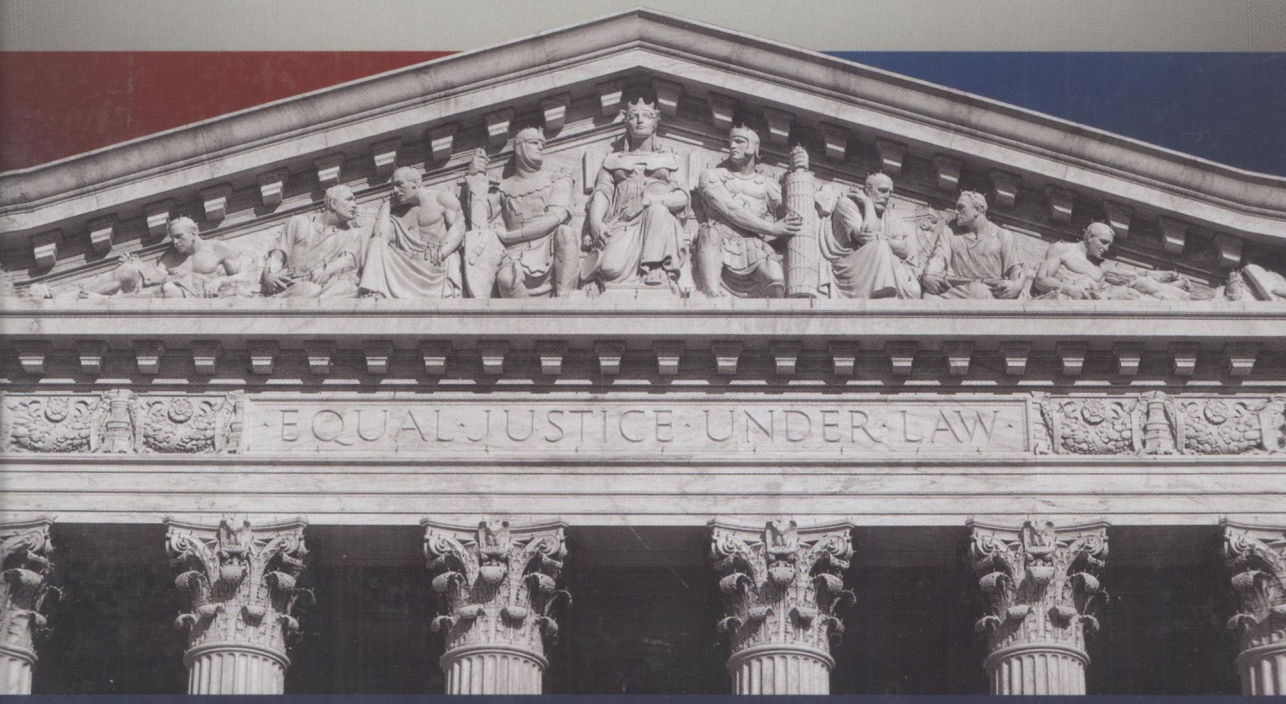
THE SUPREME COURT'S POWER IN AMERICAN POLITICS

THE SUPREME COURT AND CRIMINAL PROCEDURE

THE WARREN COURT REVOLUTION



MICHAL R. BELKNAP

The Supreme Court and Criminal Procedure: The Warren Court Revolution

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The Supreme Court and Criminal Procedure

For Mary Perez: A marvelous research assistant and treasured friend without whose prodigious labors this book would not exist.

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I would like to take this opportunity to acknowledge the contributions of a number of people, without whose efforts this book would not exist. I am particularly indebted to a group of outstanding research assistants, who actually gathered the material assembled in these pages. At the top of this distinguished list is Mary Perez, who was collecting articles and newspaper stories for most of a year before I really got to work on this project. She became something of a legend to those who followed her, and they heard endless tales about Mary's feats such as getting somebody with historical documents on the work of a police department to let her simply walk off with them on the strength of nothing more than her promise to return them later. Gabriela Martinez discovered that there are old police manuals for sale on eBay, and she outbid anybody who tried to get the ones she wanted. Mark Hotchkis kept prodding the Phoenix Police Department until it finally located material it insisted it did not have. Jane Krikorian handled the complicated business of getting copyright clearances for the documents the others found and paying for them, even while she was preparing for the dreaded California Bar Exam. Sarah Sloviter and Kristine Borgia contributed in countless ways great and small, the most important of which was doggedly pursuing that one elusive police manual from the South that we never could seem to find—until they finally located one in, of all unlikely places, the Library of Congress.

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While Jackie and my research assistants deserve most of the credit for this book, other people assisted me as well. The most important by far was Sandy Moreau, executive assistant to the associate deans at California Western School of Law, who enabled the rest of us to satisfy the bureaucratic requirements that had to be met to obtain the assistance and funding that we needed. Associate Dean William Aceves was generous with his financial support for this project. The Historical Office of the San Diego Police Department facilitated research in the collection of that department.

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Foreword

In studying the opinions of the U.S. Supreme Court, certain decisions capture greater attention than others, and certain phrases often catch the eye. But what do those cases mean when other branches or levels of the government have to implement them, sometimes incurring substantial costs to do so? For example, when the justices ruled that states had to provide lawyers for indigent defendants, how did the states respond? What programs did they have to enact? The ruling in *Gideon v. Wainwright* (1963) meant nothing until the states actually implemented it.

Most studies of the Court are doctrinal, in that they view Court decisions in a particular area to see how they have evolved, what rules have been created, and what precedents are established. This is all legitimate, and primarily what we do in law schools. Historians and political scientists also tend to look at the impact that Court decisions have on different groups and agencies. They want to know how the Court's decisions affected the actions of the states, the president, Congress, and other parts of society—how words translated into action.

The books in this series, while not ignoring doctrinal issues, focus more on how Court decisions translate into practice. What does it mean, for example, in actual police work when a court says that officers must follow certain rules in gathering evidence or making arrests? What does it mean to a state legislature when the high court holds current schemes of legislative apportionment unconstitutional? How does an administrative agency respond when courts rule that it has overstepped its authority?

In some areas the responses have been simple, if not always straightforward. For all the furor raised by critics of the ruling in *Miranda v. Arizona* (1966), within a relatively short time police departments made the *Miranda* warning part of the arrest routine. On the other hand, decisions regarding school prayer and abortion have met with opposition, and the responses of state and local governments have been anything but simple or straightforward.

Like the president, judges, as well as senators and members of Congress, take an oath of office to preserve, protect, and defend the Constitution. While the document is quite explicit in some areas (such as the length of a term of office), the framers deliberately wrote other provisions in broad strokes so that the Constitution could grow and adapt to the needs of future ages. What specific meanings should be attached to various constitutional clauses is a task that lies not only with the courts, but with the other branches of government as well.

In this volume, *The Supreme Court and Criminal Procedure,* by Michal R. Belknap, we see what the revolution in criminal justice wrought by the Warren Court has meant in

practice. Although the Supreme Court had dealt with a few matters of criminal procedure before 1953, they had been few and far between. For the most part, federal courts left criminal justice in the hands of state courts and police and only acted in extraordinary cases when they believed the trials had been travesties of justice and the behavior of police and prosecutors egregious. It is not so much that the justices believed that all was well in the state systems, but that the traditions of federalism precluded them from interfering. Justice Oliver Wendell Holmes Jr. once commented that he was prepared to overlook many irregularities in state courts unless they made him want to puke.

Then, starting in the late 1920s the Court embarked upon what became known as "incorporation," or the application of the guarantees in the Bill of Rights to state governments as well as to Congress. There are some scholars who believe that the framers of the Fourteenth Amendment intended that its Due Process Clause should do just that, but the Court moved in this direction very slowly. In 1937 Justice Benjamin N. Cardozo set up one test to rationalize how courts should proceed in the process of incorporation. In his opinion in *Palko v. Connecticut,* Cardozo acknowledged that the Fourteenth Amendment did incorporate some rights, but not all. He included all of the protections of the First Amendment, for freedom of thought and speech "is the matrix, the indispensable condition, of nearly every other form" of freedom. But as for the Second through Eighth Amendments, the Court should apply only those that are "of the very essence of a scheme of ordered liberty" and "so rooted in the traditions and conscience of our people to be ranked as fundamental."

Some years later Justice Hugo L. Black rejected this theory of "selective incorporation" and argued instead that the Fourteenth Amendment's Due Process Clause had been intended to incorporate all of the protections of the first nine amendments. In *Adamson v. California* (1947) Black offered an extensive historical analysis of the passage of the Fourteenth Amendment, and from then on he championed the idea of "total incorporation." For the next fifteen years, Black argued for total incorporation while his great jurisprudential foe on the bench, Felix Frankfurter, championed Cardozo's selective incorporation. Although the Court never formally embraced Black's views, in effect the Warren Court, especially after Frankfurter left the bench in 1962, adopted Black's position while utilizing the Cardozo/Frankfurter rationale.

As Professor Belknap shows, the Warren Court applied nearly every one of the Bill of Rights guarantees involving criminal procedure, and in doing so forced the states to adopt new ways of investigating and gathering evidence, the arrest and arraignment of people suspected of crimes, the manner in which people accused of crimes were tried, and then how their cases would be reviewed on appeal.

Nearly all of the procedures promulgated by the Warren Court had, in fact, already been adopted by the Federal Bureau of Investigation, which as an arm of the national government was bound by the Bill of Rights. Some states had similar provisions in their state constitutions, and some did not. Similarly, some states already acted under constraints similar to those guiding the FBI, but many did not. What the Warren Court demanded is not that all states move in lockstep, but that they all give at least minimal assurances of protecting individual rights in the criminal justice system.

Professor Belknap follows the trail of these different protections—the right to be secure in one's home, standards for securing a search or arrest warrant, the right to counsel, the right to a fair trial by a jury of one's peers, and others—and explains how both state and local police and governments responded to Warren Court decisions. He also explains how the justices reached these decisions, for contrary to some opinion, the members of the Warren Court were far from united in how far they wanted to go in interpreting the meaning of important constitutional phrases.

Although conservatives attacked the Warren Court, and Richard Nixon ran for president on a promise to undo what he considered its wrongheaded opinions, all of the major criminal justice decisions of the Warren Court remain good law today, four decades after Earl Warren retired from the bench. Some have been modified, and others fine-tuned, but all are still in place, and state courts and police have for the most part not only learned to live with them but, as Warren expected, use them to develop a more efficient and effective system. That is the story Professor Belknap tells.

Melvin I. Urofsky
May 2010

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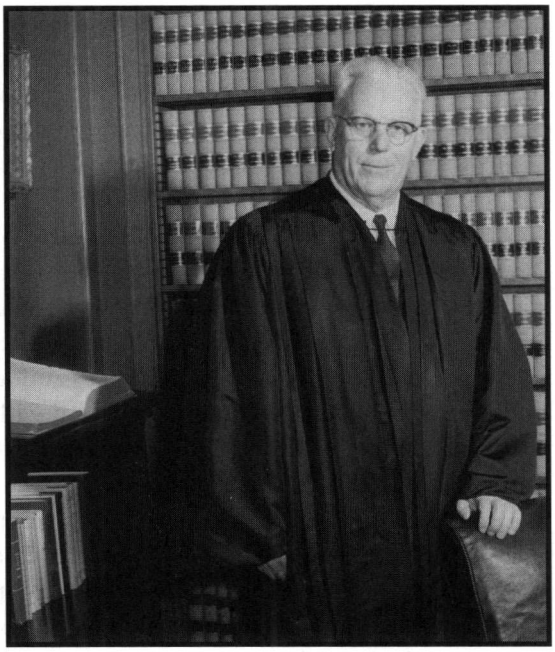
Introduction

During the sixteen years when Earl Warren served as chief justice of the United States, as Lawrence Friedman has so colorfully explained, "Constitutional law and criminal procedure came together, like the *Titanic* and its iceberg. . . ."[1] The result was what many observers have characterized as a "revolution" in American criminal procedure. Although Warren headed the Supreme Court from 1953 to 1969, this revolution actually took place during a much shorter period of time, lasting only from 1961 until about 1967.[2] At its core were three landmark rulings, *Mapp v. Ohio* (1961),[3] *Gideon v. Wainwright* (1963),[4] and *Miranda v. Arizona* (1966).[5] This book focuses on those decisions, examining both contemporary reaction to the Supreme Court's rulings and their actual impact on the operation of the American criminal justice system. Although concerned primarily with developments during the period when Warren was chief justice, it also addresses the question of how long-lasting the effects of the Warren Court's "revolution" proved to be.



Earl Warren, former governor of California, served as chief justice of the U.S. Supreme Court from 1953 to 1969. Warren presided over the Court during a time of great social and political change. The Warren Court drastically expanded the rights of the criminally accused, handing down such landmark cases as Mapp v. Ohio, Gideon v. Wainwright, *and* Miranda v. Arizona.

The Pre-1961 Period

That revolution was slow getting started. Warren was appointed chief justice on September 30, 1953, by President Dwight Eisenhower, who was fulfilling a promise to name him to the first Supreme Court vacancy, made in order to obtain the support of the three-term governor of California for the 1952 Republican presidential nomination. Although Warren lacked any judicial experience, his appointment aroused no opposition, and he was easily confirmed. During the first half of his chief justiceship, the Supreme Court played a small and relatively unimportant role in American criminal justice. The early

Warren Court did produce radical change, but it did so in the field of race relations rather than criminal justice. By far the most important decision the Supreme Court handed down during the period 1953–1960 was *Brown v. Board of Education* (1954), holding that segregation of public schools violated the Equal Protection Clause of the Fourteenth Amendment.[6] One of the most important rulings in American judicial history, *Brown* established the Warren Court as a symbol of modern liberalism.[7] After this momentous declaration of principle, however, it fell largely silent on the subject of race for a number of years. The country did not. Heated southern opposition and resistance by southern states to their desegregation decision inspired Warren and his colleagues to issue in *Cooper v. Aaron* (1958) probably the boldest declaration ever of the principle that the Supreme Court is supreme in the interpretation of the Constitution and that states must follow its rulings on that subject.[8]

Brown was not the only ruling of the early Warren Court to inspire impassioned opposition. So too did many of its decisions in the field of subversive activities. McCarthyism still had a strong hold on the country when Warren became chief justice. His Court challenged it with a series of decisions that limited federal and state initiatives to combat domestic communism. Although rather cautious in character, these rulings provoked an outpouring of adverse commentary. Faced with legislative efforts to overturn them, the Court between 1959 and 1961 beat a retreat from a number of the positions it had staked out in 1956 and 1957.[9]

Its criminal procedure decisions during this period aroused far less passion than did its rulings concerning antisubversive measures. Nor did they excite nearly as much opposition or even interest as its school desegregation decision. That is hardly surprising. Traditionally, what the Supreme Court had to say concerning how criminal cases were conducted had not been very important. Where that subject was concerned, before Warren became chief justice the Court's role was small and relatively inconsequential. It did supervise federal criminal trials and law enforcement, but since about 98 percent of American criminal prosecutions were brought in state courts, the pronouncements of the Supreme Court had little impact on most of them.[10]

Nor did the Constitution. Its Fourth, Fifth, Sixth, and Eighth Amendments all addressed issues of criminal procedure and punishment. But in *Barron v. Baltimore* (1833) the Supreme Court had taken the position that those amendments, along with the rest of the Bill of Rights, applied only to the national government, and while the Court had over the years found ways to make the states do some of the things they required, this remained a fundamental principle of constitutional law.[11] The states did, though, have to comply with the Fourteenth Amendment, which forbade them to deprive any person of life, liberty, or property without due process of law. As interpreted by the Court, that amendment's Due Process Clause required that they afford defendants fair and decent trials. It did, however, leave them free within very broad limits to determine what satisfied that requirement.[12]

During the 1930s and 1940s the Court held that the First Amendment freedoms of speech, press, religion, and assembly were part of the "liberty" that states were forbidden to take away without due process of law. It seemed reluctant, however, to hold that the criminal procedure rights protected by the Fourth, Fifth, Sixth, and Eighth Amendments

were also protected. The Court did hold in *Powell v. Alabama* (1932) that the Due Process Clause required the states to appoint lawyers for indigent defendants in capital cases. The reason was not, however, that the Sixth Amendment applied to them. Rather, it was that some things that would violate the Bill of Rights if the federal government did them also happened to be denials of due process if done by a state. From the 1930s through the 1950s the Court wrestled with the question of what those things were. It failed to provide much real clarification. In *Palko v. Connecticut* (1937), however, Justice Benjamin Cardozo did explain that they were those rights that were "of the very essence of a scheme of ordered liberty," which lay "at the base of all our civil and political institutions," and the denial of which would be shocking. The prohibition of double jeopardy, at issue in *Palko,* did not meet those criteria, Cardozo concluded. Which ones did, he failed to say. Beyond the right to counsel in capital cases and the right to have a coerced confession excluded from evidence, even the most astute lawyer could not have determined.[13]

Palko required a case-by-case approach to determining what rights the Due Process Clause of the Fourteenth Amendment protected. That pleased Justice Felix Frankfurter, one of the intellectual leaders of the "Roosevelt Court" whose members had been appointed by President Franklin Roosevelt between 1937 and 1945. Intellectually, Frankfurter had come of age early in the twentieth century, when conservative judges were regularly using an expansive conception of "due process of law" to justify declaring unconstitutional regulatory legislation that conflicted with their own economic and social philosophies. Deeply disturbed by what he viewed as abuses of judicial power, Frankfurter became a proponent of judicial self-restraint. He maintained a firm commitment to the idea that judges should strike down statutes as violations of the Fourteenth Amendment only when the laws in question were so outside the limits of supportable judgment as to be completely arbitrary. Generally, he believed, jurists should let legislators do what they considered best, no matter how strongly they disagreed with the policies adopted by the people's elected representatives.[14] Frankfurter favored a limited role for the Supreme Court. Rather than leaping to invalidate what its members considered violations of individual rights, Melvin Urofsky points out, "More often than not, Frankfurter tried to get the Court to avoid deciding cases."[15]

His approach contrasted sharply with that of Justice Hugo Black, who became his great intellectual rival while Roosevelt was president and continued to dispute him until Frankfurter's retirement in 1962. A product of rural Alabama and a former New Deal senator, Black believed in the liberal ideal of a paternalistic state, responsive to the needs of the common person. Unlike Frankfurter, however, he recognized that while it could promote community welfare, the liberal state was also capable of destroying individual rights. Black was a judicial activist who believed judges should use their authority to keep that from happening. But he understood that judges, like other government officials, could misuse their power. The quandary was how to prevent that while still encouraging active judicial enforcement of constitutional rights.[16]

Black's solution to this dilemma was incorporation. He became convinced that the Cardozo-Frankfurter approach to determining whether the Due Process Clause had been violated, which he condemned as a "natural law" one, permitted a dangerous amount of judicial discretion. The way to cabin the power of judges purporting to enforce the