

"States Rights or Criminal Rights:
An Analysis of State Performance in
U.S. Supreme Court Litigation"

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Introduction

Issues of law and order are of major concern to most Americans. Clearly, the primary responsibility for maintaining law and order rests with the states. Thus, if there is to be any alleviation of public concern about crime, it is most probable that action must come from the states.

There are several ways in which the states can respond to this public concern. Ways that have been suggested as methods include "beefing up" police forces, lessening reliance on plea bargaining, increasing mandatory sentences, etc. All of these ideas and others represent solutions to various aspects of problems that permeate the criminal justice system. Another, less explored, way in which the states can deal with problems of criminal justice is through litigation resulting in major doctrinal change.

Litigation seems a viable strategy to deal with this problem for several reasons. First, for years, those seeking protection of criminal rights have resorted to the courts. These individuals and groups were particularly successful during the Warren Court era in securing rights for the criminally accused. And, in fact, decisions such as Mapp, Miranda, Escebedo, and Gideon, seem to indicate that if alleged criminals can expand rights through doctrinal change, so too can states use the courts to assist them in their mission.

Second, the job of police would be facilitated through the erosion of some of the Warren Court decisions. The exclusionary rule as applied to the states in Mapp, for example, is considered by many law enforcement officers to be a major hindrance to the performance of their jobs. Viewed as even more detrimental are Escebedo and Miranda.

The third advantage inherent in seeking doctrinal change is that it would facilitate the job of local prosecutors in the same way that the

Warren Court decisions buttressed the ability of defense lawyers to obtain acquittals for their clients. The recent Supreme Court decision, for example, that liberalized automobile searches will undoubtedly aid the conviction rates of prosecutors. This particular advantage has been even further substantiated by the work of Bradley Canon (1974). Canon has indicated that state courts routinely adopt Supreme Court precedents especially in the area of criminal procedure.

Based on the above discussion, it is clear that major doctrinal change from the Supreme Court would be exceptionally beneficial to the states. Yet it is questionable how well states actually have fared in U.S. Supreme Court litigation during the Burger Court era. Court observers, as well as individual members of the Court, in fact, have expressed their concern with the quality of state representation (Howard 1982:434-438). In a 1982 Catholic Law Review article, Stewart A. Baker, a former clerk to Justice Stevens, and James R. Asperger noted that:

Despite the frequency of their appearances before the Supreme Court and the importance of the issues, state and local governments lack a coordinated strategy for the representation of their common interests. As a result of this lack of coordination, the quality of legal representation with respect to state and local issues is as varied as the number of state and local governments in existence (1982:368).

Speeches of and interviews with the Justices also have revealed their concern with the quality of state representation. In a 1974 speech Justice Powell noted that state and local prosecutors are "frequently outgunned and

overmatched by the defense" (Powell 1974). Similarly Justice Brennan (1983) often has appealed to state and local government organizations to improve the quality of their work before the Court. Additionally, one U.S. Supreme Court Justice* noted that most states "don't give us their best shot." In fact, "it's embarrassing for us to sit there and listen" to the arguments offered by state prosecutors. Several other Supreme Court Justices have concurred with this assessment.

Thus, there seems to be agreement concerning the quality (or lack thereof) of legal representation of the states before the Court. There is little empirical data, however, indicating if in fact, this assumption is correct, or explanations as to why this exists. The purpose of this paper, then, is to examine two questions: (1) how are states faring in criminal cases decided by the U.S. Supreme Court? (2) if the states are faring poorly in that forum, how can they seek to maximize their efforts?

The significance of this exercise is threefold. First, similar examinations of the U.S. government's litigation activities have provided important contributions to our understanding of the Supreme Court decision-making process and the way in which government operates (O'Connor, 1983; Puro, 1971; Scigliano, 1971). For example, it is common knowledge that the Office of the U.S. Solicitor General is a highly respected advocate. One Supreme Court Justice has noted that the "Solicitor General's office by tradition has had a very high calibre lawyer

*Interviews were conducted with several U.S. Supreme Court Justices during September 1983. Unless otherwise indicated, the particular Justice speaking did so under the stipulation that his or her remarks would not be for direct attribution.

working on its staff . . . whose lawyers tend to be very skilled." Another echoed this sentiment commenting that "the ablest advocates in the U.S. are the advocates in the Solicitor General's office." Second, because of the importance of Supreme Court decisions in this area, this analysis could provide important indications as to factors necessary for increased success. In turn, increased litigation success could help remedy some of the problems in the criminal justice system. Finally, an investigation of this nature provides just one more example of how interests, in this instance--states--can use the courts to obtain policy objectives.

Methods

To answer these questions, we examined all criminal cases decided by the Burger Court between its 1969 to 1981 terms.¹ For each case we coded whether a state or the federal government was involved, the nature of that participation, and the Court's disposition of the case.

While not all criminal cases decided by the Supreme Court result in major doctrinal change, we included every case. This decision was based on the assumption that the Supreme Court decides only cases that it deems to have some policy implications. Clearly, some of those implications will be more significant than others. Yet it is difficult, if not impossible, to assess exactly those impacts, particularly of the most recent cases. Thus, we chose to include all cases rather than making subjective assessments of the relative value of each.

Analysis

(1) How are states faring in the Supreme Court?

Table 1 below illustrates the relative successes of the states and

(Table 1 about here)

the federal government in Court. While the states won 54 percent (n=263) of the cases in which they were involved, they did not fare particularly well when compared to the Court's overall support of law enforcement claims, or the U.S. government more specifically. Over the past 13 terms, the Burger Court, reputed to be especially amenable to the claims of law enforcement officers (Funston 1977), took what we term the conservative posture in 59 percent of the 413 cases involving criminal issues. The states had a somewhat lower success rate than would be expected given the Burger Court's overall record concerning these issues. This is particularly evident when the record of the states taken collectively is compared to that of the federal government. As Table 1 reveals, the U.S. government won 68 percent of the 150 cases in which it participated. Thus, the federal government actually boosted the Supreme Court's conservatism, while the states' participation tended to detract from that stance.

The disparity between the success rates of the U.S. government and the states can be explained by several factors. The Court, for example, traditionally has viewed the Solicitor General as a "tenth member" (Werdegar 1967-68) who shares responsibility for selecting the best cases for the Court's review. Thus, when the Solicitor General takes a position, the Court is aware that that position has been carefully considered.

Another reason for this difference is the way in which these governmental bodies approach litigation. Like the NAACP LDF and other interest groups that use the courts to obtain favorable precedent often as part of a test case strategy, the Solicitor General's office also is ever

mindful of its policy function (Lee 1982). Thus, the Solicitor General's office often is more concerned with building precedent rather than with obtaining a more narrow ruling on the merits. In contrast, the states generally appear to be highly concerned with their conviction records and thus necessarily hold a more short term view of the litigation.

A third yet related explanation for the disparity between the states and the United States is what we term "institutional expertise." Almost all Supreme Court litigation involving the U.S. government is screened through one central, highly specialized office--the Solicitor General's office. In contrast, there are 50 states all pursuing widely individualized cases with disparate expertise, resources and goals.

This final reason is further substantiated in Table 2 below, which

(Table 2 about here)

among other things, indicates that the participation and success rates of the states tend to vary by state. Table 2 reveals that 20 percent of the states in the Union are responsible for 59 percent of all the criminal cases in which a state was a party. Possible explanation for this phenomenon include population, state conviction rates, reputation of the lower court, and political culture.

Regardless of the reasons why some states have more Supreme Court litigation than others, based on Marc Galanter's (1974) theory of repeat players, which posits that those who appear most frequently before the Court will be the most successful, one would expect that the success rates of these 10 states would be significantly higher than those of the remaining 80 percent. Those repeat player states, however, had a slightly lower success rate than did their nonlitigious counterparts (53 vs. 55.5%).

While the repeat player theory may not explain this phenomenon, there does, however, appear to be another explanation. The litigious southern states,² which account for 60 percent of the repeat players, have a far lower success rate than that of the non-southern repeat players--48 vs. 59 percent.

The finding that the south fares poorly in Supreme Court litigation is not surprising given scholarly research on the subject and conventional wisdom. S. Sidney Ulmer (1969), for example, found that some members of the Supreme Court had an almost automatic negative perception of the southern states. Other less formal explanations of this disparity include the high inmate and death row populations in the southern states, notorious prison conditions, and the large proportion of the population living below the poverty level.

While success rates tend to vary by region, at least two other factors also appear to affect the states in Court: the assistance of the Solicitor General and the party appealing the case. When the Solicitor General files an amicus brief in support of the position advanced by a state, the success rate of the states jumps from 54 to 78 percent. Once again, this finding is not surprising given the Solicitor General's reputation. Additionally, as demonstrated in Table 3 below, there is a

(Table 3 about here)

huge disparity between success rates depending upon whether the state or the criminal appeals to the U.S. Supreme Court. States, in fact, win over 80 percent of the cases that they themselves appeal. In contrast, they win only slightly more than one-third of the cases in which they are respondents. This finding is consistent with scholarly treatments of the

certiorari process, which indicate that the Court tends to accept cases to review to reverse (Brenner 1979).

In this section we attempted to determine how well states fared in Supreme Court litigation. Generally, our results indicate that states are not particularly successful especially when compared to the U.S. government. Three factors, however, appear to affect that success. First, for reasons mentioned above, the non-southern "repeat player" states generally are far more successful than their southern counterparts. Second, the Solicitor General's participation as *amicus curiae* acts to raise state success rates significantly. And, third, and perhaps most significantly, who appeals the case tends to determine the victor.

(2) How can states maximize their litigation efforts?

The findings revealed in the first section of this paper can be used to develop two models of optimal state litigation plans: the "cooperative selective model" and the "cooperative organization" model which are illustrated below in Figure 1.

(Figure 1 about here)

Cooperative selective model

As revealed in Figure 1, the cooperative selective model is based entirely on the findings of this study. Given the discrepancies between the success rates of the states and the U.S. government, it is suggested that one important method by which states could improve their respective success rates is by encouraging only non-southern repeat player states to bring suit. This suggestion is based on the finding that these states won 59 percent of the cases in which they participated. That figure jumps to 85 percent when those states were the appealing party and were not placed in the position of responding to the claims of criminal defendants.

Simultaneously, in accordance with the proposed model, these states should request the assistance of the U.S. Solicitor General in the form of compatible amicus curiae briefs. Because the Office of the Solicitor General is so successful as a sponsor, its input as an amicus curiae was expected to be welcomed by the Court. And, in fact, the Solicitor General's participation as amicus curiae increased state success rates.

When this model is operationalized, that is to say, when we examined the success rates of non-southern repeat players states that appealed cases assisted by the Solicitor General, they won 100 percent of their cases! One point of comparison to this phenomenon is the track record of southern, non-repeat player states, where the criminal has appealed and the U.S. did not participate as an amicus curiae. In this situation, alleged criminals won over 82 percent of the time!

Cooperative organizational model

This model flows not from our findings, but instead from comments about and studies of the Office of the U.S. Solicitor General. In general, this model predicts that if states filter all their Supreme Court litigation through one central office, then they will be more successful in Court.

Some of the Justices of the Court, in particular, are quite enthusiastic about the establishment of such an office. And, in fact, a State and Local Legal Center was established in 1983 to coordinate the efforts of states and to assist states in their litigation efforts. One Justice, in speaking of the new project noted "most of us applaud that effort and wish it well. It is in the public interest to have both sides well represented." Another reiterated that view noting that "finally (there was) an effort to improve the quality of (state) representation."

At the time of this writing, however, it is unclear whether this office will even handle criminal cases (Baker, 1983; Velvel 1983). If the Center does not chose to assist the states in these kinds of issues, then perhaps the establishment of such an office is warranted (see Baker and Asperger 1982a for a general discussion of the Center).

Conclusion

Concerns about criminal justice long have been voiced by Americans. One way in which these concerns could be assuaged is through systematic Supreme Court litigation conducted by the states resulting in major doctrinal change. Thus, the purpose of this analysis was to determine how well states fared in that forum.

Our findings reveal that states are not successful in Court. Further analysis, however, reveals that the efforts of states are enhanced if the U.S. government files an amicus curiae brief in support of states' positions and states appeal the judgment of the lower court. Thus, we created two models of optimal state litigation that flow from these findings.

These models indicate that using appropriate strategies, states can maximize their efforts in Court. Such efforts could lead to policies more favorable to the states, and, in fact, have been urged by several Justices of the U.S. Supreme Court.

Notes

¹Criminal cases were defined as those involving 4th, 5th, 6th and/or 8th amendment issues and habeus corpus petitions. All full opinion and those per curiam cases having sufficient legal reasoning were included. We excluded criminal cases in which the alleged criminal was not an individual. Thus, a total of 413 cases were included in this analysis.

²We used the ICPSR coding scheme to define southern states. Thus, border states also were included in our southern category.

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Table 1

Success Rates of the States and of the U.S. Government in
Criminal Cases Decided by the Supreme Court, 1969-1981 Terms

	Percent Won	N=
U.S.	68%	150
States	54	263

Table 2

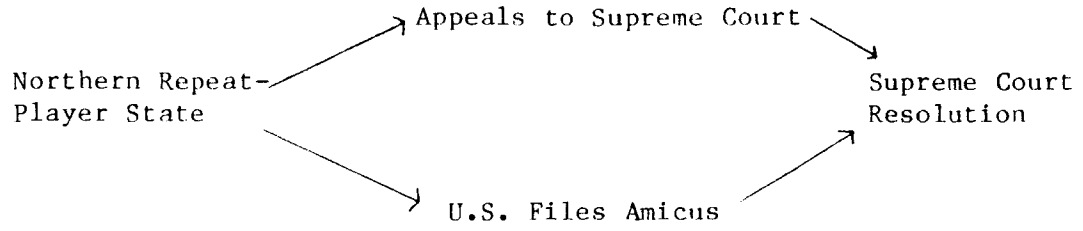
Participation and Success Rates of
the Individual States Involved in Criminal Cases decided by
the Supreme Court, 1969-1981 Terms

State	N of Partici- pation	Percent Won	State	N of Partici- pation	Percent Won
California	23	65%	New Jersey	4	50%
Florida	22	59	Maryland	3	67
New York	19	63	Oklahoma	3	0
Illinois	17	47	Delaware	2	0
Georgia	15	40	Iowa	2	0
Kentucky	13	61.5	Maine	2	50
Texas	13	46	Montana	2	0
North Carolina	12	50	Nebraska	2	100
Ohio	11	54.5	New Hampshire	2	0
Lousiana	10	20	Puerto Rico	2	50
Michigan	9	89	Rhode Island	2	100
Oregon	9	90	South Carolina	2	100
Pennsylvania	8	50	Washington	2	50
Tennessee	7	86	Wisconsin	2	50
Arkansas	6	17	Alaska	1	0
Missouri	6	33	Indiana	1	0
Alabama	5	40	Mississippi	1	0
Arizona	5	20	New Mexico	1	0
Connecticut	5	100	South Dakota	1	100
Massachusetts	5	100	Wyoming	1	0
Virginia	5	60			

Figure 1

Optimal Litigation Models

Cooperative Selective Model



Cooperative Organizational Model

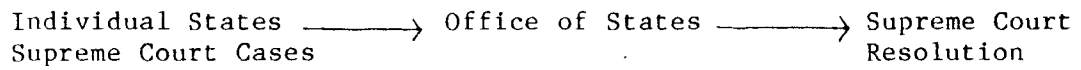


Table 3

Resolution of Criminal Cases by the Supreme Court by
 Appealing Party, 1969-1981 Terms

Appealing Party	Court's Resolution		N=
	% Won	% Lost	
State	80%	20%	112
Alleged Criminal	66	34	151