- A Further Erosion of the Exclusionary Rule," 22 Loyola Law Review 859 (1976).

⁴⁰*Ibid.*

notes that

By comparison with its predecessor, the Burger Court has shown greater restraint toward legislative action, lower court judges' rulings, and state policy in some areas.⁴¹

The distinction between the Warren Court and the Burger Court, in the area of state criminal procedure, is best illustrated by comparing the two cases that stand at opposite ends of the habeas corpus continuum--Fay v. Noia and Stone v. Powell.

Stone v. Powell

Facts of the Case

In February of 1968 Lloyd Powell, the respondent in this case, was arrested for vagrancy in Henderson, Nevada. In the search incidental to his arrest, Powell was found to have in his possession the weapon used to commit a murder in San Bernardino, California. Powell was then extradicted to California and eventually convicted of second degree murder.

Powell's objection at the time of the trial, and subsequently, was that the vagrancy ordinance under which he was arrested was unconstitutional, thus negating the arrest and subsequent search. The conviction, however, was sustained through the California appellate courts and by the federal

⁴¹Wasby, Continuity and Change, p. 207.

district court, in which Powell petitioned for habeas corpus relief.

When the case reached the United States Ninth Circuit Court of Appeals, the conviction was overturned on the basis of the unconstitutional vagueness of the Nevada vagrancy ordinance. The Circuit Court upheld use of the exclusionary rule even though "exclusion of the evidence would serve no deterrent purpose with regard to police officers who were enforcing statutes in good faith."⁴² The purpose for applying the exclusionary rule, then, was to "serve the public interest by deterring legislators from enacting unconstitutional statutes."⁴³

The United States Supreme Court accepted this case, and the companion case of Wolff v. Rice, on a writ of habeas corpus and reversed the decision of the Ninth Circuit Court of Appeals. Justice Lewis Powell, one of the Court's Nixon appointees, delivered the opinion of the Court with Justices Brennan, Marshall, and White dissenting.

The Court's Opinion

In his opinion, Justice Powell gave special emphasis to the historical development of the writ of habeas corpus

⁴²507 F. 2d 98.

⁴³*Ibid.*

beginning with the Judiciary Act of 1789.⁴⁴ Justice Powell's greatest concern, however, was with the three Supreme Court cases which had greatly expanded application of the writ:

- 1) Frank v. Mangum⁴⁵--allowing the Supreme Court to inquire into the lawfulness of state detentions.
- 2) Brown v. Allen⁴⁶--while denying a state prisoner relief, the case did expand Supreme Court purview of state criminal procedure, specifically grand jury selection and composition.
- 3) Fay v. Noia⁴⁷--removing the "final barrier to broad collateral re-examination of state criminal convictions in federal habeas corpus proceedings."⁴⁸

The Court's ruling in Stone lay squarely against the conventional wisdom that violations of the Fourth Amendment exclusionary rule, articulated in Mapp v. Ohio,⁴⁹ necessitated habeas corpus relief for state prisoners. In fact, the Court

⁴⁴1 Stat. 81. See also, Chapter III of this text.

⁴⁵237 U.S. 309 (1915).

⁴⁶344 U.S. 443 (1953).

⁴⁷372 U.S. 391 (1963).

⁴⁸428 U.S. 477.

⁴⁹367 U.S. 643 (1961).

returned to the standard proposed in Frank v. Mangum--that of "full and fair litigation of federal claims."⁵⁰

Substantively, Mapp v. Ohio and Stone v. Powell⁵¹ dealt with the same issue--the use of illegally seized evidence in a criminal trial. Prior to Mapp the exclusionary rule had been applied only by federal courts in federal cases. This judicially devised remedy was first applied in the case of Weeks v. United States.⁵² However, until Mapp, the federal courts had resisted pleas to extend exclusionary rule protection to state courts. Therefore, when the Supreme Court extended exclusionary rule protection to state criminal defendants in Mapp v. Ohio, the way was opened for much closer scrutiny of states' criminal procedure.

Basically, the Supreme Court's holding in Mapp was two-fold. First, illegally obtained evidence would have to be excluded from a criminal trial in order to insure "judicial integrity." This simply meant that courts would not be parties to procedures that did not comport with "due process of law." Secondly, and perhaps most importantly, illegally

⁵⁰237 U.S. 333-336.

⁵¹367 U.S. 643 and 428 U.S. 465, respectively.

⁵²232 U.S. 383 (1914).

obtained evidence would have to be excluded in order to serve as a deterrent to illegal acts by law enforcement officers.

In Stone v. Powell, Justice Powell's opinion addressed the efficaciousness of the exclusionary rule.⁵³ On the question of judicial integrity Powell said that

While courts, of course, must ever be concerned with preserving the integrity of the judicial system, this concern has limited force as a justification for the exclusion of highly probative evidence.⁵⁴

Powell added that

The force of this justification becomes minimal where federal habeas corpus relief is sought by a prisoner who previously has been afforded the opportunity for full and fair consideration of his search-and-seizure claim at trial and on direct review.⁵⁵

In dealing with the issue of deterrence of police misconduct, Justice Powell noted that there was no evidence to support the effectiveness of this claim, and that

. . . the physical evidence sought to be excluded is typically reliable and often the most probative information bearing on the guilt or innocence of the defendant.⁵⁶

⁵³See, additionally, Yale Kamisar, "The exclusionary rule in historical perspective: the struggle to make the Fourth Amendment more than 'an empty blessing'," 62 Judicature 337-350 (1979) and Malcolm Richard Wilkey, "A call for alternatives to the exclusionary rule: let Congress and the trial courts speak," 62 Judicature 351-356 (1979).

⁵⁴428 U.S. 485.

⁵⁵428 U.S. 486.

⁵⁶428 U.S. 490.

Therefore,

The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice.⁵⁷

Justice Powell suggested that the essential procedural question was

. . . whether state prisoners--who have been afforded the opportunity for full and fair consideration of their reliance upon the exclusionary rule with respect to seized evidence by state courts at trial and on direct review--may invoke their claim again on federal habeas corpus review.⁵⁸

Powell maintained that

. . . in the case of a typical Fourth Amendment claim, a convicted defendant is usually asking society to redetermine an issue that has no bearing on the basic justice of his incarceration.⁵⁹

Thus,

. . . the contribution of the exclusionary rule, if any, to the effectuation of the Fourth Amendment is minimal and the substantial societal costs of application of the rule persist with special force.⁶⁰

In concluding the majority opinion, Justice Powell asserted that use of federal habeas corpus to apply Fourth Amendment exclusion was premised on the "mistrust of the

⁵⁷Ibid.

⁵⁸428 U.S. 489.

⁵⁹428 U.S. 492n.

⁶⁰428 U.S. 494-95.

state courts as fair and competent forums for the adjudication of federal constitutional rights."⁶¹ The Burger Court majority explicitly rejected this line of reasoning holding that there "now exists . . . appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States."⁶²

It was the view of the majority that the exclusionary rule often diverted the trial court from the "truth finding process and often frees the guilty."⁶³ The essence of the majority opinion, then was that

. . . where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.⁶⁴

The Dissent

Justice Brennan, in his dissenting opinion, attacked the majority for abandoning such precedents as Brown v. Allen and Fay v. Noia.⁶⁵ His dissent was predicated on a view of

⁶¹428 U.S. 493n.

⁶²428 U.S. 494n.

⁶³428 U.S. 490.

⁶⁴428 U.S. 494.

⁶⁵344 U.S. 443 (1953) and 372 U.S. 391 (1963), respectively.

the Supreme Court as closely supervising states criminal procedure--a view obviously held by a minority of the justices. The thrust of Brennan's argument was that federal collateral attack should be an instrument readily available to criminal defendants. Essentially, Brennan felt that decisions based on "proper" application of constitutional principles by state trial and appellate courts would be "vindicated on the merits when collaterally attacked."⁶⁶

In Fay v. Noia, Brennan had pointed to a broad interpretation and expansive application of the Supreme Court's habeas corpus jurisdiction.⁶⁷ This interpretation clearly placed state court procedures in subjugation to those of the federal courts.

In contrast to this approach, the Burger Court's view in Stone v. Powell carefully circumscribed the Court's jurisdiction in federal habeas corpus petitions. The Burger Court majority held, in contrast to Fay v. Noia, that the most critical issue was not whether the criminal defendant has exhausted his state remedies, but whether the state had provided "full and fair litigation" of the federal claims being pressed.

⁶⁶428 U.S. 530.

⁶⁷See, 372 U.S. 406, for example.

The opinion in Stone v. Powell, then, overcame one of the greatest objections that state supreme court judges had to federal habeas corpus review--that a state decision could be overturned by a single federal judge.⁶⁸

The departure from Fay v. Noia has not been universally well received. Two reservations have been specifically expressed over the decision rendered in Stone. First, is the "interest balancing rationale" postulated by the majority could not lead to the judgment ultimately reached. Secondly, that

An even more troubling implication is the possibility that removal of the threat of federal collateral review will lead to a less conscientious application of the exclusionary rule in the state courts and a watering down of fourth amendment rights.⁶⁹

A number of the law reviews contained comments of people joining in this second conclusion fearing that Stone v. Powell will have the effect of relegating Fourth Amendment constitutional claims to "second class status."⁷⁰

Whatever one's philosophical predisposition toward the decision rendered in Stone v. Powell, the case and the

⁶⁸3 Journal of Contemporary Law at 328.

⁶⁹10 John Marshall Journal at 415.

⁷⁰"Recent Decisions," 53 North Dakota Law Review 263 (1976).

unanswered questions emanating from it turn upon one essential principle--full and fair litigation. It, thus, becomes necessary to attempt to provide some substance to this loosely defined phrase.

Full and Fair Litigation

What did Justice Powell mean when he postulated, for the Supreme Court, a "new" standard for habeas corpus decisions? Did he and/or other members of the majority have a definitive set of guidelines in mind when articulating this ideal? Does "full and fair litigation" equate with "due process?"

The phrase "full and fair litigation" utilized by Justice Powell was by no means original or novel in the case of Stone v. Powell. In fact, the phrase had been in use, in the context of federal habeas corpus questions, as far back as the decision in Frank v. Mangum.⁷¹

Although it is likely that the Court did not have a definitive "standard" in mind,⁷² the "full and fair litigation" proposal did address itself to a number of problem areas. First, it seems likely that Stone v. Powell was aimed at providing state appellate courts with greater flexibility in

⁷¹237 U.S. 333-336 (1915).

⁷²30 Vanderbilt Law Review 881ff.

developing state procedural guidelines, as opposed to federal policy-setting. Secondly, the flexibility implicit in the "full and fair litigation" formula gave the Burger Court a rationale upon which it could contract its own jurisdiction while simultaneously increasing the jurisdiction of state appellate courts. Warr says that "there has always been a substantial opinion protesting the steady encroachment of state powers by the federal government."⁷³ And, that "nowhere is the conflict between state and federal government more apparent than in the courts."⁷⁴

One point should be added here. The majority decision in Stone provides for, as many rightly point out, the "opportunity" for full and fair litigation of federal claims. Having the "opportunity" can take on one of two divergent meanings. To some, state courts could provide the opportunity for full and fair litigation without adequately resolving the federal claims being raised. On the other hand, most state judges would maintain that providing the "opportunity" means properly disposing of the federal claims.

It seems that Justice Powell and the majority in Stone were holding the second view, expressing "an increased trust

⁷³ Journal of Contemporary Law at 339.

⁷⁴ Ibid.

. . . in state court determinations regarding constitutional matters,"⁷⁵ and in the ability of state appellate courts to "construe constitutional concerns correctly."⁷⁶ If this is indeed the case, the Supreme Court had a greater zealously for proper and appropriate airing and adjudication of federal constitutional claims, than for the method(s) utilized by state appellate courts in disposing of those claims.

In this instance, it seems, "full and fair litigation" assures that the ends justify the means in state appellate courts fully discharging their "federal" responsibilities. This being the case, the Supreme Court articulated not a set of guidelines, but a philosophy toward lower courts and federalism in general.

Summary

Archibald Cox has maintained that Warren Court activist intervention was necessitated by "state defaults, both legislative and judicial."⁷⁷ If this reasoning holds true, the clash between state and federal courts was inevitable. The

⁷⁵Ibid., p. 343.

⁷⁶Ibid., p. 341.

⁷⁷Cox, The Warren Court, p. 87.

"dual" appellate route, certiorari and habeas corpus, sanctioned by the Warren Court, meant that

The judgments of the State courts of last resort are thus subject not only to reversal by the Supreme Court of the United States on certiorari, but also under the rule allowing the use of federal habeas corpus to review constitutional questions ⁷⁸

Stephen Wasby sees less change in the transition from the Warren Court to the Burger Court than some would have envisioned.

Wasby says that despite the presumption that there would be

. . . substantial retrenchment from Warren Court policy . . . both the exclusionary rule of Mapp and the warning requirement of Miranda, although suffering some erosion, remain essentially intact.⁷⁹

Despite this assessment, it seems that very basic, philosophical differences exist between the Burger and Warren Courts. These can be seen most clearly in differing decisions on the same issue, as here with the use of federal habeas corpus review. Thus, the Warren Court, in decisions like Fay v. Noia, expressed a greater openness to pressing federal claims by means of the vehicle of habeas corpus. Conversely, the Burger Court, in decisions like Stone v. Powell, has articulated a greater deference toward state appellate courts in the settling of federal constitutional claims.

⁷⁸Ibid., p. 89.

⁷⁹Wasby, Continuity and Change, p. 207.

CHAPTER V

STATE APPELLATE COURT DECISIONS

One way to determine the impact of any Supreme Court decision is to note the number of subsequent references to a case in federal and state appellate decisions. A case could be judged significant based solely on a high number of subsequent references. However, the number of citations may not be as critical as the content of those citations, for the content should reveal the reflections of state appellate judges on a Supreme Court decision. This should not imply that state appellate judges are doing what the Supreme Court intended for them to do, but the things judges say formally, in a written opinion, should give some indication as to the nature of the impact of a Supreme Court decision. Finally, reviewing state appellate decisions will provide a check on consistency between the things judges say in their written opinions and the things they might say when surveyed confidentially.

From the time the case was decided in 1976 through the publication of the Shepard's Citations in April of 1979, there were 104 state appellate references to Stone v. Powell.

Seventy-two¹ of these decisions were included in the regional case reporters and will be utilized for analysis in this chapter.² Although the vast majority of these cases were decided by state supreme courts, some are intermediate appellate court opinions. The latter are included to give a fuller reading of the way in which Stone v. Powell is being cited and applied in state courts.

Features of State Appellate Decisions

In reading and analyzing state appellate court decisions, it becomes readily apparent that these decisions differ from those of the United States Supreme Court in a number of ways. First, and by no means an insignificant point, state appellate decisions are much shorter in length. Where United States Supreme Court decisions are often from thirty to forty pages in length, state appellate decisions are seldom more than ten pages and frequently only two or three pages long.

In addition to differences in length, state appellate decisions seldom record separate concurring or dissenting opinions. This especially stands in contrast to Supreme

¹This also includes four District of Columbia Court of Appeals cases.

²See Appendix A for a full listing of these cases.

Court decisions which often contain several concurrences and dissents.³ Table V-1 illustrates the number of opinions delivered by the United States Supreme Court over the past fifteen years, including concurrences and dissents. Although many have characterized the Burger Court as being especially fractionalized, this table shows that given the larger total number of cases decided by the Court there has not been a significant increase in the percentage of concurring and dissenting opinions. Also, not only do most state appellate courts record only a majority opinion, but many of the cases are rendered as unsigned, per curiam decisions.⁴

It becomes obvious after reading a number of state appellate decisions that perhaps because of time and workload constraints, state appellate judges normally address an agenda of specific issues in a given case and then move on to the decision. In addressing these issues, the judges try to provide, in summary fashion, answers to the questions being raised. They seldom expound broadly developed judicial philosophies in any area. The result of this is that references to other cases, such as Stone v. Powell are often in a list of

³See, for example, Regents of University of California v. Bakke 98 S. Ct. 2733 (1978).

⁴A heavier state workload may necessitate this, however.

Table V-1

Number of Opinions Issued by the Supreme Court
From 1963-1977

Term	Opinions of the Court	Concurrences*	Dissents*	Total
1977	135	81 (22.5%)	143 (39.8%)	359
1976	142	91 (24.3%)	140 (37.5%)	373
1975	156	86 (23.9%)	117 (32.5%)	359
1974	137	51 (17.6%)	101 (34.9%)	289
1973	157	57 (16.0%)	142 (39.8%)	356
1972	164	67 (16.3%)	178 (43.5%)	409
1971	151	69 (19.7%)	130 (37.1%)	350
1970	122	82 (25.7%)	115 (36.0%)	319
1969	94	52 (24.0%)	70 (32.4%)	216
1968	122	67 (23.1%)	101 (34.8%)	290
1967	127	75 (25.5%)	91 (31.0%)	293
1966	119	26 (10.7%)	97 (40.0%)	242
1965	107	37 (16.9%)	74 (33.9%)	218
1964	101	46 (21.1%)	71 (32.5%)	218
1963	127	30 (12.8%)	77 (32.9%)	234

*Percentages shown for concurring and dissenting opinions as compared with total opinions delivered.

Source: Harvard Law Review (November issues) 1964-1978.

other cases, frequently in footnotes, or generally without any comment or explanation. Given these limitations, it becomes imperative to examine the context within which a case is mentioned.

Context of the Citations

The seventy-two state appellate court decisions previously mentioned as citing Stone v. Powell can be divided into a number of categories for purposes of analysis. First, some of the cases are those which merely cite Stone v. Powell in a long list of cases. These references quite often do not cite specific portions of Supreme Court decisions, nor do they explain essential points in the cases.

Secondly, some citations, although singling out Stone v. Powell, merely use it for "window dressing" and not for elucidation of the state court's ruling or reasoning. These references will generally cite the opinion of a specific Supreme Court justice, but with little additional commentary or clarification.

Finally, from these cases can be extracted those opinions which expound upon Stone v. Powell as a part of the justification for the majority opinion, or in some cases in concurring or dissenting opinions. From the above description

of the features of state appellate decisions, it should be apparent that this last category of cases represents a minority of the opinions rendered. Additionally, it should be mentioned that the three classifications of cases mentioned are not mutually exclusive, although the cases themselves reveal that the categories are nearly so.

Within the foregoing categories, the most productive foci seem to be those cases which cite Stone v. Powell in either a very narrow, substantive context or those cases which cite Stone v. Powell much more broadly as an administration of justice ruling. The "narrow" focus of Stone v. Powell is seen in references to application of the Fourth Amendment exclusionary rule.⁵ The vast majority of references which provide explication of Stone v. Powell fall into this category. Their emphasis on the Supreme Court decision is centered around its implications for applying or not applying the exclusionary rule articulated in Mapp v. Ohio.⁶

The broader context within which Stone v. Powell is given reference focuses on the United States Supreme Court's disengagement from the area of actively supervising states'

⁵This was the essential, substantive issue in Stone v. Powell.

⁶367 U.S. 643 (1961).

criminal procedure, or the effect of the "full and fair litigation" standard on state appellate court operations and obligations. It is within this broader context, the federal habeas corpus issue, that certain state appellate judges deal with most extensively.

Although opinions addressing both the narrow and the broad contexts of Stone v. Powell will be dealt with, the broad application and more expansive reading of the decision is the most important for this research effort.

Applications of Stone v. Powell

Of the seventy-two cases utilized in this analysis, all but eight were exclusively concerned with Fourth Amendment considerations of search and seizure and exclusion of illegally obtained evidence. Of the eight exceptive cases, two dealt with Fourth Amendment concerns applied to probation revocation hearings,⁷ three with exclusion of testimony in Miranda-like, Fifth Amendment contexts,⁸ and three concerned Sixth Amendment fair trial questions, such as the prejudicial

⁷State v. Spratt (Rhode Island) 386 A. 2d 1094 (1978) and Davenport v. State (Texas) 574 S.W. 2d 73 (1978).

⁸People v. Bell (Illinois) 365 N.E. 2d 203 (1977), Bartram v. State (Maryland) 364 A. 2d 1119 (1976), and People v. Kusowski (Michigan) 272 N.W. 2d 503 (1978).

actions of judges, charges to juries, or procedural defaults.⁹ Therefore, although only twenty-one of the seventy-two cases presented Stone v. Powell in a broad, procedural context, practically all of the cases were cast in terms of the Fourth Amendment.¹⁰

The Narrow Focus: Fourth Amendment Concerns

Many of the state appellate decisions which took the narrow or substantive focus of Stone v. Powell set forth the original purpose of the exclusionary rule, as dealt with by Justice Powell in delivering the opinion of the Supreme Court in Stone v. Powell, namely that "the exclusionary rule is based on the theory that its invocation will deter future illegal police conduct."¹¹

However, even though many of the state appellate decisions took cognizance of the deterrent purpose of the exclusionary rule, many were quick to point out two equally important mitigating considerations. First, the deterrent

⁹State v. King (Iowa) 256 N.W. 2d 1 (1977), State v. Melvin (Maine) 390 A. 2d 1024 (1978), and State v. Olaon (North Dakota) 244 N.W. 2d 718 (1976).

¹⁰Justifiably so given the substantive nature of Stone v. Powell.

¹¹State v. Washington (Arizona) 585 P. 2d 249, 252 (1978).

qualities of the exclusionary rule have not been, or perhaps cannot be, proven. And, secondly, the exclusionary rule has come under increasing attack from the Burger Court and state appellate courts.

Incorporating both of these concerns in the Louisiana case of State v. Sierra,¹² Judge Walter Marcus, of the Louisiana Supreme Court, wrote that

. . . in the recent decisions of Stone v. Powell . . . and U.S. v. Janis . . . the exclusionary rule has come under increasing criticism. In those cases, the Supreme Court observed that after fifteen years of experience with the rule, we are still unable to say whether it has had a significant effect on police conduct.¹³

In the Massachusetts case of Commonwealth v. Reynolds,¹⁴ Justice Benjamin Kaplan noted that

It has not escaped our attention that the exclusionary doctrine of Weeks and Mapp has been subjected to strong attack . . . and that it has been somewhat narrowed or weakened by recent decisions of the Supreme Court.¹⁵ [Specifically citing Stone v. Powell].

Also, Justice Dan Moore of North Carolina observed that the "continued efficacy and scope of the exclusionary rule

¹²338 So. 2d 609 (1976).

¹³338 So. 2d at 616.

¹⁴370 N.E. 2d 1375 (1977).

¹⁵370 N.E. 2d at 1380.

. . . has been questioned."¹⁶ He added that "Stone v. Powell further limited the scope of the exclusionary rule in certain Fourth Amendment cases."¹⁷

Judge Moylan of Maryland, however, sounded the alarm that

. . . the whole body of law grown up around the "fruit of the poisonous tree" doctrine, on the one hand, and the discernable and almost tidal retreat from the exclusionary rule by the Supreme Court, on the other hand, are in essential collision.¹⁸

Finally, the decisions rendered in at least two cases maintain that Stone v. Powell has not changed the rules of the game in respect to application of the exclusionary rule. Judge Hubbard of Florida said:

Although there has been some suggestion that the Fourth Amendment exclusionary rule should be altered or abolished, Stone v. Powell . . . , the rule of Mapp v. Ohio . . . remains intact.¹⁹

And, Justice Kaul of Kansas said that the

Application of the exclusionary rule to state proceedings was modified [by Stone v. Powell], but the decision was specifically limited to habeas corpus relief.²⁰

¹⁶State v. Ross 246 S.E. 2d 780, 783 (1978).

¹⁷Ibid.

¹⁸Everhart v. State 315 A. 2d 80 cited in Bartram v. State 364 A. 2d 1146 (1976).

¹⁹Taylor v. State 355 So. 2d 180, 184 (1978).

²⁰State v. Dowdy 563 P. 2d 425, 430 (1977).

The consensus of opinion, by state appellate judges, with reference to the exclusionary rule, is that the Burger Court has consistently refused to expand application of exclusion and has, to some extent, contracted its application.²¹

The Broad Focus: Full and Fair Litigation

Although Fourth Amendment exclusionary considerations are important, and although Stone v. Powell was a Fourth Amendment case, the broader implications and applications of the decision seem much more important. Broadly applied, Stone v. Powell could be an instrument of docket control for the federal courts. This would mean a changing relationship between the federal courts and state courts, and possibly changes in the administration of criminal justice. This view of Stone v. Powell is especially important when seeking to determine the impact on state appellate court workloads and procedures.

In a number of state appellate decisions, the judges writing opinions clearly acknowledge the fact that Stone v. Powell offers some potentially far-reaching consequences. Primary among these concerns are those of judicial integrity, both with reference to justification for applying the

²¹See, for example, Chief Justice Kenison's concurring opinion in *State of New Hampshire v. Slade* 362 A. 2d 194, 197 (1976).

exclusionary rule and also concerning federalism and comity matters, and the impact of "full and fair litigation" or fair trial standards.

On the judicial integrity issue, Associate Judge Eaton of the California Court of Criminal Appeals has said that

. . . the United States Supreme Court no longer regards the "imperative of judicial integrity" as a justification for the exclusion of illegally seized evidence.²²

With reference to federalism and comity, Justice Charles Levine, of the Michigan Supreme Court, has noted that the United States Supreme Court has

. . . eschewed expansion of the role of the United States district courts and courts of appeal in supervising state court criminal proceedings ²³

However, Justice Levine also warned that

Although deterrence of future police misconduct is the primary function of the exclusionary rule, the suppression of illegally obtained evidence also prevents the debasement of the judicial process by insuring that courts do not become accomplices in willful disobedience of the law.²⁴

The issue of judicial integrity, especially with respect to federalism, probably has not had a more expressive spokesman than Justice Robert Lukowsky of the Kentucky Supreme Court.

²²People v. Belleci 146 Cal. Rptr. 462, 466 (1978).

²³People v. Harrell (Michigan) 247 N.W. 2d 829, 834 (1976).

²⁴Johnson v. State (Maryland) 384 A. 2d 709 (1978).

In at least two opinions, one concurring and one dissenting, Justice Lukowsky has explored some of the broad implications of Stone v. Powell and similar decisions. In the case of Whorton v. Commonwealth,²⁵ Justice Lukowsky wrote:

The course of the Burger court is not significantly different from that of the Warren court, except that it has limited the use of federal habeas corpus as a method of enforcing these newly promulgated constitutional rights.²⁶

The judicial restraint of the Burger Court is important, then, because

State systems of criminal procedure are like delicate Swiss watches. They are designed to equally balance the rights of the parties. When the balance is externally disturbed the shockwave requires a reevaluation and readjustment of the entire system.²⁷

Lukowsky leaves no room for doubt that he thinks state systems of criminal justice have been tampered with "externally" far too often. The clear implication is that state judiciaries need to, and should, be masters of their own fates. For Lukowsky, then, a decision like Stone v. Powell is welcomed as allowing state judiciaries to maintain the delicate balance between parties.

²⁵570 S.W. 2d 627 (1978).

²⁶570 S.W. 2d at 634.

²⁷Ibid.

Justice Lukowsky also articulated the increased responsibilities of state appellate courts arising under Stone v. Powell in the case of Collins v. Commonwealth.²⁸ There, in a dissenting opinion, Lukowsky said:

Currently state courts bear an increased burden in deciding Fourth Amendment issues because Stone v. Powell . . . revoked the habeas corpus jurisdiction of federal courts in this area.²⁹

Therefore,

State judges may no longer take comfort in the thought that any inadvertent misinterpretation of the Fourth Amendment is subject to collateral review in the federal courts and must realize that chances of direct review by the Supreme Court of the United States are slim indeed.³⁰

Because the federal courts cannot, or will not, closely supervise state criminal procedure machinery, "state judges should be particularly sensitive to Fourth Amendment claims presented to them."³¹

In these opinions, Justice Lukowsky spelled out more fully than any other state appellate court judge the implications of Stone v. Powell in the area of judicial integrity and federalism and comity.

²⁸574 S.W. 2d 296 (1978).

²⁹574 S.W. 2d at 298.

³⁰Ibid.

³¹Ibid.

The area of "full and fair litigation," or fair trial, was also recognized as an important consideration in Stone v. Powell by a number of state appellate judges. Of primary importance in these cases was whether issues had been fully and fairly tried and appealed. The "full and fair litigation" guideline has become a justification of some consequence for denying a defendant's plea, for remanding a case for retrial for a finding of facts "sufficient to meet the test set forth in Stone v. Powell."³² Thus, Stone v. Powell was cited as justification for either further judicial action or for no further judicial action at all.

The Georgia Supreme Court, in a per curiam decision, noted that the "guideline" enunciated in Stone v. Powell was "'full and fair opportunity'; not whether the claim was in fact, litigated."³³ Thus, some state appellate courts are taking cognizance of their role in insuring the opportunity, procedurally, for full and fair litigation. Full and fair litigation, therefore, may become synonymous with fundamental fairness or fair trial.

³²Johnson v. Commonwealth (Kentucky) 563 S.W. 2d 486, 488 (1978).

³³Jacobs v. Hopper 233 S.E. 2d 792, 794 (1977).

One note of interest concerns the designations "opportunity for full and fair litigation" and "full and fair litigation" itself. Although both federal and state decisions have occasionally noted the subtle difference in these phrases, it apparently has not been an overriding concern for most state appellate judges. It may be, therefore, that in the minds of most state appellate judges, for the "opportunity" to exist, federal claims must be fully and fairly disposed of.

The opportunity for full and fair litigation thus preempts federal court action. As Judge Wilhoit of Kentucky has said: "Full and fair litigation of claims . . . obviates the necessity of applying to federal courts to obtain [habeas corpus] relief."³⁴

Other judges have also recognized the fact that federal courts have been foreclosed from acting broadly in cases involving the claims of state prisoners by way of habeas corpus relief. Chief Justice Thomas Kavanagh of the Michigan Supreme Court noted that

. . . a Federal Court will not entertain a state prisoner's Fourth Amendment exclusionary rule claim on habeas corpus where the prisoner has already received full and fair hearing on the matter in the state court system ³⁵

³⁴Lee v. Commonwealth 547 S.W. 2d 792, 794 (1977).

³⁵People v. Kusowski 272 N.W. 2d 503, 506 (1978).

Similarly, Judge Robert Clifford of New Jersey observed that "the federal habeas corpus remedy is no longer available after full and fair litigation in a state court of a Fourth Amendment claim."³⁶

The implication on the part of these, and other, judges is not that the federal courts cannot act, since other routes of appeal are still available, but that federal habeas corpus has effectively been removed as a vehicle for intruding into the criminal procedure of state courts. Some judges are quick to note that their own vigilance is filling this procedural gap and that they are now performing the functions by-and-large set forth by the United States Supreme Court over the past decade and one-half, since Mapp v. Ohio.

Summary

A number of state appellate court judges have noted the potential significance of the Stone v. Powell decision on federal-state court relations. Some of these judges have cast their perceptions in terms of judicial integrity, federalism, and comity, emphasizing the increasingly important role that state supreme courts will or must play in supervising criminal proceedings.

³⁶State v. Fariello 366 A. 2d 1313, 1316n (1976).

State appellate judges, in recognizing a new phase of federal-state court relations, seem to emphasize that even absent active federal scrutiny, they are not willing to abandon their responsibility with regard to federal laws and rights. Thus, Stone v. Powell is seen less as a part of the "slow strangulation of the exclusionary rule,"³⁷ and more as an opportunity to interpret federal questions within guidelines meeting or exceeding the minimum safeguards of the United States Constitution.³⁸

³⁷People v. Clark (Illinois) 357 N.E. 2d 798, 801 (1976). Justice Goldenhersh dissenting.

³⁸Harris v. State (Alabama) 352 So. 2d 479, 491 (1977).

CHAPTER VI

SURVEY OF STATE SUPREME COURT JUDGES

Since no uniform title is applied to the highest appellate court in every state, the designation "state supreme court" is sometimes misleading. However, it will be used in this chapter for purposes of consistency and convenience.¹ (See Appendix A for the exact name of each court and the two exceptions utilized in this analysis.) In addition to varying in name, state appellate courts of final jurisdiction vary in size from three² to nine³ judges, the average being between five and seven, and the number currently totalling 322.

Purposes of the Survey

Stone v. Powell⁴ clearly provides the opportunity for state appellate courts to be the beneficiaries of decreasing

¹See, for example, U.S., Department of Justice, Law Enforcement Assistance Administration, State Court Caseload Statistics: The State of the Art (Washington, D.C. : U.S. Government Printing Office, 1978), pp. 50-51, 65.

²For the State of Delaware.

³For states such as Alabama, Iowa, Mississippi, and Washington.

⁴428 U.S. 465 (1976).

federal supervision of criminal procedure cases. But, whether or not state supreme courts have increased in importance and influence, and procedurally how they have responded to Stone v. Powell are of importance here.

In an effort to probe these questions, a mailed survey was constructed to gauge the perceptions of state supreme court judges on the impact of Stone v. Powell. These judges stand between state trial and intermediate appellate courts on the one hand, and the federal courts on the other.

A short survey instrument of twenty-two items was sent to each of the 312 state appellate court judges responsible for reviewing criminal cases.⁵ This instrument consisted of sixteen statements to each of which the judges were asked to give one of the following responses: strongly agree, agree, no opinion, disagree, strongly disagree. In addition, the judges were asked six questions dealing with the legal and judicial experience they possessed. (See Appendix C for the survey instrument and accompanying cover material.)

⁵A discrepancy of ten judges exists between this number and the number of state supreme court judges (322) because Texas and Oklahoma have divided courts of last resort for civil and criminal cases, and in those states the judges of the Courts of Criminal Appeals were surveyed. See, State Court Caseload Statistics, p. 65.

In designing the survey, two broad issue areas were addressed. First, what has been the immediate impact of Stone v. Powell? And, secondly, what implications does this decision have for judicial federalism and for federal-state court relations?

The "immediate" impact of Stone v. Powell was interpreted to reflect the consequences of the decision from 1976 to the time when the questionnaire was returned (June 1979). Questions were directed toward the workloads of state appellate courts: whether these courts are hearing more or fewer cases and whether they are more closely scrutinizing those cases.

Also critical in this case is whether or not the Supreme Court's opinion in Stone v. Powell provides sufficient clarity for state appellate courts to meet the "full and fair litigation" standard. Primarily of interest are: whether "full and fair litigation" is really a guideline and, if so, whether this guideline allows state courts flexibility in designing their own solutions to particularized problems of criminal procedure?

The second broad issue area is that of judicial federalism: with Stone v. Powell, have state appellate courts increased or decreased in importance? Judicial federalism is taken to mean the division of responsibility between federal

and state courts. Although both have individual responsibilities in adjudication, there is some overlap of functions with state courts bearing some federal responsibilities and federal courts in the position to receive appeals from state courts.

Finally, implications for federalism may hinge on perceptions of the Burger Court by state appellate court judges. Thus, in looking at the interactions between federal and state courts, some questions dealt with the noninterventionist orientation of the Burger Court and the Supreme Court's role in determining criminal procedure for states.

The survey, therefore, was exploratory in nature and the results should not be taken as definitive statements of the immediate impact of Stone v. Powell, the implications of the case for judicial federalism, or the judges' perceptions of Burger Court policies.

Response to the Survey

The survey instrument was deliberately kept brief to facilitate maximum consideration on the part of the judges and a maximum rate of return. In assessing the productivity of the survey, it was felt that there were a number of countervailing forces which might influence the rate of return.

Factors which might militate against judges answering

and returning the questionnaire were:

- 1) All state supreme courts would not be in session when the survey was sent, thus preventing some judges from being reached at a centralized mailing address.
- 2) Some judges might feel that comments on United States Supreme Court cases, or the Court itself, are inappropriate.⁶
- 3) Heavy workloads might preclude responding to surveys, questionnaires, or interviews.⁷
- 4) Some judges might feel that this type of research by social scientists is inappropriate or unproductive.

Weighing against these factors, it was felt that judges would be likely to respond because:

- 1) They are public figures and many are accustomed to public scrutiny.
- 2) Some hold strong feelings about the case of Stone v. Powell.
- 3) Some hold strong views, for or against, the Burger Court.

⁶One judge did, in fact, respond that answering the questionnaire would be "an act of interference with independent fulfillment of the judicial function."

⁷Only one judge took the time to write a response saying that his schedule prevented him from completing the questionnaire.

- 4) Most judges see themselves as representing their courts and would want the best representation possible.

It was hoped that 100 questionnaires, approximately one-third, would be completed and returned. The actual return was ninety-two (29.48%). Although the surveys returned could not be purported to represent all state supreme court justices, they did closely represent those judges and courts that had heard cases relating to Stone v. Powell from 1976 to 1979. (See Appendix B for these cases and Appendix D for the list of states and the number of respondents per state.) Only six states had no respondents.⁸ These six states accounted for only four of the seventy-two state appellate decisions (5.5%) citing Stone v. Powell from 1976 to 1979.

Analysis of Data

In order to analyze the data, the questionnaires were broken down into three segments: questions which were demographic in nature, questions which dealt with the immediate impact of Stone v. Powell, and questions relating to judicial federalism. Although the questionnaire was designed differently, this will be the order of discussion of the data.

⁸These states were: California, Connecticut, Delaware, Ohio, New York, and Pennsylvania.

Profile of the Judges

The judges were asked six questions dealing with their legal experience and judicial service as well as their political party identification. The answers of those responding to the questionnaire revealed the following profile. The range of years of experience on the state supreme court was from one to twenty-four, with five judges having twenty years or more of experience. The average length of service on the state supreme court was approximately eight years. Most of these judges had no previous intermediate state appellate court experience.⁹

Of the judges responding, slightly less than one-half (41.3%) had served as either state or federal prosecutors, with most having one to five years of experience either with the state or federal government. Only one judge had experience as both a state and federal prosecutor. Additionally, most of the prosecutorial service came early in the judges' legal careers. The judges were also almost equally divided between whether or not they had served as trial court judges. For the forty-seven judges (51.1%) who had served as trial judges, the average length of service was approximately ten years.

⁹Only eleven judges (12.1%) indicated having such experience.

Most of the state supreme court judges had some early experience as defense counsels. Of the seventy-one judges (77.2%) with such backgrounds, the average length of experience was just over eleven years. (See Table VI-1 for a summary of the judges' experience.)

Finally, of the judges that responded, fifty-two (56.5%) labelled themselves as Democrats, sixteen (17.4%) designated the Republican Party as their political party of affiliation, and twenty-four (26.1%) listed themselves as Independents. One possible explanation for the number of Independent state supreme court judges is the nonpartisan nature of some methods of judicial selection. (See Table VI-2 for a summary of political party affiliations.)

Immediate Impact Questions

Eight questions were directed at the area of the immediate impact of Stone v. Powell and dealt with workloads, case preparations, and procedures (questions 1-5, 7, 13, and 16). The remaining eight questions dealt with judicial federalism (questions 6, 8-12, and 14-15). (See Appendix C.) In most instances responses in the extreme categories of strongly agree and strongly disagree were negligible. These categories generally had less than 10% each of the responses and often less than 5% each. Attention will be drawn to questions in

Table VI-1

Judicial and Legal Experience of Respondents

	Lower appellate Court experience	Prosecutorial Experience	Trial court Experience	Criminal (Defense) Attorney
No	81 (88.0%)	54 (58.7%)	45 (48.9%)	21 (22.8%)
Yes	11 (12.0%)	38 (41.3%)	47 (51.1%)	71 (77.2%)

Table VI-2

Political Party Affiliation of Respondents

	Number of judges	Percentage
Republican	16	17.4%
Democrat	52	56.5%
Independent	24	26.1%
Total	92	100%

which responses depart from this pattern. For this reason, the categories "strongly agree" and "agree" and "disagree" and "strongly disagree" were collapsed in analysis.

The judges were asked two questions about petitions for habeas corpus hearings: one about petitions from their courts to federal district courts and one concerning habeas corpus petitions to their courts (questions 1 and 13 respectively). Many of the judges (50.0%) had no opinion as to whether habeas corpus petitions to the federal courts had decreased since Stone v. Powell. Another 39.6% felt that Stone v. Powell had reduced the number of habeas corpus petitions from state prisoners to federal courts. Although it was believed that many state supreme court judges would not have accurate information on this subject, most should have some impressions. Indeed, a number of judges qualified their answers as educated guesses for their localities and one judge added: "Our federal trial courts seem to pay little or no attention to Powell." On the state court side, 51.7% of the judges said they had seen no increase in state habeas corpus petitions as a result of Stone v. Powell. No judges responded "strongly agree" to this question.

Two questions were directed at the "quality" of state trial and appellate proceedings (questions 2 and 3). Here

the judges were asked whether attorneys were preparing and arguing cases better at the state level and whether state supreme courts were more closely scrutinizing cases since Stone v. Powell. Implicit in the United States Supreme Court decision in this case was the idea that cases could, and should, be given closer scrutiny in the state appellate process. On the point of better preparation and presentation, 43.5% of the judges said that cases were not better prepared and argued since Stone v. Powell, while only 20.7% of the judges felt that the Stone decision had made a difference on this point. More than one-third (35.9%) expressed no opinion.

As far as giving greater scrutiny to state appellate cases, assuming a decreased likelihood of federal collateral review, 60.8% of the judges felt that Stone v. Powell had not compelled closer scrutiny of cases, while only 22.9% felt that closer scrutiny had been forthcoming. One reason for this response seems to be that some state judges felt that they were giving appropriate oversight to the cases that came before them. One judge added simply: "I think we already did scrutinize carefully." Another noted that if Stone v. Powell requires more attention be given to state appellate cases, then, "This assumes that state courts are slovenly." This judge added: "Since Townsend v. Sain, Sanders v. U.S., and

Mapp v. Ohio, state courts have vastly improved." Thus, "Stone will have little effect since state courts are, in my judgment, conscientious."

In the area of workload, the state judges were asked about the impact of Stone v. Powell on the litigiousness of trial attorneys and whether or not criminal defendants had lowered their appellate review expectations as a result of the case. On the issue of litigiousness, 50.0% of the judges said that people had not been less litigious as a result of Stone v. Powell. Many of the judges (44.6%) had no opinion to this question. Only five judges (5.4%) agreed that people had been less litigious since Stone v. Powell, and there were no judges who strongly agreed to this question.

In comparison, 43.4% of the judges felt that criminal defendants had lowered their expectations relative to appellate review. This is contrasted by 25.0% of the judges who felt that there had been no reduction in defendants' appellate expectations, and 31.5% with no opinion.

One question in the area of appellate procedure dealt with federal guidelines for state appellate proceedings. The judges were asked whether Stone v. Powell "full and fair litigation" standards were definitive enough to guide state appellate courts in their decisions. Responses showed that 20.7%

of the judges believed that the "full and fair litigation" standard was not a clear statement of policy or preference, while 66.3% of the judges felt that this standard would provide adequate guidance. One judge took the opportunity to emphasize that "Stone only requires the opportunity for such, not its actual delivery."

The final question relating to the "immediate" impact of Stone v. Powell dealt with state appellate proceedings (question 16) and pertained to the latitude given state appellate courts. The judges were asked whether Stone v. Powell, or similar decisions, would provide wider discretion procedurally for state appellate courts. Fifty of the judges (54.3%) felt that Stone and similar decisions of the Burger Court permitted state supreme courts wider discretion in determining procedural standards for criminal defendants. This was contrasted with twenty-seven of the judges (29.4%) who felt that broader discretion was not forthcoming. One of the state supreme court judges noted that Stone v. Powell "gives wider discretion over substantive rights without benefit of further review on the merits."

Judicial Federalism

In the area of federal-state court relations, it was quite apparent that the state supreme court judges were, and

had been, concerned over federal court encroachment into what they perceived as rightly their domains. One state chief justice from the Midwest noted the differences in Supreme Court policies by saying: "How refreshing to have the Burger Court after the dark years of the Warren Court!"

Three questions dealt with the relationship between the Burger Court and state appellate courts (questions 6, 8, and 14). First, the state judges were asked whether or not the Burger Court had been quick to interfere in state criminal decisions. The overwhelming response (73.9%) was that the Burger Court had shown much greater deference to state appellate courts. On this question only fifteen judges (16.3%) disagreed or strongly disagreed with the statement.

Closely related to federal court interference with state court decisions was a question on the increasing trust of state appellate courts by the United States Supreme Court under Chief Justice Burger. Although the response was not as strong as on the previous question, the judges showed agreement with the proposition of Burger Court trust in state courts by 58.7%. On this question 19.6% of the judges disagreed.

Another perspective on this same issue was taken by contrasting Warren Court confidence in state courts with that

of the Burger Court. In comparing the two Courts, 78.3% of the judges agreed that the Burger Court had been more confident of state appellate court interpretations of the rights of criminal defendants, while only 8.7% disagreed. This was the largest difference recorded on any question on the survey.

Although essentially tapping the same dimension, questions 6, 8, and 14 grow increasingly specific in trying to determine how state supreme court judges react to United States Supreme Court disengagement in the area of criminal procedure. As is clearly seen, the disengagement of the Burger Court is viewed as expressing more trust and confidence, thus giving greater latitude to state appellate courts. Trust may not be the primary consideration in a decision such as Stone v. Powell, however. As one state chief justice, whose court has heard a number of cases related to Stone, noted

Although I rather agree that the Burger court does have more confidence in the state courts, I feel that the overriding reason for the attitude of the Burger court is that it wants to cut down on the volume of business before the Supreme Court of the United States.

Questions 9 and 10 dealt with state appellate court responses to standards articulated by federal courts, especially the Supreme Court. Judges were asked whether, in effect, the Supreme Court had been compelled to intervene in state criminal cases because of inadequate state appellate

procedures. Fifty-five judges (59.8%) disagreed that this was the reason for close supervision by the Supreme Court of state criminal proceedings. This question recorded the largest extreme answer with 23.9% of the judges responding "strongly disagree." Nearly one-third (29.4%) said that inadequate appellate procedures had compelled Supreme Court intervention. One judge noted that the "procedures are adequate, but the substantive decisions are wrong."

Always of importance in attempting to measure impact is how sympathetic are state judges to newly created or articulated federal rights. This is one of the central issues in the studies of compliance. When asked to respond to the statement that some state judges are unsympathetic to federally created rights, 65.2% of the judges agreed, with many emphasizing the word "some." A Southeastern state chief justice responded by saying

At first there was a great reluctance to comply with the constitutional principles newly enunciated by the United States Supreme Court. This was followed by a sense of resignation. Now, although some few judges still look for ways to evade or defy the new principles, most of us have accepted them as a matter of course.

The remaining three questions (numbers 11, 12, and 15) deal with the consequences of federal court supervision of state criminal cases. One of the most sensitive spots for state judges is that of collateral review. The judges were

asked whether collateral review was necessary to ensure that state courts would be conscientious in applying the exclusionary rule. The judges were divided almost equally, with thirty-eight (41.3%) saying that federal collateral review was necessary and forty-five (48.9%) saying that even without collateral review, state courts would still maintain the vitality of the exclusionary rule. This question showed the greatest polarization of opinions.

Closely tied to the question of collateral review was that of whether state supreme court judges feel less responsibility for improving criminal justice when the United States Supreme Court is actively interventionist. Even if the Supreme Court is interventionist, the vast majority of the state judges (70.6%) said that they feel an independent responsibility for improving the quality of criminal justice. This was compared with 20.7% of the judges who felt that close Supreme Court scrutiny was necessary for the improvement of criminal justice.

Finally, question 12 dealt with the very essence of judicial federalism and federal court activism. The state judges were asked whether or not their work was undermined when a state supreme court decision was overruled by a single federal judge. That is, were they seen as a final authority in some

matters or merely as stopping off points in the long appellate process? In answering this question, 63.7% of the judges felt that their work was undermined by federal district courts, while 28.6% felt that the federal courts did not diminish their importance.

Since much work has been done on the influence of judges' background characteristics on their attitudes,¹⁰ a look was taken at the characteristics of the state supreme court judges and correlations with perceptions of the impact and broader implications of Stone v. Powell. The background characteristics included were: lower appellate court service, trial court experience, prosecutorial service, experience as a criminal (defense) attorney, and political party identification.

To represent the areas of "immediate impact" and "broader implications" three questions were chosen from each area of questions. Thus, for "immediate impact" the responses to questions dealing with closer scrutiny (question 3), decreasing litigiousness (question 4), and clarity of Stone guidelines (question 7) were utilized.

¹⁰See, for example, Bradley C. Canon, "The Impact of Formal Selection Processes on the Characteristics of Judges - Reconsidered." 6 Law and Society Review 579-93 (1972) and Dean Jaros and Bradley C. Canon, "Dissent on State Supreme Courts: The Differential Effect of the Characteristics of Judges," Midwest Journal of Political Science 15 (1971) : 322-46.

In the area of "broader implications" the questions dealing with Burger Court trust of state courts (question 8), state decisions being undermined by federal courts (question 12), and lack of confidence in state courts by the Warren Court (question 14) were selected as representative of this area. These six questions generally showed the clearest response patterns or tendencies toward clear majority or extreme answers.

In an effort to determine correlations between the influence of background characteristics and the impact and implication variables, a correlation matrix was constructed to calculate the Pearson product moment coefficient (r) for these variables. The analysis of these correlations readily pointed to an apparent problem--the small sample size (N). The (r) for only one pair of variables--lower appellate court service and lack of confidence by the Warren Court--proved to be significant at the .05 level. Even here the (r) of .20 shows relatively little explanatory value.¹¹ (See Table VI-3 for the full correlation matrix.)

¹¹By utilizing the (r^2) value of .04 it can be seen that lower appellate court service only explains 4% of the variance in responses to lack of confidence by the Warren Court.

Table VI-3

Correlation of Background Characteristic with State Supreme
Court Judges' Perceptions of Stone v. Powell

	Scrutiny	Litigiousness	Guidelines	Trust	Undermined	Confidence
Lower appellate court service	r= .11 s= .14	r= .11 s= .15	r= .07 s= .27	r= .13 s= .11	r= .14 s= .10	r= .20* s= .02
Trial court experience	r= -.03 s= .38	r= .11 s= .16	r= .02 s= .41	r= .05 s= .33	r= .14 s= .10	r= .14 s= .09
Prosecutorial service	r= -.06 s= .27	r= .07 s= .26	r= .08 s= .24	r= .05 s= .32	r= .06 s= .27	r= .10 s= .18
Criminal (defense) experience	r= .14 s= .09	r= .03 s= .37	r= .13 s= .10	r= .06 s= .29	r= .01 s= .46	r= .07 s= .26
Political party identification	r= .16 s= .06	r= -.03 s= .40	r= .05 s= .32	r= .13 s= .11	r= .08 s= .22	r= .14 s= .10

*Significant at .05 level

Because of the small sample size, little can be said about the influence or explanatory value of the judges' background characteristics on their perceptions of Stone v. Powell or the United States Supreme Court in general.

Summary

In general, the ninety-two state supreme court judges who responded to the survey showed mixed feelings relative to the impact of Stone v. Powell on their workloads and procedures. The answers to the questions in this area show opinions fairly evenly divided.

When dealing with judicial federalism and the role of federal court supervision of state criminal proceedings, the judges show distinct displeasure over the course charted by the Warren Court. An equal amount of approval is also shown when addressing the Burger Court's treatment of state appellate courts.

It finally appears that the ninety-two state supreme court judges see little effect of Stone v. Powell in the way they are, or have been, doing business. For example, while one judge said: "I believe that . . . Stone v. Powell 428 U.S. 465 (1976), and similar decisions have had a significant and favorable impact on state appellate practice," he did not

say what that impact entailed. His state's chief justice merely noted: "I really do not think this change [withdrawal from intervention in search and seizure matters] has had any effect whatever on the practice or handling of cases in this court."

Perhaps the most thorough commentary was that given by a Northeastern judge who said that Stone v. Powell in no way diminished the importance of Fourth Amendment rights. The ultimate impact, then, was that

It simply reduces the role of the lower federal judiciary in reviewing the determinations of the state judiciary as to appropriate application of the exclusionary rule in the Fourth Amendment area.

In all other respects, the procedural safeguards remain the same. I believe that the Court in Stone v. Powell concluded that state judges, both trial and appellate, were making a zealous effort to protect these rights, after a passage of 18 years since Mapp v. Ohio first made the exclusionary rule applicable to the states.

This judge concluded by saying that the effect of Stone v. Powell had been to leave to state courts the determination as to whether procedural safeguards had been applied "subject to the certiorari review by the Supreme Court of the United States."

Thus, as a result of Stone v. Powell, it seems that only a few state supreme court judges are cognizant of their important role in the appellate process. Additionally, most judges do not feel that their role has been enhanced by

Stone v. Powell. This means that most references to Stone are in the substantive context of applying or not applying the Fourth Amendment exclusionary rule, and not in the procedural context of expanding state supreme court oversight of cases that might not make it into the federal appellate arena. It is as if many state judges have felt they were right all along and now the United States Supreme Court has come to agree with them.

CHAPTER VII

CONCLUSIONS

It would be a mistake to view the case of Stone v. Powell¹ as the primary case impacting on criminal procedure during the Burger Court era. The two cases decided contemporaneously with Stone v. Powell,² and two cases decided subsequently,³ further illuminate the Burger Court's philosophy relative to state appellate courts. Thus, Stone v. Powell is important because it is illustrative of a broader range of cases dealing with state criminal proceedings and federal-state court relations.

Two critical factors must be taken into consideration when assessing the time frame within which Stone v. Powell was decided. First, as a holdover from the Warren Court era, federal courts had expansively applied Fay v. Noia,⁴ in effect giving those courts wide-ranging supervisory influence and

¹428 U.S. 465 (1976).

²Francis v. Henderson 425 U.S. 536 (1976) and Estelle v. Williams 425 U.S. 501 (1976).

³Henderson v. Kibbe 431 U.S. 145 (1977) and Wainwright v. Sykes 433 U.S. 72 (1977).

⁴372 U.S. 391 (1963).

control over state appellate courts. And, second, as a result of this supervision, federal courts had been inundated with petitions from state prisoners. Thus, cases like Stone v. Powell gave the Burger Court the mechanism whereby the federal courts could divest themselves of certain types of appellate cases, notably state prisoner habeas corpus petitions. As the number of Nixon appointees rose on the Supreme Court, increasing emphasis was given to the ability or opportunity for state supreme courts to discharge their responsibilities for settling federal questions.

Dimensions of the Decision

The case of Stone v. Powell can be viewed along two dimensions. The first, or more narrowly drawn approach to the case, is that of viewing Stone v. Powell as merely an exclusionary rule decision. If this approach is taken, application of the decision would seem to portend a different approach to handling Fourth Amendment claims, but no substantial difference in the kind and quality of justice given a criminal defendant. Here only the arena of decision-making would be changed from the federal to the state courts.

The second, and much broader dimension of Stone v. Powell is that involving judicial federalism; that is, what are the

roles of state and federal courts and what are the relative relationships of each? Application of the Stone decision along this dimension would suggest United States Supreme Court disengagement from active supervision of state criminal proceedings, and vastly increased supervisory and procedural responsibilities for state supreme courts. Here state supreme courts would have to be assured that the "opportunity for full and fair litigation" had been provided at trial and on direct review, and that federal questions had been fully and fairly resolved.⁵

Implications of the Case

The two dimensions seem to diverge and imply different things for state supreme courts. If, for example, most state courts choose the "safe" route and apply Stone v. Powell only in the substantive context of Fourth Amendment exclusionary rule questions, these courts will not be expanding their influence into an area from which the Supreme Court has disengaged. If this is the case, state courts will not be co-equal partners with the federal courts in assuring adequate and appropriate disposition of federal claims. Thus, state

⁵The "opportunity" seems fairly hollow without the actual resolution of federal questions raised.

appellate courts will continue to be reactors to the decisions of federal courts.

If, on the other hand, state supreme courts step in and exert their influence in areas of criminal procedure from which the Supreme Court has withdrawn, it is likely that these courts will find themselves cast in a role of increasing importance. With a broad application of the doctrine of federalism implied in Stone v. Powell, state supreme courts could design judicial remedies appropriate to their jurisdictional and political environments and provide appropriate solutions to appellate questions which might consume much time and money as a result of the application of collateral relief. As many state judges have asked: "Why allow a case to be endlessly appealed in the federal system when most often these cases are returned to the state courts for disposition?"

Cases Decided in the Aftermath of Stone v. Powell

Two cases decided since Stone v. Powell further illustrate the Burger Court's intention to disengage from active policy-making in the area of criminal procedure. Both of these cases were decided in 1977 and were based on considerations other than Fourth Amendment exclusionary claims.

First, in the case of Henderson v. Kibbe,⁶ the petitioner filed for a federal writ of habeas corpus based on an improper charge to the trial jury. The second case, Wainwright v. Sykes,⁷ brought a habeas corpus challenge to a state conviction based on an allegedly involuntary confession, contrary to Miranda v. Arizona.⁸ Both of these cases will be examined briefly to determine the effect they may have on clarifying Stone v. Powell.

Henderson v. Kibbe

In this case the petitioner appealed to the federal courts on the basis of an improper charge to the jury by the trial court judge. Justice Stevens delivered the opinion of the Court in which he said that failure to make a timely challenge to a trial court error largely negated the basis for this appeal. Justice Stevens said that

It is a rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court. The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's

⁶431 U.S. 145 (1977).

⁷433 U.S. 72 (1977).

⁸384 U.S. 436 (1966).

judgment is even greater than the showing required to establish plain error in direct appeal.⁹

Justice Stevens added in a footnote that

The strong interest in preserving the finality of judgments . . . as well as the interest in orderly trial procedure, must be overcome before collateral relief can be justified.¹⁰

Wainwright v. Sykes

In this case Sykes appealed for habeas corpus relief challenging a confession allegedly obtained involuntarily. Neither he nor his attorney raised this claim before the trial court, thus negating an appeal based on Florida Rules of Criminal Procedure, Section 3.190. Justice Rehnquist delivered the opinion of the Supreme Court in which he held that the Florida rules relating to objections were consistent with the United States Constitution "thus [the defendant's] failure to timely object . . . amounted to an independent and adequate state procedural ground which would have prevented direct review here."¹¹

Rehnquist noted that this decision ran counter to that

⁹431 U.S. at 154.

¹⁰431 U.S. at 154n.

¹¹433 U.S. at 87.

of the majority in Fay v. Noia¹² "which would make federal habeas corpus review generally available to state convicts absent a knowing and deliberate waiver of the federal constitutional contention."¹³

Justice Rehnquist concluded his argument against the habeas corpus doctrine in Fay v. Noia by saying that such cases

. . . may encourage "sand bagging" on the part of defense lawyers, who may take their chances on a verdict of not guilty in a state trial court and intend to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off.¹⁴

Justice Stevens concurred with Justice Rehnquist but attempted to develop a framework for what could be seen as the "full and fair litigation" standard of Stone v. Powell. Justice Stevens emphasized critical considerations such as

. . . the competence of counsel, the procedural context in which the asserted waiver occurred, the character of the constitutional right at stake, and the overall fairness of the entire process . . .¹⁵

Although not specifically directed at Stone v. Powell and

¹²372 U.S. 391 (1963).

¹³433 U.S. at 87.

¹⁴433 U.S. at 89.

¹⁵433 U.S. at 96.

"full and fair litigation," Justice Stevens asserted that these were the factors weighed in determining the appropriateness of federal collateral attack.

These two cases provide a broader context for the Supreme Court's disengagement from the area of habeas corpus review than does Stone v. Powell standing alone. The Burger Court, through a series of cases, has clearly articulated a policy whereby it is limiting the federal habeas corpus cases it will hear or that will even enter the federal court system. The implication is equally clear; the United States Supreme Court has opened the way for state court systems to shoulder more and more of the burden of federal claims litigation.

The Future of Criminal Appeals

Beginning with cases such as Stone v. Powell, the United States Supreme Court has articulated a policy of disengagement from the area of criminal procedure supervision. The Burger Court's ostensible reasoning for this disengagement is two-fold. First, it is aimed at relieving some of the congestion in the federal courts. Controlling habeas corpus petitions from state prisoners is seen as one way to accomplish this objective. Secondly, at least by implication, the Burger Court has expressed increased confidence in state appellate courts.

One implication of this change in philosophy is that state criminal defendants who would have formerly appealed by writ of habeas corpus will now likely have to appeal by writ of certiorari. This will mean that a larger number of cases will be competing for the limited number of certiorari appeals heard by the Supreme Court each year. If this does happen, in all likelihood, only the grossest violations of state criminal defendants' rights will reach the Court for hearing.

For the courts the 1970s have proven to be a period of consolidation and clarification rather than expansion. Therefore, while most doctrines articulated by the Warren Court have not been done away with, they have been consistently "honed" by the Burger Court.

Specifically in reference to Stone v. Powell and similar cases, the Supreme Court has opened the way for nearly unprecedented expansion of jurisdiction and importance by the state supreme courts. On the surface, most state supreme court judges responding to the survey in Chapter VI welcomed this change in philosophy by the federal courts.

In the end, however, it seems that Supreme Court disengagement has made little difference to state supreme courts for two reasons. First, most state supreme courts have

applied cases such as Stone v. Powell on very narrow, substantive grounds. The vast majority of the seventy-two state appellate decisions citing Stone v. Powell, between 1976 and 1979, did so on Fourth Amendment exclusionary rule grounds. This meant that the decision was not viewed as increasing the scope of authority or importance of the state supreme courts.

Finally, the feeling seems pervasive among state supreme court judges that they have no reason to change their methods for handling criminal appeals. Thus, although a few state appellate judges have recognized and commented on the potential benefits from cases such as Stone v. Powell, most state supreme courts have shown no inclination to move to a more expansive or assertive role in federal-state court relations.

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Hawk, Ex parte 321 U.S. 114 (1944)

Henderson v. Kibbe 431 U.S. 145 (1977)

Henry v. Mississippi 379 U.S. 443 (1965)

Jacobellis v. Ohio 378 U.S. 184 (1964)

Jacobs v. Hopper (Georgia) 233 S.E. 2d 169 (1977)

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Judiciary Act of 1867. 14 Stat. 385-86.

U.S. Constitution. Art. II, Sec. 3.

APPENDICES

APPENDIX A
STATE SUPREME COURTS

STATE SUPREME COURTS

Alabama Supreme Court -
9 judges

Alaska Supreme Court -
5 judges

Arizona Supreme Court -
5 judges

Arkansas Supreme Court -
7 judges

California Supreme Court -
7 judges

Colorado Supreme Court -
7 judges

Connecticut Supreme Court -
5 judges

Delaware Supreme Court -
3 judges

Florida Supreme Court -
7 judges

Georgia Supreme Court -
7 judges

Hawaii Supreme Court -
5 judges

Idaho Supreme Court -
5 judges

Illinois Supreme Court -
7 judges

Indiana Supreme Court -
5 judges

Iowa Supreme Court -
9 judges

Kansas Supreme Court -
7 judges

Kentucky Supreme Court -
7 judges

Louisiana Supreme Court -
7 judges

Maine Supreme Judicial
Court - 7 judges

Maryland Court of Appeals -
7 judges

Massachusetts Supreme
Judicial Court -
7 judges

Michigan Supreme Court -
7 judges

Minnesota Supreme Court -
9 judges

Mississippi Supreme Court -
9 judges

Missouri Supreme Court -
7 judges

Montana Supreme Court -
5 judges

Nebraska Supreme Court -
7 judges

Nevada Supreme Court -
5 judges

New Hampshire Supreme Court - 5 judges	Tennessee Supreme Court - 5 judges
New Jersey Supreme Court - 7 judges	Texas Supreme Court (civil cases only) - 9 judges
New Mexico Supreme Court - 5 judges	Texas Court of Criminal Appeals (criminal cases) - 5 judges
New York Court of Appeals - 7 judges	Utah Supreme Court - 5 judges
North Carolina Supreme Court - 7 judges	Vermont Supreme Court - 5 judges
North Dakota Supreme Court - 5 judges	Virginia Supreme Court - 7 judges
Ohio Supreme Court - 7 judges	Washington Supreme Court - 9 judges
Oklahoma Supreme Court (civil cases only) - 9 judges	West Virginia Supreme Court of Appeals - 5 judges
Oklahoma Court of Criminal Appeals (criminal cases) - 3 judges	Wisconsin Supreme Court - 7 judges
Oregon Supreme Court - 7 judges	Wyoming Supreme Court - 5 judges
Pennsylvania Supreme Court - 7 judges	
Rhode Island Supreme Court - 5 judges	
South Carolina Supreme Court - 5 judges	
South Dakota Supreme Court - 5 judges	

APPENDIX B
STATE APPELLATE DECISIONS

STATE APPELLATE DECISIONS

Alabama --

Harris v. State 352 So. 2d 479 (1977)

Alaska --

Davenport v. State 568 P. 2d 939 (1977)

Arizona --

State v. Moody 560 P. 2d 1272 (1977)

State v. Washington 585 P. 2d 249 (1978)

State v. Dwyer 585 P. 2d 900 (1978)

California --

People v. Cook 583 P. 2d 130 (1978)

People v. Belleci 146 Cal. Rptr. 462 (1978)

Colorado --

People v. McNeal 553 P. 2d 757 (1976)

People v. Casias 563 P. 2d 926 (1977)

People v. Roblas 568 P. 2d 57 (1977)

District of Columbia Court of Appeals --

In the Matter of David Toon 364 A. 2d 1177 (1976)

United States v. Anderson 366 A. 2d 1098 (1976)

Crews v. United States 369 A. 2d 1063 (1977)

Hargett v. United States 380 A. 2d 1005 (1977)

Crews v. United States 389 A. 2d 277 (1978)

Florida --

Taylor v. State 355 So. 2d 180 (1978)

Georgia --

Connally v. State 227 S.E. 2d 352 (1976)
Parrish v. Hopper 233 S.E. 2d 161 (1977)
Jacobs v. Hopper 233 S.E. 2d 169 (1977)
Smith v. Hopper 239 S.E. 2d 510 (1977)

Illinois --

People v. Clark 357 N.E. 2d 798 (1976)
People v. Bell 365 N.E. 2d 203 (1977)

Indiana --

Carpenter v. State 378 N.E. 2d 908 (1978)

Iowa --

Moose v. Rich 253 N.W. 2d 565 (1977)
State v. King 256 N.W. 2d 1 (1977)
Young v. City of Des Moines 262 N.W. 2d 612 (1978)

Kansas --

State v. Dowdy 563 P. 2d 425 (1977)
State v. Turner 586 P. 2d 279 (1978)

Kentucky --

Lee v. Commonwealth 547 S.W. 2d 792 (1977)
Johnson v. Commonwealth 563 S.W. 2d 486 (1978)
Whorton v. Commonwealth 570 S.W. 2d 627 (1978)
Collins v. Commonwealth 574 S.W. 2d 296 (1978)

Louisiana --

State v. Sierra 338 So. 2d 609 (1976)
State v. Culotta 343 So. 2d 977 (1976)
State v. Herbert 351 So. 2d 434 (1977)
State v. Doucet 359 So. 2d 1239 (1977)

Maine --

State v. Melvin 390 A. 2d 1024 (1978)

Maryland --

Bartram v. State 364 A. 2d 1119 (1976)
Duncan v. State 366 A. 2d 1058 (1976)
Baker v. State 383 A. 2d 698 (1978)
Johnson v. State 384 A. 2d 709 (1978)

Massachusetts --

Commonwealth v. DeChristoforo 353 N.E. 2d 769 (1976)
Commonwealth v. Reynolds 370 N.E. 2d 1375 (1977)
Commonwealth v. Boswell 372 N.E. 2d 237 (1978)

Michigan --

People v. Harrell 247 N.W. 2d 829 (1976)
People v. Warner 258 N.W. 2d 385 (1977)
People v. DeFillipo 262 N.W. 2d 921 (1978)
People v. Kusowski 272 N.W. 2d 503 (1978)

Minnesota --

State v. Nolting 254 N.W. 2d 340 (1977)
State v. Causey 257 N.W. 2d 288 (1977)
State v. Lien 265 N.W. 2d 833 (1978)

Nevada --

Surianello v. State 553 P. 2d 942 (1976)

New Hampshire --

State v. Slade 362 A. 2d 194 (1976)

New Jersey --

State v. Fariello 366 A. 2d 1313 (1976)

New York --

People v. Coffey 407 N.Y.S. 2d 267 (1978)

North Carolina --

State v. Louchheim 244 S.E. 2d 195 (1978)
State v. Jones 245 S.E. 2d 711 (1978)
State v. Ross 246 S.E. 2d 780 (1978)
State v. Alford 247 S.E. 2d 634 (1978)
State v. Stinson 249 S.E. 2d 891 (1979)

North Dakota --

State v. Olson 244 N.W. 2d 718 (1976)
State v. Stockert 245 N.W. 2d 266 (1976)

Pennsylvania --

Commonwealth v. Diggs 394 A. 2d 586 (1978)

Rhode Island --

State v. Spratt 386 A. 2d 1094 (1978)

Texas --

Wilder v. State 558 S.W. 2d 883 (1977)
Wilder v. State 560 S.W. 2d 676 (1978)
Ex parte Garcia 560 S.W. 2d 948 (1978)
Davenport v. State 574 S.W. 2d 73 (1978)

Virginia --

Owens v. Commonwealth 235 S.E. 2d 331 (1977)

Washington --

State v. Smith 558 P. 2d 265 (1976)
State v. Williams 560 P. 2d 1160 (1977)

Wyoming --

Smith v. State 557 P. 2d 130 (1976)

APPENDIX C

SURVEY OF STATE APPELLATE JUDGES

EAST TENNESSEE STATE UNIVERSITY

JOHNSON CITY, TENNESSEE 37601

COLLEGE OF ARTS AND SCIENCES
Department of Criminal Justice

May 1, 1979

The enclosed survey is being sent to you and all 322 state supreme court judges in the United States. The survey is a part of the work on my doctoral dissertation at the University of Tennessee. Reading this letter and completing the survey should take about 15 minutes of your time.

The purpose of the survey is to assist in an analysis of the impact of the United States Supreme Court case of Stone v. Powell 428 U.S. 465 (1976). Broadly speaking I am asking: what has been the result of Burger Court policies toward state appellate courts?

I am interested in your perceptions of the significance of Stone v. Powell. What, in your opinion, has resulted from this case and its "full and fair litigation" guidelines? Your responses will be held in strictest confidence and nothing in the dissertation, or subsequent published research drawn from it, will give any indication of the identity of individuals responding to the questionnaire.

If you would like to add anything not covered by the survey, please feel free to express additional opinions on the back of the questionnaire.

Your participation is greatly appreciated and will be instrumental in the completion of my dissertation.

Sincerely,

G. Larry Mays, Instructor and Coordinator
Criminal Justice Extension Program



THE UNIVERSITY OF TENNESSEE

169

KNOXVILLE
37916

THE DEPARTMENT OF POLITICAL SCIENCE
McClung Tower
974-2261

April 27, 1979

This statement certifies that G. Larry Mays is a candidate for the Ph.D. degree in Political Science at the University of Tennessee. He is writing a dissertation assessing the impact of recent United States Supreme Court restrictions on Federal Habeas Corpus review of state criminal convictions. The enclosed questionnaire focussing on State Appellate Court responses to Stone v. Powell, 428 U.S. 465 (1976), is a component of Mr. Mays' dissertation research.

As members of his doctoral committee, we would greatly appreciate your participation in this project through completion of the enclosed questionnaire.

Sincerely,

Committee Chairman
Otis H. Stephens
Professor of Political Science

Committee Members:

Thomas D. Ungs
Professor and Head

Myrum Plaas
Professor of Political Science

The purpose of this questionnaire is to obtain your opinions on the landmark Supreme Court case of Stone v. Powell 428 U.S. 465 (1976). The questions are designed to allow you to finish the questionnaire in 15 minutes or less. A copy of this questionnaire is being sent to every State Supreme Court Judge in the United States so it is very important to the research that each questionnaire be returned. Your responses will be kept fully confidential. The number in the upper right hand corner is only for the purpose of checking the questionnaire return rate.

The response choices abbreviated below each question correspond to: SA (strongly agree), A (agree), N/O (no opinion), D (disagree), and SD (strongly disagree). Please check the one response to each item that most closely approximates your opinion. THANK YOU FOR YOUR TIME AND RESPONSES.

1. U.S. Supreme Court decisions like Stone v. Powell have reduced the number of applications for federal habeas corpus relief from state appellate courts.
6.5% SA 32.6% A 50.0% N/O 9.8% D 1.1% SD
2. Cases appearing before state appellate courts are more carefully prepared and argued since Stone v. Powell.
3.3% SA 17.4% A 35.9% N/O 33.7% D 9.8% SD
3. Stone v. Powell will cause the highest state appellate courts to scrutinize more closely criminal cases.
2.2% SA 20.7% A 16.3% N/O 46.7% D 14.1% SD
4. Trial attorneys have been less litigious under Stone v. Powell guidelines.
 SA 5.4% A 44.6% N/O 42.4% D 7.6% SD
5. Criminal defendants have lowered their appellate review expectations under the Burger Court.
4.3% SA 39.1% A 31.5% N/O 22.8% D 2.2% SD
6. Burger Court decisions have shown that federal courts will not be quick to interfere in state criminal decisions.
7.6% SA 66.3% A 9.8% N/O 15.2% D 1.1% SD
7. The "full and fair litigation" standard of Stone v. Powell does not provide state appellate courts with adequate guidelines.
3.3% SA 17.4% A 13.9% N/O 62.0% D 4.3% SD
8. Stone v. Powell expressed the Burger Court's increased trust of state appellate courts.
6.5% SA 52.2% A 21.7% N/O 16.3% D 3.3% SD
9. Inadequate state appellate procedures have compelled U.S. Supreme Court supervision of state criminal cases.
3.3% SA 26.1% A 10.9% N/O 35.9% D 23.9% SD

10. Some state appellate judges are unsympathetic to federally created rights.
14.1% SA 51.1% A 15.2% N/O 14.1% D 5.4% SD
11. Without federal collateral review it is doubtful that state appellate courts would be as conscientious in applying the exclusionary rule.
12.0% SA 29.3% A 9.8% N/O 35.9% D 13.0% SD
12. The work of state supreme court judges is undermined when a decision can be overruled by a single federal judge.
31.5% SA 32.6% A 7.6% N/O 25.0% D 3.3% SD
13. Habeas corpus petitions to the highest state appellate courts have increased since Stone v. Powell.
 SA 9.8% A 39.1% N/O 47.8% D 3.3% SD
14. Compared to the Burger Court the Warren Court had less confidence in state appellate court interpretations of the rights of criminal defendants.
12.0% SA 66.3% A 13.0% N/O 7.6% D 1.1% SD
15. When the U.S. Supreme Court is actively interventionist, state appellate court judges feel less responsibility for improving criminal justice.
1.1% SA 19.6% A 8.7% N/O 54.3% D 16.3% SD
16. Decisions such as Stone v. Powell permit state appellate courts to exercise wider discretion in determining procedural standards for criminal defendants.
4.3% SA 50.0% A 16.3% N/O 26.1% D 3.3% SD
- The following questions ask for information about your judicial career.
17. What year were you elected/appointed to your state's supreme court? 19
18. Did you have lower state appellate court service?
12% Yes 88% No yrs.
19. Did you have trial court service?
51.1% Yes 48.9% No yrs.
20. Did you have prosecutorial service at the federal or state level? If so, which and how long? 41.3% Yes 58.7% No Federal (yrs.) State (yrs.)
21. Did you have previous service as a criminal (defense) trial attorney?
77.2% Yes 22.8% No yrs.
22. How would you characterize yourself politically?
17.4% Republican 56.5% Democrat 26.1% Independent

APPENDIX D
QUESTIONNAIRE RESPONSES BY STATE

QUESTIONNAIRE RESPONSES BY STATE

Alabama - 3	Louisiana - 3	Ohio - 0
Alaska - 1	Maine - 2	Oklahoma - 1
Arizona - 2	Maryland - 3	Oregon - 3
Arkansas - 3	Massachusetts - 1	Pennsylvania - 0
California - 0	Michigan - 1	Rhode Island - 2
Colorado - 3	Minnesota - 2	South Carolina - 1
Connecticut - 0	Mississippi - 1	South Dakota - 2
Delaware - 0	Missouri - 1	Tennessee - 2
Florida - 3	Montana - 3	Texas - 2
Georgia - 2	Nebraska - 3	Utah - 2
Hawaii - 1	Nevada - 2	Vermont - 1
Idaho - 1	New Hampshire - 2	Virginia - 2
Illinois - 1	New Jersey - 2	Washington - 3
Indiana - 3	New Mexico - 2	West Virginia - 2
Iowa - 3	New York - 0	Wisconsin - 2
Kansas - 2	North Carolina - 3	Wyoming - 1
Kentucky - 5	North Dakota - 1	

VITA

George Larry Mays was born in Knoxville, Tennessee on July 2, 1949. He attended elementary schools in that city and was graduated from East High School in 1967. In June of 1967 he entered The University of Tennessee, Knoxville, and in June 1971 he received a Bachelor of Science degree in Business Administration.

After graduating from The University of Tennessee, Mr. Mays was employed by the Knoxville Police Department where he served as a uniform patrol officer, narcotics investigator, and juvenile officer. In September of 1974 he entered East Tennessee State University and received the Master of Arts degree from that institution in August 1975.

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The author is a member of Pi Gamma Mu, the Fraternal Order of Police, the Tennessee Association of Criminal

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He is married to the former Brenda Oliver of Knoxville, Tennessee and they have one son, Gregory.