

MILESTONES IN HABEAS CORPUS: PART III

BROWN V. ALLEN: THE HABEAS CORPUS REVOLUTION THAT WASN'T

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I. SUMMARY

A. *The Issue*

*Brown v. Allen*¹ has long been the focus of an intense controversy in the history of habeas corpus. Beginning from a common agreement that the published opinion borders on the incomprehensible, some scholars—in a view that some current Justices accept—argue that the case revolutionized the ability of the federal courts to examine the constitutionality of state criminal convictions,² while others assert with equal fervor that the

1. 344 U.S. 443 (1953).

2. *E.g.*, LUCAS A. POWE, *THE WARREN COURT AND AMERICAN POLITICS* 421 (2000); Kent S. Scheidegger, *Habeas Corpus, Relitigation, and the Legislative Power*, 98 COLUM. L. REV. 888, 933 (1998); Katy J. Harriger, *The Federalism Debate in the*

decision “worked no revolution when it recognized the cognizability on habeas corpus of all federal constitutional claims presented by state prisoners.”³

Both sides are motivated by unabashedly contemporary concerns: Those arguing for *Brown* as revolutionary seek to undermine the legitimacy of searching federal habeas corpus review of state criminal convictions by portraying the practice as a recent innovation, while their opponents wish to demonstrate the contrary.

*B. The Background: Professor Bator Meets
Dr. Rorschach*

When the Justices released *Brown*, “[m]ore than 40,000 words and six separate documents were required to set forth their concurrences, dissents and separate opinions.”⁴ This kaleidoscopic production received withering reviews. A commentator in the journal of the Philadelphia Bar Association mourned that “that peerless wit, Mr. Dooley (Finley Peter Dunne)” was no longer on the scene to do full justice to the case and described “the number and length of opinions filed, the uncertainty as to the result, and the confusing alignment of the Justices” as follows:

Mr. Justice Reed announced the judgment of the Court. He also handed down a 15,000-word opinion covering two—or is it three?—principal points of law. On the first point (namely, what consideration should lower courts give to a denial of certiorari by the Supreme Court), his opinion states that it is *not* the opinion of the Court. As far as anyone outside the Court can tell, one of Mr. Justice Frankfurter’s *two* opinions in the case reflects the Court judgment *and* reasoning on this first point (although there is a vocal, even if not too clearly identified, minority).

Transformation of Federal Habeas Corpus Law, 27 PUBLIUS 1, 3 (1997); see also *infra* notes 9, 28 (discussing views of Justices).

3. 1 JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE & PROC. § 2.4d, at 61 (2d ed. 1994). See generally *Stone v. Powell*, 428 U.S. 465, 476 n.9 (1976) (“There has been disagreement among scholars as to whether the result in *Brown v. Allen* was foreshadowed by the Court’s decision in *Moore v. Dempsey*, 261 U.S. 86 (1923).”).

4. Luther A. Huston, *Suit on Juries Won by North Carolina*, N.Y. TIMES, Feb. 10, 1953, at 17.

On the other points, Mr. Justice Reed wrote—or at least so it seems—for himself, the Chief Justice, and Justice Minton, without reservation (excepting of course those stated or implied in the opinion itself). Mr. Justice Reed's *judgment* suited Mr. Justice Jackson, but the Reed opinion did not, so there is a Jackson opinion concurring in the judgment only. Mr. Justice Burton and Mr. Justice Clark joined in the judgment of the Court, but not in the Reed opinion in its entirety—in fact, they seem to adhere to one of Mr. Justice Frankfurter's opinions, at least on the first point of law. They did not, however, join Mr. Justice Frankfurter's second opinion (apparently dissenting on the merits), but that opinion was joined by Mr. Justice Black and Mr. Justice Douglas.

Of course, Mr. Justice Black also wrote a dissent on the merits, and Mr. Justice Douglas joined in the Black opinion too. This accounts for all the writing in the case, except that one of Mr. Justice Frankfurter's opinions has a voluminous Appendix, which seems to speak only for him.

* * *

[C]omment, in legal circles and elsewhere, has been . . . biting.

* * *

[T]here does not now seem to be any sound basis for hope that the real 'last word' is any closer than it was in Mr. Dooley's day.⁵

That evaluation would seem to be the sensible response to a fragmented decision.

Considering, moreover, that all relief was denied to the state prisoners before the Court—even though each of the petitioners whose case eventually received plenary consideration had been sentenced to death and presented very sympathetic claims on the merits⁶—the decision would seem on its face most

5. James M. Marsh, *The "Supreme Court": Mr. Dooley Should Take Another Look*, 16 THE SHINGLE 179-80, 184 (1953). See *Woe for the Lawyers*, WALL ST. J., Feb. 13, 1953, at 6 ("There may be a 'rule of law' in those cases but the lawyers are going to be busy as little moles digging it out. . . . Where [all the writing] leaves the learned counsels and their clients, we don't know. It left us confused."); see also MARY FRANCES BERRY, STABILITY, SECURITY AND CONTINUITY 115 (1978) ("The final decision gave little additional guidance to the bench and bar.").

6. In one of the cases before the Court, the petitioner proved to be insane, see *infra* text accompanying note 283, while the three other cases displayed some of the worst features of Southern justice, see *infra* text accompanying notes 86-89, 95-99, 106-11; note 101. See generally Eric M. Freedman, *Federal Habeas Corpus in Capital*

unlikely to represent a fundamental change of law in favor of more intrusive federal habeas corpus review of state criminal convictions.

But, as Justice Douglas later commented, the *Brown* “opinions were so long, and so discursive that one could find in them what he was looking for.”⁷

Enter Professor Paul Bator of Harvard Law School. Ten years after the decision came down, he pronounced that the Court had taken a “radical” step without “any apparent understanding” of its significance: “With only Mr. Justice Jackson disagreeing, eight of nine Justices assumed that on habeas corpus federal district courts must provide review of the merits of constitutional claims fully litigated in the state-court system.”⁸ Taking a view that has received some support from later Justices,⁹ Bator claimed that in *Brown* the Court had suddenly and

Cases, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT AND FUTURE OF THE ULTIMATE PENAL SANCTION 417, 424-25 (James Acker et al. eds., 1998) (stating that as numerous studies show, cases of capital defendants “are more likely than those of defendants not facing execution to have been infected by distortions arising from racism, the incompetence of defense counsel, their own mental limitations, public passion, political pressures, or jury prejudice or confusion,” all of which results in “a dangerous increase in the risk that the system will make a fatal error.”).

7. Memorandum from Justice William O. Douglas to the Conference 2 (Oct. 23, 1961) (Library of Congress, Hugo L. Black Papers, Box 60, Frankfurter File 1958-64). This memorandum was a reply to one dated September 25, 1961, from Felix Frankfurter regarding possible changes in Court procedures, *see infra* note 127. *See generally* Melvin I. Urofsky, *The Failure of Felix Frankfurter*, 26 U. RICH. L. REV. 175, 183-85 (1991) (discussing this interchange between Douglas and Frankfurter as illustrative of the latter's poor relationship with his colleagues).

8. Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 500 (1963).

9. In *Wright v. West*, 505 U.S. 277 (1992), Justice Thomas, in lengthy dicta in an opinion in which Chief Justice Rehnquist and Justice Scalia joined, adopted the Bator thesis, *Wright*, 505 U.S. at 285-288. Justice O'Connor, “writ[ing] separately only to express disagreement with certain statements in [Justice Thomas'] extended discussion . . . of this Court's habeas corpus jurisprudence,” *id.* at 297 (O'Connor, J., concurring), and joined by Justices Blackmun and Stevens, vigorously rejected it, *id.* at 297-301 (O'Connor, J., concurring). Justice Kennedy declined to enter the “difficult historical inquiry,” *id.* at 306 (Kennedy, J., concurring); *see also infra* notes 28, 203 (discussing O'Connor-Thomas debate and *Williams v. Taylor*, 120 S. Ct. 1495 (2000)).

The earliest Justice to accept Professor Bator's views was Justice Harlan. *See Fay v. Noia*, 372 U.S. 391, 456-63 (1963) (Harlan, J., dissenting); *see also Mackey v. United States*, 401 U.S. 667, 683-84 (1971) (Harlan, J., concurring and dissenting); *Desist v. United States*, 394 U.S. 244, 261 (1969) (Harlan, J., dissenting). He was followed by several Nixon appointees, Justices Powell and Rehnquist and Chief Jus-

silently decided "that it is the purpose of the federal habeas corpus jurisdiction to redetermine the merits of federal constitutional questions decided in state criminal proceedings,"¹⁰ rather than to assess the adequacy of the state's corrective process.

This theory suffers from three major weaknesses. Two have long been apparent, and the third is the principal subject of this Article.

First, the idea that a permanent revolution in the law of habeas corpus took place because of an unexamined novel assumption silently shared by eight Justices who collectively wrote six opinions in a controversial area of the law is implausible at best. This would certainly be a unique way for major doctrinal change to occur.

Second, the legal basis of the Bator thesis is simply wrong: It was not the pre-existing law that the only question open on federal habeas corpus was the adequacy of the state's corrective process, as opposed to its outcome.¹¹ Thus, the Court's reaffirmation of the role of the federal courts on habeas corpus—to determine the correctness of the conclusions on the federal constitutional issues previously reached by the state courts—was in no way revolutionary.¹²

Third, the facts as revealed in the historical record refute Bator's thesis.

tice Burger. See *Schneekloth v. Bustamonte*, 412 U.S. 218, 250 (1973) (Powell, J., concurring).

10. Bator, *supra* note 8, at 500.

11. See Alan Clarke, *Habeas Corpus: The Historical Debate*, 14 N.Y.L. SCH. J. HUM. RTS. 375, 433 (1998) ("For Bator *Brown* constituted a profound and dubious change in the law. The Court is saying that the federal habeas court does have the power to determine the factual predicates of alleged constitutional violations arising out of the state criminal process. Contrary to Bator, however, this is not new. The federal habeas courts had this power at least since *Moore v. Dempsey*, 261 U.S. 86 (1923).") (footnotes omitted); Stephen A. Saltzburg, *Habeas Corpus: The Supreme Court and the Congress*, 44 OHIO ST. L.J. 367, 382 (1983) ("Was the decision a departure from prior holdings? The only fair answer is 'no.'"); see also *infra* Part IV.B.

12. See Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579, 662 (1982) ("By the time *Brown v. Allen* was decided, federal habeas relitigation of state court determinations of federal law was simply not an issue.").

C. Outline

The primary purpose of this Article is to present new evidence rather than to advance new arguments. After laying out the procedural background of *Brown* in Part II.A, it centers, in Part II.B, on a detailed examination of the extant papers of the Justices of the *Brown* Court.¹³

This review, embracing seven collections of documents¹⁴—and including two sets of notes of the critical Court conference¹⁵—demonstrates that the Justices did not view themselves as making new law concerning the scope of the writ. Indeed, they went out of their way not to do so.¹⁶ All of the Justices (except Jackson, who—egged on by his clerk William Rehnquist—sought to alter existing law so as to narrow the writ)¹⁷ were working within a consensus that the substantive nature of the inquiry that a federal habeas corpus court should make into the constitutionality of prior state criminal proceedings was simply not on the table.

The Justices' focus internally was on exactly the concerns of the published opinions, which are described in Part II.C.

13. For brief sketches of the members of the Court at this period, see JAN PALMER, *THE VINSON COURT ERA* 6-14 (1990) and WILLIAM H. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* 32-35 (1987). For background on their interactions, see Melvin I. Urofsky, *Conflict Among the Brethren: Felix Frankfurter, William O. Douglas and the Clash of Personalities and Philosophies on the United States Supreme Court*, 1988 DUKE L.J. 71 (1988).

14. These are: the collected papers of Hugo L. Black, Harold H. Burton, William O. Douglas, and Robert H. Jackson in the Library of Congress; the papers of Felix Frankfurter, which are physically divided between the Harvard Law Library and the Library of Congress, but available on microfilm from University Publications of America; the papers of Stanley Reed in the Margaret I. King Library of the University of Kentucky; and the papers of Tom C. Clark, Tarlton Law Library, University of Texas at Austin. See also *infra* note 120.

15. See *infra* text accompanying notes 158-64.

16. See *infra* text accompanying notes 211-14.

17. See *infra* text accompanying notes 215-54. Thus, for example, Rehnquist, approving Justice Jackson's idea "to completely forget about precedent and write a new ticket," see *infra* text accompanying note 224, urged the Justice to write "an incisive statement of new law," see *infra* text accompanying note 230. And Justice Jackson wrote in his first draft: "It is my belief that our greatest need is not to try to cite or apply the recent decisions on this subject but rather to try to clear the site of many of them and to look forward rather than backward for our remedy." See *infra* text accompanying note 241.

Throughout the Court's deliberations, the central question was the effect that a denial of certiorari from state court proceedings should have in a subsequent federal habeas corpus action. The ruling was that the requirement of filing a certiorari petition, recently imposed by *Darr v. Burford*,¹⁸ would be retained, but that the federal habeas corpus court should attribute no significance to its denial.¹⁹

A secondary question was the degree to which the district court hearing the federal habeas petition could rule on it summarily (meaning, as a practical matter, deny it),²⁰ simply on the basis of the state court record. Here, the Justices, unable to join a common opinion notwithstanding their lack of any substantive disagreement,²¹ wrote cloudy language leaving the decision as to whether to hold an evidentiary hearing to the district courts' good judgment. The progress of drafts led to softening and compromise and, ultimately, the same amorphous standard of discretion that had been in place since *Frank v. Magnum*²² or, at the very least, since *Moore v. Dempsey*.²³

The question of whether the federal courts should, in Bator's words, "redetermine the merits of federal constitutional questions decided in state criminal proceedings"²⁴ was not a point of contention. No one doubted that, as had been clear since *Frank v. Magnum*, or at the very least since *Moore v. Dempsey*, this

18. 339 U.S. 200 (1950) (discussed *infra* Part II.A.1).

19. See *infra* text accompanying note 256.

20. There is no reason to doubt that the Justices shared the premises that, although rarely articulated, still underlie the debate on the issue of hearings: (1) that the fact-finding made by a district court is likely to shape, if not determine, the ultimate appellate resolution of the legal issues presented by a federal habeas corpus petition and (2) that a district judge is most unlikely to grant such a petition without a hearing. Thus, the more freedom the district courts have to grant or deny hearings, the greater control they will have over the shape of the law and the more grants of habeas relief are likely to occur.

21. See *infra* notes 204, 262.

22. 237 U.S. 309 (1915). See Eric M. Freedman, *Leo Frank Lives: Untangling the Historical Roots of Meaningful Federal Habeas Corpus Review of State Convictions*, 51 ALA. L. REV. 1467, 1533-34 (2000) (arguing that *Frank* and *Moore* were governed by same legal standard, in which hearings were discretionary); *infra* Part IV.B.

23. 261 U.S. 86 (1923) See Freedman, *supra* note 22, at 1469 (reporting view that the governing standard originated in *Moore*); see also *supra* note 11.

24. Bator, *supra* note 8, at 500.

was precisely their role.²⁵ To the extent the matter arose, the Justices' editorial changes were intended to ensure that the opinions reaffirmed that the federal courts had an independent duty to ensure that the state courts had reached correct legal conclusions.²⁶

Further, as Part III discusses, developments in the period surrounding the decision do not support the thesis that it worked a broadening of the writ. Contemporaries did not believe that a major change had occurred, and the long-running battles over federal habeas corpus continued, in the legislative and judicial arenas, just as they had before.²⁷ Nor do statistics show that the ruling triggered a landslide of successful petitions; indeed, there is reason to believe that, by reducing the number of evidentiary hearings, its immediate impact was the opposite.

In short, as Part IV describes (and as most of today's Justices recognize),²⁸ *Brown* fits smoothly into a line of precedent extending back to *Frank*²⁹ and *Moore*.³⁰ The only legal point that

25. See *supra* note 12.

26. See *infra* text accompanying notes 191-200 (discussing change made by Black to remove any suggestion that the Court was retreating from *Moore*), 202 (discussing Frankfurter's concern, later obviated by Reed's change, that the opinion appeared to narrow the scope of review), 203 (discussing the change made by Reed to ensure that the Court's opinion not be wrongly read as narrowing the scope of review), 211-13 (discussing Burton's efforts with Clark to have a published opinion reflect the consensus that existed between Frankfurter and Reed on this point); see also *infra* note 203.

27. At the time of *Brown*, as the opinion itself shows, see *Brown*, 344 U.S. at 451 n.5 (opinion of the Court); *id.* at 539 & n.13 (Jackson, J., concurring), there already existed a vocal constituency condemning federal habeas corpus review as insufficiently deferential to the states—and attributing the cause to *Moore*, if not to *Frank*. See *infra* text accompanying notes 288-90.

28. Justice Kennedy's historical summary of the growth of the writ in *McCleskey v. Zant*, 499 U.S. 467, 478-80 (1991), contained in an opinion expressing the views of six Justices (all presently sitting), is consistent with the view expressed in the text. But it would appear that at least three current Justices reject that view. See *supra* note 9 (discussing *Wright v. West*, 505 U.S. 277 (1992)).

Earlier, six Justices had joined in Justice Rehnquist's opinion in *Wainwright v. Sykes*, 433 U.S. 72 (1977), which traced to *Brown* (and reaffirmed)

the rule that the federal habeas petitioner who claims he is detained pursuant to a final judgment of a state court in violation of the United States Constitution is entitled to have the federal habeas court make its own independent determination of his federal claim, without being bound by the determination on the merits of that claim reached in the state proceedings.

Wainwright, 433 U.S. at 87.

29. Indeed, as *infra* Part IV.B describes, each of the key *Brown* rulings can be

Brown permanently decided—that the denial of certiorari on direct appeal was not preclusive of federal habeas corpus review—was an incremental step,³¹ at most,³² and related to procedure not substance. *Brown* did not change the scope of the review that a prisoner could obtain³³ but, rather, was designed to make sure that, whatever its scope, the review would be meaningful; the Supreme Court did not have the institutional capacity to scrutinize the merits of prisoners' constitutional claims on certiorari,³⁴ so the task was to be performed by the District Courts on habeas corpus.³⁵

Thus, Part V concludes that, in addition to its other flaws,³⁶ Bator's contrary, substantive theory—that independent federal habeas corpus review of the constitutional validity of state criminal convictions is a modern innovation attributable to *Brown*—is simply contrary to the historical evidence.

clearly identified in the *Frank* opinion.

30. See *infra* text accompanying notes 323-24; see also *infra* text accompanying notes 191-200; note 265.

31. See Barry Friedman, *A Tale of Two Habeas*, 73 MINN L. REV. 247, 273-77 (1988).

32. Indeed, there is strong reason to believe that it was not even that much. According to Professor Harper V. Fowler of Yale Law School, an authority on the Court's certiorari practice, this holding was merely a restatement of prior law, and the dissent's contrary view was "at variance . . . with the law as applied to habeas corpus proceedings." Fowler V. Harper & Arnold Leibowitz, *What the Supreme Court Did and Did Not Do During the 1952 Term*, 102 U. PA. L. REV. 427, 432 (1954); see *infra* note 43 (quoting Professor Henry M. Hart, Jr. of Harvard Law School expressing same view).

33. As Professors Liebman and Hertz have documented, see LIEBMAN & HERTZ, *supra* note 3, § 2.4d, at 67-68, this had been long settled by the time of *Brown* and was simply re-iterated in that opinion.

34. See *infra* text accompanying notes 297-301; App. 1. See generally *infra* text accompanying note 306.

35. See LIEBMAN & HERTZ, *supra* note 3, §2.4d, at 68-69; Henry M. Hart, Jr., *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 106-08 (1959).

36. See *supra* text accompanying notes 10-12.

II. THE PUBLIC AND PRIVATE HISTORY OF *BROWN V. ALLEN*

A. *The Legal Background*

1. *Darr v. Burford*.—In April, 1950, Justice Reed, writing for five members of the Court (with Justice Douglas not participating), held in *Darr v. Burford*³⁷ that, except in unusual circumstances,³⁸ a state prisoner was required to seek certiorari from the denial of state collateral relief before filing a federal habeas corpus petition.³⁹ At the same time, however, five of the Justices made clear in dictum their view that, this requirement having been complied with, the denial of certiorari should be given no weight by the District Court when passing upon the subsequent habeas corpus application.⁴⁰ This opinion—inconsistent with

37. 339 U.S. 200 (1950).

38. The majority pointedly did not define these, but cited *Moore v. Dempsey*, 261 U.S. 86 (1923), with a "Compare." *Darr*, 339 U.S. at 210.

39. As the Judicial Conference of the United States later noted, "While [*Darr*] involved a failure to seek a writ of certiorari from a decision of a state court denying postconviction relief, it [was] read by some prisoners as suggesting that they must also file petitions in the Supreme Court of the United States from the affirmance of their convictions by a state supreme court." REPORT OF PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 50 (1962). To avoid the resulting "useless and time consuming" filings, it recommended that the problem be fixed by statute. *Id.* The Court then rendered this course unnecessary by overruling *Darr* in *Fay v. Noia*, 372 U.S. 391, 435-38 (1963). See also *infra* note 318.

40. Justices Burton and Clark, concurring, wrote that "the denial should be disregarded in passing upon a subsequent application for relief." *Darr*, 339 U.S. at 219 (Burton, J., concurring). In dissenting, Justice Frankfurter, for himself and Justices Black and Jackson, wrote that "such a denial has no legal significance whatever bearing on the merits of the claim." *Id.* at 226 (Frankfurter, J., dissenting).

Justice Reed's opinion, which on this point expressed the views only of himself, Chief Justice Vinson, and Justice Minton, did not explicitly discuss the issue. *Id.* at 216. It recognized the power of the district court to "disregard our denial of certiorari," *id.*, and justified the requirement that the prisoner seek certiorari on the grounds that this procedure was more respectful of the states, not on any suggestion that the Court had passed on the merits. *Id.* But it did write, "[i]t is this Court which ordinarily should reverse state court judgments concerning local criminal administration." *Darr*, 339 U.S. at 216.

Technically, as Justice Reed was later to note, see *Brown v. Allen*, 344 U.S. 443, 450 (1953), the issue of what weight the district court should give to a denial of certiorari was not before the *Darr* Court because the petitioner in that case had in fact never sought Supreme Court review from the state's denial of collateral re-

one that had come down two years earlier⁴¹ and rendered in a case that had not been argued orally⁴²—proved very confusing to the lower federal courts,⁴³ some of which concluded that the district court should proceed to examine the federal habeas corpus petition de novo, and others of which felt that the denial of certiorari was a factor of greater or lesser weight to be considered against the prisoner.⁴⁴

The Supreme Court—as it said twice in print⁴⁵ and as is clear throughout the records of its internal deliberations⁴⁶—was primarily seeking in *Brown* to resolve this problem.

2. *The Decisions Below.*—*Brown* originated in five certiorari petitions granted in March, 1952:⁴⁷

a. *Smith v. Baldi*

Although ultimately decided in a separate published opinion,⁴⁸ this case is of some significance in untangling the meaning of *Brown*. First, it represents the first post-*Brown* application of *Brown*.⁴⁹ Second, we have the Court's own word⁵⁰ that certiorari was originally granted in this case, in tandem with the others, primarily to determine what effect should be given in

lief.

41. That ruling was *Wade v. Mayo*, 334 U.S. 672, 679-82 (1948), a five-to-four decision in which Justice Reed wrote a dissent that said in substance the same thing as his majority opinion in *Darr*. Cf. *Darr*, 339 U.S. at 210 ("Whatever deviation *Wade* may imply from the established rule will be corrected by this decision.")

42. See PALMER, *supra* note 13, at 28.

43. See Hart, *supra* note 35, at 95 n.20 ("The prevailing opinion in *Darr v. Burford* . . . unhappily confused the traditional doctrine in the field of federal habeas corpus for state prisoners until a divided Court straightened the matter out in *Brown v. Allen*.")

44. See *Brown*, 344 U.S. at 451 n.4 (collecting cases).

45. See *id.* at 450-52; *United States ex rel. Smith v. Baldi*, 344 U.S. 561, 565 (1953).

46. See *infra* Part II.B; see also *infra* text accompanying note 224 (quoting clerk Rehnquist's observation that Justice Reed saw this as the point to be decided).

47. Data on the certiorari votes of the individual Justices respecting the four cases that the Court eventually decided by plenary opinion is to be found in PALMER, *supra* note 13, at 355-56.

48. *Smith v. Baldi*, 344 U.S. 561 (1953).

49. See *infra* text accompanying notes 276-82.

50. *Baldi*, 344 U.S. at 565.

federal habeas corpus proceedings to the Court's prior action in denying certiorari from state habeas proceedings.⁵¹

The Court acted sensibly in separating this case from the others since it had an extensive prior history and raised a number of significant issues on the merits, but for our purposes it may be summarized rather briefly.

In January, 1948, James Smith, who had a long history of mental illness, shot and killed the driver of a taxi in which he was riding as a passenger.⁵² He appeared at his arraignment without counsel, and the judge asked a lawyer who happened to be present in the courtroom to advise him.⁵³ "This lawyer, who knew nothing about petitioner, advised him to enter a plea of 'not guilty.'⁵⁴ The effect of this was that Smith lost the right to have a preliminary jury determination of sanity.⁵⁵ He eventually pleaded guilty as part of an arrangement to obtain evidence from out of state concerning his psychiatric condition (because under Pennsylvania law he was not entitled to the appointment of a defense psychiatrist), and evidence on this issue was then presented to a three-judge trial court as bearing upon sentence; although it remained in dispute when or on what basis he had been found guilty (and, implicitly, sane), this panel sentenced him to death.⁵⁶

On direct appeal, the conviction and sentence were affirmed.⁵⁷ Smith did not seek certiorari, but filed a federal habeas corpus petition; an en banc district court held an evidentiary hearing, but eventually the writ "was denied on the ground that petitioner was not within the jurisdiction of the court at the time the proceeding was instituted,"⁵⁸ having been removed to the execution site.⁵⁹ After affirmance by the Third Circuit,⁶⁰ no

51. Indeed, as shown *infra* Part II.B, the merits of the constitutional claims in the individual cases were of only peripheral interest to the Court; during its internal deliberations, the focus was on procedural matters concerning habeas corpus.

52. Brief and Affidavit of Counsel at 5, *Smith v. Baldi*, 344 U.S. 561 (1953) (No. 31).

53. *Baldi*, 344 U.S. at 561-62.

54. *Id.* at 562.

55. *Id.* at 567.

56. *Id.* at 563, 566.

57. *Commonwealth v. Smith*, 66 A.2d 764 (Pa. 1949).

58. *Baldi*, 344 U.S. at 564.

59. See *United States ex rel. Smith v. Warden*, 87 F. Supp. 339, 340 (E.D. Pa.

Supreme Court review was sought.⁶¹ "A petition for habeas corpus was then filed in the State Supreme Court. This was entertained on the merits and denied,"⁶² and certiorari was denied.⁶³

Smith again sought federal habeas corpus, asserting the same claims as in the state habeas petition.⁶⁴ The district court once more convened en banc, and denied the writ on a four-to-three vote.⁶⁵ The majority wrote:

[I]t is the law that where remedies are available under state law and the highest state court has considered and adjudicated the merits of the relator's contentions, including a full and fair adjudication of the federal contentions raised, and the United States Supreme Court has either reviewed or declined to review the state court's decision, then the district courts will not ordinarily, upon writ of habeas corpus, re-examine the questions thus adjudicated.⁶⁶

Smith had, to be sure, met the requirements of *Darr* by filing a certiorari petition after the denial of state collateral relief, and the court would give "no legal significance" to the denial of certiorari; but, "[i]n a valid exercise of sound judicial discretion, we decline to re-examine, upon writ of habeas corpus, the questions . . . adjudicated" in the state collateral proceedings.⁶⁷ The dissenters considered this disposition "premature" and would have held a hearing.⁶⁸

On appeal to the Third Circuit sitting en banc, a four-member majority agreed with the lower court's treatment of *Darr*, but continued:

That [petitioner's] allegations have been decided on the merits by the highest state court is a fact to be given great weight by a

1949).

60. United States *ex rel.* Smith v. Warden, 181 F.2d 847 (3d Cir. 1950).

61. See *Baldi*, 344 U.S. at 564.

62. *Id.* See Commonwealth *ex rel.* Smith v. Ashe, 71 A.2d 107 (Pa. 1950).

63. Pennsylvania *ex rel.* Smith v. Ashe, 340 U.S. 812 (1950).

64. See *Baldi*, 344 U.S. at 565.

65. United States *ex rel.* Smith v. Baldi, 96 F. Supp. 100 (E.D. Pa. 1951).

66. *Smith*, 96 F. Supp. at 103 (citing *Ex parte Hawk*, 321 U.S. 114, 118 (1944); *White v. Ragen, Warden*, 324 U.S. 760, 764-65 (1945); John J. Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171, 174, 175-78 (1949)).

67. *Smith*, 96 F. Supp. at 104-05.

68. *Id.* at 106.

district court in passing upon petitions for habeas corpus. But that fact does not relieve the federal court of the duty to pass upon the merits of the petition.

The District Court exercised its "discretion" to decline to pass upon the merits. We do not think it had such discretion, and proceed to consider whether, if factually true, the petition sets forth a violation of the federal Constitution.⁶⁹

On the merits, the majority thought that there had been no constitutional violation, while the dissenters—who documented at length Smith's mental disabilities and the procedural miasma in which their consideration had been lost—believed the contrary.⁷⁰

At this stage, in March, 1952, the Supreme Court granted certiorari.⁷¹

b. McGee v. Ekberg

Although this case, too, ultimately formed no part of the published *Brown* decision, having been dismissed as moot in June, 1952 on the release of the prisoner,⁷² it is also significant to a proper understanding of *Brown*, because it framed the issues eventually decided by the Court.⁷³

James Nel Ekberg, who had a long criminal history, was

69. *United States ex rel. Smith v. Baldi*, 192 F.2d 540, 544 (3d Cir. 1951). For the reasons stated *infra* note 82, the ruling of the court of appeals, rather than that of the district court, was the correct application of *Ex parte Hawk*, 321 U.S. at 114.

70. *See Smith*, 192 F.2d at 549 (Biggs, C.J., dissenting).

71. *United States ex rel. Smith v. Baldi*, 343 U.S. 903 (1952). The case, which had been on the Miscellaneous Docket as No. 300, was given Appellate Docket No. 669 upon the grant of certiorari in the 1951 Term. When it was carried over to the 1952 Term for re-argument, *see infra* text accompanying notes, 139-40, it was designated No. 31.

For reasons lucidly explained in Bennett Boskey, Note, *The Supreme Court's "Miscellaneous" Docket*, 59 HARV. L. REV. 604 (1946), the Court at this period placed on a Miscellaneous Docket (a) requests for extraordinary writs and (b) petitions for certiorari *in forma pauperis*. In the event that one of these latter were granted, the case was transferred to the Appellate Docket. *See PALMER, supra* note 13, at 23-24.

72. *See McGee v. Ekberg*, 343 U.S. 970 (1952). The release of the prisoner was reported in a pool memorandum to all the Justices, which is undated but was probably written in early June, 1952, *see* Supplemental Memorandum re *McGee v. Ekberg* (No. 517). This survives in various copies, including one in the Harold H. Burton Papers, Library of Congress, Box 231, Briefs for Argued Cases, Book 4.

73. *See infra* text accompanying notes 122-24.

convicted in a California trial court of check fraud and weapons possession after a jury trial in which he was represented by counsel;⁷⁴ on his pro se direct appeal, the conviction was affirmed in a reasoned opinion that systematically rejected various claims of error, including some framed in constitutional terms.⁷⁵ According to the government, Ekberg did not seek certiorari, but rather filed a state habeas corpus petition, which was denied without opinion.⁷⁶ He sought certiorari from this decision, which was denied.⁷⁷

Ekberg, again acting pro se, thereupon filed a petition for a writ of habeas corpus in the United States District Court for the District of California.⁷⁸ The most cogent federal claims presented in this rambling document were that Ekberg had been denied counsel of his choice, represented incompetently by trial counsel, and denied the right to call certain witnesses in his defense.⁷⁹ The petition and an application to file it in forma pauperis came before District Judge Dall M. Lemmon, who denied it in an order that recited the procedural history and continued:

Where a state court has considered and adjudicated the merits of a petitioner's contentions a federal court will not ordinarily re-examine upon writ of habeas corpus the questions thus adjudicated. The state of California accords remedies which give due process of law and there is nothing alleged which presents "exceptional circumstances of peculiar urgency" which entitle him to the issuance of the writ. *Ex parte Hawk*, 321 U.S. 114 [(1944)]; *U.S. ex rel. Kennedy v. Tyler*, 269 U.S. 13 [(1925)]. This being the situation this court should deny the right to file the petition in forma pauperis and it is so ordered. *Huffman v. Smith*, 172 F.2d 129 [(9th Cir. 1949)].⁸⁰

74. See *People v. Ekberg*, 211 P.2d 316, 317 (Cal. Dist. Ct. App. 1949).

75. *Ekberg*, 211 P.2d at 319.

76. See Brief in Support of Petition for Writ of Certiorari at 19, *McGee v. Ekberg*, 343 U.S. 970 (1952) (No. 517).

77. *Ekberg v. California*, 339 U.S. 969 (1950). The case file of this proceeding (including Ekberg's handwritten legal work) is currently in the Washington facility of the National Archives, Record Group No. 267, Case File 1792, Box 6217.

78. See Petition for Writ of Habeas Corpus, reprinted in Transcript of Record at 1-19, *McGee v. Ekberg*, 343 U.S. 970 (1952) (No. 517).

79. *Id.* at 8-11.

80. Order Denying Petition for Writ of Habeas Corpus, reprinted in Transcript of Record at 21, 31, *McGee* (No. 517). Noting that "there is a justiciable problem involved in this case," the District Judge thereupon issued a certificate of probable

On appeal, the Ninth Circuit reversed in an opinion by Chief Judge William Denman.⁸¹ The court of appeals held that “special circumstances” were only required in the case of an applicant who had not exhausted his state remedies; a petitioner who had done so and pleaded a violation of federal constitutional rights, was entitled to have the district court review the state court record; accordingly, the Ninth Circuit remanded the matter to the district court for consideration on the merits.⁸² In March, 1952, the Supreme Court granted the government’s petition seeking review of this ruling.⁸³

The remaining three cases all began as criminal prosecutions in the North Carolina courts that were challenged by federal habeas corpus petitions in the United States District Court for the District of North Carolina and then in the United States Court of Appeals for the Fourth Circuit. They were, “for the most part handled as one, particularly in the District Court.”⁸⁴ This is because each case had as a central element on the merits a challenge to the jury selection system that North Carolina had implemented to replace the one that the Supreme Court had brusquely struck down as racially discriminatory in early 1948.⁸⁵ The cases were:

cause to appeal, *id.* at 34.

81. *Ekberg v. McGee*, 194 F.2d 178 (9th Cir. 1951); see also *infra* note 298 (describing Denman).

82. *Ekberg*, 194 F.2d at 180. A dissenting judge would have affirmed on the basis that because the “petition for the writ presented no question of substance,” there had been no error in its dismissal. *Id.* (Healy, J., dissenting).

The ruling of the court of appeals, unlike that of the district court, was in accord with *Ex parte Hawk*, 321 U.S. 114 (1944), which specifically stated that the requirement of

presenting ‘exceptional circumstances of peculiar urgency,’ often quoted from . . . *United States ex rel. Kennedy v. Tyler*, [269 U.S. 13, 17 (1925), originated] in a case in which the petitioner had not exhausted his state remedies and is inapplicable to one in which the petitioner has exhausted his state remedies, and in which he makes a substantial showing of a denial of federal right.

Hawk, 321 U.S. at 117-18.

83. *McGee v. Ekberg*, 342 U.S. 952 (1952). The Washington facility of the National Archives contains in Records Group 267, Box 6790, the printer’s copy of the record of the lower court proceedings that was created for the Court’s use as a result of this order.

84. Brief of Petitioner at 7, *Speller v. Allen*, 344 U.S. 443 (1953) (No. 22).

85. *Brunson v. North Carolina*, 333 U.S. 851 (1948). This opinion consists of the

c. Brown v. Allen

Clyde Brown, an illiterate black youth, was arrested for the beating and rape of a white high school student.⁸⁶ He was held without charges for five days, during which time he confessed; he was not given a preliminary hearing until eighteen days after his arrest; and he was not formally appointed counsel until three days after that.⁸⁷

In connection with the trial court proceedings, which resulted in a conviction by an all-white jury and a mandatory death sentence,⁸⁸ he raised unsuccessful Fourteenth Amendment challenges to the voluntariness of his confession as well as to the allegedly racially discriminatory manner in which the grand and petit juries were selected in his case.⁸⁹ He renewed these contentions, also without success, on direct appeal to the North Carolina Supreme Court⁹⁰ and in a petition for certiorari.⁹¹

His assertion of them in a federal habeas corpus petition met with a summary denial in the District Court, on the basis that the record did not reveal "any unusual situation" that would justify issuing the writ in the face of the reasoned rejection of the claims by the trial and appellate courts of the state and the Supreme Court's denial of certiorari on the same re-

single word "Reversed," followed by a string-cite to the Court's classic jury discrimination cases.

86. See *Petition for Writ of Habeas Corpus*, reprinted in *Transcript of Record* at 1, 2-3, *Brown v. Allen*, 344 U.S. 443 (1953) (No. 32). The case attracted considerable local notoriety, and the *Winston-Salem Journal* provided updates daily for the first ten days. See, e.g., *Case Against Brown Tightens; Beaten Girl Still Unconscious*, WINSTON-SALEM J., June 27, 1950, at 3; *Doctors Fight to Save the Life of Girl, 17, Brutally Beaten at Her Father's Radio Shop*, WINSTON-SALEM J., June 17, 1950, at 1; *Youth Admits Criminal Assault Try*, WINSTON-SALEM J., June 18, 1950, at 8; *Youth Admits He Beat Girl With Rifle, Police Report*, WINSTON-SALEM J., June 25, 1950, at 1.

87. See *Brown*, 344 U.S. at 476; *Order Appointing Counsel for Defendant*, reprinted in *Transcript of Record* at 21, *Brown* (No. 32).

88. See Bill Woestendick, *Jury Finds Brown Guilty of Rape; Death Penalty is Mandatory*, WINSTON-SALEM J., Sept. 15, 1950, at 1.

89. The trial court heard testimony and rendered findings of fact and conclusions of law on both issues. See *Order on Motion to Quash Bill of Indictment*, *Transcript of Record* at 50-53, 87-122, *Brown* (No. 32).

90. *State v. Brown*, 63 S.E.2d 99 (N.C. 1951).

91. *Brown v. North Carolina*, 341 U.S. 943 (1951). Justices Black and Douglas voted to grant review. The text of the petition is reproduced in *Transcript of Record* at 239-52, *Brown* (No. 32).

cord.⁹² The Fourth Circuit affirmed in a brief opinion embracing this rationale.⁹³ In March, 1952, the Supreme Court granted Brown's petition for certiorari.⁹⁴

d. Speller v. Allen

Raleigh Speller, "an illiterate and feeble-minded Negro of about forty-six years of age,"⁹⁵ was three times convicted of the

92. *Brown v. Crawford*, 98 F. Supp. 866, 867 (E.D. N.C. 1951).

93. This affirmance came in a per curiam opinion that also affirmed the ruling of the district court in *Speller*, described *infra* text accompanying notes 101-03. *Speller v. Allen*, 192 F.2d 477 (4th Cir. 1951). The panel consisted of Chief Judge John J. Parker and Judges Morris A. Soper and Armistead M. Dobie. See *infra* notes 286-87 and accompanying text (describing Parker).

The court of appeals wrote: "We think that dismissal in both cases was clearly right [in] view of the action of the state Supreme Court upon the identical questions presented to the court below and the denial of certiorari by the Supreme Court of the United States," *Speller*, 192 F.2d at 478 (citing *Darr v. Burford*, 339 U.S. 200 (1950); *Ex parte Hawk*, 321 U.S. 114 (1944) (per curiam)).

The court of appeals here was relying upon a different portion of *Ex parte Hawk* than the one quoted *supra* note 82. After that discussion of a petitioner who had not exhausted state remedies (which was the situation presented by the case), the Court had continued in dictum:

Where the state courts have considered and adjudicated the merits of his contentions, and this Court has either reviewed or declined to review the state court's decision, a federal court will not ordinarily re-examine upon writ of habeas corpus the questions thus adjudicated. *Salinger v. Loisel*, 265 U.S. 224, 230-32 [(1924)]. But where resort to state court remedies has failed to afford a full and fair adjudication of the federal contentions raised, either because the state affords no remedy, see *Mooney v. Holohan*, [294 U.S. 103,] 115 [(1935)], or because in the particular case the remedy afforded by state law proves in practice unavailable or seriously inadequate, cf. *Moore v. Dempsey*, 261 U.S. 86 [(1923)]; *Ex parte Davis*, 318 U.S. 412 [(1943)], a federal court should entertain his petition for habeas corpus, else he would be remediless.

Ex parte Hawk, 321 U.S. at 118.

This passage, whose first sentence stated a rule based on inapplicable authority (since *Salinger* was a case where a federal prisoner had made successive identical claims on federal habeas corpus, see *infra* note 209) and the remainder of which created exceptions whose contours were unclear, see *infra* note 327, was erased by the holding in *Brown* that the Court's denial of review of state proceedings was to be given no effect by a subsequent federal habeas corpus court, see *infra* note 256 and accompanying text. This is made clear by the fact that the three-Justice *Brown* minority on the point, see *infra* note 256, rested its view squarely upon "the teaching of *Ex parte Hawk*, 321 U.S. 114, 118," *Brown*, 344 U.S. at 456.

94. *Brown v. Allen*, 343 U.S. 903 (1952). At that point, the case, which had been No. 333 on the Miscellaneous Docket, was assigned Appellate Docket No. 670 in the 1951 Term; when carried over to the 1952 Term for re-argument, see *infra* text accompanying notes 139-40, it was designated No. 32.

95. Petition for Writ of Habeas Corpus ¶3, reprinted in Transcript of Record at

rape of a fifty-two-year-old white housewife and sentenced to death.⁹⁶ The first conviction was reversed because of racially discriminatory jury selection.⁹⁷ The second conviction was reversed on the basis that the defense had been denied a sufficient opportunity to investigate possible racial bias in the jury selection mechanism.⁹⁸ The third conviction was affirmed, in an opinion whose principal holding was that the trial court had acted properly when, after a full evidentiary hearing, it rejected Speller's challenge to the jury selection procedure.⁹⁹ Certiorari was denied.¹⁰⁰

Speller thereupon pursued his challenge in a federal habeas corpus petition. Over the government's objections, the district court held a hearing.¹⁰¹ It then dismissed the petition on the alternative bases, first, that a "habeas corpus proceeding is not available to the petitioner for the purpose of raising the identical question passed upon in [the state] Courts"¹⁰² and, "secondly, that in any event, even if petitioner is now entitled to raise the same question passed on in the State Courts, he has failed to substantiate the charge that he did not have a trial according to due process."¹⁰³ The Fourth Circuit affirmed in the brief opinion already described,¹⁰⁴ and the Supreme Court granted certiorari in March, 1952.¹⁰⁵

2, *Speller v. Allen*, 344 U.S. 443 (1953) (No. 22).

96. See *Brown v. Allen*, 344 U.S. 443, 477 (1953); Brief of Robert A. Allen . . . Opposing Petition for Writ of Certiorari at 6, *Speller v. Allen*, 344 U.S. 443 (1953) (No. 22).

97. *State v. Speller*, 47 S.E.2d 537 (N.C. 1948).

98. *State v. Speller*, 53 S.E.2d 294 (N.C. 1949).

99. *State v. Speller*, 57 S.E.2d 759 (N.C. 1950).

100. *Speller v. North Carolina*, 340 U.S. 835 (1950).

101. This revealed, among other things, that the slips or "scrolls" containing the names of jurors that were drawn at random had dots on them showing the race of the jurors and that of the 63 jurors actually summoned to attend Speller's trial, four were black (6.3%, in a county in which 38% of the taxpayers were black, *Brown v. Allen*, 344 U.S. 443, 481 (1953)); one of the blacks summoned reached voir dire, but was not selected. See *Speller v. Crawford*, 99 F. Supp. 92, 97-98 (E.D.N.C. 1951).

102. *Crawford*, 99 F. Supp. at 95.

103. *Id.* at 97.

104. *Speller v. Allen*, 192 F.2d 477 (4th Cir. 1951) (described *supra* note 93).

105. *Speller v. Allen*, 342 U.S. 953 (1952). The case, which had been No. 274 on the Miscellaneous Docket, was thereupon assigned No. 643 in the 1951 Term. When carried over to the 1952 Term for re-argument, see *infra* text accompanying notes 139-40, it was designated No. 22.

e. Daniels v. Allen

The cousins Lloyd Ray Daniels and Bennie Daniels, two illiterate black teenagers, were each arrested before dawn on a February morning and imprisoned on suspicion of the brutal murder of a white taxicab driver, a crime that had strongly outraged the local community.¹⁰⁶ After having been found mentally competent to stand trial, they were convicted and sentenced to death in proceedings which, they charged, had been flawed by the use of racially discriminatory procedures for the selection of their grand and petit juries, the admission of involuntary confessions which they had allegedly given while in custody, and the submission of instructions that precluded the jury from passing upon this latter issue.¹⁰⁷

Their counsel was one day late in serving the record on the government and thereby forfeited their appeal as of right.¹⁰⁸ The North Carolina Supreme Court:

(a) declined to issue a discretionary writ of certiorari to allow an appeal nevertheless, but pointed out that defendants could seek leave to file a writ of error *coram nobis*,¹⁰⁹

(b) denied such leave when defendants did seek it,¹¹⁰ and

(c) dismissed the attempted direct appeal as untimely.¹¹¹

The prisoners sought certiorari in the United States Supreme Court from all of these rulings,¹¹² which the state op-

106. See Brief for Petitioners at 3, 29-30, *Daniels v. Allen*, 344 U.S. 443 (1953) (No. 20).

107. See Petition for Writ of Habeas Corpus, reprinted in Transcript of Record at 1, 3, *Daniels v. Allen*, 344 U.S. 443 (1953) (No. 20).

108. *Brown v. Allen*, 344 U.S. 443, 484-85 (1953).

109. *State v. Daniels*, 56 S.E.2d 2 (N.C. 1949).

110. *State v. Daniels*, 56 S.E.2d 646 (N.C. 1949). This terse opinion ruled that the petition did not "make a prima facie showing of substance" and was therefore "insufficient." *Daniels*, 56 S.E.2d at 647.

111. *State v. Daniels*, 57 S.E.2d 653 (N.C. 1950). In this opinion, the court stated, "We have carefully examined the record filed in this case and find no error therein. . . . [T]he judgment of the lower court is affirmed and the appeal is dismissed." *Daniels*, 57 S.E.2d at 654.

112. Petition for Writ of Certiorari to the Supreme Court of North Carolina and/or to the Superior Court, Pitt County, North Carolina at 1-2, *Daniels v. North Carolina*, 339 U.S. 954 (1950) (No. 412 Misc.). This document is to be found in the Washington facility of the National Archives and Record Administration, Record Group 267, Entry 21. In addition to re-asserting the prior grounds for relief, this petition challenged the rulings designated (a) and (b) in the text as Equal Protection

posed on the grounds that there had been no ruling below on the constitutional merits and that petitioners still had an available state remedy by way of *coram nobis*.¹¹³ Certiorari was denied.¹¹⁴

After a further unsuccessful *coram nobis* petition,¹¹⁵ the prisoners sought federal habeas corpus. The warden moved to dismiss; the district court denied the motion and heard evidence, but subsequently concluded "that the decision overruling the respondent's motion to dismiss the writ as a matter of law upon the procedural history was erroneous, and that the motion should have been granted."¹¹⁶

violations. Petition for Writ of Certiorari to the Supreme Court of North Carolina and/or to the Superior Court, Pitt County, North Carolina at 11-12, 13-15, *Daniels* (No. 412 Misc.).

113. The government argued that because the ruling described *supra* note 110 "merely held that the petition was insufficient, there is no reason why the Petitioners cannot now avail themselves of this remedy [*coram nobis*] if they will file a proper and sufficient petition . . . The Respondent, therefore, contends that the Petitioners have never exhausted their remedies [and the North Carolina Supreme Court] has, therefore, not passed upon the constitutional issues." Brief of the State of North Carolina, Respondent, Opposing Petition for Writ of Certiorari at 28, *Daniels v. North Carolina*, 339 U.S. 954 (1950) (No. 412 Misc.).

Petitioners' response was that, even assuming that the ruling of the North Carolina Supreme Court was procedural rather than substantive, repetitive resort to the state courts was not required:

The fact that the highest court of the State may reconsider or review its own judgment does not alter the circumstance that a judgment which finally decides and determines the rights of the litigants is reviewable by this Court. Such a judgment is final for the purposes of [28 U.S.C.] Section 1257(3) . . . [notwithstanding] the existence of a latent power in the rendering Court to reopen or revise its judgment.

Reply Brief of Petitioners in Support of Petition for Writ of Certiorari at 10, *Daniels v. North Carolina*, 339 U.S. 954 (1950) (No. 412 Misc.).

Both of these documents are to be found in the Washington facility of the National Archives, Record Group 267, Entry 21.

114. *Daniels v. North Carolina*, 339 U.S. 954 (1950).

115. *State v. Daniels*, 59 S.E.2d 430 (N.C. 1950). The court ruled that issues sought to be pursued were presented to and passed upon by the trial court, so that the prisoners were improperly attempting to use *coram nobis* as a substitute for an appeal, rather than for its intended purpose of correcting errors not appearing of record. *Daniels*, 59 S.E.2d at 432-35.

116. *Daniels v. Crawford*, 99 F. Supp. 208, 212 (E.D. N.C. 1951). The court considered in the alternative the possibility that it was entitled to intervene notwithstanding the prior state rulings "where it appears clearly that there has been such a gross violation of a defendant's constitutional rights as amounts to a denial of even the substance of a fair trial" but, reviewing the contentions made and their handling by the North Carolina courts, concluded that "[i]t is difficult to believe that any

The Fourth Circuit affirmed, on the grounds that habeas corpus could not be used in lieu of an appeal to assert claims of error, even constitutional error, but was available only where there had been such a "gross violation of constitutional right as to deny to the prisoner the substance of a fair trial" under circumstances where "he has been unable to protect himself" by the ordinary mechanism of asserting his claims in state court.¹¹⁷ Dissenting, Judge Soper contended that "special and unusual circumstances" existed, inasmuch as "the insistence by the state upon a technical and trivial procedural step" was blocking review on the merits of petitions whose contentions respecting jury selection were clearly meritorious.¹¹⁸ In March, 1952, the Supreme Court granted certiorari.¹¹⁹

B. *The Drafting Process*¹²⁰

The cases were argued at the end of April; before taking the bench, apparently, Justice Burton wrote across the bottom of his

impartial person would conclude" that this was such a case. *Daniels*, 99 F. Supp. at 213.

117. *Daniels v. Allen*, 192 F.2d 763, 767-68 (4th Cir. 1951). The Fourth Circuit panel that heard *Daniels* consisted of the same three judges who also heard *Brown* and *Speller*, see *supra* note 93.

118. *Daniels*, 192 F.2d at 772 (Soper, J., dissenting). Judge Soper relied for this conclusion on "the two reversals in *State v. Speller*," see *supra* text accompanying notes 97-98, and "a consideration of *Brunson v. North Carolina*, 333 U.S. 851 [1949]" (described *supra* note 85).

119. *Daniels v. Allen*, 342 U.S. 941 (1952). The case, which was No. 271 on the Miscellaneous Docket, was then transferred to the Appellate Docket and assigned No. 626. When carried over to the 1952 Term for re-argument, see *infra* text accompanying notes 139-40, it was designated No. 20.

120. This account is based on a review of the sources described *supra* note 14. Its purpose is not to report every reference to *Brown* in the document sets indicated, but rather to make a fair presentation of the points that are central to the present inquiry.

When, as is frequently the case, the same document exists in several of these collections, I have only cited to one of them, but I have reviewed all the copies for annotations.

Because of the frequent use of these papers by sometimes-careless researchers and the fact that *Brown* was in fact five cases, each bearing more than one number and four of which were heard in two Terms, see *supra* Part II.A.2, the documents referred to in this account may be found by future students in file locations slightly different from those indicated here. As indicated *supra* note *, they are also available from the reference desk of the Deane Law Library of Hofstra Law School.

law clerk's bench memo:

It is not enough to say that fed question was presented to state court on habeas corpus and denied and then cert denied by USSC—for the factual conclusions in state ct may not have been so considered as to present the case adequately in court—and anyway cert. may have been denied for unrelated reasons (poor record, out of time etc). There is a constitutional and statutory right to have fed question passed on by fed ct.—and it is a fed ct rule that before doing so it must be passed by state cts. (including cert to USSC). Hence that routine is a qualifying routine rather than one binding on the merits, to omit a part of this routine would require explanation—but if it has been followed *no exceptional circumstances are needed for the hearing or for the decision.*¹²¹

The Court discussed the cases at a conference on May 3, 1952, where, according to Justice Douglas's notes, Chief Justice Vinson stated as the

Question whether Denman's viewpoint or Parker's viewpoint should prevail¹²²—we should work out a procedure whereby in some of the cases at least (not necessarily all) the bearings are set down. [I]t is suggested that Reed & FF who have opposing views prepare memorandum for the Conference on our precedents—.¹²³

More tersely, Justice Burton recorded:

Duel between Denman and Parker views.
Frankfurter v. Reed
RHJ suggests memos from both.¹²⁴

121. Annotations by Justice Harold H. Burton on Bench Memorandum, *McGee v. Ekberg* 4 (No. 517) (Apr. 27, 1952) (Harold H. Burton Papers, Library of Congress, Box 231, Briefs for Argued Cases, Book 4) (original emphasis).

122. See *supra* text accompanying notes 81-82; note 93.

123. Conference Notes by Justice William O. Douglas Regarding *McGee v. Ekberg* (No. 517) (May 3, 1952) (William O. Douglas Papers, Library of Congress, Box 210, Argued Cases Memos). See generally Forrest Maltzman & Paul J. Wahlbeck, *Inside the Supreme Court: The Reliability of the Justices' Conference Records*, 58 J. POL. 528 (1996) (studying conference records of four Justices, including Douglas, for 1967-68 Terms and finding them "substantially accurate and reliable").

124. Conference Notes by Justice Harold H. Burton Regarding Nos. 517, 626, 643, 670, 669 (May 3, 1952) (Burton Papers, Library of Congress, Box 231, Briefs for Argued Cases, Book 4). On his copy of the Conference List for May 3, 1952, Justice Burton also noted of the habeas cases, "All go over for memos from SR & FF." This

On June 3, 1952, Justice Frankfurter circulated a memorandum beginning, "I give up!"¹²⁵ He explained that he would be unable to complete his assignment—"a canvass of issues involved in *Darr v. Burford* in the light of conflicting views that have arisen among the various circuits (both in the District Courts and the Courts of Appeals)"—before the conclusion of the Term, in light of the extensive work involved and the intervening distraction of the Steel Seizure Case.¹²⁶ He concluded by suggesting that, rather than being re-argued (so as to preserve the fiction that the Court cleared its docket at the end of each Term), the cases simply be held over.¹²⁷

Because he "thought they might be useful in determining our course on Brother Frankfurter's suggestion," Justice Reed circulated on June 4 draft opinions in the cases. These were "not proofread and obviously are rough,"¹²⁸ being much more complete in their recitations of the procedural history than in their legal analysis. The key points were:

1. A district court had the discretion on habeas corpus to give "such consideration to our denial" of certiorari on direct appeal "as that court feels the record justifies."¹²⁹

2. In particular, it might rely on the denial to avoid a re-

document is to be found in the Harold H. Burton Papers, Library of Congress, Box 235, Conference Sheets, Mar.-June 1952.

125. Memorandum from Felix Frankfurter to the Brethren 1 (June 3, 1952) (Hugo L. Black Papers, Library of Congress, Container 314, Habeas Corpus Folder).

126. *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Justice Frankfurter noted in his memorandum, *supra* note 125, at 2, "Certiorari in that case was granted the same day, on May 3rd, that the *Habeas Corpus* cases were assigned for reports."

127. Which of these two practices to follow was a contested issue among members of the Court, and was variously resolved, from the early part of the twentieth century, *see id.*, to its end. *See Hart, supra* note 35, at 94 n.14; Tony Mauro, *No More Dawdling; Rehnquist Takes Control of Supreme Court Docket*, LEGAL TIMES, July 5, 1999, at 1; Memorandum from Justice Felix Frankfurter to the Conference at 11 (Sept. 25, 1961) (Hugo L. Black Papers, Library of Congress, Box 60, Felix Frankfurter File); *see also infra* note 139.

128. Memorandum from Justice Stanley Reed to the Conference Regarding Nos. 517, 626, 643, 670 & 669 (June 4, 1952) (Tom C. Clark Papers, Tarlton Law Library, University of Texas at Austin, Box A19). This document was a covering memorandum to the draft opinion cited *infra* note 129.

129. Memorandum from Justice Stanley Reed Regarding *McGee v. Ekberg* 22 (June 4, 1952) (Tom C. Clark Papers, Tarlton Law Library, University of Texas at Austin, Box A19).

examination of the state's determination of the constitutional issues. "It is not necessary though they have the power for a federal court to try the merits, fact or law a second time, to assure protection of federal constitutional rights, a state trial with a right of review in this Court may furnish the necessary protection."¹³⁰

Neither point survived the Justices' consideration.¹³¹ The ultimate *Brown* opinion squarely rejected the first.¹³² And the second passage was modified before publication¹³³ to make clear that which, according to Justice Reed, it had meant all along:¹³⁴ that the federal court might defer to the state proceedings only on matters of fact, not law, and only if "the state process has given fair consideration to the issues and the offered evidence, and has resulted in a satisfactory conclusion."¹³⁵

Justice Frankfurter, plainly believing that the first problem was the one at issue, responded on June 7 by circulating "tables [to] afford a bird's eye view of the procedural steps in three of the cases involved in our Habeas Corpus problem."¹³⁶ He explained that, because "I had not conceived the assignment which was given to Stanley and me implied that we should rehash, more or less, what we had said in *Darr v. Burford*,"¹³⁷ he planned to compile similar procedural data

from the hundreds of cases in which review was sought here during the present Term of State convictions. The purpose is to ascertain what kind of issues, State or Federal, how unambiguously, and in what accessible form, they came here, in order to ascertain, with any degree of reason, what inferences may fairly be drawn from our denial of certiorari in such cases. . . . [O]nly by such a quantitative study can we fairly deduce desirable rules of

130. *Id.* at 28 (citing *Darr v. Burford*, 339 U.S. 200 (1950) (footnote omitted)).

131. See *infra* text accompanying notes 159-64.

132. See *infra* text accompanying note 256.

133. See *Brown v. Allen*, 344 U.S. 443, 463-65 (1953) (appearing under the new heading "Right to Plenary Hearing"); *infra* text accompanying notes 201-04 (tracing changes), 203 (quoting passage as modified).

134. See *infra* text accompanying notes 176-78.

135. *Brown*, 344 U.S. at 463.

136. Memorandum from Felix Frankfurter to The Brethren (June 7, 1952) (Hugo L. Black Papers, Library of Congress, Supreme Court Case File, October Term 1952, Habeas Corpus Folder).

137. *Id.*

judicial administration by the Federal courts—this Court, in requiring certiorari to be applied for and the District Courts in order to ascertain the bearing of such denials by us upon habeas corpus jurisdiction—regardless of what we have said or have not said in the past.¹³⁸

At the conference of June 7, 1952, there was “considerable argument” on whether to set the cases for reargument,¹³⁹ and it was eventually decided to do so.¹⁴⁰

As the Justices reconvened in the fall, Justice Reed circulated a draft opinion dated September 26, 1952, a revision of his June 4 effort that reflected the additional legal analysis done over the summer.¹⁴¹ One notable, albeit uncontroversial,¹⁴² addition was a footnote¹⁴³ that, in language substantially similar to that contained in the final opinion,¹⁴⁴ rejected a statutory construction proposed by Judge Parker that would have held federal habeas corpus to be unavailable “in all states in which

138. *Id.*

139. Diary Entry by Justice Harold Burton (June 7, 1952) (Burton Papers, Library of Congress, Reel 3) (“[W]e voted after considerable argument to set down habeas corpus & Kerdooff [*sic*] cases for reargument in fall”); see *Kedroff v. St. Nicholas Cathedral*, 343 U.S. 972 (1952); see also Letter from Robert H. Jackson to Felix Frankfurter (July 12, 1952) (Felix Frankfurter Papers, Library of Congress, Container 70) (recalling that Chief Justice Vinson “was very much upset . . . that the habeas corpus cases went over the term”).

The disputed issue was surely whether to set the cases for reargument or simply to hold them over as Justice Frankfurter had suggested, see *supra* text accompanying note 127; there was plainly no realistic prospect of writing a decision in the two days before the Court rose for the year, 343 U.S. at app. V (1952) (showing Court’s adjournment on June 9, 1952).

140. See *Daniels v. Allen*, 343 U.S. 973 (1952).

141. Memorandum from Justice Reed Regarding *Brown v. Allen* (Sept. 26, 1952) (Tom C. Clark Papers, Tarlton Law Library, University of Texas at Austin, Box A19).

In this document, Justice Reed elaborated upon his June discussion regarding the effect to be given to a denial of certiorari, see *id.* at 8-16, but he trimmed this before publication, presumably after discovering that he was outvoted on the issue, see *infra* text accompanying notes 158-59 (recording Conference discussion of October 27). His draft of December 4, 1952, see *infra* text accompanying note 171, covered the issue in substantially the same manner as his final opinion does.

142. See *infra* text accompanying notes 159-61 (recording consensus on this point in conference). Cf. *infra* note 235 (describing evolution of views on issue in Justice Jackson’s chambers).

143. Memorandum from Justice Reed Regarding *Brown v. Allen*, *supra* note 141, at 6 n.4.

144. See *Brown v. Allen*, 344 U.S. 443, 447 n.2, 448 n.3, 449-50 (1953).

successive applications may be made for habeas corpus to the state courts," on the theory that in such states the petitioner could never exhaust state remedies as required by 28 U.S.C. § 2254 (1948).¹⁴⁵

On October 13, 1952, as the four remaining cases were re-argued,¹⁴⁶ Justice Frankfurter circulated his "report of a study undertaken at the request of the Conference into the problem left open by *Darr v. Burford*, namely, the consequence of a denial of certiorari upon the disposition by a district court of a subsequent application for habeas corpus by a prisoner under State sentence."¹⁴⁷ This consisted of a two-page covering memorandum and a lengthy appendix, presenting substantially the same empirical data that later appeared in the U.S. Reports,¹⁴⁸ which reported on an exhaustive survey of habeas corpus cases during a recent year.

In a twenty-three-page accompanying memorandum of the same date,¹⁴⁹ Justice Frankfurter argued with vigor the conclusions to be drawn from this work:

(a) Giving any weight to denials of certiorari would be senseless, since the papers before the Court were frequently unintelligible and, in any event, not available to the district court,¹⁵⁰ and

145. See John J. Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171, 176 (1949); *infra* note 235 (describing practical effect of proposal).

Justice Reed considered asking counsel to address this proposition when the cases were re-argued, but "reached the conclusion that the time was rather short to expect them to produce anything of value and that it would not be worthwhile to make such a request." Memorandum from Justice Reed to the Conference Regarding *Brown v. Allen* (Sept. 30, 1952) (Tom C. Clark Papers, Tarlton Law Library, University of Texas at Austin, Box A19).

146. See *Brown v. Allen*, 344 U.S. 443 & n.* (1953); *Smith v. Baldi*, 344 U.S. 561 (1953) (noting reargument occurring on October 13-14); *supra* text accompanying note 72 (noting dismissal of *Ekberg* in June, 1952).

147. Memorandum from Justice Felix Frankfurter to the Conference Regarding Nos. 20, 22, 31 & 32 (Oct. 13, 1952) (Tom C. Clark Papers, Tarlton Law Library, University of Texas at Austin, Box A19).

148. See *Brown*, 344 U.S. at 514-32 (Appendix to opinion of Frankfurter, J.).

149. Memorandum of Mr. Justice Frankfurter Regarding *Daniels v. Allen* (Oct. 13, 1952) (Tom C. Clark Papers, Tarlton Law Library, University of Texas at Austin, Box A19).

150. The substance of this argument, somewhat shortened and toned down, eventually appeared in his opinion in *Brown v. Allen*, 344 U.S. at 489-97 (opinion of Frankfurter, J.); see also Supplemental Memorandum of Mr. Justice Frankfurter Regarding *Daniels v. Allen* 2 (October 22, 1952) (Tom C. Clark Papers, Tarlton Law

(b) fears of abusive use of the writ were greatly exaggerated, since the prisoner had actually secured his release in only one of the 126 cases studied.¹⁵¹

On the question of how much reliance the district court should place on prior state proceedings, the memorandum, in terms later echoed in Justice Frankfurter's published opinion,¹⁵² urged that this should be a discretionary judgment informed by the state of the available record and the nature of the issue to be decided.¹⁵³

On October 16, Justice Frankfurter circulated "Observations" on Justice Reed's memorandum of September 26:¹⁵⁴

Library, University of Texas at Austin) ("put[ting] on a single page what seem to me to be the controlling data" in support of this position).

151. See *Brown*, 344 U.S. at 526 (Appendix to Opinion of Frankfurter, J.); see also *id.* at 510 (opinion of Frankfurter, J.) (noting that figures "showing that during the last four years five State prisoners, all told, were discharged by federal district courts, prove beyond peradventure that it is a baseless fear, a bogeyman, to worry lest State convictions be upset by allowing district courts to entertain applications for habeas corpus on behalf of prisoners under State sentence."). Cf. *infra* text accompanying note 226 (presenting clerk Rehnquist's response to this argument); note 226 (citing Justice Jackson's response to this argument).

152. See *Brown*, 344 U.S. at 498-510 (opinion of Frankfurter, J.); *infra* note 257 (quoting key portions).

153. Frankfurter Memorandum, *supra* note 150, at 17-23. Cf. Freedman, *supra* note 22, at 1533-34 (arguing that the Court adopted this rule in *Frank*).

As to the record, Justice Frankfurter wrote that if

the record of the State proceedings is not filed or is found to be inadequate, the judge is required to decide, with due regard to efficiency in judicial administration, whether it is more desirable to call for the record or to hold a hearing. . . . When the record of the State court proceedings is before the Court, it may appear . . . that the facts . . . have been tried and adjudicated against the applicant. Unless a vital flaw be found in the process of ascertaining such facts in the State court, the District Judge will accept their determination in the State proceeding and deny the application.

Frankfurter Memorandum, *supra* note 150, at 22-23.

As to the nature of the issues, he articulated a tripartite scheme that was already well-established:

Where the dispute concerns the historical facts, the external events that occurred, a State adjudication upon them should be conclusive. On the other hand, some questions call for the exercise by the federal judge of independent judgment on what are clearly matters of law. . . . Where the ascertainment of the historical facts does not dispose of the claim but calls for interpretation of the legal significance of such facts, . . . the District Judge must exercise his own judgment on this blend of facts and their legal values. Thus, so-called mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the Federal Judge.

Id. at 20, 23.

154. Observations by Mr. Justice Frankfurter on September 26 Memorandum by

This is a summary of what I get out of the memorandum after careful reading:

When a State convict applies for a writ of habeas corpus in a United States district court, that court, having informed itself of the content and meaning of the record made in the courts of the State which convicted him and on certiorari in this Court, should ordinarily deny the application without more. "Ordinarily," fairly interpreted, means that such an application should be denied without more, save in extraordinary or exceptional circumstances.

This, together with discussion of the extraordinary circumstances alluded to, is designed to govern the exercise of discretion in the lower federal courts. It is meant to do so to the end that a minimum of interference with State administration of criminal justice may result. Putting to one side the question whether the interests of liberty to be served by the Great Writ should be subordinated to this one end, the difficulty with the rule [is that] it does not and cannot, with the clarity and definiteness appropriate to the problem, guide the exercise of discretion below. . . .

Let me put to one side those aspects of our central problem as to which there is, I assume, common ground among us: (1) The applicant for the writ in the federal district court must have exhausted his State remedies, whatever they are, though this does not mean that an applicant must have had recourse to all alternate remedies or repeated recourse to a single procedure if a State afford such repeated recourse. (2) Starting with the ruling in *Darr v. Burford*, the applicant, before he can go to a federal district court on habeas corpus, must have been refused opportunity to have the denial of his federal constitutional claim in the State court brought here for review. (3) The District Judge should derive what light he can from the *adjudication* in the State court.

Beyond these three aspects, [Mr. Justice Reed] and I part company, more particularly as to the legal significance which the District Judge is to give to a denial of certiorari here. . . .

* * *

Howsoever phrased, a rule presupposing that some fruitful legal conclusion is to be drawn from our denial of certiorari, as though an adjudication instead of a refusal to adjudicate were

Mr. Justice Reed Regarding *Brown v. Allen* (Oct. 16, 1952) (Tom C. Clark Papers, Tarlton Law Library, University of Texas at Austin, Box A19). The Reed Memorandum is described *supra* text accompanying notes 141-45.

involved, will inevitably lead in the courts below to that very uncertainty and conflict to eliminate which we granted certiorari in these cases.¹⁵⁵

The remainder of the memorandum elaborated on the point by showing that the District Judges in the present cases could “with equal reasonableness” have concluded that the petitioners had or had not presented special circumstances justifying disregard of the Court’s previous denial of certiorari.¹⁵⁶

On October 17, 1952, Justices Reed and Frankfurter circulated a joint one-page memorandum suggesting:

that the Conference vote successively on the following two issues before voting on the results in these cases:

1. The bearing of the denial of certiorari here on what the district court should do with an application for habeas corpus.
2. The bearing of the adjudication by the State court of federal claims upon the district court’s disposition of the application for habeas corpus.¹⁵⁷

There was a preliminary discussion at the conference of October 18, 1952 (which revealed that a majority favored affirming the denial of habeas relief in each case)¹⁵⁸ and a full one on October 27, 1952. Two Justices’ notes record this latter conference. Justice Douglas wrote:

CJ—The bearing of the denial of cert. here on what the district court should do with an application for habeas corpus—CJ states that question as one governing this group of cases—

Black, FF, WOD, RHJ, HB & TC would give no weight to fact that we denied cert.; but there are a number of different reasons given for the conclusion. Reed & Minton think denial of cert. (though not *res judicata*) should be given weight—So does CJ where the federal question was made in the state record & presented here

—that case so far as the process that brought it here has been

155. Observations, *supra* note 154, at 2-4.

156. *Id.* at 5-11.

157. Memorandum from Justices Stanley Reed and Felix Frankfurter to the Conference Regarding Habeas Corpus Cases (Oct. 17, 1952) (Tom C. Clark Papers, Tarlton Law Library, University of Texas at Austin, Box A19).

158. Annotations by Justice Harold Burton on Memorandum Setting Cases to be Conferred on October 18, 1952 (Oct., 17 1952) (Harold H. Burton Papers, Library of Congress, Box 248, List No. 1, Sheet 4).

terminated—to compel the judge to have a plenary hearing in habeas corpus is unfair

—CJ would not give any weight in the case if unfairness where the issue of federal rights was not raised—

2. The bearing of the adjudication by the State court of federal claims upon the district court's disposition of the application for habeas corpus. On this Reed and F.F. as shown by their memos are in substantial agreement—Black agrees with FF's memo on this point—WOD does substantially—all agree.¹⁵⁹

Justice Clark wrote:¹⁶⁰

F.F.

1. Shall D.C. pay any attention to Denial? None.

Reed: Must wk out admin. syst on 3 qu=

1-No collateral relief sought in State Court-in Brown—§2254-as long as you can go before state judge must go there. This does not mean identical questions—Both agree -¹⁶¹

2. *Must* there be a *hearing* in Federal Court on what was done in State Court § 2244

Both say *NO*

3. Effect of former proceedings:

(1) *State record* has weight only on whatever is decided there on constitutional questions—where can get full record, *should* get full record not *always* necessary to call for record—that is discretionary

Both agree -

Differences:

Reed

1. Reed does not say *res adjudicata* for you can't have that in habeas corpus. DC *may give weight* to record before it including State & our record-(but his decision must not be on our denial) in

159. Conference Notes by Justice William O. Douglas Regarding Daniels v. Allen (Oct. 27, 1952) (Douglas Papers, Library of Congress, Box 222, Argued Cases Office and Conference Memos).

160. Conference Notes by Justice Tom C. Clark Regarding Daniels v. Allen (Oct. 27, 1952) (Tom C. Clark Papers, Tarlton Law Library, University of Texas at Austin, Box A-19).

161. Put slightly more formally, this appears to be a consensus that, as the Court eventually held, *see* Brown v. Allen, 344 U.S. 443, 447-50 (1953), the requirement of exhaustion of state remedies contained in 28 U.S.C. § 2254 does require the pursuit of any state post-conviction remedies that might be available for the presentation of constitutional issues not previously tendered to the state courts, but does not require repetitive state filings on the same question. *See* Wilwording v. Swenson, 404 U.S. 249, 250 (1971).

examining this record he should see that same record is involved before him (& *in that case deny*)

2. What were our grounds for denial

FF on Differences:

Present Act (1867) DC authorized to *question illegal detention*

* * *

*Ex parte Royal*¹⁶²—DC can come in anytime—habeas corpus more effective here than in England—old common law conception was whether court had jurisdiction (could the court try the type of case)

Johnson v. Zerbst—*no counsel*—then court had no jurisdiction—& habeas corpus would test it¹⁶³

*Give what weight you please to a denial of cert. see p. 15 memo 10/13/52*¹⁶⁴

This discussion left Justice Frankfurter disturbed by what he considered an unduly restrictive approach to the writ, and concerned not with broadening it, but with preventing a threatened narrowing of it.¹⁶⁵ He said so in a memorandum dated October 28, 1952.¹⁶⁶

162. The reference is to *Ex parte Royall*, 117 U.S. 241 (1886).

163. See *Johnson v. Zerbst*, 304 U.S. 458, 465-68 (1938) (relying on *Frank v. Magnum*, 237 U.S. 309 (1915), to hold that denial of counsel at trial could be attacked by federal habeas corpus since violation of the Sixth Amendment "stands as a jurisdictional bar to a valid conviction and sentence"). The *Johnson* decision was well-grounded because *Frank* was based on the established meaning of "jurisdiction" in the law of habeas corpus as a synonym for fundamental error, see *id.* at 331; Freedman, *supra* note 22, at 1488 n.89. But cf. *infra* text accompanying note 219 (presenting clerk Rehnquist's view that *Johnson* was based on a "novel concept," although approving the result).

164. At the cited page of this memorandum, described *supra* text accompanying note 149, Justice Frankfurter presented data showing that "[i]n less than 10% of the cases did the applicant file any papers which would serve to indicate to the District Court what questions were before the Supreme Court." The same material appears at *Brown v. Allen*, 344 U.S. 443, 523 (1953) (Appendix to opinion of Frankfurter, J.).

165. In view of his subsequent comments, see *infra* text accompanying notes 173-75, 202, there is every reason to believe that his objection was to a suggestion (recorded just before the second paragraph numbered 2 in Justice Clark's note) that he considered cutting back on the existing independent authority of the federal habeas court to investigate the state proceedings. As the account given below will indicate, Justice Reed disclaimed any such purpose, and the *Brown* opinion was written to incorporate this understanding. See *infra* text accompanying notes 176-78, 203-14.

166. Memorandum from Felix Frankfurter to the Brethren Regarding Nos. 20, 22, 31 & 32 (Oct. 28, 1952) (Tom C. Clark Papers, Tarlton Law Library, University of

All things must come to an end and I should not like to be unmindful of the fact that crying over spilt milk is for children, not for grown men. . . . But since a case in this Court is not over until it is decided, I am venturing to put on paper what I did not get around to saying in yesterday's discussion regarding habeas corpus. . . .

Callous and even cruel though it may seem, the fate of the four petitioners is to me a matter of little importance. What this Court may say regarding the writ of habeas corpus I deem of the profoundest importance. Put in a few words, it makes all the difference in the world whether we treat habeas corpus as just another legal remedy in the procedural arsenal of our law, or regard it as basic to the development of Anglo-American civilization and unlike other legal remedies, which are more or less strictly defined. . . . If such a conception is not merely to be rhetoric and is to be an ever-living process to be enforced, certain consequences follow which cannot be imprisoned within any such rubrics as "jurisdiction," or "habeas corpus is not a substitute for appeal," etc., etc. . . .

* * *

I am not concerned with the concrete outcome of these cases—whether the judgments below are affirmed or not. I am profoundly concerned that in these days, when we boast at international conferences and otherwise through our political leaders, of habeas corpus as one of the great agencies of the Anglo-American world in safeguarding and promoting democracy,¹⁶⁷ this Court

Texas at Austin, Box A19).

167. Professors Derrick A. Bell, Jr. and Mary Duziak have both forcefully called attention to the importance of Cold War propaganda considerations in the federal government's enforcement of racial equality during this period. See Mary Duziak, *The Little Rock Crisis and Foreign Affairs: Race, Resistance, and the Image of American Democracy*, 70 S. CAL. L. REV. 1614 (1997); Mary Duziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988); Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980); see also AZZA SALAMA LAYTON, *INTERNATIONAL POLITICS AND CIVIL RIGHTS POLICIES IN THE UNITED STATES, 1941-1960*, at 1-11 (2000).

Similarly, the Court's consideration of *Brown v. Allen* took place against a Cold War background, see *infra* note 181, and was intertwined chronologically—and, surely, psychologically—with its consideration of "the cause célèbre of the 1952 term," BERRY, *supra* note 5, at 118, the espionage case against Julius and Ethel Rosenberg.

At its conference of June 7, 1952, the same one at which it decided that the

should not disregard the historic record, reflecting deep considerations of justice, and treat habeas corpus in a devitalizing manner as though it were construing merely one of the Rules of Civil Procedure. Marshall referred to the "obligation of providing efficient means by which this great constitutional privilege should receive life and activity." *Ex parte Bollman*, 4 Cranch 75, 95.¹⁶⁸ Congress has provided the means by the Act of February 5, 1867,

Brown cases should be re-argued the following fall, see *supra* text accompanying notes 139-40, the Court determined not to review the Rosenbergs' convictions on direct appeal, see Michael E. Parrish, *Cold War Justice: The Supreme Court and the Rosenbergs*, 82 AM. HIST. REV. 805, 816-18 (1977) (describing conference), although the order was not published until October 13, 1952. See *Rosenberg v. United States*, 344 U.S. 838 (1952); Letter from Ethel Rosenberg to Emanuel H. Block (Oct., 1952), reprinted in THE ROSENBERG LETTERS: A COMPLETE EDITION OF THE PRISON LETTERS OF JULIUS AND ETHEL ROSENBERG 441 (Michael Meerpool ed. 1994). The petitioners sought re-hearing of this order, which, after a discussion in conference on November 8, 1952, see Parrish, *supra*, at 817 (describing conference), was denied in an order published on November 17, *Rosenberg v. United States*, 344 U.S. 889 (1952).

The Rosenbergs then sought collateral relief, which was denied by the district court, a result that the Second Circuit affirmed on December 31, 1952, *United States v. Rosenberg*, 200 F.2d 666 (2d Cir. 1952). Their petition for certiorari seeking review of this decision was docketed on March 30, 1953, discussed in conference on April 11, 1953, see G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION* 391 (1988), and—after significant internal tensions and a further discussion in conference on May 23, 1953, see William Cohen, *Justice Douglas and the Rosenberg Case: Setting the Record Straight*, 70 CORNELL L. REV. 211, 229-36 (1985); Michael E. Parrish, *Justice Douglas and the Rosenberg Case: a Rejoinder*, 70 CORNELL L. REV. 1048, 1050-54 (1985)—denied in an order of May 25, 1953, *Rosenberg v. United States*, 345 U.S. 965 (1953). Justice Douglas's speech described *infra* note 181 was delivered on May 20, 1953.

Throughout the lengthy litigation history of the case, see *Rosenberg v. United States*, 346 U.S. 273, 277-85 (1953) (recounting procedural history through defendants' execution on June 19, 1953), Justice Frankfurter (like Justice Black) "voted to review the *Rosenberg* cases at every opportunity," Cohen, *supra*, at 214. See MELVIN I. UROFSKY, *FELIX FRANKFURTER* 119-24 (1991). See generally Laura Krugman Ray, *Autobiography and Opinion: The Romantic Jurisprudence of Justice William O. Douglas*, 60 U. PITT. L. REV. 707, 726-27 (1999).

For a discussion of the impact of Cold War politics on the Court in the immediately succeeding period, see EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION* 258-65 (2000). See also Azza Salama Layton, *International Politics and Civil Rights Policies in the United States, 1941-1960*, at 1-11 (2000).

168. The reference is to *Ex parte Bollman*, 8 U.S. 75 (1807), which I have analyzed at length in Eric M. Freedman, *Just Because John Marshall Said It, Doesn't Make It So: Ex parte Bollman and the Illusory Prohibition on the Federal Writ of Habeas Corpus for State Prisoners in the Judiciary Act of 1789*, 51 ALA. L. REV. 531 (2000). For discussion of the passage quoted in the text, see *id.* at 565, 569-70, 586-87. However, Justice Frankfurter seems to have been using it merely for its rhetorical effect, rather than for any particular legal holding.

14 Stat. 385.¹⁶⁹ I pray that this Court do not shrivel them because of fear of potential abuse, or even an occasional abuse which can easily be curbed without damage to the Great Writ.¹⁷⁰

Justice Reed circulated draft opinions on December 4,¹⁷¹ to which Justice Frankfurter responded in a memorandum dated December 19:

The chief concern in the course we have pursued in connection with the habeas corpus cases has not been the disposition of these particular cases. . . .

One vital point we have now definitively settled, namely that our denial of certiorari has no significance in the exercise of the District Court's jurisdiction. . . .

I think I am accurate in saying that Stanley said he agreed with the views I expressed regarding the relation of the State proceedings to proceedings in the District Court. I am sorry to say, however, that I do not find this agreement reflected in his opinion. . . .

I have not dealt with the merits of these cases, that is, whether the judgments in these cases should be affirmed. I have not yet dealt with them even in my own mind. I repeat, what we do with these specific cases is not the major problem before us.¹⁷²

Justice Frankfurter annexed a version of his memorandum of October 13, with the section dealing with the district courts' treatment of prior state proceedings¹⁷³ revised to respond specifically to Justice Reed's draft. The essence of these comments was that Justice Reed's formulations left the District Judge with too much scope to deny a habeas corpus application summarily, partially because they did not clearly reiterate the judge's duty to decide issues of law de novo, and partially because they seemed to allow the judge too much room to make legal rulings

169. See Freedman, *supra* note 168, at 538-39 & n.19.

170. Memorandum from Justice Felix Frankfurter, *supra* note 166, at 1, 5-6.

171. One of these covered *Smith v. Baldi*, 344 U.S. 561 (1953), and the other one covered the remaining cases. Copies of these drafts are to be found in, among other places, the Tom C. Clark Papers, Tarlton Law Library, University of Texas at Austin, Box A19.

172. Memorandum from Justice Felix Frankfurter to the Brethren Nos. 20, 22, 31 & 32, at 1-2 (Dec. 19, 1952) (Tom C. Clark Papers, Tarlton Law Library, University of Texas at Austin, Box A19).

173. See *supra* text accompanying notes 152-53.

in the absence of any factual record at all (whether compiled in state court or at a federal habeas corpus hearing):¹⁷⁴

[Mr. Justice Reed's] opinion seems to me to disregard the command of Congress that the federal courts decide the legal questions raised in a petition for habeas corpus. . . . [I]t would rub out the statute to say that the State determination of the legal question can be conclusive. Yet [Mr. Justice Reed] would permit summary denial of the application if the District Judge is satisfied, "by the record," that the State has given "fair consideration" to the issues, if the record of the State proceedings is sufficient to make, and the District Judge does make, the determination that "no unusual circumstances calling for a hearing are presented," if he is satisfied that federal constitutional rights have been protected, or, again, if he concludes a hearing is not "proper." At best, these expressions hardly make clear what the determination is that is to be made.¹⁷⁵

Justice Reed responded by insisting that no change in the current availability of the writ was intended, writing on December 24:¹⁷⁶

My draft opinion of December 4th was . . . not written with any purpose of limiting access of state prisoners to the federal courts but rather to simplify that access in situations covered by the statute.

When my memorandum in *Brown v. Allen* of September 26th was discussed at Conference with the memorandum of [Justice Frankfurter], I felt that our views were not far apart on matters other than the weight to be given our denial of certiorari. I still think this is true. . . .

There is suggestion [in Justice Frankfurter's] Comment that

174. *E.g.*, Memorandum of Mr. Justice Frankfurter, *supra* note 172, at 9 ("Congress has placed no obstacles in the way of a hearing such as [Mr. Justice Reed] seems to suggest."), 10 ("Nor does [Mr. Justice Reed] give appropriate guidance to the District Judge as to the circumstances in which it is 'proper' to hold a hearing. His opinion seems to me to authorize whatever the District Judge happens to be disposed to do."), 12 ("The District Judge is not told what to do if the record is silent on the relevant questions, and certainly a reasonable District Judge could read the language . . . to mean that he did not need to go beyond whatever record is available.").

175. *Id.* at 14 (footnotes omitted).

176. Memorandum from Justice Stanley Reed to the Conference Regarding Nos. 32, 22 & 20 (Dec. 24, 1952) (Tom C. Clark Papers, Tarlton Law Library, University of Texas at Austin, Box A19).

my draft allows the "district judge summarily" to deny an application by accepting the rule of the state court. This was not intended by me nor do I think it can properly be said that my draft opinion does so.¹⁷⁷ . . .

My draft is intended to and I think does leave entirely open to the District Court to take up those unusual situations . . . when in his views justice has not been done in the state courts. He must determine whether the record shows denial of constitutional rights; he must hold hearings if he is in doubt; and he may dismiss without a hearing if he has no doubt.¹⁷⁸

When Justice Reed circulated a revised draft opinion on December 29, 1952,¹⁷⁹ it did not, Justice Frankfurter reported on December 31, "meet the points in my Memorandum of December 19":¹⁸⁰

The uniqueness of *habeas corpus* in the procedural armory of our law cannot be too often emphasized. . . . Its history and function in our legal system and the unavailability of the writ in totalitarian societies are naturally enough regarded as one of the decisively differentiating factors between our democracy and totalitarian governments.¹⁸¹

177. At this point, Justice Reed quotes the passage reproduced *infra* text accompanying note 203—minus, of course, the phrases later added, *see id.*—which "summarizes the teaching of the opinion," Memorandum, *supra* note 176, at 2.

178. *Id.* at 1-2, 4.

179. A copy may be found, among other places, in the Tom C. Clark Papers, Tarlton Law Library, University of Texas at Austin, Box A19.

180. Memorandum from Felix Frankfurter to the Brethren Regarding Nos. 20, 22, 31 & 32, at 1 (Dec. 31, 1952) (Tom C. Clark Papers, Tarlton Law Library, University of Texas at Austin, Box A19).

181. *Cf.* William O. Douglas, *A Crusade for the Bar: Due Process in a Time of World Conflict*, 39 A.B.A. J. 871, 874-75 (1953) (address delivered to the American Law Institute, May 20, 1953):

America, seen from abroad, seems alarmed, confused, and intolerant. The reasons are manifold. One important cause is a growing tendency in the interests of security to take short cuts, to disregard the rights of the individual, to sponsor the cause of intolerance and to adopt more and more the tactics of the world forces we oppose. These practices and attitudes may go unnoticed here, but they make headlines in Asia. They are a powerful Voice of America, more powerful indeed than any program we can produce for radio broadcast. They have helped lose for America the commanding position of moral leadership which we had at the end of World War II.

Last year I visited Burma, torn by civil war for the last five years[,] . . . and talked with lawyers and judges. . . . The writ of *habeas corpus* was flourishing and respected. . . . A much higher standard governs the admission of confessions in criminal trials in Burma than in any court in

It is inadmissible to deny the use of the writ merely because a State court has passed on a Federal constitutional issue.¹⁸² It is equally inadmissible to leave each district judge effectively at large . . . by cloudy and confusing language as to what we expect from the district judges.¹⁸³

Is it asking too much to ask that if Brother Reed could sign, as he said he could, my formulations for guiding the district judges on pages 6-19 of my memorandum of December 19, that he sign them?¹⁸⁴ . . .

Let me now state specifically why I cannot approve the revised opinion of Mr. Justice Reed on these matters. . . . I thoroughly agree that the habeas corpus procedure must be saved from abuse by excessive and repetitious applications, and I insist only that the statute does require us to insure that the State prisoner will have one opportunity to test his federal claim in the federal courts. . . .¹⁸⁵ I approach the problem with the same anx-

the United States. . . .

Those experiences brought, of course, a swelling pride in my heart at the glories of due process . . . But what I saw has greater significance. Burma is winning her battle for Burmese hearts and minds . . . by the use of more than military tactics. Due process, as well as bullets, helps win those wars against Communism.

This talk was widely reprinted. William O. Douglas, *A Challenge to the Bar*, 28 NOTRE DAME L. 497 (1953); William O. Douglas, *Address Before the American Law Institute*, 12 LAW. GUILD REV. 145 (1953); William O. Douglas, *Some Antecedents of Due Process*, 2 U. KAN. L. REV. 1 (1953). See generally *supra* note 167.

182. At this point, Justice Reed wrote across his copy, which is to be found in the Stanley Reed Papers, Margaret I. King Library, University of Kentucky, Box 147, "Why? No reason not to." See *infra* note 185 (discussing the meaning of this note).

183. The elided material is quoted more fully *infra* note 209.

184. The material referred to is that which later appeared in more elaborate form in Justice Frankfurter's opinion in *Brown v. Allen*, 344 U.S. 443, 501-508 (1953) (opinion of Frankfurter, J.). For some possible responses to Justice Frankfurter's question, see *infra* note 204.

185. Justice Reed underlined the word "test" in his copy, which is to be found in the Stanley Reed Papers, Margaret I. King Library, University of Kentucky Library, Box 147, and wrote in the margin: "What is meant—not a hearing fn P 13 of Comment [] says no." The reference is to a passage in Justice Frankfurter's December 19 memorandum, see *supra* note 172, which, in substantially the same language as that appearing in his opinion in *Brown v. Allen*, 344 U.S. 443, 504 (1953) (opinion of Frankfurter, J.), authorizes district judges to dispose of habeas corpus proceedings summarily when the record is sufficiently clear for them to do so.

In other words, as the two Justices recognized in emphasizing the common ground between them, see *supra* text accompanying notes 172, 177-78; *infra* text accompanying note 189; see also *infra* text accompanying note 231 (presenting clerk Rehnquist's summary of Justice Reed's position), there was no disagreement that the

iety about abuse of the writ as does MR. JUSTICE REED, and I have clearly delimited my standards to the one opportunity which the State prisoner is given by Congress. What I do insist is that we do not, by ambiguous or meaningless phrase, leave it open to the District Judge, if he is so disposed, to shut off that one opportunity. If we do, we would, as MR. JUSTICE REED correctly infers, wipe out the practical efficacy of federal habeas corpus for State prisoners.

II. It helps my understanding, if not that of a District Judge reading the opinion without libretto, to know that "the teaching" of Mr. Justice Reed's opinion is summarized in the excerpt he quotes on page 2 of his letter.¹⁸⁶ I should be sorry if this were all we had been able to achieve by two arguments and numerous circulations and conferences in these cases. But . . . should we leave resort to a hearing to the "discretion" of the District Judge without indicating some standards for the exercise of discretion?¹⁸⁷ On the other hand, is the statute satisfied by dismissal of an application when the State has given "fair consideration" to the issues? The congressional requirement is greater. The State court cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right. . . .

V. My Memorandum certainly does not say that it is enough that the record shows that the merits received "fair consideration" in the State courts. See point II above, and pp. 14-16 of my Memorandum.¹⁸⁸ At the same time, I think often a "hearing" is unnecessary even when legal questions are involved that require a decision by the federal judge. . . .

It is at best awkward to have the Court's position on one aspect of the case—the nonsignificance of denial of certiorari here—expressed in a so-called dissenting opinion. Inasmuch as

prisoner was entitled to an independent ruling on the constitutional merits from the federal court, *see supra* text accompanying notes 24-26; the sparring was over the criteria that would entitle the applicant to a plenary hearing on the facts, *see infra* notes 257-58 and accompanying text (describing ultimate resolution).

186. *See supra* note 177; *infra* note 203 and accompanying text (showing change made to this passage before publication).

187. In his copy, *supra* note 185, Justice Reed underlined "discretion" and wrote in the margin "must be left to discretion as defined on p 2 of my memo," a reference to the same passage cited *supra* note 186. Justice Frankfurter retained portions of this memorandum in his published opinion, *Brown v. Allen*, 344 U.S. 443, 446-47 (1953) (opinion of Frankfurter, J.).

188. This latter material has been partially quoted *supra* text accompanying note 175.

Brother REED has said he can agree with what I have written as to the bearing of the proceedings in the State courts on the disposition of the applications for the writ before the District Judge, I suggest an opinion *per curiam* to consist of the substance of what I have drafted on the general procedural issues and, since a majority of the Court is with Brother REED on the merits, what he has written on the merits[, thus]. . . presenting in a single opinion the matters on which a majority of the Court, and therefore the Court, agree.¹⁸⁹

On January 23, 1953, Justice Frankfurter circulated another draft of his opinion on the habeas issues.¹⁹⁰

Also on January 23, Justice Black circulated a draft dissent on the merits.¹⁹¹ Objecting to the Court's failure to review *Daniels* because of the one-day delay in serving the appeals papers, Justice Black wrote that

the object of habeas corpus is to search records to prevent illegal imprisonments. Habeas corpus can have no higher function. To

189. Memorandum from Felix Frankfurter to the Brethren Regarding Habeas Corpus Cases Nos. 20, 22, 31 & 32, *supra* note 180, at 1-6, 8.

190. A copy of this draft with a covering memorandum may be found, among other places, in the Tom C. Clark Papers, Tarlton Law Library, University of Texas at Austin, Box A19.

The key change was the addition of the paragraph that now appears as the first paragraph of Justice Frankfurter's opinion in *Brown v. Allen*, 344 U.S. 443, 503 (1953) (opinion of Frankfurter, J.), dealing with procedural defaults on the state level. In his covering memorandum, Justice Frankfurter said, "I have heretofore written nothing about this aspect of the general problem because I stupidly had not realized it bothered some of the Brethren," Memorandum from Felix Frankfurter to the Brethren (Jan. 23, 1953) (Tom C. Clark Papers, Tarlton Law Library, University of Texas at Austin, Box A19), a statement that can only be explained by the assumption that he had not yet turned his mind to the merits of the cases, especially *Daniels*. See *supra* text accompanying notes 108-18 (describing procedural default issue in case); see also *Brown*, 344 U.S. at 557-60 (Frankfurter, J., dissenting) (objecting to the Court's failure to reach the merits notwithstanding procedural default); *infra* text accompanying notes 267-71.

In fact, the assumption appears quite sound. See Letter from Felix Frankfurter to Harold Burton (Jan. 27, 1953), (Felix Frankfurter Papers, *supra* note 14, Part III, Reel 1, Frame 260 ("I'll deal with the *Daniels* case when I come to deal with the merits of the four cases."); see also Memorandum from Felix Frankfurter to the Brethren (Jan. 23, 1953), *supra* ("[T]his opinion is not concerned with the disposition of the immediate cases before us").

191. Draft Dissent from Hugo Black re Nos. 32, 22 & 20, to the Brethren (Jan. 23, 1953). A copy of this draft, applying to *Brown*, *Speller*, and *Daniels*, may be found, among other places, in the Tom C. Clark Papers, Tarlton Law Library, University of Texas at Austin, Box A19.

hold it unavailable under the circumstances here is to degrade it. I had thought that *Moore v. Dempsey*, 261 U.S. 86, would forbid this. Perhaps the Court's opinion overrules it. That case has stood for the principle that this Court will look straight through procedural screens to see if a man's life or liberty is being forfeited in defiance of the Constitution. I would follow that principle here.¹⁹²

This passage provoked an immediate reaction from Justice Frankfurter. In a handwritten note also dated January 23, 1953, after praising Justice Black's "spirited piece of pithy writing," he continued, "I do beg of you, however, to cut the sentence . . . 'Perhaps the Court's opinion overrules it.'"¹⁹³ To "give needless ammunition to those who want to weaken the force of that opinion at least as a standard to which we can appeal" would, he suggested, not be "good intellectual strategy."¹⁹⁴

Justice Black took the point. In a handwritten response, he thanked Justice Frankfurter and continued: "I have never had an idea that it would be necessary to keep the line about *Moore v. Dempsey*—I hope it will provoke a denial—At any rate, I shall change the expression before the cases go down."¹⁹⁵ His next draft, circulated on January 28, 1953, removed the suggestion that *Moore* was anything other than good law:

To hold [habeas corpus] unavailable under the circumstances here is to degrade it. I think *Moore v. Dempsey*, 261 U.S. 86, forbids this. That case stands for the principle that this Court will look straight through procedural screens to see if a man's life or liberty is being forfeited in defiance of the Constitution. I would follow that principle here.¹⁹⁶

192. *Id.* at 5-6.

193. Letter from Justice Felix Frankfurter to Justice Hugo L. Black (Jan. 23, 1953) (Hugo L. Black Papers, Library of Congress, Container 315, Brown v. Allen Folder).

194. *Id.* This concern illustrates how far off the mark Professor Bator's thesis is. See *infra* note 310.

195. Letter from Justice Hugo L. Black to Justice Felix Frankfurter (on file in the Felix Frankfurter Papers, *supra* note 14, Part I, Reel 66, Frame 00038). The document is undated, but on the basis of the chronology set forth in this paragraph of text, was surely written sometime between January 23 and January 28, 1953.

196. Draft from Justice Hugo Black to the Brethren Regarding Nos. 32, 22 & 20, at 6 (Jan. 28, 1953) (on file in the Tom C. Clark Papers, Tarlton Law Library, University of Texas at Austin, Box A19).

And in his final version, circulated on January 31, 1953,¹⁹⁷ which is the one that appears in print,¹⁹⁸ he elaborated on the point:

To hold [habeas corpus] unavailable under the circumstances here is to degrade it. I think *Moore v. Dempsey*, 261 U.S. 86, forbids this. In that case Negroes had been convicted and sentenced to death by an all-white jury selected under a practice of systematic exclusion of Negroes from juries. The State Supreme Court had refused to consider this discrimination on the ground that the objection to it had come too late. This Court had denied certiorari. Later a federal district court summarily dismissed a petition for habeas corpus alleging the foregoing and other very serious acts of trial unfairness, all of which had been urged upon this Court in the prior certiorari petition. This Court nevertheless held that the District Court had committed error in refusing to examine the facts alleged.¹⁹⁹ I read *Moore v. Dempsey, supra*, as standing for the principle that it is never too late for courts in habeas corpus proceedings to look straight through procedural screens in order to prevent forfeiture of life or liberty in flagrant defiance of the Constitution. . . . Perhaps there is no more exalted judicial function. I am willing to agree that it should not be exercised in cases like these except under special circumstances or in extraordinary situations. But I cannot join in any opinion that attempts to confine the Great Writ within rigid formalistic boundaries.²⁰⁰

Meanwhile, the Court had been solidifying a consensus on the procedural issues that had been in the Justices' understandings but not in their drafts.²⁰¹ On January 27, Justice Frankfurter wrote to Justice Burton that his key objection to Justice Reed's draft was: "I don't want District judges to assume that merely because a federal claim has been examined in the State courts, it need not be examined even once in a federal court."²⁰²

197. Draft from Justice Hugo Black to the Brethren Regarding Nos. 32, 22 & 20, at 6-7 (Jan. 31, 1953) (on file in the Tom C. Clark Papers, Tarlton Law Library, University of Texas at Austin, Box A19).

198. *Brown v. Allen*, 344 U.S. 443, 553-54 (1953) (Black, J., dissenting).

199. This is an accurate summary of the procedural history of *Moore v. Dempsey*, 261 U.S. 86 (1923). Extensive documentation of it can be found at Freedman, *supra* note 22, at 1506-30.

200. Draft, *supra* note 197, at 6-7.

201. See *supra* note 185.

202. Letter from Justice Felix Frankfurter to Justice Harold H. Burton (Jan. 27, 1953), *supra* note 190.

On January 30, Justice Reed circulated the following:

At the suggestion of some of the Brethren, I am rephrasing p. 18 to read as indicated below. The added words are under-scored.

"It was under this general rule that this Court approved in *Salinger v. Loisel*, 265 U.S. 224, 231, the procedure that a federal judge might refuse a writ where application for one had been made to and refused by another federal judge *and the second judge is of the opinion that in the light of the record a satisfactory conclusion has been reached*. That procedure is also applicable to state prisoners. *Darr v. Burford*, *supra*, 214-215.

"Applications to district courts on grounds determined adversely to the applicant by state courts should follow the same procedure—a refusal of the writ without more, if the court is satisfied, by the record, that the state process has given fair consideration to the issues and the offered evidence, *and has resulted in a satisfactory conclusion*. . . ."²⁰³

203. Memorandum from Justice Stanley Reed to the Conference Regarding Nos. 32, 22 & 20 (Jan. 30, 1953) (on file in the Tom C. Clark Papers, Tarlton Law Library, University of Texas at Austin, Box A19).

As Justice O'Connor summarizes in a portion of her opinion in *Williams v. Taylor*, 120 S. Ct. 1495 (2000) that expresses the views of the Court, the meaning of the italicized phrase has been the subject of some disagreement among subsequent Justices. See *Williams*, 120 S. Ct. at 1522-23. In his three-Justice opinion in *Wright v. West*, 505 U.S. 277, 287 (1992), Justice Thomas suggested that "a satisfactory conclusion" might mean a reasonable one as opposed to a correct one. Justice O'Connor, in an opinion also expressing the views of three Justices, convincingly rebutted this view, correctly pointing out that the passage relates to determinations of fact, not questions of law or mixed questions of law and fact. See *Wright*, 505 U.S. at 299-302; *supra* notes 9, 153; *infra* note 257. The history presented here—clearly showing that the phrase was added precisely to obviate concerns that the opinions might be read to narrow the federal courts' duty to review the latter categories of question de novo—strongly supports Justice O'Connor's position. See *supra* note 26 and accompanying text.

Following Justice Reed's change, see also *supra* note 133, the published passage in *Brown v. Allen*, 344 U.S. 443, 463-64 (1953) read:

Applications to district courts on grounds determined adversely to the applicant by state courts should follow the same principle—a refusal of the writ without more, if the court is satisfied, by the record, that the state process has given fair consideration to the issues and the offered evidence, and has resulted in a satisfactory conclusion. Where the record of the application affords an adequate opportunity to weigh the sufficiency of the allegations and the evidence, and no unusual circumstances calling for a hearing are presented, a repetition of the trial is not required. . . . However, a trial may be had in the discretion of the federal court or judge hearing the new application. A way is left open to redress violations of the Constitution. . . . *Moore v. Demp-*

The precise origins of this change, which obviated Frankfurter's objection,²⁰⁴ are unclear, but it plainly had substantial support. Justices Burton and Clark, in particular, had clearly been thinking about ensuring that the Court's ultimate product reflected its underlying consensus on the procedural issues.

On January 16, Justice Burton sent Justice Clark a typed draft of what was to become their brief joint statement,²⁰⁵ with a handwritten covering note saying, "I am *not* circulating this but am holding it for our consideration after we see what Justice Frankfurter finally writes."²⁰⁶ When Justice Frankfurter's January 23 draft arrived in Justice Clark's chambers, the latter's law clerk, Bernard Weisberg,²⁰⁷ wrote a memo pointing out that, although the differences between Justices Frankfurter and Reed had narrowed, there was still considerable room for misunderstanding.²⁰⁸ Substantively, there were still differences as to

sey, 261 U.S. 86. Although they have the power, it is not necessary for federal courts to hold hearings on the merits, facts or law a second time when satisfied that federal constitutional rights have been protected. It is necessary to exercise jurisdiction to the extent of determining by examination of the record whether or not a hearing would serve the ends of justice. (footnotes omitted)

204. An outsider can only speculate as to why at this point the Justices could not agree on a draft. But the fact is probably best explained by some combination of tense inter-personal relations on the Court, *see* Urofsky, *supra* note 13, the normal investment of people in prose compositions to which they have devoted much work, *see* Douglas, *supra* note 7, at 2 (implicitly attributing form of *Brown* opinions to this factor), and an unwillingness to labor further on this long-running project. With respect to this last point, it may be relevant that, in light of the Second Circuit's denial of relief on December 31, 1952, *see supra* note 167, the Justices knew that they would soon be confronting a climactic appeal from the Rosenbergs.

205. *Brown v. Allen*, 344 U.S. 443, 487-88 (1953) (opinion of Burton & Clark, JJ.) The iterations of this document are detailed *infra* note 213.

206. Letter from Justice Harold H. Burton to Justice Tom C. Clark, Regarding Nos. 32, 22 & 20, Habeas Corpus (Jan. 16, 1953). Copies of this document and the enclosed typescript opinion, are to be found in the Tom C. Clark Papers, Tarlton Law Library, University of Texas at Austin, Box A19.

207. For a brief sketch of Weisberg's later career, which culminated in appointment as a United States Magistrate Judge in Chicago in 1985, *see Obituary*, CHI. DAILY L. BULL., Jan. 17, 1994, at 3.

208. Memorandum from B[ernard] W[eisberg] to Mr. Justice [Clark]. This memorandum, to be found in the Tom C. Clark Papers, Tarlton Law Library, University of Texas at Austin, Box A19, is undated but, on the basis of the chronology set forth in the text, was undoubtedly written sometime between January 23 and January 27, 1953.

when District Judges must hold hearings and how much weight they had to give to prior state proceedings.²⁰⁹ As a stylistic matter, "the reader is told . . . that he may discover the views of the Court from this and Justice Reed's opinion 'jointly,'" but—although Justice Frankfurter had "the preferable position on the procedural questions"—lower court readers were likely to accept Justice Reed's formulations as authoritative since they would be "presented as the opinion 'of the Court'."²¹⁰

On January 27—the date of Justice Frankfurter's letter to him objecting to the possible implication of Justice Reed's draft that the federal judge could simply defer to the state outcome²¹¹—Justice Burton wrote to Justice Clark, "It seems to me that, with some minor changes in Felix's opinion, we could afford to give weight to both of their opinions and encourage a reconciliation of their meaning by using the draft of the memorandum of our views which I showed to you."²¹²

209. Specifically, the unamended version of the passage that is quoted *supra* text accompanying note 203, which cited in a footnote to 28 U.S.C. § 2244 (1948), quoted in *Brown v. Allen*, 344 U.S. 443, 462 n.15 (1953) (providing that no federal judge is required to entertain an application for habeas corpus if legality of detention has been previously determined "by a judge or court of the United States," petition presents no new grounds, and "the judge or court is satisfied that the ends of justice will not be served by such inquiry"), and to *Salinger v. Loisel*, 265 U.S. 224, 231 (1924) (stating in dictum that a federal court has discretion to give conclusive weight to denial by a federal court of federal prisoner's prior petition presenting same claims), implied that a District Judge could deny a habeas corpus application summarily simply on the grounds that the state courts had passed on the merits.

In his memorandum of December 31, *supra* note 180, at 3, Justice Frankfurter had objected to this section:

We ought not to play hide-and-seek with so serious a subject as *habeas corpus* touching State convictions by cloudy and confusing language as to what we expect from the district judges. If we want them to treat a State disposition on the merits of Federal constitutional issues as *res judicata*, let us say so. If we want such a disposition by a State court to be governed by the doctrine of *Salinger v. Loisel*, 265 U.S. 224—a doctrine now put in statutory form in 28 U.S.C. § 2244, applicable, as was the *Salinger* case, to successive applications before a Federal judge and not to an application from a State confinement to a Federal court in the first instance—let us say so. If we want to tell the district judges that although the State adjudication is not *res judicata*, technically speaking, and although § 2244 does not apply in terms, they should at least as a general rule be guided by the spirit of *res judicata*, barring only exceptional cases, let us say so.

210. Memorandum, *supra* note 209, at 1-2.

211. See *supra* text accompanying note 202.

212. Letter from Justice Harold H. Burton to Justice Tom C. Clark (Jan. 27,

It may well be that Justice Reed's change, clearly removing from the "opinion of the Court" any implication that prior state dispositions would be preclusive, was responsive to the concerns of Justices Burton and Clark.²¹³

Regardless of its exact provenance, however, the meaning of the change is clear and consistent with the thinking of all the Justices except Jackson:²¹⁴ To the extent that the Justices focused on the substance of the inquiry to be made by the federal habeas court, their effort was not to broaden it, but rather to ensure that the published opinions would not be wrongly read as narrowing it.

During the various interchanges between the Justices, Justice Jackson had been fairly silent (although it had been his suggestion in conference that set Justices Frankfurter and Reed off on their respective reports),²¹⁵ but by no means idle.

In March, 1952, Justice Jackson's law clerk, William Rehnquist, wrote him a brief memo on the *Ekberg* case, concluding:

1953). A copy is in the Tom C. Clark Papers, Tarlton Law Library, University of Texas at Austin, Box A19.

213. In any event, it succeeded in retaining their votes for Justice Reed's opinion.

As noted, the draft opinion sent by Justice Burton to Justice Clark on January 16, *see supra* text accompanying note 205, was identical to the one eventually published, except that the draft concluded with: "They recognize also the propriety of the considerations to which Mr. Justice Frankfurter, as well as Mr. Justice Reed, invite the attention of a federal court when confronted with a petition for a writ of habeas corpus under circumstances comparable to those in the instant cases."

When this was circulated on January 30, it read: "[T]hey recognize the propriety of the other considerations to which MR. JUSTICE REED and MR. JUSTICE FRANKFURTER invite the attention of a federal court when confronted with a petition for a writ of habeas corpus under the circumstances stated." There is a copy of this document in the Tom C. Clark Papers, Tarlton Law Library, University of Texas at Austin, Box A19.

The published version, consistent with a second draft also circulated on January 30 and to be found in the same location, reads, "They also recognize the propriety of the considerations to which Mr. Justice Frankfurter invites the attention of a federal court when confronted with a petition for a writ of habeas corpus under the circumstances stated," *Brown v. Allen*, 344 U.S. 443, 488 (1953) (opinion of Burton & Clark, JJ.).

Thus, there was no substantive change. In all versions, the authors clearly rejected the idea of giving any weight to the denial of certiorari and considered the Reed and Frankfurter opinions to be consistent with each other on the remaining procedural issues.

214. *See infra* text accompanying notes 215-54 (discussing Jackson).

215. *See supra* text accompanying note 124.

In view of the generally troubled situation regarding habeas corpus in cases such as this, and also because the Court last week granted cert in a case involving closely related questions (*Daniels v. Allen*, No. 271 Misc, cert to CA 4),²¹⁶ I append hereto a sketchy survey of the law and the facts regarding habeas corpus in the District Courts. On the basis of conclusions reached from that material, I would recommend a grant here in order to consider it at the same time as No. 271, and perhaps straighten out the law on the subject.²¹⁷

The annexed memo is entitled, "*HABEAS CORPUS, THEN AND NOW, Or, 'If I Can Just Find the Right Judge, Over these Prison Walls I shall Fly . . .'*"²¹⁸

The basic problem is one of *res judicata*; to what extent does an adverse judgment in the state system of cts preclude a petitioner from raising anew the same questions in federal district court?

The Law.—Recent decisions of this court contain language indicating that a federal district court may consider questions of constitutional right anew even though the state court has decided the same question adversely to the petitioner, and he has been denied cert. by this court. This approach is based on two alternative rationales: (a) Where there has been a constitutional deprivation in the state ct, the result is to actually deprive that court of jurisdiction; (b) habeas corpus represents an exception to orthodox *res judicata* principles, and frankly allows a collateral attack on a criminal conviction.

(a) *a denial of due process by state cts ousts them of jurisdic-*

216. This statement serves to date the document, which does not bear a date, with some precision. Certiorari was granted in *Daniels* on March 3, 1952, *Daniels v. Allen*, 342 U.S. 941 (1952), and in *McGee* on March 10, 1952, *McGee v. Ekberg*, 342 U.S. 952 (1952).

217. Certiorari Memorandum, *McGee v. Ekberg*, 342 U.S. 952 (1952) (No. 517, O.T. 1951), Robert H. Jackson Papers, Library of Congress, Legal File, Supreme Court-O.T. 1952, Case Nos. 32, 22, 20, 31, *Brown v. Allen*, etc., Folder #2.

218. The document, bearing the notation Appendix to No. 517, is to be found annexed to *id.* It has been previously noted in Saul Brenner, *The Memos of Supreme Court Law Clerk William Rehnquist: Conservative Tracts or Mirrors of his Justice's Mind?*, 76 JUDICATURE 77, 80-81 (1992) and David J. Garrow, *The Rehnquist Reins*, N.Y. TIMES MAGAZINE, Oct. 6, 1996, at 65, 66. See also Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331, 2343 (1993). See generally William H. Rehnquist, *Who Writes the Decisions of the Supreme Court?*, 74 U.S. NEWS & WORLD REP. 74 (1957). I have silently corrected some obvious typographical errors.

tion. This novel concept was first advanced by Black, J, in *Johnson v. Zerbst*, 304 U.S. 458.²¹⁹ Petitioner therein was convicted in federal court and claimed a denial of counsel. The court said that denial of counsel was a denial of constitutional right, and that such denial was sufficient to oust the court of jurisdiction. Since a judgment may always be attacked for want of jurisdiction in the rendering court, this was no variation in the ordinary restriction of collateral attack. But of course the novelty lies in the notion that denial of a right to counsel ousts the court of jurisdiction; previously jurisdiction had been confined to notions of territoriality, statutory limitations, service and process, and notice.

However, novelty per se is not a condemnation, and my feeling is that this case, confined to its facts, is right. The reason for prohibiting collateral attack is that a litigant has previously had an opportunity to present his side of the case . . . But of course if an accused has no counsel, this 'previous opportunity' is pretty meaningless . . . and only a wooden application of the theory of *res judicata* would foreclose petitioner.

But in succeeding cases there have been vague, uncritical allusions to this case as establishing the principle that any denial of constitutional due process goes to the jurisdiction of the court. This is a horse of a different color. Questions of validity of indictment, makeup of the jury, validity of the statute under which conviction is had, might all be questions of due process. But with counsel, there is an opportunity to litigate these before an entire system of state tribunals, and to petition this court for cert. to review the judgment . . . Here the rationale for making an exception to ordinary restrictions of collateral attack . . . is not present. Litigation on due process and other constitutional questions must end in the same manner as litigation on any other question.

(b) *a frank exception is made in habeas corpus proceedings to the rule of res judicata.* The latest statement of this proposition is found in the opinion of Reed, J., in *Darr v. Burford*, 339 US 200.²²⁰ . . .

219. See *supra* note 163 (describing case). As indicated at *id.*, Rehnquist's statement, like the argument built thereon, is simply wrong as a matter of law and history. In American habeas corpus jurisprudence, the term "jurisdictional defect" has never been restricted to the sorts of issues indicated in the final sentence of this paragraph of text but has always meant "fundamental error". Compare *Custis v. United States*, 511 U.S. 485, 494-96 (1994) (Rehnquist, C.J.) (restating his theory), with *id.* at 508-10 (Souter, J., dissenting) (answering argument).

220. See *supra* Part II.A.1 (describing case).

The early cases of *Frank v. Magnum*, 237 U.S. 309, and *Moore v. Dempsey*, 261 U.S. 86, are vague in their language as to the precise effect to be given a previous adjudication in the state cts. In *Frank*, the writ was denied, the majority relying at least in part on the previous state determination, although not expressly calling it *res judicata*. 237 U.S. at 334. *Moore* seems to reject the idea that *res judicata* governs, though again not in express language, on the grounds that the charge of mob domination, if true, would be such as to actually oust the trial court of jurisdiction. Thus the rationale for the decision might be said to be not that *res judicata* did not apply, but that mob domination goes to the jurisdiction of the court, and therefore under orthodox principles collateral attack is permissible.

Recent cases have not clarified this rule. . . . [T]he important question of the weight to be given to previous adjudication by state courts has never been squarely decided recently, and language supporting any view can be found in the opinions.

The Practice.—With only such vague standards to guide them . . . confusion [reigns] in the lower courts. . . . Where the District Judge has been receptive to claims of denial of due process presented in habeas corpus, and has not been disposed to give much weight to previous state adjudication, egregious conflicts between the state and federal systems have resulted.²²¹

* * *

The rationale for this strangely disturbed state of affairs . . . is apparently that the state courts do not adequately protect the rights of defendants. . . . If the judgments of state courts were otherwise final, there might be good reason for this. But they are subject to review here. All claims cannot be reviewed, but the few that are may set a standard for the guidance of state cts in similar matters. To think that state cts would deliberately or in ignorance refuse to follow Supreme Court precedents is to suggest a malady in the body politic which no additional hearing before a federal judge would cure.

I respectfully submit that the Court would perform a signal service to the federal system if they would lay down a rule which required federal district judges to observe the ordinary principles

221. The next paragraph of the memorandum, elided here, discusses the Wells litigation, described by Justice Jackson in *Brown v. Allen*, 344 U.S. 443, 537 n.11 (1953) (Jackson, J., concurring); see also *infra* note 231 and accompanying text.

of *res judicata* in passing on habeas corpus petitions from those confined under state sentence. An exception could be made for the case where denial of the right of counsel made meaningless the opportunity to litigate questions in the previous proceedings, *Johnson v. Zerbst*, *supra*. But where the defendant has had counsel to argue all his points to the trial court, the state appellate courts, and to petition this ct for cert, it seems to me the interest in preserving some dignity in the state cts and in discouraging utterly frivolous habeas corpus petitions . . . outweigh[s] the extremely rare case where a more just result would be obtained by allowing the district judge to re-examine matters already litigated in the state ct.²²² This would [not] . . . require outright overruling of any of this court's decisions on the matter, though the language in some would have to be limited.

When the Court returned in the fall of 1952, Rehnquist sent Justice Jackson a memo entitled "*HABEAS CORPUS*, revisited"²²³

Having submitted a lengthy memo on this subject to you last spring in connection with the cases that are to be re-argued, I will not cover the same ground. You said the other day that you thought the best policy would be to completely forget about precedent and write a new ticket. There are now, as you know, two lines of activity in the court.

(1) *Reed*. From the compendious memo which he circulated at the end of last term,²²⁴ I think he regards this problem as basically the step to be taken after *Darr v. Burford*. . . . *Reed* . . . seems to see . . . only the further problem of "what weight must be given to this ct's denial of cert" . . . [and] concludes that denial of cert here must be given "respectful consideration" by the federal district ct. This contributes nothing positive except a new heading in the "Words and Phrases" volumes, and has the bad result of an express invitation to confusion among the lower cts. . . .

(2) FF. One of the clerks has been working most of the sum-

222. This position closely resembles the one that Bator later took. See Bator, *supra* note 8, at 458; see also *infra* notes 229, 329.

223. The document is to be found in the Robert H. Jackson Papers, Library of Congress, Legal File, Supreme Court-O.T. 1952, Case Nos. 32, 22, 20, 31, *Brown v. Allen*, etc., Folder #2. Again, obvious typographical errors have been silently corrected.

224. See *supra* text accompanying note 128. This reference indicates that Rehnquist's memorandum was written prior to Justice Reed's circulation of September 26, 1952, see *supra* text accompanying note 141.

mer on the problem, compiling a new set of statistics for what presumably will be a bigger and better appendix.²²⁵ The previous statistics given in *Darr v. Burford* showed that about 500 petitions from prisoners in state custody were disposed of each year by the federal district cts, and that between 2 and 3% of these resulted in the prisoners being released. FF drew the conclusion [that] since this percentage was low, there was no conflict between state and federal systems. I submit that this conclusion misses the point—in every one of the 500 cases where a petition is disposed of, or at least those in which a return must be made, the state judiciary is put on trial. . . .²²⁶

FF's point about this ct not being a good one to handle matters such as this, because they are essentially [matters] of fact, is well taken. But he proceeds to the conclusion that therefore the federal district cts must be open to them. This conclusion is valid only on the assumption that *some* federal court must be open to allow prisoners to collaterally attack a state conviction. It rests on the assumption that both history and policy make it desirable to make a special exception to the ordinary rules of *res judicata*. . . .

(a) History. . . . Until 1867, only federal prisoners could use HC in federal cts, and then only to attack the validity of commitment papers.²²⁷ When speaking loosely of the "broad scope of the great writ" it is well to remember that classical expressions on the subject dealt with England, where there is unitary jurisdiction.²²⁸ Our problem is present here only because of the difference between the US and England—here the states have primary jurisdiction to punish criminals.

225. This reference supports the dating proposed *supra* note 224 by making clear that Rehnquist's memorandum was, in any event, written before Justice Frankfurter's circulation of October 13, 1952, see *supra* text accompanying note 146. The law clerk working on the project was Donald T. Trautman, see *Brown v. Allen*, 344 U.S. 443, 514 n.2 (1953) (appendix to opinion of Frankfurter, J.), later a professor at Harvard Law School, see *Obituary, Donald T. Trautman, Professor at Harvard Law School*; at 69, *BOSTON GLOBE*, Sept. 22, 1993, at 73.

226. For the form in which Justice Jackson ultimately incorporated this thought into his opinion, see *Brown v. Allen*, 344 U.S. 443, 533 (1953) (Jackson, J., concurring).

227. *But cf.* Freedman, *supra* note 168, at 536-37, 595-600 (disputing this proposition and presenting contrary authority).

228. *But cf. Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202 (1830) (Marshall, C.J.) ("The writ of *habeas corpus* is a high prerogative writ, known to the common law, the great object of which is, the liberation of those who may be imprisoned without sufficient cause. It is in the nature of a writ of error, to examine the legality of the commitment.").

(b) Policy. One need only to venture out into the halls of this Honorable Court to hear ringing phrases to the effect that [where] liberty is at stake, traditional rules ought not to apply. I suggest that the only question really involved is, "Is this the kind of job that the federal cts can do better than the state cts?"²²⁹ . . . [This is not a situation where] the claim of one state will necessarily exclude the claim of another state, or of the federal government. . . . This is not to say that there should be no federal standards of due process, but only that we should trust the state cts to enforce them, as we do other federal standards.

The above is simply added reason for my hearty concurrence in your statement of last week that, whereas [the] denial of cert should not be held to approve the application of the law by the cts below in the sense of *stare decisis*, it should be *res judicata* so far as any further federal intervention in the case is concerned. Perhaps . . . exception[s] should be made where ptr has been denied counsel . . . [and] for actual newly discovered evidence, raising questions which ptr *did* not and *could not have* litigated in the state proceeding. Apart from these two, apply your rule of *res judicata*—and no mealy mouthed talk about "respectful consideration" which would only confuse the lower cts.

While the ACLU probably would not agree, I think that this is the forward looking approach to the problem. For many years this ct exercised a strict supervision over state economic legislation, rate-making, etc. That day is now gone. . . . But [the] very factions which most loudly damned the old court for its position on property rights are the most vocal in urging that this ct and other federal cts strictly supervise the state cts on matters of "civil liberties" and procedural due process. This inconsistency is apparently justified on some preferred position theory. What these forces fail to recognize is that the vice of the old court was not that it imposed the wrong views on the states, but that it imposed any views at all. In the fields of liberty as well as property, the states must be left to work out their own destinies within broad limits. If innocent people are regularly sent to jail, this ct or other federal cts may intervene; but subject to that limitation, there is no more reason for making this ct or other federal cts into a "super legal-aid society" than there was for elevating the doctrine of freedom of contract into a constitutional principle. For

229. Bator eventually made exactly this argument in his article. See Bator, *supra* note 8, at 441-54, which, as suggested *infra* note 329, is perhaps a further reason that his views on *Brown* found Rehnquist's ear receptive.

this ct to relax the federal grip on state criminal justice would be [a] step in the same direction as was taken by the case which overruled *Lochner v. New York*.

Lastly, may I humbly state my hope that the opinion of the ct in these cases will be yours. Reed is so bogged down in precedent that he will be unable to reach an unequivocal result that is acceptable to either side. FF . . . is one who must set down in the opinion every nuance that comes to mind. This makes for great erudition but often damn poor law. What this problem needs is an incisive statement of new law. . . .

WRITE!!!

Around October 1, 1952, Rehnquist sent a memo headed "To: The Boss Re: Habeas Corpus."²³⁰ Responding to Justice Reed's circulation in *Brown v. Allen* dated September 26, Rehnquist wrote that the alternatives seemed to shape up as follows:

(1) Reed

(a) previous adjudication in state cts, without more, not binding, and not even necessary to be considered

(b) previous adjudication in state cts, followed by denial of cert here—not binding upon DC, but may be "considered"

(c) *Darr v. Burford*, requiring petition for cert here as part of exhaustion of remedies, remains in effect.

Criticisms:

(a) Still pretty vague, because so enmeshed in precedents: what does "consideration" mean to the District Judge?

(b) Still does not strike at the small minority of federal judges, such as Goodman, who are causing trouble,²³¹ since they are

230. This is to be found in the Robert H. Jackson Papers, Library of Congress, Legal File, Supreme Court—O.T. 1952, Case Nos. 32, 22, 20, 31, *Brown v. Allen*, etc., Folder #2.

The document is undated, so the dating given in the text is conjectural, but for the following reasons, I believe it to be correct within a few days. The document begins "Reed, J, circulated this yesterday afternoon" and describes material appearing at "p. 6-8 of Stanley's memo." *Id.* at 1-2. That material appears in the indicated location of Justice Reed's memorandum in *Brown v. Allen*, dated September 26, 1952, see *supra* text accompanying note 141, a Friday. Justice Clark's copy of that memorandum, found in the Tom C. Clark Papers, Tarlton Law Library, University of Texas at Austin, Box A19, bears a pencil annotation indicating its receipt on September 30, 1952. On the assumption that all chambers received the circulation on that day, Rehnquist was writing on October 1, 1952.

231. The reference is to Judge Louis E. Goodman of the Northern District of California, who sat on the *Wells* case, see *supra* note 221.

apparently free to disregard previous adjudication if they so desire.

(2) Felix (as I piece it together from his clerks)²³²

(a) neither previous state adjudication nor denial of cert here have any weight whatever

(b) *Darr v. Burford* overruled,²³³ result is to transfer this

Following the publication of the initial print of the *Brown v. Allen* opinion on February 9, 1953, Judge Goodman wrote Justice Jackson a letter referring to note 11 of his opinion and saying that, as "one of the first judges who, in published writings, called attention to the mounting abuse of the writ," he was "somewhat shocked to find myself, not by name of course, singled out as an aider of abusive habeas corpus practice"; he urged that his conduct had been entirely in accord with governing Circuit and Supreme Court authority. See Letter from Louis E. Goodman to Robert H. Jackson (Feb. 16, 1953), Robert H. Jackson Papers, Library of Congress, Legal File, Supreme Court-O.T. 1952, Case Nos. 32, 22, 20, 31, *Brown v. Allen*, etc., Folder #3.

Justice Jackson replied: "I think the footnote to which you call my attention unconsciously does you an injustice. Fortunately, the Reporter's Office had not prepared the final text for the United States Reports, and I am adding to the footnote, after the citation of the *Wells* case, the following:

"The opinions of the District Judge show that he was well aware of the difficulties presented by the procedure, but felt he had no alternative in the light of this Court's decisions. Indeed, he has contributed the lessons of his own experience in this field in Goodman, Use and Abuse of the Writ of Habeas Corpus, 7 F.R.D. 313."

Letter from Robert H. Jackson to Louis E. Goodman (Feb. 19, 1953), Robert H. Jackson Papers, Library of Congress, Legal File, Supreme Court—O.T. 1952, Case Nos. 32, 22, 20, 31, *Brown v. Allen*, etc., Folder #3.

During World War II, Judge Goodman had dismissed on due process grounds the prosecution for draft resistance of 26 American citizens of Japanese descent who were at the time interned in California relocation camps. *United States v. Kuwabara*, 56 F. Supp. 716, 717-19 (N.D. Cal. 1944). The story has recently been told in Eric L. Muller, *All the Themes but One*, 66 U. CHI. L. REV. 1395, 1428-32 (1999), where the action of the "courageous judge" is presented as evidence that "the judicial record on civil liberties in wartime is a good deal more complex than the rather simple case," *id.* at 1432, presented by Chief Justice Rehnquist in WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE* (1998).

232. This reference is consistent with the dating suggested *supra* note 230, since it implies that the document was written before Justice Frankfurter laid out his views in his memorandum of October 13, 1952. See *supra* text accompanying notes 149-53.

233. If, as is plausible, this is what Justice Frankfurter wished to do, see *supra* text accompanying note 138 (implying a desire to revisit *Darr*), he did not so indicate in his formal circulations. As recounted above, these did not seek to persuade the brethren to abandon the requirement that would-be habeas petitioners first file a certiorari petition, but only to insure that the denials of such petitions would not be given any substantive effect. This is consistent with the approach that both Justice Reed and Justice Jackson took in modifying their various drafts; all the Justices made substantial efforts to moderate positions that they knew lacked internal sup-

kind of litigation almost entirely to [the] lower federal cts, which he says are far more capable of handling it than we [] are.

Criticisms:

This in effect sets a one judge district ct as a reviewing tribunal for the highest ct of the state in criminal matters. A state ct is not a ct of last resort, but simply one intermediate step in a series of interminable appeals. . . .

(3) Suggestions to Restrict Collateral Attack other than Reed's

(a) Previous litigation in state cts on merits, followed by denial of cert here, is *res judicata* though not *stare decisis*. This is your idea and I think it far superior to any of the above. . . . *Darr v. Burford*²³⁴ would have to be retained in order to prevent prisoners from circumventing the effect of this rule by not petitioning for cert.

(b) Accept Judge Parker's construction of "exhaustion of remedies" provision (8 FRD 171), rejected by Stanley, to the effect that in any state where habeas corpus is not *res judicata*, state remedies are always available.²³⁵ Ptr could seek cert to review these collateral attacks in the state cts, but lower federal cts would not be available. Thus the unseemly conflict between coordinate courts would be eliminated, and yet a federal avenue would remain open for the exceptional case. . . .

(c) A less forthright method for cutting down this kind of litigation would be based on the fact that almost without [] exception these petitions to the federal ct are *in forma [pauperis]*. . . . [T]he federal cts have always required . . . a certificate of probable cause [for such litigants to take appeals]. The rule could be laid down that where the contention overruled by the federal district ct has also been decided against him on the merits in the state proceedings, there is as a matter of law no probable cause. . . . [Thus,] (1) no prisoner who lost in the DC could appeal (2) the DCs themselves would feel freer in dealing with the petitions, since there would be no review of a decision adverse to the

port.

234. Next to this paragraph, Justice Jackson wrote "yes."

235. Next to this paragraph, Justice Jackson wrote "yes." He incorporated the thought in an early draft of his opinion, *see infra* text accompanying note 248, but abandoned it thereafter. As indicated in the next sentences of text, the consequence of its adoption would have been that, in a state permitting successive post-conviction filings in state court, the prisoner would never be able to file a federal habeas corpus in district court—only a petition seeking certiorari from the denial of state remedies. The treatment of this issue by the rest of the Court has been described *supra* text accompanying notes 142-45.

prisoner.

(d) Adopt a new policy on certs in this ct [on direct appeals]. When the contention raised is, in the opinion of six judges, free of state grounds which would preclude review,²³⁶ this ct should deny with the notation "with prejudice to the right to bring action for federal habeas corpus."²³⁷

It is not clear when Justice Jackson decided that he would write an opinion (although it was in all likelihood after the conference of October 27, 1952).²³⁸ But once he did, his first step was to draft himself an extensive set of handwritten notes, headed "Habeas Corpus."²³⁹ Although these contain a number

236. This appears to mean, "when the vote to deny certiorari is not based on the existence of adequate and independent state grounds."

See Letter from William O. Douglas to Jerome N. Frank (Sept. 27, 1956) ("You state in your letter [of September 11 about pending habeas corpus legislation, see *infra* text accompanying note 299] that you assume we are too busy to scrutinize carefully all the certs coming to us from State courts denying relief. I do not think that is true. We look at all these things very closely. The difficulty is that there are often persuasive grounds for believing that the State court judgment rests on an adequate State ground. Some here are sticklers on that point. Others of us are more liberal in that regard. But nonetheless a lot of cases get impaled on that barrier. So we do not get to the merits. That leaves open the avenue of relief through the Federal courts."). Copies of both letters are to be found in the William O. Douglas Papers, Library of Congress, Box 583, Habeas Corpus Law Folder.

237. Justice Jackson never gave serious consideration to this suggestion, consistently maintaining his view, see *infra* page 1601, that habeas corpus was the appropriate vehicle for the assertion of errors that did not and could not have been made part of the record before the Court on certiorari. See *Brown v. Allen*, 344 U.S. 443, 546-47 (1953) (Jackson, J., concurring in the result). Cf. *Coleman v. Balkcom*, 451 U.S. 949, 956-57, 963 (1981) (Rehnquist, J., dissenting from the denial of certiorari) (proposing that the Court grant certiorari from the state court's denial of post-conviction relief in a capital case where "the issues presented are not substantial" and petitioner has not "made any showing in the Georgia courts that he was deprived of any rights secured to him by the United States Constitution" so "that this Court may deal with all of petitioner's claims on their merits" and thereby preclude federal habeas review should the petitioner lose); *Coleman v. Kemp*, 778 F.2d 1487, 1543 (11th Cir. 1985) (granting petitioner federal habeas relief), *cert. denied*, 476 U.S. 1164 (1986).

238. See *supra* text accompanying notes 159-64 (describing conference). The inference regarding timing is based on the fact that no typed draft emerged until December, see *infra* text accompanying note 241, and the hypothesis that it would be inefficient to begin working on such a project until after one heard the views of the brethren in conference. In addition, the notes described *infra* text accompanying notes 239-40 contain the Justice's research responding to the point: "FF says Frank v Magnum and Moore v Dempsey [are] authority for considering on h.c. same issue as on cert.," and so were written at some point after Justice Jackson had heard this from Justice Frankfurter.

239. Opinion notes regarding Habeas Corpus, Robert H. Jackson Papers, Library

of thoughts that eventually found their way into his ultimate opinion, they also contain criticisms of the existing system that might have led him to voice significantly more radical views, e.g., "Abolishing states in interest of civil liberties";

"Any old key good enough to open jail doors. Presume innocent & court guilty of miscarriage";

"H.C. a judicial plaything in [a] game without rules";

"Rights of state v. individual-contrast individual elsewhere Govt. v taxpayer-regulated-controlled—

But in criminal law tie hands society-free accused. 'never had it so good'"²⁴⁰

Justice Jackson next produced several dated typescript drafts of an opinion, none of which he circulated. While showing significant variations, these display a pronounced trend towards narrowing and softening the legal propositions asserted and a shift in focus from matters of substantive due process law to matters of habeas corpus procedure.

The draft of December 29, 1952 states:²⁴¹

It is my belief that our greatest need is not to try to cite or apply the recent decisions on this subject but rather to clear the site of many of them and to look forward rather than backward for our remedy. The only usefulness I find in most of our recent procedural precedents on this subject is that they teach us how it came about that these abuses assume such proportions. . . .²⁴²

I can not exonerate the state courts from some responsibility for the extension of federal interference. One is sometimes shocked at the callousness with which the rights of defendants are treated, particularly where the defendant happened to be of particularly unpopular groups in the locality. We cannot claim either that federal justice is free of that. But it has been lawless procedures and savage penalties which were discreditable to the

of Congress, Legal File, Supreme Court-O.T. 1952, Case Nos. 32, 22, 20, 31, Brown v. Allen, etc., Folder #1.

240. *Id.*

241. Draft Opinion, Nos. 20, 22, 31 & 32 (dated Dec. 29), Robert H. Jackson Papers, Library of Congress, Legal File, Supreme Court-O.T. 1952, Case Nos. 32, 22, 20, 31, Brown v. Allen, etc., Folder #2. Like all of his notes and drafts, this one appears to be Justice Jackson's own work, with only tangential incorporation of Rehnquist's ideas and research.

242. The paragraph omitted at this point consists substantially verbatim of the Rehnquist paragraph labeled "History" that is quoted *supra* text accompanying note 227.

profession that originally moved the federal government into the state field. . . . [T]here were . . . cases of obtaining confession by the most brutal third degree methods of criminal and physical abuse of the person and by acts of terrorism which, given jurisdiction, no decent court could condone. There were instances of virtual denial of counsel to the accused and there were flagrant violations in some parts of the country of the federal statute which prohibits discrimination of a racial character in the selection of juries.

These decisions, however . . . have left the boundaries of federal power to interfere and of the grounds upon which interference may be based so vague and indefinite that no prisoner is wholly without hope of release if he can only get his case here. . . .

A considerable part of the vagueness of the effect of the Fourteenth Amendment on state trials is inherent in the subject as indicated by previous decisions. For example the *Moore v. Dempsey*, doctrine that a trial must be fair and not a mask or a form. With the development of modern methods of publicity . . . it is almost impossible to say when a fair trial has been had. . . . [Exclusion of a confession] in order not to prejudice the jury is utterly unavailing if at his dinner table . . . [a potential juror] hears the content of that confession recited over the radio perhaps with extortions [*sic*] to suit the predilections of the commentator. We have stripped, by our interpretation of the same amendment, the state courts of power to protect the processes of fair trial against this kind of intrusion. I am frank to say that I do not know whether any highly publicized trial today, state or federal, could bear the scrutiny indicated in *Moore v. Dempsey*

* * *

[Additionally,] we have really reached the point where any case in which a confession is used may present a constitutional question and I again would be unable to say what questioning of a suspect would be permitted. Also, we have gone beyond the federal statute which prohibits racial discrimination in the selection of jurors and have entertained cases in which a strong minority have indicated that it is even unconstitutional for a state to attempt to select jurors on the basis of their intelligence. In *Johnson vs. Zerbst*, 304 U.S. 458, by a feat of interpretation the Court expanded the right to have counsel in a federal case to mean the right to be furnished counsel . . . [,which] left the whole question of the right to counsel in state court trials uncertain.

Moreover there was talk in many of the opinions about the right to effective counsel. . . . The result is that we have not only a number of appeals by persons who have been convicted of minor offenses where they apparently did not have counsel, but we also have a large number of cases in which the prisoner admittedly had counsel but the claim is made that he was not effective. . . .

Another prolific source of litigation by habeas corpus has been the so-called McNabb Rule, the rule requiring immediate or semi-immediate arraignment of a prisoner after his arrest. A rule which was adopted only for federal courts and not as a constitutional matter, but in which prisoners see constitutional possibilities of its application against the state.²⁴³

Only after this 10-page attack on the substance of contemporary due process doctrine in the criminal procedure field, does the draft turn to matters of federal habeas corpus procedure.²⁴⁴ Although it here resembles more closely the discussion of the same subjects in his ultimate opinion,²⁴⁵ the tone in the draft is notably sharper, describing "lawlessness in procedure run riot," a situation in which "there are no rules. And habeas corpus has become pretty nearly a judicial plaything in a game without rules."²⁴⁶ Specifically, on the issue of the effect of the denial of certiorari:

It is true that no one outside of the Court and often those inside it do not know all of the reasons which cause six members to withhold their consent to review. Some may think the judgment below is right, others that it is wrong but of no general importance to the law, while another may believe the record not clear, that the question was [not]²⁴⁷ raised or preserved and still another, [may] think the docket is sufficiently large already and wants to be off on vacation. One may even think that the question is presented and is important and is wrongly decided but still vote against grant of certiorari in fear that the ultimate decision of his brethren would strengthen or extend what he regards as a

243. Draft Opinion, *supra* note 241, at 1-10.

244. *Cf.* Yackle, *supra* note 218, at 2349 (noting a shift in concerns of habeas opponents from matters regarding allocation of business between state and federal courts to substantive disagreement with the Court's criminal procedure rulings).

245. See *Brown v. Allen*, 344 U.S. 443, 540-48 (1953) (Jackson, J., concurring in the result).

246. Draft Opinion, *supra* note 241, at 11-12.

247. This word is not in the original document; the interpolation is purely mine.

bad rule. . . .

But denial of certiorari does have all the meaning in the world in applying the doctrine of *res judicata* to the particular case in which it issues. It leaves standing unimpaired a final judgment which, under any rational theory of the law, is conclusive against collateral attack as to the issues it settles or could have settled had the parties raised them. . . .

Habeas Corpus goes to matters that are not apparent on the record itself. This distinction has been cavalierly cast aside in recent decisions of this court and is responsible for no small part of our present difficulty. . . .

At the risk of being a reactionary, I would revert to the former rules governing habeas corpus and certiorari. We must not forget that these rules were deemed necessary to protect it from abuse by men who took far more risks than we do to grant the writ at all. We often pay them lip service and then honor them in the breach. . . .

No petition should be entertained to raise a question which was reviewed or could have been reviewed by appeal or other process. The disregard of this old and rational limitation has caused no end of mischief. . . . Frequently no appeals are taken. . . . In other cases an appeal is attempted but defaults occur. . . . Then there are the cases in which the prisoner does appeal and does obtain from the state courts a review of his case. What possible excuse can there be for allowing the prisoner to then renew the struggle in federal court. In effect, to transfer his case on the same questions from the state courts, which [have] the primary function of enforcing the criminal law, to a federal judge on collateral attack upon the convictions. There is little that I can add except hearty approval to Judge Parker's comment on this subject 8 F.R.D. 171.²⁴⁸ I think that his views would end unseemly conflict between coordinate courts and yet a federal avenue would remain open for the exceptional case in which the state judges have been led to violate constitutional rights.

Criminal law . . . is in disrepute and it is in many respects a disgrace to the profession. . . . A strong contributing factor to this is the law's delays, the fact that penalties are never really effective so long as the public is interested in the case. There is a great to-do about indictment and about conviction and then begin

248. As indicated, *supra* note 235, and consistent with the progression of his drafts towards more moderate views, Justice Jackson deleted this suggestion from later drafts; see also *infra* note 252.

a series of appeals to intermediate courts, to courts of last resort, to this Court and then there are applications for rehearings in each of those courts and then when that is at an end, the whole process is started over again by writ of habeas corpus, habeas corpus in state courts, habeas corpus in the federal courts, appeals, rehearings, petitions for certiorari, petitions for rehearing on denial of petitions for certiorari. The whole thing is disgusting and a disgrace to the profession. Moderate penalties promptly and effectively applied after fair and calm trial reviewable once to make sure that no prejudicial error has occurred is all that a defendant, in my opinion, is entitled to. When he has had that, society is entitled to have the decrees of its courts enforced with finality.²⁴⁹

The Justice's next draft, of January 5, 1953,²⁵⁰ was structurally distinctly different.²⁵¹ But it, too, while overlapping with the final version, differed from it in being far stronger in tone and substance:

The generalities of the Fourteenth Amendment . . . provided a basis for the judicial expansion of the substantive law of habeas corpus on the premise that they are violations of due process of

249. Draft opinion, *supra* note 241, at 13-20.

Justice Rehnquist's proposal in his opinion dissenting from the denial of certiorari in *Coleman v. Balkcom*, 451 U.S. 949, 956 (1981), described *supra* note 237, was motivated by similar concerns:

[T]he existence of the death penalty in this country is virtually an illusion. Since 1976, hundreds of juries have sentenced hundreds of persons to death, . . . yet virtually nothing happens except endlessly drawn out legal proceedings. . . . I do not think that this Court can continue to evade some responsibility for this mockery of our criminal justice system. . . . [T]his Court . . . has made it virtually impossible for States to enforce with reasonable promptness their constitutionally valid capital punishment statutes. When society promises to punish by death certain criminal conduct, and then the courts fail to do so, . . . they undermine the integrity of the entire criminal justice system.

Coleman, 451 U.S. at 957-59.

250. Draft Opinion, Nos. 20, 22, 31 & 32 (dated Jan. 5, 1953), Robert H. Jackson Papers, Library of Congress, Legal File, Supreme Court-O.T. 1952, Case Nos. 32, 22, 20, 31, *Brown v. Allen*, etc., Folder #3.

251. Most obviously, it deleted the long introductory attack on the substance of contemporary due process jurisprudence in the criminal procedure field, *see supra* text accompanying note 243, although, as will be seen below, remnants of the thought persisted for the nonce. But the overall focus of this draft, most of which is not quoted here because of its similarity to the ultimate opinion, is on habeas corpus procedure as such.

law. . . . [W]hen we dislike any particular practice or irregularity sufficiently we can read into the Fourteenth Amendment a Constitutional prohibition of it and it thereby becomes correctable by habeas corpus. Both the courts and the profession are too familiar with this expanding concept in this field to require detailed citations or discussions of cases. While in every other field, such as taxation, regulation of business, control of activities, the power of the state over the individual has been expanded. The trend of recent times has been to limit the right of the state to enforce its criminal judgments against the individual unless those judgments in all respects meet the approval of the last federal judges to pass upon them. . . .

That there has been a simultaneous trend away from an effort by this Court to enforce a rule of law in favor of a practice of deciding by the personal notions of justice of a majority of the judges is the belief of the profession and I must say I share it. . . . [The profession's view is] that we have no fixed principles and that any defendant may stand a chance of getting his liberty if he can only get his case in federal court.

In seeking a way out of this bog, it is important to distinguish what is practicable from what is impossible. Gallant tilting at windmills is a pastime for judges no less ridiculous than for knights. Even if it were desirable it is too late in the day, barring some such public storm as was raised by President Roosevelt's plan to reorganize this Court, which accompanied the retreat from the use of the Fourteenth Amendment to restrict state legislation in the economic field, to now reverse the course of interpretation which warrants all manner of interference in the states' action in the criminal field.²⁵²

Reorganizing his material once more, Justice Jackson produced another private draft on January 13,²⁵³ which largely tracks his eventual published opinion in its legal rulings and

252. Draft Opinion, *supra* note 250, at 1-3, 7-8. Noting the shallow roots of *Darr v. Burford*, 339 U.S. 200 (1950), see *supra* text accompanying notes 41-42, the opinion also contains a proposal, later dropped, that the prisoner be given the option of either seeking certiorari from the highest state court (and be precluded by an adverse result from seeking habeas corpus) or foregoing certiorari at that point and applying to the federal district court for habeas corpus. See Draft Opinion, *supra*, at 11.

253. Draft Opinion, Nos. 20, 22, 31 & 32 (dated Jan. 13), Robert H. Jackson Papers, Library of Congress, Legal File, Supreme Court-O.T. 1952, Case Nos. 32, 22, 20, 31, *Brown v. Allen*, etc., Folder #3.

language. On January 28, he finally circulated an opinion; it entered the U.S. Reports without substantial change.²⁵⁴

Following Justice Frankfurter's circulation of his opinion on the merits on February 5,²⁵⁵ the full set of opinions was duly released on February 9, 1953.

C. *The Dispositions*

The Court's published decision dealt with two procedural topics. First, it ruled five-to-four that a previous denial of certiorari was to be given no substantive effect by the judge ruling on a later federal habeas corpus petition.²⁵⁶

Second, it reiterated the long-established law that, in determining whether a state conviction violated the Constitution, a

254. Among the surviving copies is one in the Tom C. Clark Papers, Tarlton Law Library, University of Texas at Austin, Box A19.

As may be seen in the Jackson Papers, Library of Congress, Legal File, Supreme Court-O.T. 1952, Case Nos. 32, 22, 20, 31, *Brown v. Allen*, etc., Folder #3, Justice Frankfurter attempted, in an informal note (probably of January 28, 1953) asking Justice Jackson to detail his disagreements, in a letter dated January 29, 1953, and through marginal comments on the circulated draft, to persuade Justice Jackson to modify the views stated in his opinion. These efforts were unavailing. The only response Justice Frankfurter received from Justice Jackson was a note replying to the first one, which read in full:

FF. I can give the answer in short form
Yours is too damned gentle-I want to make it
hurt.

Bob

This document is to be found in the Felix Frankfurter Papers, *supra* note 14, Part I, Reel 66, Frame 00028.

But just as Justice Frankfurter was unable to convince Justice Jackson, so must it have been clear to Justice Jackson that he himself would be highly unlikely to persuade any of the others—and, indeed, there is no written record of his having tried to do so. As indicated in the text, he simply circulated his opinion and promptly filed it.

255. There is a copy in the Tom C. Clark Papers, Tarlton Law Library, University of Texas at Austin, Box A19.

256. See *Brown v. Allen*, 344 U.S. 443, 497 (1953) (opinion of Frankfurter, J.) (expressing the "position of the majority upon that point," *Brown*, 344 U.S. at 452). It thus rejected "the position of the Fourth Circuit," *id.* at 491, which has been described *supra* note 93. The section of Justice Reed's opinion for the Court stating the minority viewpoint on this issue, see *Brown*, 344 U.S. at 456-57, had the support of Justice Minton and Chief Justice Vinson, see *supra* note 40, who did not write separately. Justice Jackson urged a broader rule of preclusion, see *Brown*, 344 U.S. at 543-45 (Jackson, J., concurring), which would have foreclosed the petitioners before the Court.

federal habeas corpus court should, after consideration of the state court record, decide what further factual inquiries were needed in order to discharge responsibly its duty to make an independent determination of federal law, a decision that would be given a large measure of deference.²⁵⁷ While contained in two opinions (reflecting the inability of Justices Reed and Frankfurter to agree upon a single draft) all the Justices but Jackson were in accord on this second set of procedural issues.²⁵⁸

257. See *Brown*, 344 U.S. at 463-64 (opinion of the Court per Reed, J.), *id.* at 500 (opinion of Frankfurter, J.). Cf. Freedman, *supra* note 22, at 1533-34 (tracing this rule to Frank).

Justice Frankfurter's published discussion of the procedural issues tracked his earlier internal writing, see *supra* note 153, both on the matter of the record for federal habeas corpus adjudication, see *Brown v. Allen*, 334 U.S. 443, 503-04 (1953) (opinion of Frankfurter, J.), and in elaborating upon the established distinctions between earlier state rulings on:

(a) questions of historical fact (which the federal judge could accept as binding "[u]nless a vital flaw be found in the process of ascertaining such facts"), *Brown*, 334 U.S. at 506,

(b) "questions of law [which] cannot, under the habeas corpus statute, be accepted as binding," since "[i]t is precisely these questions that the federal judge is commanded to decide," *id.*, and

(c) "mixed questions or the application of constitutional principles to the facts as found," where "the duty of adjudication [rests] with the federal judge," and "[t]he State court cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right." *Id.* at 507-08.

Justice Reed's opinion, although more oblique, agreed. See *id.* at 463-65.

The current Court continues to apply this framework. See *Thompson v. Keohane*, 516 U.S. 99, 102 (1995).

258. That there was no real disagreement between Justices Reed and Frankfurter respecting hearings—so that indeed "[t]he views of the Court on these questions may thus be drawn from the two opinions jointly," *Brown v. Allen*, 344 U.S. 444, 497 (1953) is shown by the fact that no Justice believed that the district courts in the cases at hand had been required to conduct *de novo* review of the factual findings of the state courts regarding whether confessions had been coerced or a petitioner was sane. See *infra* note 262; text accompanying notes 279, 310-13. Thus, the opinion not only made no new law on the scope of review, see *supra* text accompanying notes 33-35, but also did not do so on the issue of when hearings were mandatory.

At the same time, as described *infra* note 265, Justice Reed pointedly approved of the decision of the *Speller* district court to exercise its well-established discretion to conduct a hearing into how North Carolina selected juries. See *Brown*, 344 U.S. at 478; *supra* note 101 and accompanying text; *infra* text accompanying note 326.

In short, Justice Frankfurter was accurate in reporting: "The issue of the significance of the denial of certiorari raises a sharp division in the Court. This is not so as to the bearing of the proceedings in the State courts upon the disposition of the application for a writ of habeas corpus in the Federal District Courts." *Brown*,

On the merits of the cases decided in the *Brown* opinion,²⁵⁹ on the other hand, the Justices were sharply at odds. Justice Reed wrote for himself and Justices Vinson, Minton, Burton, Clark and Jackson in denying all relief. Justice Black's dissent was joined by Justice Douglas, while Justice Frankfurter's was joined by those two Justices.

In *Brown*, the Court focused principally on the challenge to the jury selection procedures and held that the use of tax lists as the basis of selection for grand and petit jurors was not unconstitutionally racially discriminatory, notwithstanding the racially unequal distribution of wealth, the resulting disparate impact on the composition of the jury pool, and North Carolina's history of unconstitutional discrimination in jury selection.²⁶⁰ Nor did the Court's terse review of the record respecting the confession persuade it that the statement had been involuntary.²⁶¹

Both dissents discussed primarily the jury selection issue.²⁶² Justice Black concluded that there had not been a "genuine abandonment of [the] old discriminatory practices."²⁶³ Justice Frankfurter focused his fire on the impropriety of an affirmance in a case where the court of appeals had—wrongly, as the Court now held—declined to reach the merits in deference to the prior proceedings.²⁶⁴

344 U.S. at 497.

259. That is, *Brown*, *Speller* and *Daniels*, see *supra* text accompanying notes 84-119 (describing cases); as indicated *supra* text accompanying note 48, *Smith v. Baldi* was decided in a separate published opinion, United States *ex rel.* *Smith v. Baldi*, 344 U.S. 561 (1953), which is discussed *infra* text accompanying notes 274-83.

260. See *Brown v. Allen*, 344 U.S. 443, 467-74 (1953).

261. See *Brown*, 344 U.S. at 475-76.

262. This is probably because under the procedural formulations of both Justice Frankfurter, see *id.* at 504-08 (opinion of Frankfurter, J.), and Justice Black, see *id.* at 554 (Black, J., dissenting), the confession issue was one on which the district court might properly have deferred to the state's factual findings—in which case, its ultimate legal conclusion that the confession was voluntary would have been difficult to cast as reversible error. Cf. *Watts v. Indiana*, 338 U.S. 49, 52 (1949) (reviewing capital murder conviction on direct appeal, the Court, accepting the state's version of what events occurred, reverses on basis of coerced confession; Frankfurter, J. observes that "there comes a point where this Court should not be ignorant as judges of what we know as men").

263. *Brown*, 344 U.S. at 551 (Black, J., dissenting). Justice Black took a similar approach to *Speller*, adding that, unlike the majority, see *infra* text accompanying note 266, he would consider on the merits the challenge to a wealth-based jury selection system. See *Brown*, 344 U.S. at 551-52.

264. See *id.* at 556 (Frankfurter, J., dissenting); *supra* note 256; see also *supra*

The Court disposed of *Speller* similarly.²⁶⁵ It refused to consider the additional argument that, quite apart from race, wealth discrimination in jury selection was impermissible. This claim had not been asserted below, and “[s]uch an important national asset as state autonomy in local law enforcement must not be eroded through indefinite charges of unconstitutional actions.”²⁶⁶

As to *Daniels*, the Court rested its affirmance on counsel having been one day late in serving the appeals papers.²⁶⁷ “To allow habeas corpus in such circumstances would subvert the entire system of state criminal justice and destroy state energy in the detection and punishment of crime.”²⁶⁸ Justice Black responded: “State systems are not so feeble.”²⁶⁹ Justice Frankfurter wrote that—in light of the strength of the petitioners’ underlying claims²⁷⁰—the refusal of the North Carolina Supreme Court to exercise its discretion to review the merits had resulted in a “complete . . . miscarriage of justice.”²⁷¹

The real-world outcomes of these dispositions were four executions. Within a few months, *Brown* and *Speller* were put to death in the gas chamber simultaneously,²⁷² as were the *Daniels* cousins later in the year.²⁷³

note 93 (describing the court of appeals’ disposition). Since the court of appeals had decided *Speller* in the same opinion as *Brown*, see *supra* note 93, Justice Frankfurter labeled this section of his merits dissent as applicable to *Speller* as well. See *Brown*, 344 U.S. at 554-55.

265. It noted, however, that in this case the district court had held a hearing, see *supra* note 101 and accompanying text, and specifically observed:

This was in its discretion. *Moore v. Dempsey*, 261 U.S. 86; *Darr v. Burford*, 339 U.S. 214, cases which establish the power of federal district courts to protect the constitutional rights of state prisoners after the exhaustion of state remedies. It better enabled that court to determine whether any violation of the Fourteenth Amendment occurred.

Brown, 344 U.S. at 478.

266. *Brown*, 344 U.S. at 480-81.

267. See *supra* text accompanying note 108.

268. *Brown*, 344 U.S. at 485.

269. *Id.* at 553 (Black, J., dissenting). He then continued with the passage quoted *supra* text accompanying note 200.

270. See *supra* note 118 and accompanying text.

271. *Brown*, 344 U.S. at 559 (Frankfurter, J. dissenting).

272. See *Barron Mills, Clyde Brown, Speller Pay With Lives for Crimes*, WINSTON-SALEM J., May 30, 1953, at 1.

273. See *Cousins Die In Gas Chamber For Killing Pitt Cab Driver*, THE NEWS and OBSERVER [Raleigh, N.C.], Nov. 7, 1953, at 1.

The decision in the companion case of *Smith v. Baldi*²⁷⁴ followed a similar pattern, albeit with less fatal consequences. Again, the Court was unanimous on the issues of habeas corpus procedure.²⁷⁵

Smith argued that he was insane, that an insane person could not constitutionally be executed, and that he was entitled to a federal court hearing on whether he was in fact insane.²⁷⁶

Rejecting this claim of entitlement, the Court quoted with approval the district court's statement that only if

special circumstances prevail, should the lowest federal court reverse the highest state court in cases where the constitutional issues have been disposed on the merits by the highest state court in an opinion specifically setting forth its reasons that there has been no denial of due process of law, and where the record before the state court and the allegations in the petition for the writ before the federal court fail to disclose that the state in its prosecution departed from the constitutional requirements. That is this case.²⁷⁷

The Court then continued:

This view of the proceedings accords with our holding in the *Brown* case, *supra*. As the trial and appellate State court records which were before the District Court show a judicial hearing, where on the plea of guilty the question of sanity at the time of the commission of the crime was canvassed, the sentence does not violate due process.²⁷⁸

The dissent, written by Justice Frankfurter for himself and Justices Douglas and Black, specifically agreed that "[i]t is not for this Court to find a want of due process in a conviction for murder sustained by the highest court of the State merely because a finding that the defendant is sane may raise the gravest

274. 344 U.S. 561 (1953). See *supra* text accompanying notes 48-71 (describing the background of case).

275. See *Smith*, 344 U.S. at 565. The Court was also unanimous in rejecting Smith's substantive claim that he had a constitutional right to the appointment of a psychiatrist. *Id.* at 568. This decision was repudiated in *Ake v. Oklahoma*, 470 U.S. 68, 85 (1985). Justice Rehnquist dissented.

276. *Smith*, 344 U.S. at 568-69.

277. *Id.* at 569-70 (quoting *United States ex rel. Smith v. Baldi*, 96 F. Supp. 100, 103 (E.D. Pa. 1951) (described *supra* text accompanying notes 65-68)).

278. *Smith*, 344 U.S. at 570.

doubts.²⁷⁹ Rather, it contended, “the accused in this case was deprived of a fair opportunity to establish his insanity.”²⁸⁰

Thus, all the Justices were in accord that—accepting Smith’s legal proposition that an insane person could not be executed²⁸¹—the constitutional question was not whether Pennsylvania had resolved the factual issue of insanity correctly, but only whether Smith had been provided with a fair process for its resolution.²⁸² And that, all agreed, could properly be decided summarily.

Fortunately for Smith as well as for the interests of justice, within days after the Supreme Court’s ruling, the Pennsylvania courts ordered an inquiry into Smith’s sanity, which eventuated in a ruling that he was insane.²⁸³

279. *Id.* at 571 (Frankfurter, J., dissenting).

280. *Id.* at 572.

Neither Justice Frankfurter nor any of the others mentioned that the incumbent Philadelphia District Attorney, repudiating the views of his predecessor, had filed a brief on behalf of the prisoner. Endorsing the dissent in the court of appeals, *see supra* text accompanying note 70, this urged:

It is clear from the record, that the issues of fact raised by the petition for a writ of *habeas corpus* have not been determined either by the Supreme Court of Pennsylvania or by the United States District Court. Since substantial issues of Federal constitutional law are raised, it was incumbent on the District Court to determine the facts. . . .

It is, therefore, respectfully submitted that for the reasons contained in the dissenting opinion of Chief Judge Biggs the judgment should be reversed and the cause remanded with instructions to the District Court to make findings of fact necessary for the proper determination of the Federal questions involved.

Brief of the District Attorney for the City and County of Philadelphia at 3, *Smith v. Baldi*, 344 U.S. 561 (1953) (No. 31). *See* Earl Selby, *Dilworth Will Intercede in High Court for Killer*, PHILADELPHIA EVE. BULL., Apr. 16, 1952, at 1 (describing prosecutor’s decision as “an action believed to be almost without precedent” and detailing issues in case). This brief was filed for its persuasive effect only, since the litigation on the government’s side was conducted by the Attorney General of Pennsylvania.

Rather, as a separate and conclusive reason “why this Court should not affirm the judgment below,” Justice Frankfurter highlighted an affidavit presented to the Court informing it that, subsequent to the rulings below, the government’s witness on Smith’s insanity “had himself been committed . . . because of an incurable mental disease which had deprived him of ‘any judgment or insight.’” *Smith*, 344 U.S. at 572 (Frankfurter, J., dissenting).

281. This presented no difficulty in the case at hand because Pennsylvania law so provided, *Smith*, 344 U.S. at 568-69, 571, and thus it was not necessary to rule whether the Constitution so required.

282. *See Ford v. Wainwright*, 477 U.S. 399, 406 (1986).

283. *1951 Mental Health Act Applies to Prisoner Awaiting Execution*, [Philadel-

III. THE PRE-BATOR CONTEXT OF *BROWN V. ALLEN*

None of the developments, judicial or legislative, that followed upon the release of the decision support the view that it significantly re-shaped the legal landscape. Nor did any of the contemporary antagonists over the appropriate scope of habeas corpus view it as having done so. Prior to the appearance of Bator's article,²⁸⁴ *Brown* was just another, not particularly prominent, episode in an ongoing contest that had begun long before and continues to this day. Indeed, to the extent it had any immediate impact at all, *Brown* seems to have increased the rate at which federal habeas corpus petitions by state prisoners were summarily denied.

A. *Pre-Brown Background*

The perceived intrusion on state criminal processes caused by federal habeas corpus review had long been the subject of complaint in certain quarters.²⁸⁵

phia] LEGAL INTELLIGENCER, Mar. 24, 1953, at 1 (reprinting ruling and sanity commission report on which it was based). The question at this point was present competency to be executed, not whether Smith had been sane at the time of the crime or his guilty plea, but the findings cast strong doubt on the earlier determinations. See Michael von Moschzisker, *An Old Murder Case Returns to the Courts*, PHILADELPHIA EVE. BULL., June 18, 1968, at 68. ("Technically [the commission] was to determine the condition of the man five years after the crime, but the real effect was to recheck the original diagnosis of the court psychiatrist, who had been found to be not well himself"); Earl Selby, *Insanity Ruling Saves Life of Cabbie's Killer*, PHILADELPHIA EVE. BULL., Mar. 23, 1953, at 1 (publishing Smith's diagram of a "supernatural efficacious transmitter" that, by shooting out a "telepathic electro-magnetic beam," prevented his mind from "rotating normally," thereby causing his troubles). Eventually, in 1968, Smith was determined to be sane—and thus potentially subject to execution—at which point the Governor commuted his sentence to life imprisonment. See *Shafer Commutes Slayer's Sentence*, PHILADELPHIA EVE. BULL., Nov. 19, 1968, at 35. The Pennsylvania Board of Pardons reviewed the case in February, 1973 and, relying upon Smith's "excellent conduct record" in prison and the absence of any psychiatric symptoms, recommended that he be paroled as of September, 1974—a recommendation that the Governor approved. *In re Application of Smith*, No. 9994 (Pa. Bd. Pardons, Feb. Sess. 1973).

284. Bator, *supra* note 8.

285. The short discussion that follows does not purport to be a complete account of the tangled maneuverings over habeas corpus from the early 1940s through the late 1960s, but merely an effort to locate *Brown* within that debate. For a more extensive discussion of the history, see Yackle, *supra* note 218, at 2341-48. In addi-

Thus, for example, Judge Parker—who sat on the Fourth Circuit panel reviewing the North Carolina cases that were decided in *Brown*²⁸⁶—had chaired a committee of the Judicial Conference that in 1943 persuaded that body to support a statute denying federal habeas corpus jurisdiction to state prisoners for as long as they had state collateral remedies available.²⁸⁷

tion, the subject was thoroughly canvassed in a number of scholarly amicus briefs filed on behalf of the prisoner (the Supreme Court respondent) in *Wright v. West*, 505 U.S. 277 (1992) (No. 91-542). See Motion for Leave to File Brief and Brief Amici Curiae of Benjamin R. Civiletti, Nicholas deB. Katzenbach, Edward H. Levi, Elliot L. Richardson et al. in Support of the Respondent, *Wright* (No. 91-542) (authored by James S. Liebman et al.); Brief Amicus Curiae of the American Civil Liberties Union and the ACLU of Virginia in Support of Respondent, *id.*; Brief of the States of New York and Ohio Amicus Curiae in Support of Respondent on the Issue of De Novo Review, *id.*; Brief for Senator Biden and Representative Edwards as Amici Curiae in Support of Respondent, *id.*; Motion for Leave to File and Brief Amici Curiae on Behalf of [Law Professors Including] Gerald Gunther, Philip B. Kurland . . . and Herbert Wechsler, *id.* (authored by Larry W. Yackle). See generally Brief of the American Bar Association as Amicus Curiae in Support of Respondent, *Wright* (No. 91-542) (authored by Seth P. Waxman, et al.).

286. See *supra* note 93.

After an active career in Republican politics and five years on the Fourth Circuit, see Harry E. Watkins, *A Great Judge and a Great American: Chief Judge John J. Parker, 1885-1958*, 44 A.B.A. J. 448 (1958), Judge Parker had been nominated to the Supreme Court in 1930, but was rejected by the Senate on a 41-39 vote after opposition from labor unions and the NAACP. See *Confirmation of Hon. John J. Parker to be an Associate Justice of the Supreme Court of the United States: Hearing Before the Subcommittee of the Committee on the Judiciary, United States Senate, 71st Cong., 2d Sess. (1930)*; *John Parker Dies; Federal Judge, 72, N.Y. TIMES*, Mar. 18, 1958, at 29. He remained a possible candidate for the Court, however, see DAVID ALISTAIR YALOF, PURSUIT OF JUSTICES 22-25 (1999) (describing Truman Administration consideration of Parker in 1945); *A Tribute to Judge John J. Parker—"The Gladsome Light of Jurisprudence"*, 37 N.C. L. REV. 1, 14 (reprinting remarks of Judge Orrie L. Phillips of the Tenth Circuit, who served with Parker on Judicial Conference habeas corpus committees and was himself considered for the Court). In particular, after the sudden death of Chief Justice Vinson in September, 1953, see *Chief Justice Vinson Dies of Heart Attack in Capital, N.Y. TIMES*, Sept. 8, 1953, at 1, "he was mentioned for the vacant post . . . , but by that time he was nearly 68 years old and President Eisenhower chose a younger man—Earl Warren," *Judge Parker Dies, supra*; see YALOF, *supra*, at 44-51 (describing Warren nomination).

287. See REPORT OF THE [1943] JUDICIAL CONFERENCE OF SENIOR CIRCUIT JUDGES 22-25 (1944); REPORT OF THE [1945] JUDICIAL CONFERENCE OF SENIOR CIRCUIT JUDGES 18 (1946); John W. Winkle, III, *Judges as Lobbyists: Habeas Corpus Reform in the 1940s*, 68 JUDICATURE 263, 266-67, 272 (1985). As noted *supra* text accompanying notes 141-45, in *Brown v. Allen*, 344 U.S. 443, 447-50 (1953), the Court unanimously rejected Judge Parker's argument that the 1948 revisions to 28 U.S.C. § 2254 embodied this rule. Cf. *infra* note 336 (noting Justices' concern during 1940s

Similarly, as the *Brown* opinions note,²⁸⁸ the assembled state chief justices had in the fall of 1952 resolved that "a final judgment of a State's highest court [should] be subject to review or reversal only by the Supreme Court of the United States."²⁸⁹

The source of the problem was generally identified as *Moore*, if not *Frank*.²⁹⁰

B. Post-Brown Developments

In the aftermath of *Brown*, the opponents of generous habeas corpus review considered it one more example of their complaints,²⁹¹ but not as a sea change in the law. Thus, when Attorney General Herbert Brownell spoke to the Judicial Conference following the decision, he suggested that *Brown* had cor-

with the inadequacy of state collateral remedies in Illinois).

In 1952, the Judicial Conference considered and rejected supporting a statutory amendment that would have barred state prisoners from successive federal habeas corpus applications. See REPORT OF THE [1952] JUDICIAL CONFERENCE OF THE UNITED STATES 223-24 (1953).

288. 344 U.S. 443, 451 n.5 (1953) (opinion of the Court); *Brown*, 344 U.S. at 539 & n.13 (Jackson, J., concurring in the result).

289. *Id.* at 539 n.13 (setting forth text of resolution).

290. See, e.g., *id.* at 533 n.4 (Jackson, J., concurring in the result) (noting both cases).

291. For instance, Judge Parker, testifying in June, 1955 in support of H.R. 5649, see *infra* note 292 (describing bill), referred to *Brown* critically but as a typical example of long-subsisting abuses. See *Habeas Corpus: Hearings on H.R. 5649 Before the Subcomm. No. 3 of the House Comm. on the Judiciary, 84th Cong., 1st Sess. at 10-11 (1955).*

Similarly, the habeas corpus committee of the conference of state chief justices in its June, 1953 report included as part of a lengthy appendix a description of the case provided by the Chief Justice of North Carolina, who suggested that the protracted federal review of Speller's case, see *supra* text accompanying notes 101-05, derogated from "the rights of the state and the public to the speedy administration of justice." REPORT OF THE SPECIAL COMMITTEE ON HABEAS CORPUS TO THE CONFERENCE OF CHIEF JUSTICES, at App. 10 (June 1953). There is a copy in the Robert H. Jackson Papers, Library of Congress, Box 120, Habeas Corpus file.

Prior to *Bator*, *supra* note 8, other aspects of *Brown* were at least as salient. The press was interested because of the unusual format of the decision, see *supra* text accompanying notes 4-5, and because of the substantive issue of jury discrimination in North Carolina, see *Huston*, *supra* note 4. The Justices needed to put the cases down for reargument, see *supra* text accompanying notes 139-40, because they saw the major and time-consuming task before them as resolving the issue—on which the lower courts had split, see *supra* text accompanying notes 41-44, and on which they eventually did as well, see *supra* text accompanying note 256—of the weight to be given on habeas corpus to a prior certiorari denial.

rectly decided "that the practice which permits State prisoners to apply to the lower Federal courts for relief by habeas corpus is required by the present habeas corpus statute, in particular, 28 U.S.C. 2254," and outlined various possible statutory changes.²⁹²

292. See REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 40 (1953). Brownell noted that a committee of the state chief justices' conference had recommended a system under which a state prisoner could pursue federal habeas corpus in the district court only if the Supreme Court so authorized in passing on his or her certiorari application on direct appeal, *cf. supra* text accompanying notes 236-37 (quoting similar suggestion by clerk Rehnquist), but that the entire body had not adopted this, preferring instead its earlier proposal, *see supra* text accompanying note 289, under which only the Supreme Court could nullify state criminal convictions.

He continued,

Still another form of statutory amendment might be the proposal implicit in Mr. Justice Jackson's concurring views in *Brown v. Allen*. This would exclude lower court entertainment of a petition unless the state law allowed no access to its courts on the constitutional points raised; or the petition showed that, although the law allows a remedy, the petitioner was improperly obstructed from making a record . . . I mention these several suggestions for Federal action because it seems to me this is a problem for the Judicial Conference in the first instance.

REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, *supra*, at 40-41. *Cf. supra* text accompanying note 287 (noting that the Judicial Conference had previously endorsed legislation to this effect).

In response to these remarks, the Conference re-activated its habeas corpus committee under Judge Parker. See REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, *supra*, at 26. In September, 1954, the committee proposed that a subsection be added to 28 U.S.C. § 2254 providing that habeas corpus applications by state prisoners might be entertained:

only on a ground which presents a substantial Federal constitutional question (1) which was not theretofore raised and determined (2) which there was no fair and adequate opportunity theretofore to raise and have determined and (3) which cannot thereafter be raised and determined in a proceeding in the State court, by an order or judgment subject to review by the Supreme Court of the United States on writ of certiorari.

An order denying an application for a writ of habeas corpus by a person in custody pursuant to a judgment of a State court shall be reviewable only on writ of certiorari [and the] petition for the writ of certiorari shall be filed within 30 days.

ANNUAL REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 22-23 (1955). The committee reported in 1955 that the proposal had received the concurrence of most of the judges who had responded to a request for the expression of views, as well as of various other legal groups, and had been introduced in the House of Representatives as H.R. 5649, 84th Cong., 1st Sess. (1955). See ANNUAL REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 23, 79, 272 (1956). As the committee reported in 1956, this legislation eventually passed the House but not the Senate. See ANNUAL REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 34 (1957); *infra* text accompanying notes 300-

But there is no evidence that anyone before Bator considered *Brown* to have worked a revolutionary broadening of the writ. And for good reason. In the aftermath of the decision, the percentage of petitions disposed of without hearings increased,²⁹³ and Justice Frankfurter, at least, thought there was a causal connection.²⁹⁴

But Justice Frankfurter did not attack this effect.²⁹⁵ Rather, as he had in the past,²⁹⁶ he identified as the central holding of the case its rejection of any substantive effect to the denial of certiorari and stressed the importance of this in structural terms:

[O]n the basis of . . . practical considerations . . . *Brown v.*

01.

293. See *infra* App. 2.

294. The legislation that had previously passed the House, see *supra* note 292, was re-introduced in the 85th Congress and designated H.R. 8361. See H.R. REP. NO. 1293, 85th Cong., 2d Sess., at 1 (1958). Chief Justice Warren asked Justices Frankfurter, Clark and Harlan to serve as a committee to consider it. See Letter from Felix Frankfurter to Tom Clark and John Harlan (Sept. 29, 1958), Felix Frankfurter Papers, *supra* note 14, Part III, Reel 6, Frame 728.

Justice Frankfurter thereupon wrote a Memorandum for the Committee on Proposed Habeas Corpus Legislation (Nov. 3, 1958), a copy of which is to be found at *id.*, Part III, Reel 6, Frame 422. He observed:

In applying *Brown v. Allen*, 344 U.S. 443 the district courts may, barring a serious infirmity in state-court proceedings, rely on the state court record in passing on a federal habeas corpus application. The practical result of this utilization of *Brown v. Allen* is that all but a small percentage of such applications are denied upon the moving papers. During the last three available years, district courts held factual hearings on only 76 of 2,192 applications.

[3.5%]

Id. at 3.

295. Indeed, he embraced it as showing that restrictive legislation was unnecessary. The sentence immediately following the last one quoted *supra* note 294 is: "According to a study by the Administrative Office, only .004 percent of district court time is devoted to state habeas corpus cases."

Moreover, to help head off restrictive legislation, Justice Frankfurter was willing to make the *Brown* rule "explicit by statute" so that "the District Court would be authorized to order a hearing on a state prisoner's habeas corpus application only in a case where the record of the state proceedings were found to be an inadequate basis for determining the merit of the constitutional claim." *Id.* at 7-8.

296. See Letter from Felix Frankfurter to Sherman Minton (May 28, 1954) ("In *Brown v. Allen* the Court decided that the lower federal courts must not draw any inference of unsubstantiality from denial of certiorari. That decision was reached after as thorough consideration as any question that has been before the Court since you and I have been on it. . . . Nor is this rule merely technical."). There is a copy in the Felix Frankfurter Papers, *supra* note 14, Part III, Reel 2, Frame 441.

Allen finally established that denial of certiorari by this Court in these habeas corpus cases implied no decision whatever on the merits of the case. At present about 350 of such petitions come before us per Term. Apart from all else—that is, without regard to the demands of the other cases that come before the Court—we could not possibly dispose of so many cases on the merits nor would we have the facilities, time apart, to examine and ascertain the too-often hidden facts in these cases. At present, the Court can conscientiously deny certiorari . . . with the knowledge that a prisoner is free after our denial to seek habeas corpus in a forum equipped to ascertain the facts, *i.e.*, the district court.

The proposed measure would make certiorari the final and, for all practical purposes, exclusive federal method for review of a state prisoner's claim under the United States Constitution. A denial of certiorari would become a definitive disposition of the federal constitutional claim. But for the reasons indicated, this Court could not, and therefore would not, base such a final decision on the unsatisfactory records now available here . . . [and] would be confronted with the necessity of establishing new, appropriate procedures to assure a responsible adjudication on the merits of constitutional claims. . . .

[T]he initial and final sifting of habeas corpus claims by the federal judiciary most certainly is not the function of this Court.²⁹⁷

This view proved persuasive. Although only Chief Judge Denman of the Ninth Circuit²⁹⁸ and Chief Judge Jerome N. Frank of the Second Circuit had raised the problem initially,²⁹⁹

297. Memorandum, *supra* note 294, at 5-6. The problem of the distribution of business between the Supreme Court and the lower federal courts had been of concern to Frankfurter since the mid-1920's. See Edward A. Purcell, Jr., *Reconsidering the Frankfurterian Paradigm: Reflections on Histories of the Lower Federal Courts*, 24 L. & SOC. INQUIRY 679 (1999) (analyzing FELIX FRANKFURTER & JAMES L. LANDIS, *THE BUSINESS OF THE SUPREME COURT* (1928)).

298. Denman, "a New Deal Democrat [who] maintained a consistently liberal, and sometimes controversial," role on the bench, see *Coast Ex-Jurist Reported Suicide*, N.Y. TIMES, Mar. 10, 1959, at 29, and who had written the Ninth Circuit's opinion in *Ekberg*, see *supra* text accompanying notes 81-82, was a frequent adversary of Judge Parker's on habeas matters in judicial and legislative fora, both before and after *Brown*. See, e.g., Letter from John J. Parker to William Denman (May 16, 1956) (defending H.R. 5649, 84th Cong., 1st Sess. (1955), against objections raised by Denman; copied to Senate Judiciary Committee, Supreme Court, and Judicial Conference). There is a copy in the William O. Douglas Papers, Library of Congress, Box 583, Habeas Corpus Law folder.

299. See Letter from Jerome N. Frank to William O. Douglas (Sept. 11, 1956).

the Judicial Conference proposal of 1955³⁰⁰ foundered in the wake of this memorandum, when "several members of the Supreme Court" indicated that the bill "would unduly increase the work of that Court," which "is not constituted to hear contested applications for habeas corpus" and which would respond to such legislation by referring petitions "to district judges sitting as special masters."³⁰¹

Indeed, despite the drumbeat of criticism against federal habeas corpus for state prisoners, "[n]one of the restrictive bills was enacted into law";³⁰² "the Court promptly rejected Professor Bator's thesis" in a trilogy of habeas corpus cases that "in 1963 confirmed *Brown* in the clearest of terms and, indeed, built upon that decision in setting down guidelines for the exercise of independent federal judgment on the merits of federal claims";³⁰³ and in 1966 "Congress enacted legislation that codified the essentials of *Brown*" in rejecting preclusive effects of state court determinations.³⁰⁴

In short, one can designate *Brown* as a revolutionary case only by shutting one's eyes to the surrounding decades of historical context. The case was simply one episode in a long-running struggle that was under way long before the case was decided and continued little changed thereafter.

There is a copy in the William O. Douglas Papers, Library of Congress, Box 583, Habeas Corpus Law folder.

300. See *supra* note 292.

301. ANNUAL REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES [FOR 1959] 313 (1960).

302. Yackle, *supra* note 218, at 2347.

303. *Id.* (citing *Townsend v. Sain*, 372 U.S. 293 (1963), *Fay v. Noia*, 372 U.S. 391 (1963), and *Sanders v. United States*, 373 U.S. 1 (1963)).

304. *Id.* at 2347-48 (citing 1966 revision of 28 U.S.C. § 2254(a)). See LIEBMAN & HERTZ, *supra* note 3, § 2.4d, at 64 (concluding that "the 1966 amendments either confirmed or left intact what the caselaw had long established."). This, of course, was not the end of the story. Like the combatants in World War I, succeeding waves of warriors continued to do battle over the same narrow terrain—and are doing so still. See Larry W. Yackle, *Recent Congressional Action on Federal Habeas Corpus: a Primer*, 44 BUFF. L. REV. 381 (1996); see also Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 37-47 (1997).

IV. UNDERSTANDING *BROWN V. ALLEN*

Legally, *Brown* was an exceedingly minor event. On the issue of the federal habeas courts' re-examination of state court findings, its substantive standards were deferential in the extreme; its reaffirmation of independent federal review of legal issues was unsurprising; and its procedural guidelines for when hearings should be held proved ephemeral. The only enduring law that the case made—rejecting any preclusive effect for certiorari denials—was so eminently sensible as to be uncontroversial today.³⁰⁵

But the pragmatic effect of that legal ruling—that primary responsibility for federal scrutiny of state criminal convictions would rest with the district courts rather than the Supreme Court—was to assure the real-world ability of the federal court system to apply the applicable substantive standards, thereby vindicating on the ground in the second half of the Twentieth Century the promises of *Frank* and *Moore* in the first.³⁰⁶

To seek to grasp *Brown* as new law is to clutch at a ghost; to understand it as the implementation of old law is to add a modest but solid stone to the fabric of a cathedral.³⁰⁷

A. *The Ghost*

No evidence for the proposition that *Brown* inaugurated some new and more intrusive level of federal scrutiny of state court proceedings is to be found in the opinions themselves. "As in other appeals, the scope of review was to be *de novo* on the

305. See 1 LIEBMAN & HERTZ, *supra* note 3, § 2.4d, at 68-69 ("The only 'revolution' *Brown* worked, therefore, was one that seems so obvious today that we can hardly imagine anyone having thought the law different—its holding that denial of certiorari on direct review was not a ruling on the merits, hence could not serve in lieu of review as of right on habeas corpus.").

Accepting this proposition, those seeking to narrow habeas review have sought in more recent years to constrict the ability of habeas corpus petitioners to appeal from the district courts to the circuit courts of appeals. See 28 U.S.C. § 2253(c) (1994 & Supp. II 1996); *Hohn v. United States*, 524 U.S. 236, 256, 263-64 (1998) (Scalia, J., dissenting) (claiming the Court is defying this provision).

306. See *supra* text accompanying notes 34-35.

307. By his title to Yackle, *supra* note 218, Professor Yackle has anticipated me in using the cathedral metaphor to characterize the habeas corpus edifice.

law³⁰⁸—and the Court did give plenary consideration to the claims that the structure of the North Carolina jury selection system and the procedures for sanity review in Pennsylvania were unconstitutional—but “deferential on the facts,”³⁰⁹ as it most certainly was.³¹⁰

In the *Brown* case itself, not even Justices Frankfurter and Black were willing to assert that the district court should have conducted an independent review of the circumstances of the confession,³¹¹ notwithstanding the grave suspicions raised by those circumstances.³¹² Similarly, no Justice was willing to re-examine the state courts' sanity findings in *Smith*, utterly wrong though they were in fact.³¹³ And two people whose constitutional rights had in all probability been denied³¹⁴ died in North Carolina's gas chamber because the *Daniels* majority held that unless it gave preclusive effect to the one-day lateness in filing the appeals papers it “would subvert the entire system of state criminal justice and destroy state energy in the detection and punishment of crime.”³¹⁵

Just as any novel substantive aspects of *Brown* are chimerical, so did any novel procedural ones prove to be ephemeral. The case's foggy and forgiving formulations as to when federal habeas courts were required to hold evidentiary hearings were replaced by more precise and demanding ones in *Townsend v. Sain*,³¹⁶ ones which were themselves replaced by equally pre-

308. LIEBMAN & HERTZ, *supra* note 3, § 2.4d, at 62. See *Brown v. Allen*, 344 U.S. 443, 458 (1953) (holding that federal habeas courts should give rulings of the state courts on the constitutional law issues “the weight that federal practice gives to the conclusion of a court of last resort of another jurisdiction on federal constitutional issues”).

309. LIEBMAN & HERTZ, *supra* note 3, § 2.4d, at 62.

310. Indeed, Bator could with equal plausibility (albeit no less erroneously, see *supra* note 26 and accompanying text) have argued that *Brown* represented a return to the appropriately deferential standard of *Frank* and a repudiation of *Moore*. See Freedman, *supra* note 22, at 1530-32 (discussing Bator's views of relationship between *Frank* and *Moore*).

311. See *supra* note 262.

312. See *supra* text accompanying notes 86-87.

313. See *supra* note 283.

314. See *supra* text accompanying notes 106-07.

315. *Brown v. Allen*, 344 U.S. 443, 485 (1953). Cf. William J. Brennan, Jr., *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423, 430-32, 437-38, 441-42 (1961) (attacking this outcome).

316. 372 U.S. 293, 312-19 (1963) (announcing “[t]he appropriate standard—which

cise but deferential ones in *Keeney v. Tamayo-Reyes*.³¹⁷ The ruling in *Daniels* precluding review due to a day's tardiness in the filing of an appeal was repudiated in *Fay v. Noia*,³¹⁸ but revived in *Coleman v. Thompson*.³¹⁹

To attack *Brown* as a novelty that changed the direction of habeas corpus law is to spear a cloud:

B. *The Cathedral*

For those who do not believe in ghosts, there is a much more sensible approach, one which views the basic contours of habeas corpus law as a legal cathedral built up over many generations by workers who have often been at odds on points of decoration but have had a common understanding of the fundamental plan.

As I have recently described in detail,³²⁰ the government in *Frank* argued that the petitioner was precluded from federal habeas corpus relief by the prior rejection of his claims by the state courts and the Supreme Court's subsequent refusal to grant writs of error. The Court rejected both positions³²¹ and held that the district court had the power to hold a hearing to investigate the petitioner's claims of constitutional error during the state proceedings.³²²

must be considered to supersede, to the extent of any inconsistencies, the opinions in *Brown v. Allen*".

317. 504 U.S. 1, 5-8 (1992) (overruling *Townsend*). In 1996, Congress created its own statutory standards for mandatory, but not discretionary, hearings. See 28 U.S.C. § 2254 (e)(2) (1994 & Supp. II 1996); *Jones v. Vacco*, 126 F.3d 408, 417 n.2 (2d Cir. 1997); see also *Burris v. Parke*, 116 F.3d 256, 258-59 (7th Cir. 1997); *Jones v. Wood*, 114 F.3d 1002, 1113 (9th Cir. 1997).

318. 372 U.S. 391, 425-26, 433-35 (1963) (Brennan, J.) (granting habeas relief to an applicant who had filed no state appeal at all). As indicated *supra* note 39, the same case also took the step that the *Brown* Court had been unwilling to take and overruled *Darr*. See *Fay*, 372 U.S. at 435-38.

319. 501 U.S. 722, 749-51 (1991) (holding habeas relief precluded by three-day lateness in filing appeal from denial of state post-conviction remedies). See Eric M. Freedman, *Habeas Corpus Cases Re-Wrote the Doctrine*, NATL. L.J., Aug. 19, 1991, at S6 (criticizing decision's repudiation of *Fay*); see also Freedman, *supra*, note 227, at 557 n.63 (criticizing the decision's historically inaccurate view of federalism). Cf. *Sullivan v. Boerckel*, 526 U.S. 838 (1999) (holding habeas relief precluded by failure to file a petition for discretionary review of conviction by state Supreme Court).

320. Freedman, *supra* note 22, at 1490.

321. See *id.* at 1491.

322. The *Frank* majority upheld the district court's exercise of discretion to de-

The government made precisely the same set of arguments in *Moore*.³²³ They were again rejected, and without the articulation of any new legal standards, the Court held that the District Judge had been required to hold a hearing.³²⁴

Thus, by the time of *Darr v. Burford*,³²⁵ it was well-established that neither the prior merits rulings of the state courts nor the failure of the Supreme Court to review them would preclude federal habeas review. And it was equally clear that the front line of such review was the district court, which had some discretion—one whose contours were as yet undefined—over whether or not to hold a hearing to exercise its undoubted power to consider whether the state proceedings had been infected by fundamental error.³²⁶

Darr, however, created doctrinal confusion³²⁷ and a potential practical problem. Doctrinally, the requirement that state prisoners file a certiorari petition raised the question of whether, *Frank* and *Moore* notwithstanding, some substantive significance should be given to the petition's denial. And, as a practical matter, if this were to happen, the task of reviewing state convictions for constitutional error—under whatever standard might be applicable—would fall on the Supreme Court, not the district courts, necessarily circumscribing such review radically. As already indicated, all those involved in *Brown* clearly saw these problems and clearly saw the legal ruling it made—to reject any preclusive effect for the denial of certiorari—as solving them.³²⁸

Brown thus restored the legal and practical *status quo ante*

cline to hold such a hearing, while the dissent would have required one. *See id.* at 1492-94.

323. *See id.* at 1523.

324. *See id.* at 1529. Rather than go through with such a hearing, the parties negotiated the petitioners' release, thereby freeing men who had come within days of execution. *See id.* at 1512-13, 1529-30.

325. 339 U.S. 200 (1950) (described *supra* Part II.A.1).

326. *See Freedman, supra* note 22, at 1532-34; *see also supra* note 238 (recording a similar understanding of Justice Frankfurter).

327. *See supra* text accompanying notes 41-44. An alternative view would be that *Darr* did not itself create the confusion, but rather was the bit of fuel that caused to leap into flames the confusion that had previously been smoldering. *See LIEBMAN & HERTZ, supra* note 3, §2.4d, at 67; *see also* Jordan Steiker, *Innocence and Federal Habeas*, 41 UCLA L. REV. 303, 317 (1993); Bator, *supra* note 8, at 496-98; *supra* note 93.

328. *See supra* text accompanying notes 34-35, 224, 257, 296-301.

that *Darr* had threatened. This—not more and not less—is what the case did, and it should define the niche it appropriately occupies in the habeas edifice.

C. *The Ghost in the Cathedral*

The attempt to find in *Brown* what is not there surely owes much to now Chief Justice Rehnquist, whether one attributes it to a desire common among law clerks to believe that cases in which they participated were of special importance, an exaggeration of the extent to which his views were ultimately shared either by Justice Jackson or by the Court, to intellectual sympathy with Bator,³²⁹ or to a more ideological distaste with the fact that *Brown* did buttress federal habeas corpus as a practical remedy.³³⁰ Then, too, the phenomenon that other Justices can also see the ghost³³¹ demonstrates the influence a Harvard Law professor can have on others' perceptions of empirical reality by publishing an article in the *Harvard Law Review*.

But there is no ghost. Nothing about *Brown* was revolutionary.

V. CONCLUSION

The theory that independent federal habeas corpus review of the constitutional validity of state criminal convictions is a modern innovation attributable to *Brown* is simply inconsistent with the historical evidence.

329. The fact that some parts of Professor Bator's argument were so clearly in tune with clerk Rehnquist's thinking, see *supra* notes 222, 229, doubtless made Chief Justice Rehnquist readier to believe the parts relating to the importance of *Brown*.

330. See Steiker, *supra* note 327, at 319 (observing that *Brown* remains important because, although "as a theoretical matter," it was "simply a codification of pre-*Brown* habeas law," it eventually led in practice to more habeas relief); *supra* note 20.

331. See *supra* notes 9, 28.

Appendix 1³³²FEDERAL HABEAS CORPUS CASES FILED BY
STATE PRISONERS 1941-1960

1. <i>Fiscal Year</i>	2. <i>Cases Filed</i> ³³³	3. <i>State Prisoners</i> ³³⁴	4. <i>Filing Rate</i> ³³⁵
1941	127	146,974	.864
1942	130	133,761	.972
1943	269	121,107	2.22
1944	605 ³³⁶	114,317	5.29

332. This Appendix is designed to provide some empirical perspective on two issues: (a) the gross number of cases filed during the period, which is relevant to the Supreme Court's institutional ability to process them and (b) the rate of filings relative to the total number of state prisoners, which is relevant to the claims of habeas corpus opponents that the federal courts were being flooded with such applications.

333. The figures are taken from ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 1960 116 (1961).

334. The figures are taken from PATRICK A. LANGAN ET AL., HISTORICAL STATISTICS ON PRISONERS IN STATE AND FEDERAL INSTITUTIONS, YEAREND 1925-86, at 7-10 (1988).

335. This figure, designed to create an index of the frequency of claims, is simply the number in Column 2 divided by the number in Column 3 and multiplied by 1000.

336. See ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 1950, at 113 (1950) ("Until recently the courts of Illinois did not provide [hearings comporting with due process], and as a result 342 Federal question habeas corpus suits were brought in the Northern District of Illinois in 1944 and 238 in 1947."). If all 342 of the 1944 cases were subtracted, then the figure in Column 1 would be 263, and that in Column 4 would be 2.30.

The background of the Illinois situation is to be found in an illuminating report drafted for the Habeas Corpus Committee of the Chicago Bar Association in October, 1947 by Dean Wilber G. Katz of the University of Chicago Law School:

In April 1945, when *White v. Ragen*, 324 U.S. 760 [(1945)], was argued in the United States Supreme Court, Chief Justice Stone and other members of the Court vigorously expressed their concern over the hundreds of Illinois criminal cases on their docket. Similar concern was expressed a year later at the argument of *Woods v. Nierstheimer*, 328 U.S. 211 [(1946)]. . . . In November 1946 at the argument of *Carter v. Illinois*, 329 U.S. 173 [(1946)], Mr. Justice Frankfurter pressed counsel for the petitioner . . . as to what is wrong with the jurisprudence of Illinois that the United States Supreme Court should be flooded with petitions from Illinois prisoners.

1. <i>Fiscal Year</i>	2. <i>Cases Filed</i>	3. <i>State Prisoners</i>	4. <i>Filing Rate</i>
1945	536	115,011	4.66
1946	492	122,457	4.01
1947	485	134,158	3.61
1948	543	139,649	3.89
1949	584	146,881	3.98
1950	560	149,031	3.76
1951	482	148,285	3.26
1952	541	150,219	3.60
1953	548	154,216	3.55
1954	597	162,898	3.66
1955	660	165,692	3.98
1956	734	169,431	4.33
1957	778	174,836	4.45
1958	755	184,094	4.10
1959	822	185,613	4.43
1960	871	189,735	4.59

After quoting the ruling in *Carter*, 329 U.S. at 175, that a state must give a prisoner an opportunity to litigate fundamental errors not appearing on the record, the report continued: "Hundreds of attempts have been made to secure such hearings in Illinois but not a single case has come to the attention of the committee in which a prisoner has had in a state court an opportunity to prove his allegations," a situation it attributed to labyrinthine statutory procedures administered by unsympathetic courts and government attorneys. CHICAGO BAR ASSOCIATION, DRAFT REPORT OF COMMITTEE ON HABEAS CORPUS 1-2, 8-11 (Oct. 30, 1947). Dean Katz sent a copy of this report to Justice Frankfurter under cover of a letter dated November 3, 1947, and both documents are to be found in the Frankfurter Papers, *supra* note 14, Part III, Reel 6, Frames 845-59.

*Appendix 2*EVIDENTIARY HEARINGS BY DISTRICT COURTS ON HABEAS
CORPUS APPLICATIONS³³⁷

<i>Fiscal Year</i>	<i>% Disposed of After Hearing</i>
1941	11.9
1942	24.6
1943	9.1
1944	2.9
1945	4.3
1946	6.5
1947	10.4
1948	11.3
1949	8.4
1950	10.0
1951	6.2
1952	4.9
1953	5.5
1954	3.3
1955	3.7
1956	2.7
1957	3.4

337. The figures are taken from S. REP. NO. 85-2228, at 30 (1958) (to accompany H.R. 85-8361).