Six years ago President Richard M. Nixon nominated Warren Earl Burger as the fifteenth Chief Justice of the United States. Prior to his nomination, Burger was known principally for his opinions on criminal procedure during thirteen years' service on the United States Court of Appeals for the District of Columbia Circuit. His outlook in this area seems to have substantially influenced his selection as Chief Justice. Although the specific nomination of Burger was a surprise to most observers, the appointment of an individual of his general persuasion in criminal procedure was expected—given the times and in view of the 1968 Nixon presidential campaign.

The decade of the sixties witnessed several landmark Supreme Court decisions expanding the procedural rights of persons accused of crimes. Those were "revolutionary decisions to make the routine process of criminal justice square with the Anglo-American traditions." Generally speaking, Burger possessed many of the background characteristics which were most common of Nixon appointees to federal courts. See Goldman, Judicial Backgrounds, Recruitment, and the Party Variable: The Case of the Johnson and Nixon Appointees to the United States District and Appeals Courts, 2 Ariz. St. L.J. 211 (1974). However, his views on criminal procedure and his experience as the head of the Justice Department's Civil Division may have been somewhat atypical of federal judges appointed during the Nixon years. According to Goldman, "[d]espite the Nixon administration's use of 'law and order' as a political theme, the findings suggest no dramatic tendency to appoint individuals with public prosecutorial experience to the federal judiciary." Id. at 221. See also Goldman, Johnson and Nixon Appointees to the Lower Federal Courts: Some Socio-Political Perspectives, 34 J. Pol. 934, 941-42 (1972).
That period was further characterized by increases in crime rates, widespread demonstrations over the Vietnam War, assassinations of prominent political leaders, and ghetto riots by minority groups. Criminal procedure policies of the Warren Court and "law and order" developed into hotly debated political issues. Actions by Congress, including the Omnibus Crime Control and Safe Streets Act of 1968, fell short of thoroughly placating the electorate. Hence, "law and order" became a significant issue during the 1968 presidential primaries and election campaign, especially for Richard Nixon. In October 1968, Nixon was reportedly viewed by the public as the presidential candidate who "could do the best job of handling law and order."

Nixon had carefully cultivated this image by focusing on the "law and order" issue early in the campaign. Believing that certain Warren Court decisions had contributed to the nation's law enforcement difficulties, Mr. Nixon criticized the Supreme Court for months preceding the November election. For him, one partial solution to the "law and order" problem was simple: if elected he would appoint to the Supreme Court individuals who would resist Warren Court trends in criminal procedure. Above all else, these would be judges who would not weaken and restrict law enforcement activities so as to favor those who violate criminal laws. Nixon appointees would instead be inclined to construe strictly the judicial function and would be highly experienced in criminal law and procedure. Several months later President Nixon, after what was

---


8 In early November 1968, shortly before his election, Nixon explained in the following terms the characteristics he was seeking in Supreme Court nominees:
to become "one of the most overt attempts in American history to alter the policy directions of the federal judiciary," announced the nomination of Judge Burger to fill the strategic position left vacant by Earl Warren's retirement.10

This Article seeks to promote an understanding of the judicial attitudes of Chief Justice Burger and thereby clarify why former President Nixon believed that Burger's appointment was consistent with his 1968 campaign pledge. This objective is approached by briefly surveying Burger's philosophical tendencies in criminal procedure, as reflected through his years on the Supreme Court, and then identifying in detail related decisional tendencies in a number of his more notable lower court opinions written between 1956 and 1969.11 To make the study of manageable scope, this Article is specifically addressed to Burger's views in four procedural areas which were particularly significant during those years: probable cause, searches and seizures, unnecessary delays and the admissibility of resulting confessions, and effective assistance of counsel.

Other themes are also pursued here to emphasize and assist in narrowing two related gaps in knowledge of the American judiciary. First, relatively speaking, students of the judicial process have neglected the lower federal courts and the judges who sit on them. Excessive emphasis on the Supreme Court as a policymaker

Among their qualifications I would consider would be experience or great knowledge in the field of criminal justice, and an understanding of the role some of the decisions of the high court have played in weakening the peace forces in our society in recent years.

... [T]he abused in our society deserve as much protection as the accused. ... The rights of the former have not been given sufficient consideration in recent [Supreme Court] decisions. And any Justice I would name would carry to the bench a deep and abiding concern for these forgotten rights.

There are other requirements I would make of nominees to the high court which the people have a right to know. They would be strict constructionists who saw their duty as interpreting law and not making law. They would see themselves as caretakers of the Constitution and servants of the people, not super-legislators with a free hand to impose their social and political viewpoints upon the American people.


10 See note 1 supra.

11 Although not discussed here, philosophical overtones were also evident in Burger's extrajudicial writings during these years. See, e.g., Burger, Paradoxes in the Administration of Criminal Justice, 58 J. CRIM. L.C. & P.S. 428 (1967); Burger, Who Will Watch the Watchman?, 14 AM. U.L. REV. 1 (1964). For an analysis of his extrajudicial activities since becoming Chief Justice, see Landever, Chief Justice Burger and Extra-Case Activism, 20 J. PUB. L. 523 (1971).
has been deplored for years, yet the bulk of the federal judiciary continues to be relegated to a secondary position in research priority.\textsuperscript{12} This situation still persists for the most part, although it has slowly improved over the last ten years—particularly with regard to such topics as voting behavior, interpersonal relations, and leadership on the appeals courts.\textsuperscript{13} Second, and more specifically, studies have largely ignored the lower court philosophies of judges who ultimately served on the Supreme Court.\textsuperscript{14} To be sure, the paucity of literature on individual lower court judges is usually justifiable on grounds of academic economy. A research gap becomes obvious, however, when a lower court judge is promoted to


\textsuperscript{14} For an account of the extent to which Supreme Court Justices have served on state and lower federal courts, see H. Abraham, \textit{Justices and Presidents: A Political History of Appointments to the Supreme Court} 45-47 (1974). According to Abraham, 100 men have served on the Supreme Court. Of these, no Chief Justice had served more years on the lower federal courts than did Warren Burger, and only Chief Justice Taft accumulated as many years of total state and lower court experience. Of all 100 Justices, only four had served more years on lower federal courts than Chief Justice Burger. Finally, with respect to both state and lower federal court backgrounds, only 11 Justices at the time of their appointments had more judicial experience than Chief Justice Burger. For additional discussions of prior judicial experience see J. Schmidhauser, \textit{The Supreme Court: Its Politics, Personalities, and Procedures} 51-54 (1960); Schmidhauser, \textit{The Justices of the Supreme Court: A Collective Portrait}, 3 MIDWEST J. POL. SCI. 1, 41-44 (1959).
the High Court. In the case of Chief Justice Burger, for instance, there is no systematic account of his appellate court philosophy and no major attempt to relate it to his Supreme Court career to date. This Article, therefore, will probe the development of Burger's criminal procedure philosophy, while touching upon a larger area of neglected research. In so doing it should facilitate comprehension of Burger as Chief Justice of the United States and provide guidance as to where he is likely to stand in future cases involving criminal procedure.

I

Probable Cause

The fourth amendment provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Generally speaking, probable cause is said to exist when there "is a reasonable ground for belief in guilt." Probable cause is necessary for securing both arrest and search warrants, but is also the primary legal foundation for arrests, searches, and seizures permissible without warrants.

Decisions by the Warren Court required substantial, credible evidence for obtaining warrants, yet in some notable instances it departed from a pure "liberal" line on probable cause. The

---


17 U.S. Const. amend. IV.


20 See, e.g., Terry v. Ohio, 392 U.S. 1 (1968); United States v. Ventresca, 380 U.S. 102 (1965); Draper v. United States, 358 U.S. 307 (1959). In Terry, the important "stop-and-
Burger Court seems mainly to have followed the latter line of Warren Court decisions, with Chief Justice Burger often speaking for his conservative colleagues. A prime example is the five to four ruling in United States v. Harris.21 There Burger’s majority opinion assumed a practical stance on the issue of required credibility of information used to obtain a search warrant. Although the information came from an unidentified informant not shown to have previously been a reliable source, the Chief Justice rejected the lower court’s dependence on “hypertechnicality”22 and found probable cause:

While a bare statement by an affiant that he believed the informant to be truthful would not, in itself, provide a factual basis for crediting the report of an unnamed informant, we conclude that the affidavit in the present case contains an ample factual basis for believing the informant which, when coupled with affiant’s own knowledge of the respondent’s background, afforded a basis upon which a magistrate could reasonably issue a warrant.23

A pro-prosecution attitude is also suggested by Chief Justice Burger’s voting in other nonunanimous probable cause decisions where he did not author an opinion. In Whiteley v. Warden24 he

frisk” case, Chief Justice Warren’s majority opinion held that there was probable cause to arrest the suspects even though the policeman had no specific knowledge that a crime had been, or was about to be, committed. The arresting policeman had watched the suspects “go through a series of acts, each of them perhaps innocent in itself, but which taken together warranted further investigation.” 392 U.S. at 22. In Ventresca, the Court by a seven to two vote ruled that information presented in an affidavit to a magistrate constituted probable cause to issue a search warrant, although the sources of many of the alleged facts were unstated. See 380 U.S. at 118-19 (Douglas, J., dissenting). Justice Goldberg, speaking for the Court in Ventresca, argued that affidavits “must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion.” Id. at 108. Since the affidavit contained numerous details suggesting that the law was being violated, there was a substantial basis for a warrant, regardless of the omission of the identity of certain sources. Six years earlier, in Draper, the Warren Court had made an even greater departure from its typically “liberal” line. There the police, acting upon one informant’s tip and without a warrant, arrested an individual at a train station who was suspected of transporting illegal narcotics; police did not know that a crime had been committed. Justice Whittaker, delivering the Court’s opinion, wrote that the police had probable cause to arrest and search Draper since the informer’s description of the suspect and his location were accurate and since the suspect walked “fast” when leaving the train station. 358 U.S. at 313.


22 Id. at 579-80 (emphasis in original).

joined the dissent of Justice Black, who urged that probable cause for arrest existed despite the absence of corroboration by the arresting officer of reports that the appellant had illegally entered a private residence. More recently, Burger concurred with the Court's holding in Cupp v. Murphy. There it was decided that probable cause was present for police, without a warrant, to take a sample of scrapings from underneath the accused's fingernails after his wife's murder because he had been with her that night, the room where the crime occurred was undisturbed indicating the murder was not committed by an intruder, the couple had experienced a "stormy" marriage, and the accused showed no "concern or curiosity" upon hearing of his spouse's death. And in Almeida-Sanchez v. United States, Burger aligned with Justice White's dissent, which asserted that probable cause was unnecessary in an automobile search by roving border patrols that led to the discovery of illegally imported marijuana. When considered in conjunction with other Burger Court criminal procedure decisions, these go far toward the "lessening of requirements relating to probable cause for arrest and search."

The positions on probable cause taken by Burger as Chief Justice follow the philosophy reflected in his probable cause opinions during his years on the United States Court of Appeals for the District of Columbia Circuit. From the outset of his judicial

---

25 412 U.S. 291 (1973). Chief Justice Burger joined the concurring opinion of Justice Blackmun and rejected the dissenting argument of Justice Douglas. Id. at 300. Douglas's assertion was that there may not have been probable cause for the search and that a warrant should have been sought. Id. at 301.

26 Id. at 293.


29 For Burger's lower court probable cause opinions other than those discussed here, see
career, Burger demonstrated a tendency to construe probable cause against the claims of appellants and in favor of the government.\(^3\) An illustration from Burger’s early years as a circuit judge is provided by *Christensen v. United States*.\(^3\) Christensen had been described to police by an informer as a peddler of stolen narcotics. Officers were told the location where Christensen was supposedly selling these drugs. Following this lead, without a warrant, they arrested the appellant who denied ownership of a paper bag containing stolen drugs, which officers said he possessed before arrest. The defendant appealed his subsequent district court convictions, alleging that there was no probable cause for arrest. Upholding the district court, Burger reasoned that whether there existed probable cause should be weighed in “view [of] the situation as it appeared to ‘the eyes of a reasonable, cautious and prudent peace officer under the circumstances of the moment.’”\(^3\)


\(^3\) When his voting is compared to that of his lower court colleagues, it becomes readily apparent that Judge Burger was prone to decide probable cause claims against appellants, as is suggested by Table 1. The table depicts decision scores (percentage of votes cast against criminal appellants) for court members in all nonunanimous arrest, search and seizure cases in which Burger participated between 1956 and 1969. A major subset of these cases involved probable cause.

### Table 1

**Decision Scores Against Criminal Appellants in Nonunanimous Arrest, Search and Seizure Cases, 1956-1969**

<table>
<thead>
<tr>
<th>Judge*</th>
<th>Decision Score Against Criminal Appellants**</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bastian</td>
<td>1.000 (5/5)</td>
</tr>
<tr>
<td>Bazelon</td>
<td>.053 (1/19)</td>
</tr>
<tr>
<td>Burger</td>
<td>.962 (25/26)</td>
</tr>
<tr>
<td>Edgerton</td>
<td>.167 (1/6)</td>
</tr>
<tr>
<td>Fahy</td>
<td>.400 (2/5)</td>
</tr>
<tr>
<td>Prettyman</td>
<td>1.000 (13/13)</td>
</tr>
</tbody>
</table>

* Judges excluded from the table because of insufficient data are: Danaher 1.000 (4/4); Leventhal 1.000 (1/1); McGowan .500 (1/2); Miller 1.000 (3/3); Robinson (no participations); Tamm 1.000 (3/3); Washington .750 (3/4); and Wright .000 (0/4).


There was probable cause in view of both the informer's information and observations of Christensen by police. "Neither one standing alone would constitute probable cause, but together they composed a picture meaningful to a trained, experienced observer."33

Cases involving similar conditions for probable cause, based on hearsay from an informant, demonstrate a continuation of Burger's philosophical tendency evident in Christensen. One such case is Jones v. United States.34 Anderson Jones, a resident of Washington, D.C., previously convicted for possession of narcotics, had been placed under surveillance for suspected involvement in illegal drug traffic. Police were told by a previously reliable informant that Jones had bought illicit narcotics in New York City. The suspect allegedly was returning to the District of Columbia with the drugs. Upon arrival Jones was arrested and found to possess a bag containing heroin. The heroin was later admitted in evidence at trial, and Jones was found guilty of possessing illegal narcotics. He appealed the decision.35

Speaking for the court of appeals, Burger emphasized the appeal's frivolous nature as viewed from the majority's perspective. In his view, there clearly existed probable cause for Jones's arrest. "Indeed under the decided cases his arrest would have been proper independent of the arresting officer's knowledge of the then pending investigation of appellant's suspected narcotics activities, or of his prior conviction."36 But in view of supplementary information obtained from the informant, probable cause was virtually unquestionable. The only information of which officers were uncertain was whether the bag contained narcotics, and under the circumstances they were justified in assuming that Jones probably possessed illicit drugs. In this situation, therefore, probable cause was a relative question to Burger:

The essence of the matter is the probability of truth, not the certainty. If certainty were required few if any arrests could ever be made in the effort to curb the narcotics traffic—or indeed in most areas of law enforcement. To ask more of law enforcement officers is to set up standards totally separated from reality.37

33 259 F.2d at 193. Dissenting, Judge Bazelon urged that there were inadequate grounds for probable cause and that, hence, the evidence was illegally seized. Id. at 201-02.
35 Jones contested his conviction in forma pauperis and was provided an attorney. Id. at 495.
36 Id. at 496. Here, Judge Burger relied on Draper v. United States, 358 U.S. 307 (1959); Brinegar v. United States, 338 U.S. 160 (1949); and Brandon v. United States, 270 F.2d 311 (D.C. Cir. 1959).
37 271 F.2d at 496-97. Compare this explanation of "probability of truth" to that in United States v. Harris, 403 U.S. 573, 582-83 (1971).
The "probability of truth" was established, then, by hearsay received from the informant; evidence establishing reasonable cause or upon which a valid warrant may issue need not be sufficient or admissible to prove guilt. Judge Burger stated: "It would be difficult to imagine a more conclusive case of probable cause and reasonable grounds for arrest." This argument notwithstanding, Judge Edgerton, in his dissent, construed precedent as requiring that the informer's name be divulged, if the appellant so demanded. According to Edgerton, without the informant's information the police lacked probable cause. "It was therefore exceedingly 'relevant and helpful to the defense', and 'essential to a fair determination of [the] cause', that the informer's identity be disclosed, so that his reliability could be 'subjected to meaningful judicial scrutiny rather than accepted on a policeman's word.'

Perhaps Warren Burger's most pragmatic and definitive statements concerning probable cause for arrest without a warrant were enunciated in the 1962 case of *Jackson v. United States*. Washington, D.C., police had traced stolen property to John Keyes, who claimed the item was given to him by Sammie Jackson. Accompanying the officers to Jackson's residence, Keyes also informed them that another missing object was hidden in Jackson's apartment. Jackson was quickly arrested without a warrant; police discovered a large number of stolen goods during a subsequent search. Reacting to Jackson's appeal from convictions of house breaking and grand larceny, the Burger opinion elaborated upon the concept of probable cause:

We have indicated on many occasions that there are few absolutes in the area of the law dealing with what constitutes probable cause for arrest. We have also emphasized from time to time that probable cause is not to be evaluated from a remote vantage point of a library, but rather from the viewpoint of a prudent and cautious police officer on the scene at the time of arrest. The question to be answered is whether such an officer in the particular circumstances, conditioned by his observations and information, and guided by the whole of his police experience, reasonably could have believed that a crime had been committed by the person to be arrested.

---

38 271 F.2d at 497-98.
39 *Id.* at 498 (dissenting opinion), quoting *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957), and *Jones v. United States*, 266 F.2d 924, 929 (D.C. Cir. 1959) (Bazelon, J., statement of position) (footnote omitted) (brackets in original).
40 302 F.2d 194 (D.C. Cir. 1962).
41 *Id.* at 196.
Interpreting precedent\textsuperscript{42} against the appellant, Judge Burger concluded that probable cause had existed in view of the totality of incriminating information. Apart from this, the police were justified in arresting the suspect without a warrant because of the practical circumstances in the case: had they sought a warrant, a friend of Keyes—who was aware of the forthcoming arrest—could possibly have warned Jackson.\textsuperscript{43} Finally, Burger addressed the decisionmaking process that policemen employ to determine probable cause. In making this decision, he pointed out, officers exercise "a very specialized form of judgment, an expertness in making evaluations under pressure in circumstances where an untrained person might well be at a loss."\textsuperscript{44} In making judgments as to probable cause, policemen need not rely completely on evidence admissible in a court of law. Indeed, they may search for and weigh various factors, including hearsay, when balancing the pros and cons of reasonable cause. When they have considered all available evidence, the decision as to probable cause may then be made.

While Jackson supplies evidence of Burger's pragmatism, Smith \textit{v. United States}\textsuperscript{45} clarifies his interpretation of collective information providing probable cause. In Smith, a federal narcotics agent in Baltimore received information from a supposedly reliable source that the defendant Smith and a companion were in route to Washington, D.C., via bus, each possessing illegal narcotics. The Baltimore agent relayed the tip to a Washington agent who, accompanied by colleagues, proceeded to the bus station without a warrant. Recognizing Smith from the informant's description and previous information, agents immediately arrested the suspects. Smith was found to possess heroin, for which crime he was later convicted.

Smith appealed the conviction, insisting that the Washington agent did not have probable cause for arrest, that the reliability of the informant was unestablished, and that the heroin discovered in the search should have been suppressed as unlawfully obtained evidence. Writing for the circuit court, Judge Burger noted that the court had "already decided that probable cause is to be evaluated by the courts on the basis of the collective information of the police rather than that of only the officer who performs the act\textsuperscript{46} Dixon \textit{v. United States}, 296 F.2d 427 (D.C. Cir. 1961); Bell \textit{v. United States}, 254 F.2d 82 (D.C. Cir. 1958); Brinegar \textit{v. United States}, 338 U.S. 160 (1949).\textsuperscript{43} 302 F.2d at 197.\textsuperscript{44} Id.\textsuperscript{45} 358 F.2d 833 (D.C. Cir. 1966),\textit{ cert. denied}, 386 U.S. 1008 (1967)."
of arresting.”  

The Washington agent, for this reason, could base probable cause for arrest on the information of his Baltimore colleague; he did not have to have personal knowledge that the informant was reliable. Further, observations of Smith by the Washington agent provided the agent with “substantial confirmation of the reliability of the informant and of his information.”  

Burger thus maintained that “[t]o sustain Appellant’s sweeping claims [the court] would be required to strike hard at police incentive to perform this ‘act of judgment’ and reduce them to automatons.”  

Ward v. United States provides an informative case for further analyzing Burger’s philosophy, for it reveals his inclination to construe narrowly the role of courts in determining whether evidence constitutes probable cause for a search and seizure. Wilbur Ward’s residence had been under surveillance when two officers requested a search warrant from a United States Commissioner. The request alleged that narcotics peddlers and addicts had visited Ward at least twice. One of these peddlers—Lester Cowan—was later arrested for possessing heroin said to have been bought from Ward. Cowan claimed to have purchased drugs from Ward on prior occasions. In deciding to issue the warrant, the Commissioner did not require a written statement from Cowan. After the warrant was issued, Ward’s apartment was searched, drugs were seized, and he was arrested. Ward was subsequently convicted of possessing illegal narcotics.

Relying upon Jones v. United States, as he later did—as Chief Justice—in the Harris case, Judge Burger found that evidence...
other than the allegations of Cowan provided probable cause for the warrant. Indeed, under the applicable statute, Burger noted that "if the Commissioner is satisfied 'of the existence of the grounds of the application or that there is probable cause to believe their existence, he must issue a search warrant.'" The Commissioner could have issued the warrant without relying directly on Cowan's statement, basing his decision instead on additional evidence which provided probable cause. Yet Burger remarked that magistrates should specify in writing all the information which substantially influences decisions to issue warrants. Otherwise, courts would find it difficult to judge whether the evidence before the magistrate established probable cause. Hence, Burger suggested that by encouraging magistrates and policemen rigorously to abide by procedural provisions regulating the issuance of search warrants, the reviewing court's inquiry could be effectively narrowed.53

The case of *Irby v. United States*54 also touched upon the interesting and controversial question of a magistrate's weighing of probable cause. Detectives gave an informer money to buy heroin from James Irby, who had been previously convicted of illegally selling drugs. Later the same morning, the informant gave the money to another apparent drug peddler who then visited the Irby apartment, returning with a package containing "white powder." Again, six weeks later, the informer returned on his own to Irby's apartment where he purchased additional capsules of "white powder" from a woman, presumably Mrs. Irby. A warrant was then secured from a United States Commissioner, and police seized a large supply of illegal drugs. Mary Irby was arrested; she was later found guilty of violating narcotics laws.

The court, in an opinion by Judge Burger, upheld the Commissioner's determination of probable cause. Burger sympathetically remarked that

[a]n appellate court must approach the issue mindful of, although not bound to accept in all cases, the presumptions of regularity which attend the action of the United States Commissioner.... [who,] as any magistrate experienced in these matters,

---

52 281 F.2d at 918, quoting D.C. CODE ANN. § 33-414(e) (1951) (emphasis added by court).
53 281 F.2d at 919.
is entitled to draw inferences from acts which to the uninitiated and unskilled would be innocent acts.\textsuperscript{55}

Magistrates may perceive probable cause in information short of that required for conviction, and probable cause is frequently founded upon hearsay, as in \textit{Jones}.\textsuperscript{56} Although suggesting that more information might have been obtained to substantiate probable cause, Judge Burger nevertheless upheld the issuance of the warrant. The time lapse between the gathering of information and the actual issuance of the warrant did not weaken Burger's belief that probable cause had been properly established.\textsuperscript{57}

Thus, Burger's appellate court opinions on probable cause reflect the same philosophical tendencies evident in his Supreme Court opinions—in particular, a pro-prosecution orientation which rejects legal technicalities in criminal procedures that restrict the police in conducting their business. This attitude can also be detected in the next area to be discussed, Burger's interpretation of the meaning of unreasonable and illegal searches and seizures and of the conditions under which seized evidence should be admissible in court.

\section*{II}

\textbf{Searches, Seizures, and the Exclusionary Rule}

Four general eras of Supreme Court interpretation have been recognized in the case law dealing with seaches and seizures.\textsuperscript{58} Two

\begin{itemize}
\item \textit{Id.} at 253.
\item 362 U.S. 257 (1960).
\end{itemize}

\textsuperscript{57} In dissent, Judge Wright construed information in the affidavit as insufficient to provide probable cause. Why, for example, was it not “alleged that the unidentified informant [was] reliable or that the 'white powder' was contraband of any kind [? ... And why did the police wait so long ... before making their affidavit and obtaining the warrant?" 314 F.2d at 255 (dissenting opinion) (footnote omitted). Wright argued that \textit{Jones} involved hearsay statements and that a supply of narcotics was normally maintained at a particular place in the searched residence, but in \textit{Irby} “there [was] no allegation that narcotics were in the apartment at all.” \textit{Id.} at 256.

\textsuperscript{58} J. LANDYNKSI, SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY OF CONSTITUTIONAL INTERPRETATION 263-65 (1966). During the first era, which extended approximately four decades after the decision in Boyd v. United States, 116 U.S. 616 (1886), “the exclusionary rule for the federal courts was fashioned and, in general, the freedom from unreasonable searches was interpreted so as to recognize a constitutional right of privacy not limited to the literal language of the Fourth Amendment.” J. LANDYNKSI, supra at 263. The second era began during the prohibition years and continued for two decades, when attitudes favoring stricter law enforcement permeated much of the nation and the judiciary. During those years, the Supreme Court viewed fourth amendment rights narrowly, while announcing broad guidelines permitting wiretapping, searches, and seizures, thus allowing greater leeway for law enforcement activities. See, e.g., Goldman v. United States, 316 U.S.
of the periods—the first and the fourth—are pertinent here. During the first, *Weeks v. United States*\(^5\) announced the exclusionary rule, holding that evidence obtained through illegal searches and seizures by federal officials is inadmissible in federal prosecutions. In the most recent of the four periods, Judge Burger sat on the court of appeals. During those years, and particularly during the 1960's, a Supreme Court majority often accepted interpretations of the Constitution which strongly protected the rights of the accused. Warren Court policymaking was, in fact, characterized by leading decisions involving the fourth amendment's guarantee against unreasonable searches and seizures and the application of the exclusionary rule as an enforcement mechanism for that requirement.\(^6\)

In contrast, the Supreme Court, under the leadership of Warren Burger, has slowed this trend or at least has attempted to do so.\(^6\)\(^1\) For example, in *Williams v. United States*\(^6\)\(^2\) and *Hill v. California*,\(^6\)\(^3\) both decided in 1971, the Court held that the 1969 decision in *Chimel v. California*,\(^6\)\(^4\) which narrowed the scope of permissible searches incident to arrest, would not be applied retroactively—*i.e.*, to searches carried out prior to the decision. In *United States v. Robinson*,\(^6\)\(^5\) reversing the appellate court opinion of Judge Wright, the Supreme Court ruled that a warrant was un-

---

\(^5\) 232 U.S. 383 (1914).


\(^6\)\(^1\) 401 U.S. 646 (1971).

\(^6\)\(^2\) 401 U.S. 797 (1971).


\(^6\)\(^4\) 414 U.S. 218 (1973). See also the related, supplementary holding in *Gustafson v. Florida*, 414 U.S. 260 (1973), decided the same day as *Robinson*. 

---
necessary to search fully an individual under lawful custodial arrest and that such a search was reasonable. In *United States v. Calandra*, a majority held that although questions advanced before a grand jury were founded on evidence from an illegal search and seizure, a witness summoned to testify before that grand jury could not refuse to answer questions on fourth amendment grounds. In *United States v. Matlock*, where a woman living in the same house as the respondent, and jointly occupying a bedroom with him, consented to a warrantless search, the Court found the evidence seized in the search to be admissible. And in *United States v. Edwards*, the Court declared that it was constitutional under the fourth amendment for police to conduct a warrantless search of the arrestee's clothing ten hours after he had been processed and jailed and that evidence from the second search, which resulted in his conviction, was admissible.

Chief Justice Burger voted with the Court majority and against the defendant in each of these cases. In other search and seizure cases, however, Burger has dissented. His dissenting opinions clearly express his "conservative" attitude toward fourth amendment cases. To illustrate, in *Colonnade Catering Corp. v. United States*, Treasury agents acting without a warrant used force to break and enter a locked liquor storeroom to inspect bottles thought to have been refilled in violation of federal statutory provisions. According to the majority, although Congress had

---

67 Through Justice Powell's majority opinion in *Calandra*, the Court noted that traditionally "[t]he grand jury may compel the production of evidence or the testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials." *Id.* at 343. The exclusionary rule is ordinarily applicable to proceedings which determine guilt or innocence, and since grand jury proceedings do not perform this function, witnesses before the grand jury cannot refuse to testify where evidence was gained in violation of the fourth amendment. *Id.* at 349. Otherwise, "allowing a grand jury witness to invoke the exclusionary rule would unduly interfere with the effective and expeditious discharge of the grand jury's duties." *Id.* at 350. Moreover, even if the exclusionary rule were applied to evidence in grand jury proceedings, it would have little deterrent effect on police misconduct since "[s]uch an extension would deter only police investigation consciously directed toward the discovery of evidence solely for use in a grand jury investigation." *Id.* at 351.
71 See 26 U.S.C. §§ 5146(b), 7606 (1964). Section 5146(b) reads:

The Secretary or his delegate may enter during business hours the premises (including places of storage) of any dealer for the purpose of inspecting or examining any records or other documents required to be kept by such dealer under this chapter or regulations issued pursuant thereto and any distilled spirits, wines, or beer kept or stored by such dealer on such premises.

Section 7606 reads:
made it an offense for a liquor licensee to refuse admission to a federal inspector, a fine was the government's exclusive remedy for noncompliance. Because Congress had failed to specify inspection procedures if the owner refused entry, the warrantless forced entry was thus illegal. Joined by Justices Black and Stewart, Chief Justice Burger vigorously dissented on the ground that, since Congress had authorized inspection, the provision was meaningless unless officials were given the right to examine thoroughly the places within a retail establishment where liquor was kept. The forcible inspection procedures employed in Colonnade were reasonable, wrote the Chief Justice, because "the agents acted explicitly under statutes containing the language 'so far as it may be necessary'; this is simple and clear and for me it is plainly broad enough to permit inspection of all spirits 'kept or stored . . . on such premises' whether in lockers, cabinets, closets, or storerooms." As will be seen, other cases involving forcible entries under statutory law were milestone decisions in Chief Justice Burger's lower court career.

Even more revealing of Chief Justice Burger's views are his Supreme Court statements dealing with the exclusionary rule, of which he has justifiably been called "a long-time implacable foe." Arguing for judicial restraint in his dissent in Bivens v. Six Unknown Federal Narcotics Agents, Chief Justice Burger assailed the premises underlying the exclusionary rule, but argued that only Congress could determine whether citizens could recover damages where the forth amendment had been violated by federal agents. The exclusionary rule, founded on the presumption that suppression of improperly obtained evidence deters police from employing unlawful methods, is a drastic and ineffective solution to the problem,

(a) Entry during day.
The Secretary or his delegate may enter, in the daytime, any building or place where any articles or objects subject to tax are made, produced, or kept, so far as it may be necessary for the purpose of examining said articles or objects.
(b) Entry at night.
When such premises are open at night, the Secretary or his delegate may enter them while so open, in the performance of his official duties.

72 397 U.S. at 79.
73 See notes 91-102 and accompanying text infra.
74 Landynski, Search and Seizure, in THE RIGHTS OF THE ACCUSED IN LAW AND ACTION 48 (S. Nagel ed. 1972). For some of his views on the exclusionary rule as stated over a decade ago, see Burger, Who Will Watch the Watchman?, supra note 11. See also the discussion of Burger's views as contrasted to those of other Court members, past and present, in Schrock & Welsh, Up from Calandra: The Exclusionary Rule as a Constitutional Requirement, 59 MINN. L. REV. 251 (1974).
according to the Chief Justice. Yet, instead of advocating judicial abandonment of the rule, he recommended that Congress do so through enactment of legislation establishing a tribunal to award damages in lieu of excluding unlawfully obtained evidence. Likewise, in *Coolidge v. New Hampshire* the Chief Justice filed an opinion, dissenting in part, commenting on the suppression doctrine. There the majority determined that a search warrant was not issued by a "neutral and detached magistrate," that the subsequent search was thus unreasonable, and that the resulting evidence was inadmissible in court. Chief Justice Burger responded: "This case illustrates graphically the monstrous price we pay for the exclusionary rule in which we seem to have imprisoned ourselves."

Mindful of Chief Justice Burger's apparent decisional tendencies since 1969, this analysis turns to his lower court philosophy with respect to searches, seizures, and the exclusionary rule. Such an examination must begin with his first substantial lower court search and seizure opinion, a forceful dissent in *Work v. United States*. In that case, Ella Mae Work, a known narcotics addict, was

---

76 403 U.S. 388, 422 (1971).
77 403 U.S. 443 (1971).
78 Id. at 449.
79 Id. at 493. However, the Chief Justice has not always been forced to dissent in order to express his views on the suppression of evidence. He was afforded the rare opportunity to write for a unanimous Court in *Brown v. United States*, 411 U.S. 223 (1973). In that case, it was decided that although a search warrant was defective, appellants had no standing to contest the admissibility of seized evidence since they claimed no proprietary or possessory interest in the seized goods or searched premises, and since the charges against them were independent of their possession of the goods at the time of the search and seizure.


80 See notes 21-28, 61-79 and accompanying text supra.
81 243 F.2d 660 (D.C. Cir. 1957). In addition to Burger's opinions discussed in the following pages, see his views on searches, seizures, and the exclusionary rule as stated in *Coates v. United States*, 413 F.2d 371 (D.C. Cir. 1969); *Parman v. United States*, 399 F.2d 559 (D.C. Cir.), cert. denied, 393 U.S. 858 (1968); *Smith v. United States*, 358 F.2d 833 (D.C. Cir. 1966); *Chappell v. United States*, 342 F.2d 935 (D.C. Cir. 1965); *Irby v. United States*, 760
sought by police officers, without either an arrest or a search warrant, after reports of narcotics use at her residence. Getting no response after knocking, policemen opened the door and stepped into a hallway of the rooming house; Miss Work immediately walked through the hallway and down the steps. Agents watched her deposit an article in a trash can in which an officer, upon inspection, discovered and seized a phial of narcotics. Miss Work was arrested and later found guilty of concealing illegally imported narcotics. Contesting the decision, she succeeded in having the conviction reversed and remanded.

According to Judge Fahy, whose majority opinion has been labeled "extreme" by some commentators, officers claimed no reason to arrest Miss Work or to search the premises when first going to her rooming house. Nor were there "exceptional circumstances" making a search warrant unnecessary in the investigation. The ingredients for an illegal search and seizure were therefore present. The trash can was considered by the majority to be close enough to the house to be protected under the fourth amendment. Fahy also insisted that because of the officers' illegal entry, Miss Work attempted to conceal the narcotics, and the police ultimately were able to confiscate the phial. Thus, the evidence was not admissible in court.

Judge Burger, however, construed the fourth amendment and related case law in a different light and found no unreasonable search and seizure. In his dissent, Burger noted that "reasonableness is determined neither by a piecemeal examination of the facts nor by application of rigid formulas; the question must be resolved upon an appraisal of 'the total atmosphere in the case.'" Thus demonstrating the pragmatic philosophy in criminal proce-
dure evident in Colonnade, Judge Burger deemed it reasonable under the circumstances for officers to investigate the trash can's contents. He did not consider outside trash cans to be areas protected by the fourth amendment since the District of Columbia government was obligated to empty them regularly. Certainly, Judge Burger hypothesized, no unreasonable search and seizure would have been claimed had trashmen extracted the phial after witnessing the appellant deposit the evidence. He protested: "[T]he majority would require one narcotic agent to stand guard over the garbage can while his colleague, if he has one handy, attempts to go downtown to secure a search warrant."

In addition, Judge Burger did not believe the search was "unreasonable' merely because the sight of agents in the vestibule of the rooming house induced appellant . . . to make a hasty disposal of incriminating evidence." The entry of officers was not necessarily a search which caused Work to conceal the narcotics. Had she observed police approaching the house from the street, she might have reacted similarly. In this sense how could the entry and resulting search and seizure have violated the fourth amendment? To so decide would mean that no matter how or where the defendant endeavored to hide or abandon the narcotics, police confiscation would have been illegal. Judge Burger concluded his stinging dissent with a stirring call to guarantee the accused only rights equivalent to those of average, lawful citizens:

Honest citizens neither need nor, I think, want protection for their privacy extended to these artificial limits, and a presently confessed, previously convicted narcotics violator is not entitled to it. Of course the guilty should have the same protective safeguards as the innocent and I would afford them as much. But I refuse to join in what I consider an unfortunate trend of judicial decisions in this field which strain and stretch to give the guilty, not the same, but vastly more protection than the law-abiding citizen. In this balancing of rights of the individual and the whole public, which is admittedly a delicate process, society's vital stake too often is overlooked for reasons which I cannot justify as essential for the preservation of our important fundamental rights.

Whereas Work involved a constitutional question of seizure

---

88 243 F.2d at 663 (footnote omitted).
89 Id. at 664 (emphasis in original) (footnote omitted).
90 Id. at 665 (footnote omitted).
from an outside trash can, *Masiello v. United States*\(^9\) presented a statutory question of forcible entry into an individual’s living quarters.\(^9\) Franklin Masiello had been arrested as a participant in illegal gambling operations. At trial he claimed that police had knocked and identified themselves, yet failed to state that they possessed a search warrant. Masiello alleged that he responded, but while he was making an effort to open the door, police forced their way into his apartment. He urged that the resulting search and seizure were unreasonable and that the seized evidence should be suppressed. The officers claimed that their purpose had been announced. The district judge ruled that the evidence was admissible. Masiello challenged his conviction in the court of appeals, which unanimously remanded the case to resolve testimonial conflicts as to whether the police had properly announced their purpose.\(^9\) New hearings were conducted by the district court. It concluded that an officer had knocked twice and announced that he had a warrant after the second knock. Masiello once more appealed.

Judge Burger, writing for a unanimous three-judge panel,\(^6\) relied primarily upon the credibility of the officers’ testimony, thereby affirming Masiello’s conviction and upholding the forcible entry.\(^5\) The District of Columbia law allowed police to employ force for breaking into a residence only if “refused admittance,”\(^9\) but Judge Burger reasoned that “the phrase ‘refused admittance’ is not restricted to an affirmative refusal. Indeed it would be an unusual case coming before the courts where an occupant affirmatively ‘refused admittance’ or otherwise made his refusal known verbally . . . .”\(^9\) Moreover, while serving the warrant, police heard sounds from within which led them to believe that the suspect was

---

\(^9\) 317 F.2d 121 (D.C. Cir. 1963).

\(^9\) The statutory provision in question reads:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.


\(^9\) Masiello v. United States, 304 F.2d 399 (D.C. Cir. 1962).

\(^6\) Judge Burger was joined on a rare occasion by Chief Judge Bazelon and Judge Wright.

\(^9\) This was essentially the position Burger later took on the Supreme Court in his dissent in *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970). See notes 70-72 and accompanying text *supra*.

\(^9\) 18 U.S.C. § 3109 (1970); see note 92 *supra*.

\(^9\) 317 F.2d at 122.
destroying evidence. Under these "exigent circumstances" the police behaved legally in utilizing force.\(^98\)

An even earlier indication of Judge Burger's views on forcible entries appeared in *Woods v. United States*,\(^99\) a case somewhat akin to *Masiello*. Both *Woods* and *Masiello* involved the same statutory provision regulating forcible entries. Yet the key question in *Woods* was not whether an illegal search and seizure had occurred; it related instead to the effect on a jury verdict of illegally seized, but admitted, evidence. Jewell Woods and other suspected participants in numbers games were under surveillance by police in the District of Columbia. Officers observed one suspect conducting regular rounds, collecting what were thought to be numbers slips and bets. The investigation also revealed a counting house and a money drop which supposedly linked several suspects to the illegal gambling activities. Policemen obtained search warrants for five of the premises, forcibly entered at least one residence, and seized various items related to numbers games. Woods and several others were subsequently found guilty of lottery law violations.

Eleven of the convicted individuals then challenged the decision, but Judge Burger's opinion affirmed the lower court's findings that there was probable cause for search warrants. To be sure, he wrote, police employed force to enter one residence, without the consent of the occupant and without announcing their identity or official purpose.\(^100\) The warrant was thus illegally effected. Yet, above all else, Judge Burger insisted that the prosecution's case against ten of the eleven appellants was independent of illegally obtained evidence. Ten convictions were therefore affirmed because "the evidence seized there was utterly insignificant compared with the masses of material seized at other places."\(^101\) The conviction of just one appellant was reversed, for he was the only person who appealed whose conviction rested solely upon evidence seized at the illegally entered residence. Judge Burger concluded: "With regard to the others, ... we are convinced the error did not influence the jury or at most had but very slight effect."\(^102\)

\(^{98}\) Id. at 122-23.


\(^{100}\) Id. at 39.

\(^{101}\) Id. at 40.

\(^{102}\) Id. Judge Bazelon, in dissent, wanted to reverse all convictions if "[t]he unlawfully obtained evidence was used against all the appellants, and, if it may have helped to convict them." Id. at 41-42 (dissenting opinion). Judge Bazelon further maintained that in deciding that the illegally seized evidence was more significant in one conviction than in the other ten, Judge Burger was not exercising a legitimate function of the court. This determination was instead a responsibility of the lower court jury. Id. at 45-46.
In *Wayne v. United States*, the court faced more complicated questions concerning the admissibility of "search and seizure" evidence where a forcible entry resulted from what Judge Burger considered to be "exigent circumstances," and where an announcement by police of their purpose would have been a "useless gesture." Lewis Wayne, an unlicensed physician, had attempted an abortion on one Jean Dickerson, who had died in his apartment during the attempt. Her sister immediately reported to the police the location of the "unconscious body," although she was unsure if the sister was dead. Responding without a warrant to what they considered to be an emergency, policemen rushed to Wayne's residence, identified themselves, but failed to state their purpose. Police forcibly entered and seized the body and various medications used in the abortion attempt. Prior to the first trial, the medication was held inadmissible as "fruit" of an illegal seizure under statutory law. At a second trial, Wayne's counsel argued that the initial suppression ruling extended to the autopsy report. However, the coroner's testimony was ruled admissible.

On appeal the coroner's testimony was again asserted to be inadmissible as "fruit" of an illegal entry. Judge Burger's majority opinion rejected the argument and, as he later did on the Supreme Court in *Bivens* and *Coolidge*, sought a basis for circumventing the exclusionary rule. He noted that in *Wong Sun v. United States* the Supreme Court had ruled that government evidence from an "independent source" was admissible. Under *Wong Sun*, the standard for admissibility was formulated as "whether, granting establishment of the primary illegality, the evidence to which the instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Applying the *Wong Sun* test to *Wayne*, Judge Burger found the coroner's testimony to be an "independent source" of information. He asserted:

> It was inevitable that, even had the police not entered appellant's

---


104 318 F.2d at 210.


107 *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); see notes 77-79 and accompanying text supra.


110 318 F.2d at 209.
apartment at the time and in the manner they did, the coroner would sooner or later have been advised by the police of the information reported by the sister, would have obtained the body, and would have conducted the post mortem examination prescribed by law.\textsuperscript{111}

The emergency in \textit{Wayne}, according to Judge Burger, was a "distinguishable" circumstance; police thought that Miss Dickerson was possibly still alive. Seized evidence thus was not secured "by exploitation of that illegality."\textsuperscript{112}

Judge Burger then proceeded to consider \textit{Wayne} from a different perspective, concluding not only that the coroner's testimony was admissible but also that the entry was legal under those conditions. The first trial judge, interpreting the Supreme Court's decision in \textit{Miller v. United States}\textsuperscript{113} and the statutory provision,\textsuperscript{114} decided that the entry was illegal because of police failure to announce their purpose. But that interpretation was questionable since \textit{Miller} did not preclude forcible entries under "exigent circumstances" and did not require an announcement of purpose where it would be a "useless gesture."\textsuperscript{115} Judge Burger therefore reasoned that

\begin{quote}

[unless [18 U.S.C.] § 3109 is to be applied to the point of utter absurdity the courts are warranted, by what the Supreme Court has said, in assuming that circumstances may arise where because of an urgent need or because announcement would be a "useless gesture," literal compliance with § 3109 is not always required.\textsuperscript{116}

Thus, Judge Burger's position in \textit{Wayne} was consistent with the views he expressed in other opinions. He discovered "exigent circumstances" requiring a rejection of legal technicalities and necessitating a relatively broad construction of \textit{Miller} and section 3109. The police were reacting primarily to a civil emergency, not a violation of criminal laws. Demonstrating a propensity to uphold

\begin{footnotes}
\textsuperscript{111} Id.
\textsuperscript{112} Id.
\textsuperscript{113} 357 U.S. 301 (1958). \textit{Miller} reversed a conviction for federal narcotics law violations where policemen, not possessing a warrant, forcefully entered a home without announcing their purpose and authority. The subsequent arrest was ruled illegal by the Supreme Court and seized evidence was held inadmissible.
\textsuperscript{114} 18 U.S.C. § 3109 (1970); see note 92 supra.
\textsuperscript{115} 318 F.2d at 210; \textit{Miller v. United States}, 357 U.S. 301, 310 (1958).
\textsuperscript{116} 318 F.2d at 210. He later wrote in the same opinion: "I reject the idea that society can be frustrated and denied reasonable protection by mechanical adherence to formalism." \textit{Id.} at 214.
\end{footnotes}
forcible entries as he did in *Masiello*\(^\text{117}\) and *Woods*,\(^\text{118}\) and later on the Supreme Court in *Colonnade*,\(^\text{119}\) Judge Burger found that conditions in *Wayne* justified entry without a warrant just as a forcible entry would be appropriate in a "myriad of circumstances"—to restrain a fire, rescue inhabitants, or provide medical aid.\(^\text{120}\) Judge Burger asserted:

Neither the Constitution, statutes or judicial decisions have made the home inviolable in an absolute sense. Collectively they have surrounded the home with great protection but protection which is qualified by the needs of ordered liberty in a civilized society.\(^\text{121}\)

Thus far it has been shown that some of Chief Justice Burger's views on probable cause, searches, seizures, and the exclusionary rule may generally be traced back from his Supreme Court years to those during which he served on the court of appeals. Most prominent among his philosophical tendencies were a prosecution orientation, a fundamental pragmatism concerning criminal procedure guidelines, a rejection of legal technicalities which favor the accused, and demands that suspects only be afforded rights equivalent to those of the average citizen. Next it will be determined whether similar traits were evident in Chief Justice Burger's lower court opinions dealing with unnecessary delays and the admissibility of confessions—another aspect of

\(^\text{117}\) *Masiello* v. United States, 317 F.2d 121 (D.C. Cir. 1963); see notes 91-98 and accompanying text *supra*.

\(^\text{118}\) *Woods* v. United States, 240 F.2d 37 (D.C. Cir. 1956); see notes 99-102 and accompanying text *supra*.

\(^\text{119}\) *Colonnade Catering Corp.* v. United States, 397 U.S. 72 (1970); see notes 70-72 and accompanying text *supra*.

\(^\text{120}\) 318 F.2d at 212.

\(^\text{121}\) *Id.* Judge Edgerton dissented on the grounds that the forcible entry was illegal and the evidence obtained thereby was therefore inadmissible. Taking issue with Judge Burger's interpretation of *Miller*, Judge Edgerton wrote that "[t]he Supreme Court suggested but did not say that an express announcement of purpose may be unnecessary" if it would be a "useless gesture." *Id.* at 215. Since the occupants in the apartment may have been uncertain of the reason for the policemen's presence, communication of purpose was still required. Further, the so-called emergency aspects of the situation did not release the policemen from the requirement. Judge Edgerton also noted that officers had been told that the sister was dead, not merely unconscious. Consequently, there was no emergency. Finally, he insisted that "[t]he 'independent source' principle is simply that evidence obtained *without use of illegal means* is not excluded on the ground that the same evidence has also been obtained by use of illegal means." *Id.* at 217 (emphasis in original). The principle thus was not applicable in *Wayne*, for the body—upon which the coroner's testimony depended—was seized through illegal, not legal, means. *Id.*
criminal procedure which received considerable attention during the 1950's and 1960's.

III

UNNECESSARY DELAYS AND ADMISSIBLE CONFESSIONS

During most of Chief Justice Warren Burger's thirteen years on the court of appeals, confessions to crimes were inadmissible in federal courts under two general circumstances. If they resulted from coercion or failure to inform suspects of their rights, confessions were suppressed as involuntary, untrustworthy, and violative of due process of law. Additionally, if a criminal suspect was not afforded a preliminary hearing "without unnecessary delay," confessions were suppressed under McNabb v. United States and Mallory v. United States. Attention is given here to the latter circumstances and to the problem of reaffirming confessions.

124 318 U.S. 392 (1943).

With the exception of Oliver, Burger construed the law in favor of the prosecution in each of these cases, arguing for admitting confessions. His views on the admission of confessions under Miranda v. Arizona, 384 U.S. 436 (1966), and Mallory v. United States, 354 U.S. 449 (1957), were most forcefully stated in the Frazier case, decided two months before Burger's nomination as Chief Justice. There the defendant, initially declining to exercise his right to counsel, confessed to four crimes after being given the Miranda warnings, but later claimed that he had not effectively waived his right against self-incrimination. Judge Robinson, writing for the court of appeals, agreed: "testimony suggests powerfully that the waiver was not understandably made; in addition, the hour appellant spent in custody before the ceremonial 'waiver' casts doubt on whether it was voluntarily made." 419 F.2d at 1168. The confessions were thus held inadmissible.
McNabb and Mallory were extremely controversial Supreme Court decisions with which Judge Burger fundamentally disagreed. \(^{127}\) McNabb, decided in 1943, held that confessions were inadmissible in federal courts if obtained during a period of illegal detention when federal officers failed to present a suspect promptly before a magistrate for preliminary hearings as required by federal statute. Three years later a requirement similar to the McNabb rule was codified as Rule 5(a) of the Federal Rules of Criminal Procedure. \(^{128}\) The Supreme Court subsequently reaffirmed McNabb in relation to that provision. \(^{129}\) Then, in 1957, the Warren Court, in Mallory, construed the meaning of "unnecessary delay" under Rule 5(a), clarifying McNabb. The Court held that between an arrest and the preliminary hearing only "ordinary administrative steps" were authorized. \(^{130}\) Justice Frankfurter, writing for the majority, further explained the procedure to be employed in arraigning suspects:

The police may not arrest upon mere suspicion but only on

In response, Burger eloquently presented the position of judicial restraint concerning the suppression of confessions under Miranda and Mallory:

The seeming anxiety of judges to protect every accused person from every consequence of his voluntary utterances is giving rise to myriad rules, sub-rules, variations and exceptions which even the most alert and sophisticated lawyers and judges are taxed to follow. Each time judges add nuances to these "rules" we make it less likely that any police officer will be able to follow the guidelines we lay down. We are approaching the predicament of the centipede on the flypaper—each time one leg is placed to give support for relief of a leg already "stuck", another becomes captive and soon all are securely immobilized. Like the hapless centipede on the flypaper, our efforts to extricate ourselves from this self-imposed dilemma will, if we keep it up, soon have all of us immobilized. We are well on our way to forbidding any utterance of an accused to be used against him unless it is made in open court. Guilt or innocence becomes irrelevant in the criminal trial as we flounder in a morass of artificial rules poorly conceived and often impossible of application.

Frazier v. United States, 419 F.2d 1161, 1176 (dissenting opinion) (emphasis in original).


\(^{128}\) FED. R. CRIM. P. 5(a) provides that:

An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

This provision was augmented by the Omnibus Crime Control and Safe Streets Act of 1968. See note 132 infra.

\(^{129}\) Upshaw v. United States, 335 U.S. 410 (1948).

\(^{130}\) 354 U.S. at 453.
"probable cause." The next step in the proceeding is to arraign the arrested person before a judicial officer as quickly as possible so that he may be advised of his rights and so that the issue of probable cause may be promptly determined. The arrested person may, of course, be "booked" by the police. But he is not to be taken to police headquarters in order to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt.\(^{131}\)

Almost a year prior to the appointment of Warren Burger to the Supreme Court, unnecessary delay standards were relaxed by the Congress through enactment of the Omnibus Crime Control and Safe Streets Act of 1968.\(^{132}\) Thus, questions of unnecessary delays have not consumed much of Chief Justice Burger's time on the Supreme Court. However, his appellate court opinions involving delays in preliminary hearings\(^{133}\) are important since they reveal some of his basic views on general aspects of confessions and their admissibility at trial.\(^{134}\)

\(^{131}\) Id. at 454.

\(^{132}\) Act of June 19, 1968, Pub. L. No. 90-351, 82 Stat. 197. Section 701(a) of the Act augments the conditions under which confessions are admissible in federal courts when unnecessary delays have occurred. It provides:

In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: \(Provided,\) That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate or other officer.


\(^{133}\) For Burger's lower court opinions relating to unnecessary delays which are not discussed elsewhere in this Article see Adams v. United States, 399 F.2d 574 (D. Cir.) (concurring opinion), \textit{cert. denied}, 395 U.S. 1067 (1968); Brown v. United States, 375 F.2d 310 (D. Cir.) (concurring opinion), \textit{cert. denied}, 388 U.S. 915 (1967); Mathies v. United States, 374 F.2d 312 (D. Cir. 1967); Long v. United States, 360 F.2d 829 (D. Cir. 1966); Alston v. United States, 348 F.2d 72 (D. Cir. 1965); Perry v. United States, 347 F.2d 813 (D. Cir. 1964), \textit{cert. denied}, 382 U.S. 910 (1965); Copeland v. United States, 343 F.2d 287 (D. Cir. 1964); Lockley v. United States, 270 F.2d 915 (D. Cir. 1959) (dissenting opinion); Trilling v. United States, 260 F.2d 677 (D. Cir. 1958) (concurring opinion).

\(^{134}\) In Table 2, Judge Burger's views are reflected by his voting behavior in nonunanimous unnecessary delay cases as compared to his colleagues' votes where they jointly participated. Although Burger's pro-prosecution views clearly emerge from the table, his tendency to vote against appellants was not as strong in unnecessary delays as in questions of arrests, searches and seizures, shown in Table 1, note 30 \textit{supra}.
Unlike some federal courts, the Court of Appeals for the District of Columbia Circuit tended to construe the McNabb and Mallory guidelines to favor appellants. Individual judges on the court nevertheless displayed significant differences in defining an unnecessary delay in specific cases. Judge Burger, departing from the views of other court members, tended, with but few exceptions, to construe the law against appellants' claims rather than suppress confessions because of technicalities and short delays.

For example, in Metoyer v. United States Burger's majority opinion upheld a two-hour interrogation by Maryland police used to secure a confession prior to the arrival of Washington, D. C., officers to arrest and extradite the suspect. Judge Burger insisted that there was no unnecessary delay in arraignment since Washington police did not know, prior to their arrival, whether Metoyer should be arrested, arraigned, and extradited. He explained that "[d]elay does not mean mere passage of time; it means passage of time during which that which should and could be done is not done." In another case, Heideman v. United States, the suspect was interrogated for one hour between arrest...
and the preliminary hearing, during which time he voluntarily confessed to a robbery. Burger's majority opinion ruled that the delay was necessary for the completion of administrative procedures in preparation for the hearing.¹⁴⁰

Although Judge Burger had spoken for the court on these issues prior to 1960, his more noteworthy court of appeals decision came in Goldsmith v. United States,¹⁴¹ which held that reaffirming confessions obtained after a preliminary hearing were admissible under the McNabb-Mallory rule. In Goldsmith, police had received information from an arrestee that Warren Goldsmith and Earl Carter had committed a robbery; the suspects were picked up the following day. The questioning of the suspects was twice interrupted when the interrogating officers were required to testify in other cases.¹⁴² When questioning resumed a third time, Goldsmith and Carter were confronted with the individual who had initially implicated them. They then admitted and described the robbery, both signing confessions. After being in custody for less than five hours, the defendants were taken to Municipal Court for a preliminary hearing under Rule 5(a).¹⁴³ After the hearing, the officers obtained permission from the magistrate to interrogate them further. Without counsel present, Carter and Goldsmith reaffirmed their written confessions. At trial the confessions received prior to the preliminary hearing were ruled inadmissible under Mallory. However, the post-hearing reaffirming confessions were held to be admissible.¹⁴⁴

On appeal, the question was whether the reaffirming confessions should also have been held inadmissible as "fruit" of the prehearing confessions. Answering this question in the negative, Judge Burger construed precedent against the claims of Goldsmith and Carter. In the opinion, he relied heavily upon United States v. Bayer¹⁴⁵ where the Supreme Court upheld a reaffirming confession given six months after an original prearraignment confession which the Court assumed to be inadmissible under McNabb. Fur-

¹⁴⁰ Judge Bazelon disagreed, contending that Heideman's confession was inadmissible under Mallory and Trilling. See note 136 supra. Police had conducted a preliminary hearing of their own, Judge Bazelon argued, which resulted in the confession. Id. at 949.


¹⁴² The first interruption was for a period of 18 minutes; the second involved 45 minutes. 277 F.2d at 338.

¹⁴³ See note 128 supra.

¹⁴⁴ In the trial court, the jury found that the confessions were voluntary, despite allegations of coercion. 277 F.2d at 340.

¹⁴⁵ 331 U.S. 532 (1947).
thermore, Mallory was inapplicable to reaffirming confessions procured after defendants were arraigned without unnecessary delay. And in this case there was no unnecessary delay between the arrest and the preliminary hearings; the delay was essential for the officers' appearance in court and for the defendants' confrontation with their accuser. Preliminary hearings need not be "immediate," said Judge Burger. However, in distinguishing a necessary from an unnecessary delay, he offered a broad standard:

[Judges] must examine in detail all the circumstances surrounding [the delay], taking into consideration the manner in which interrogation was conducted, the length of time involved, and particularly the purposes which the police had in conducting their inquiry, if the purposes can be discerned.

By 1960, then, positions of Judge Burger and certain of his colleagues were at odds in several unnecessary delay cases, but these disagreements were mild when compared to those that emerged two years later in Killough v. United States. Killough stands in sharp contrast to the Goldsmith decision, for here the court majority supported a significant policy shift which was opposed by Judge Burger. James Killough reported to police that his wife had disappeared five days earlier, but he failed to meet with officers the following day to disclose the details. Returning to Washington after a brief absence, Killough was arrested by police who had since discovered incriminating evidence against him. No charges were immediately filed, but the suspect was intermittently interrogated for approximately eleven hours. The next day, after brief questioning, Killough admitted murdering his wife. Upon signing a confession he was taken for a preliminary hearing—

146 277 F.2d at 341.
147 Id. at 342.
148 Id. at 344. In his dissent, Judge Fahy argued for suppression of the initial and reaffirming confessions. He believed that an unnecessary delay had occurred when officers left the arrestees in order to testify in other cases; the policemen should have then taken Goldsmith and Carter for preliminary hearings. Instead, maintained Judge Fahy, the officers "delayed doing so until the confessions had been obtained, using the time after the arrests and before the arraignments to obtain no additional information except the confessions." Id. at 346. And Bayer, he argued, was not comparable to Goldsmith because in the former case "six months had intervened to erase the alleged involuntariness of the confession." Id. at 347. The second confessions were also inadmissible because of inadequate, "fleeting representation" of counsel after arraignment when the confessions were reaffirmed. Id. at 346.
thirty-four hours after his arrest—in an attempt to comply with Rule 5(a). On the following day, Killough again agreed to talk to an officer, when he once more volunteered an oral confession. At trial his written confession was suppressed as being secured in violation of Rule 5(a), but the oral post-commitment confession was admitted. Jurors decided that the oral confession was trustworthy and voluntary beyond a reasonable doubt.

In a five to four decision, the court of appeals overturned the lower tribunal. Judge Fahy's majority opinion conceded that in Goldsmith and Jackson v. United States the court had upheld the admission of reaffirming confessions. Yet Fahy emphasized that in both decisions dissenters had contended that, under the Mallory-McNabb formulation, "the second confession stemmed so directly from the illegally procured and inadmissible first confession that it was also inadmissible." In the spirit of those dissents, the court majority now maintained that Killough's second confession was inadmissible as "fruit" of the first. Judge Fahy distinguished Killough from Goldsmith and Jackson because in the latter cases defendants received advice from attorneys before the reaffirming confessions; in Killough the suspect received no legal advice prior to the second confession.

Judge Warren Burger's scornful dissent in Killough is perhaps his best known lower court opinion. It began in a fervent tone:

The majority holding today is one of the most significant and far reaching of this court in many years. It goes far beyond the statute it purports to "interpret" and far beyond any prior opinion of this court or the Supreme Court. No statute remotely authorizes the holding. No one even suggests that any right under the Constitution is involved.

Judge Burger acknowledged that Killough's confession taken during illegal detention was inadmissible. But when brought before the magistrate, Killough was informed of his rights and thus the oral confession given voluntarily the following day was properly admitted by the lower court. As in Goldsmith, Burger noted that the Supreme Court in Bayer had held admissible a reaffirming

---

150 See note 128 supra.
151 285 F.2d 675 (D.C. Cir. 1960), cert. denied, 366 U.S. 941 (1961). In Jackson, the defendant's reaffirming confession was ruled admissible because he had been fully advised of his rights. Judge Fahy dissented, however, arguing that the initial confession, which was obtained during an unnecessary delay, "was used as the leverage to obtain its affirmation two days after it was signed." Id. at 681.
152 315 F.2d at 242.
153 Id. at 243-44.
154 Id. at 253.
155 See note 145 and accompanying text supra.
confession obtained six months after an inadmissible confession. Killough, Judge Burger believed, should have been decided with Bayer in mind. He also thought that the majority had construed Rule 5(a) beyond recognition. True, the provisions required that a defendant be presented before a magistrate without unnecessary delay. But, Judge Burger urged, "once the hearing is held the directive of Congress is satisfied. Congress was not dealing with events after that hearing; its command governs events before that hearing." For this reason, Rule 5(a) was not controlling in relation to Killough's reaffirming confession. Nor was Mallory applicable since it concerned confessions resulting from illegal detentions prior to arraignment and notification of constitutional rights.

Judge Burger also criticized the exclusionary rule, as he later did in his Supreme Court dissents in Bivens and Coolidge. He argued that its effect had not been to deter police from using unconstitutional means for securing evidence. Instead, the exclusionary rule "punishes society as a whole for the transgressions of a poorly trained or badly motivated policeman but does nothing to get at the heart of the problem." The practical effect of Killough, Judge Burger asserted, would be to extend Mallory to confessions voluntarily submitted after arraignment. Moreover, Killough would exclude "any admissions except where the accused is advised and prepared to enter a guilty plea." It also would proscribe "any interrogation of an accused after he has had the judicial warning until he secures a lawyer."

Judge Burger's dissent concluded by censuring the majority for making, rather than applying, the law and for not faithfully heeding the separation of powers doctrine:

I find it difficult to characterize what the court does in this case. To me it is an abuse of judicial power to write what is, in effect, an amendment to Rule 5(a) because some think that Congress did not go far enough. More than that the arrogated power is exercised in a way which offends common sense. Some of the members of the court might remember that there are other branches of government at least equally qualified to frame

---

156 315 F.2d at 255 (emphasis in original).
157 See notes 75-76 and accompanying text supra.
158 See notes 77-79 and accompanying text supra.
159 315 F.2d at 257-58 n.5.
160 Id. at 258.
161 Id.
162 Id. (emphasis in original).
the laws, explicitly ordained to do just that, and no less concerned than we are with individual liberty. Our task as judges, properly exercised, is a narrow one: to interpret the laws faithfully as Congress wrote them, not as we think Congress ought to have provided. Here the majority completely rewrites a statute already strained by a most generous interpretation.\textsuperscript{163}

\textit{Smith v. United States}\textsuperscript{164} furnishes an example of Judge Burger's subsequent interpretation of \textit{Killough}. \textit{Smith} involved delay where the suspect confessed and implicated another whose testimony was instrumental in his conviction. Washington, D.C., police had arrested Wilson Smith, Jr., and Raymond Bowden on suspicion of robbery. Bowden, a juvenile, was later released, but Smith was held for a lineup where he caught the attention of an officer investigating an unrelated murder-robbery case. Meanwhile Bowden agreed to return to the police station for questioning, where he confessed to participating in a robbery with Smith. The following day Smith was once more interrogated, admitted his role in the murder-robbery and implicated another juvenile, Philip Holman. Only then—after sixty hours of detention—was Smith taken for a preliminary hearing under Rule 5(a).\textsuperscript{165} Holman later testified that he, Smith, and Bowden robbed the victim after Smith committed the murder. At trial the confessions extracted during illegal detention were excluded as evidence; however, the testimony of Holman was admitted. All three were convicted and Smith and Bowden subsequently appealed to the court of appeals.

Judge Burger's majority opinion characterized the appellants' claim as follows: "[B]ecause the confessions made during the 'unnecessary delay' are inadmissible, the testimony of an eyewitness to the crime must also be suppressed because the existence of the eyewitness was revealed to police by appellants during the same period of time."\textsuperscript{166} He observed that courts had increasingly established stricter guidelines for admission of evidence, but no court had ruled that testimony of witnesses should be excluded because their identity was divulged during an unnecessary delay. Burger noted: "The fact that the source of evidence is 'tainted' by violation of constitutional or statutory provisions has not precluded the use of that evidence in every circumstance."\textsuperscript{167} Interpreting the majority's opinion in \textit{Killough}, Judge Burger insisted that Holman's testimony could not be suppressed under that decision or any other

\textsuperscript{163} Id. at 260.
\textsuperscript{165} See note 128 supra.
\textsuperscript{166} 324 F.2d at 879.
\textsuperscript{167} Id. at 881 (emphasis in original).
precedent. In contrast, Chief Judge Bazelon’s dissent favored reversing both convictions because Holman’s testimony was the “fruit” of an unnecessary delay. He maintained that the Supreme Court’s decisions in *McNabb* and *Mallory* would “be a dead-letter” if not employed by courts to suppress evidence under such conditions. Strict adherence to the *McNabb-Mallory* doctrine is particularly a judicial responsibility because “the temptation to violate this command [of Rule 5(a)] is so great that police will not voluntarily comply, and the legislature and executive have been either unable or unwilling to employ effective methods to insure compliance.”

During the two years following *Smith*, Judge Burger continued to display a pragmatic, pro-prosecution philosophy and to disagree with certain of his colleagues over unnecessary delays. For example, in *Spriggs v. United States* a majority concluded that there was an unnecessary delay in arraigning Leroy Spriggs, who had been held at a police station in order to fill out administrative forms related to “booking.” Officers testified that thirty minutes after the arrest the suspect had confessed to an assault. Spriggs, however, denied the confession. Judge Fahy concluded that the appellant had not been presented before a magistrate “as quickly as possible,” and that since inquiries made by the police were for the purpose of obtaining the confession, it was inadmissible. Judge Burger, in his dissent, insisted that the form-filling process was necessary and that the case should not have been reversed. Instead, *Spriggs* should have been remanded to the lower court for more specific findings as to the admissibility of the confession.

As the preceding cases illustrate, in dealing with the concept of “unnecessary delay,” Judge Burger typically chose an interpretation favoring the prosecution and rejecting legal technicalities presented on the behalf of the accused. What Burger considered a necessary delay was quite frequently deemed unnecessary by his more liberal colleagues. Similar disagreement between Judge Burger and the other members of the court of appeals can be observed in their treatment of the question of effective representation, the area of procedure next examined.

---

168 *Id.*
169 *Id.* at 883.
170 *Id.*
171 335 F.2d 283 (D.C. Cir. 1964).
173 *Id.* at 287.
174 *Id.* A related disagreement was evident in *Perry v. United States*, 347 F.2d 813 (D.C. Cir. 1964), *cert. denied*, 382 U.S. 959 (1965), where Judges Burger and Washington clashed over the effect of continued police questioning during “booking” in spite of the arrestee’s statement that he preferred to remain silent.
For over four decades American courts have affirmed the general notion that persons accused of crimes should receive "effective assistance" of counsel. This qualification has been an element of the right to counsel at least since the Supreme Court's 1932 decision in *Powell v. Alabama.* An individual may be denied effective assistance if, for instance, the defense is so incompetent as to make the trial a farce, or if counsel is appointed late in pretrial or judicial proceedings. Effective assistance, like many other legal phrases, has yet to be defined comprehensively by the courts. Rather, its meaning has evolved through a case-by-case determination of particular factual situations which constitute effective or ineffective representation.

Since Warren Burger's appointment as Chief Justice, a Supreme Court majority has usually assumed a pragmatic stance on the required effectiveness and competence of counsel when the issue has arisen. This is illustrated by a trio of 1970 cases which mainly involved plea bargaining but which also necessarily touched upon the question of effective assistance. The Court opinion in each case was assigned to Justice White. Chief Justice Burger joined the conservative majority. In *Brady v. United States,* the Court held:

A plea of guilty triggered by the expectations of a competently

---

175 287 U.S. 45 (1932). In *Powell,* Justice Sutherland wrote:

All that it is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.

Id. at 71 (emphasis added).


177 See L. LEVY, supra note 28, at 221-30; Stephens, *The Burger Court: New Dimensions in Criminal Justice,* 60 GEO. L.J. 249, 254 (1971). See also *Chambers v. Maroney,* 399 U.S. 42 (1970), where the Burger Court majority held that the appellant was afforded effective assistance of counsel, notwithstanding the fact that a new attorney was appointed only a short time before a second trial. Justice Harlan dissented in part, urging that ineffective assistance may have resulted from counsel's late appointment, from his handling of certain claims, and from his cross-examination of a prosecution witness. Id. at 55-58.


counseled defendant that the State will have a strong case against him is not subject to later attack because the defendant's lawyer correctly advised him with respect to the then existing law as to possible penalties but later pronouncements of the courts, as in this case, hold that the maximum penalty for the crime in question was less than was reasonably assumed at the time the plea was entered.\(^\text{180}\)

The six to three decision in *McMann v. Richardson*\(^\text{181}\) more specifically addressed effective representation, although the principal holding asserted that the defendant was not entitled to a hearing on a petition of habeas corpus despite the claim that his guilty plea was based on a coerced confession. Richardson urged that his plea in a New York court resulted in part from ineffective assistance. But the Supreme Court majority ruled that counsel was "reasonably competent" and that the effectiveness of counsel should be judged "not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases."\(^\text{182}\) *Parker v. North Carolina*,\(^\text{183}\) the last of the threesome, likewise involved a guilty plea later claimed to have been founded on a coerced confession. Rejecting this assertion, the Burger Court acknowledged that had counsel deemed the confession inadmissible, the plea would have been different. That fact, however, failed to signify ineffective assistance, for, as in *McMann*, counsel's advice "was well within the range of competence required of attorneys representing defendants in criminal cases."\(^\text{184}\)

Chief Justice Burger, after six years of service on the United States Supreme Court, has authored several opinions regarding assistance of counsel generally,\(^\text{185}\) but none on the specific question

\(^{180}\) *Id.* at 757. See also the application of the *Brady* standard in *North Carolina v. Alford*, 400 U.S. 25, 31-32 (1970).


\(^{182}\) *Id.* at 771. Compare *Tollett v. Henderson*, 411 U.S. 258 (1973), where three dissenters agreed that the appellant had been denied effective assistance in state criminal proceedings. But Justice Rehnquist's majority opinion, joined by the Chief Justice, adopted a different position—that once the accused acknowledges in court his guilt to charged crimes, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann*.


\(^{184}\) *Id.* at 797-98.

of "effective" assistance. To anticipate how he will likely decide in the future, at least three indicators should be helpful. First is his Supreme Court voting record, as reflected in the above decisions which partially concern the issue of effective assistance, where he seems plainly to align with the more conservative of his colleagues. Second are his public statements, perhaps the most important of which was a November 1973 speech where he observed that "[m]any judges consider a majority of trial lawyers not competent to give effective representation to their clients." Chief Justice Burger agreed with this assessment and recommended restricting the number of lawyers qualified for trial practice. A third and probably more reliable indicator of what is to come is provided by his lower court opinions concerning effective assistance. Some of the more noteworthy of these will be analyzed here.

Chief Justice Burger wrote several opinions involving effective

---

186 N.Y. Times, Nov. 27, 1973, § 1, at 1, col. 3.
187 At first glance, it might appear that Chief Justice Burger's public acknowledgment of the generally poor quality of trial lawyers is inconsistent with his Supreme Court and court of appeals voting records, which show his clear tendency to reject appellants' allegations of ineffective assistance. However, the likely explanation for this apparent inconsistency is that Chief Justice Burger, although deploring the low caliber of most American trial lawyers, nevertheless utilizes the standard range of attorney competence in determining whether effective assistance has been had. Cf. text accompanying note 182 supra. Thus, it appears that he would approach the problem of effective assistance by more rigorous training of lawyers rather than by "letting off" convicted criminals.

188 Judge Burger's propensity to vote against claims of ineffective assistance is shown in Table 3. It indicates all nonunanimous effective assistance cases in which Burger participated between 1956 and 1969, thereby permitting a comparison between his voting and that of his colleagues in those cases. When compared to the tables in notes 30 and 134 supra, Table 3 suggests that Burger voted most conservatively on questions of arrests, searches and seizures; next on claims of inadequate representation; and least conservatively on issues of unnecessary delays. However, it is evident that he tended to vote against appellants' positions in each of these areas.

### Table 3

<table>
<thead>
<tr>
<th>Judge*</th>
<th>Decision Score Against Criminal Appellants**</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bazelon</td>
<td>.000 (0/7)</td>
</tr>
<tr>
<td>Burger</td>
<td>.818 (9/11)</td>
</tr>
<tr>
<td>Edgerton</td>
<td>.000 (0/6)</td>
</tr>
<tr>
<td>Fahy</td>
<td>.000 (0/5)</td>
</tr>
<tr>
<td>Miller</td>
<td>1.000 (5/5)</td>
</tr>
<tr>
<td>Prettyman</td>
<td>.800 (4/5)</td>
</tr>
</tbody>
</table>

* Judges excluded from the table because of insufficient data are: Bastian 1.000 (3/3); Danaher 1.000 (3/3); Leventhal (no participations); McGowan (no participations); Robinson (no participations); Tamm (no participations); Washington .000 (0/4); and Wright .000 (0/1).

** For explanations and applications of decision scores, see the references cited at note 30 supra.
assistance questions during his first years on the court of appeals. One—a dissent—was filed in Jenkins v. United States.\textsuperscript{189} According to Judges Edgerton and Fahy, who vacated the lower court decision in that case and remanded for rehearing and resentencing, Jenkins may have received ineffective assistance because his "interests conflicted with the interests of co-defendants who were represented by the same counsel."\textsuperscript{190} Aside from this, "when appellant appeared for sentencing no one was afforded an opportunity to make a statement in his behalf . . . ."\textsuperscript{191} Dissenting, Judge Burger would have required only a resentencing. He found no basis for the determination that the assistance of counsel had been ineffective. He instead claimed that the majority's "action goes beyond granting the accused his 'rights.' It is an unrealistic emphasis on empty form wholly unrelated to substance."\textsuperscript{192}

Of much greater impact than his dissent in Jenkins was Judge Burger's majority opinion in Ellis v. United States.\textsuperscript{193} In that case, police, who had been watching a neighborhood which had experienced frequent housebreakings, arrested Edward Ellis upon his failure to explain his presence at the door of a private residence. They searched the suspect and discovered stolen goods and an instrument which could be employed for unlawful entry. Ellis was subsequently found guilty of housebreaking and larceny. Responding to his request to appeal in forma pauperis, the court of appeals appointed two attorneys to scrutinize the case. Counsel were instructed that if it was "impossible to determine without the aid of the stenographic transcript whether the appeal is frivolous or taken for delay, [they] shall so advise the Court."\textsuperscript{194} After examining the

\textsuperscript{189} 249 F.2d 105 (D.C. Cir. 1957). For Judge Burger's effective assistance opinions not analyzed in this Article, see Harried v. United States, 389 F.2d 281 (D.C. Cir. 1967); Gilmore v. United States, 273 F.2d 79 (D.C. Cir. 1959); Clark v. United States, 259 F.2d 184 (D.C. Cir. 1958).

\textsuperscript{190} 249 F.2d at 105.

\textsuperscript{191} Id.

\textsuperscript{192} Id. at 106.

\textsuperscript{193} 249 F.2d 478 (D.C. Cir. 1957). For comments on Ellis, see 43 VA. L. REv. 1126 (1957). The case was later remanded by the Supreme Court. Ellis v. United States, 356 U.S. 674 (1958). There the Court, in a per curiam opinion, held that Ellis's appeal was made in "good faith" under 28 U.S.C. § 1915 (1958) and that it was "not plainly frivolous." The Court remanded the case since, contrary to Judge Burger's view, appointed counsel for Ellis "performed essentially the role of amici curiae [whereas] representation in the role of an advocate is required." Id. at 675. For a more detailed account of the Supreme Court's actions in Ellis and related cases, see Comment, Appellate Review for Indigent Criminal Defendants in the Federal Courts, 26 U. CHI. L. REv. 454 (1959).

\textsuperscript{194} 249 F.2d at 478, quoting the same court's order of November 27, 1957, appointing counsel for Ellis.
appellant's allegations, counsel concluded that the only conceivable basis for finding a violation of Ellis's rights was the tenuous argument that there had been a lack of probable cause for his arrest. Declining to argue that his rights were violated, however, counsel advised the court that "no substantial" question was presented. By a five to four vote the court ruled that counsel had effectively represented the appellant.

Judge Burger, speaking for the majority, approved of counsel's performance and recommendations. The two lawyers had simply followed instructions to determine whether the lower court decision warranted review, and their actions satisfied legal requirements for assisting Ellis, including those explained by the Supreme Court in Johnson v. United States. Judge Burger further pointed out that although counsel had a responsibility both to the court and the accused, their failure to discover a substantial issue did not indicate ineffective representation. Burger insisted that there was "no evidence whatever that [counsel] failed to give appellant adequate representation while discharging their obligation to the court." Indeed, he argued, "'counsel has done all that honestly can be done . . .'" But despite these arguments by Judge Burger, four judges strongly dissented.

A year after Ellis the court considered issues involving the wisdom of counsel's advice and strategy in Edwards v. United States. Alphonzo Edwards had been arrested for suspected robbery. After confessing and waiving a preliminary hearing, he was indicted on three counts of robbery. He initially pleaded not guilty, but upon the advice of appointed counsel he changed his plea to guilty and was sentenced. The court of appeals refused to vacate the sentence. In his opinion for the court, Judge Burger acknowledged that counsel had only once discussed the case with the defendant and that counsel had advised Edwards of his limited chance for acquittal and recommended that he plead guilty. Yet

195 Id. at 479 (emphasis in original).
197 249 F.2d at 479.
198 Id., quoting Judge Washington's dissent. Id. at 480.
199 Judge Washington's dissent, joined by Chief Judge Edgerton and Judges Bazelon and Fahy, urged that the court-appointed attorneys had ineffectively represented Ellis because "they conceived their role to be that of impartial arbiters rather than advocates in a contested proceeding." Id. at 480 (dissenting opinion). In Johnson, the Supreme Court required appointed counsel actually to represent the accused. Therefore, according to Judge Washington, counsel should have more effectively played the role of advocate in Ellis's appeal. Id.
these were not necessarily signs of inadequate representation. "Mere improvident strategy, bad tactics, mistake, carelessness or inexperience do not necessarily amount to ineffective assistance of counsel, unless taken as a whole the trial was a 'mockery of justice.'" Judge Burger agreed that counsel could have advanced additional arguments on Edwards's behalf, but failure to do so did not constitute ineffective assistance. Edwards had waived arguments of innocence by voluntarily pleading guilty with adequate knowledge of the consequences. Understanding the plea of guilty did not require that the defendant comprehend the "technical defenses which might very well make the prosecutor's job more difficult or even impossible were he put to his proof." Quite the contrary, reasoned Judge Burger, understanding "refers merely to the meaning of the charge, and what acts amount to being guilty of the charge, and the consequences of pleading guilty thereto."

*Brown v. United States,* decided in 1959, was also concerned with the meaning of effective representation. There the District of Columbia Circuit declared that the concept does not necessarily mean optimistic assistance. William Brown, Jr., was appointed counsel who was skeptical of Brown's chances of successfully defending against assault charges. Brown therefore indicated to counsel a preference for another attorney—one more optimistic of victory. Counsel informed the trial judge of the request but was directed to continue defending the accused. The judge neither asked Brown why he preferred another attorney nor informed the defendant of his right to defend himself. Challenging his subsequent conviction, Brown argued that the trial judge failed to explain various relevant aspects of the right to counsel and that effective assistance was not afforded. A conservative majority upheld Brown's conviction in a five to four decision. Judge Miller's majority opinion reasoned that the trial judge did not err by failing to ask Brown why he preferred another attorney. Brown's request did not indicate any

---

201 Id. at 708.
202 Id. at 710.
203 Id. (emphasis in original). In dissent, Judge Bazelon asserted that Edwards's confessions were inadmissible if they were obtained while the suspect was experiencing severe narcotic withdrawal symptoms. Edwards may also have been denied effective assistance if counsel recommended the plea of guilty without considering whether the confessions were inadmissible, or if counsel advised a guilty plea with knowledge of the confessions' inadmissibility. Id. at 711.
reason except counsel's pessimism as to the probable outcome, noted Miller, which is not an adequate reason for appointing another attorney. Nor does pessimism indicate ineffective assistance. Indeed, that Brown was convicted on only two of seven counts suggests that counsel had been effective, according to Miller. 205

Judge Burger concurred, showing little sympathy for the appellant's claims, but much support for a trial judge's discretion in such matters. He wrote that "[t]he constitutional right to counsel does not mean counsel who will be optimistic in his private appraisal of the evidence and his advice to the accused." 206 A judge possesses discretionary powers concerning requests to change counsel, and in Brown the judge justifiably declined to assign another attorney since insufficient reasons were advanced. "Limited only by the necessity to ascertain the basis of the objection and then to rule on the reasons rather than on a naked request for new counsel, the trial court must be allowed very wide discretion." 207 Moreover, in complex cases where an accused could not adequately defend himself, a judge may assign counsel without the defendant's concurrence in the selection. In such cases, however, the defendant should still be given an opportunity to advance his own arguments to the jury. 208

After 1960 Judge Burger was assigned to fewer court panels adjudicating effective assistance issues, yet his 1966 opinion in Levin v. Katzenbach 209 is worthy of mention since it was a controversial case involving the prosecution's duty to disclose evidence that

205 264 F.2d at 365.
206 Id. at 369.
207 Id. (emphasis in original). In contrast to Judge Burger's views, four judges dissenting in Brown believed that the appellant was denied effective assistance and that the trial judge had committed error:

We think the trial court erred when it directed counsel to proceed, without consulting the accused or asking him the basis for his attitude towards counsel, or even whether his attitude had been correctly reported, and without advising him of his right to proceed alone if he insisted.

Id. at 370 (Washington, J., dissenting). Conceding that trial judges possess discretion in these cases, the minority observed that this discretion should be exercised only on an "informed basis." Id. An "informed basis" had not characterized the decision to deny Brown's request, for the defendant was not even consulted. Finally, the dissenters disagreed with Judge Burger's interpretation of the right to counsel. Judge Washington emphasized that "[c]onsent is and must remain the basis of assigning counsel to indigents accused of crime." Id. A court, he urged, "must apply the same rules to indigents as to persons of means: it cannot force an indigent into a trial with repudiated counsel simply because he is an indigent and has had counsel appointed for him by the court." Id.
208 Id. at 369 (Burger, J., concurring).
might support defense contentions. Milton Levin had been found guilty of grand larceny. The court of appeals affirmed the conviction. After the Supreme Court denied certiorari, Levin filed a habeas corpus petition in the district court, requesting a new trial on grounds that the government deliberately concealed evidence that was beneficial to the defense. The lower court denied Levin's request, but the court of appeals reversed and remanded. Chief Judge Bazelon filed the majority statement, Judge Burger a dissent.

It is fundamental that if the prosecution deliberately misleads jurors or fails to divulge exculpatory evidence, a defendant's right to due process is violated. Bazelon's opinion extended this tenet. He insisted that if the undisclosed evidence in Levin might have influenced jurors reasonably to doubt Levin's guilt, then the accused deserved a new trial. If there had been negligence on the part of the prosecution, according to Bazelon, the evidence should have been given to the defense. With reference to effective assistance, he maintained that "[r]equiring government disclosure will not encourage defense counsel to be careless in trial preparation since there can be no assurance that the government, even with all its resources, will discover all significant evidence favorable to the defense."

Contrary to Chief Judge Bazelon, Judge Burger saw no reason to reverse the conviction or to expand the meaning of negligent nondisclosure. He contended that Levin's counsel had access to, and partial knowledge of, evidence that the prosecution failed to disclose at trial. Aside from that, because of the defense strategy, Judge Burger questioned whether all the evidence would have been used even if counsel had possessed it. There was, then, no negligent nondisclosure by the government. Bazelon's opinion, argued Burger, extended the principle of negligent nondisclosure far beyond any previous case to a point where it will put a premium on slovenly trial preparation by defense counsel and tend to allow a second trial to any defendant imaginative enough to dream up a new theory of defense as "newly discovered" because neither party elected to use it at trial.

213 Id. at 290 & n.6.
214 363 F.2d at 291.
215 Id.
216 Id. at 295.
217 Id. at 292.
Another crucial fact in Levin, from Judge Burger’s standpoint, was that defense counsel had only superficially prepared the case. The facts indicated a lack of diligence on the part of counsel, not negligence on the prosecution’s part. Thus, Judge Burger perceived Levin as involving effective assistance and claimed that the majority was attempting to enlarge the scope of that concept:

I suggest that the majority holding is a thinly disguised holding that defense counsel gave Appellant ineffective assistance . . . , and in the future I shall regard this case as holding nothing more than that. If the question is one of ineffective assistance, it should be considered as such candidly and directly rather than by the back door. The majority contends that its holding will not encourage defense counsel to be careless in their trial preparation. However, if defense counsel was careless here (and it is only the majority which so decides), he has succeeded in the very result which the majority contends its “rule” will not encourage. By offering the possibility of a new trial for ineffective assistance of counsel, without facing up to that issue, the majority erects a great incentive for all counsel to neglect trial preparation and rely on what it characterizes as “the government . . . with all its resources,” to do his fact-gathering for him.

Judge Burger concluded his dissent by enumerating several advantages that persons accused of crimes have over the prosecution. The majority, he believed, in an effort to further expand the parameters of effective assistance, ignored the weighty advantages that the defense already possesses.

**Conclusion**

At the time of his appointment as Chief Justice, Warren Burger’s judicial philosophy in criminal procedure was generally described in terms of strict construction, conservatism, and judicial restraint. Speaking broadly, these traits emerged in some of his opinions during thirteen years experience on the United States Supreme Court.

---

218 Id. at 295.

219 Id.

220 Among the advantages which Judge Burger considered most important are “[t]he presumption of innocence, the privilege against self-incrimination and the Government’s burden of proof beyond a reasonable doubt,” as well as the defendant’s freedom from any “obligation to reveal evidence which would aid the prosecution.” Id.

Court of Appeals for the District of Columbia, as they have in some of his Supreme Court holdings. These labels are, however, so vague as to be of limited utility in characterizing Judge Burger's lower court criminal procedure decisions. Rather than adopting such conceptual terminology, it is perhaps more accurate to describe his philosophical orientation in three general ways, each of which has been illustrated here through examination of his positions on probable cause, search and seizure, unnecessary delay, and effective assistance cases. First, Judge Burger was generally prone to decide in favor of the prosecution, provided that law enforcement or court officials had not blatantly violated individual rights. Second, he consistently advocated that courts be careful in restricting the police in carrying out their responsibilities, believing that pragmatism and common sense should be essential elements in judicial decisionmaking. He therefore responded critically when he perceived criminal suspects receiving broader protection of rights than the average citizen, and he found fault in legal technicalities which impede the workings of criminal justice. Third, Burger's opinions were periodically marked by the attitude that piecemeal judicial policymaking in criminal procedure is normally an unjustifiable and unwise abuse of judicial power—that in regard to most procedural questions only legislatures, not courts, can effectively frame policy.

In retrospect, these salient philosophical traits correspond closely to what Richard Nixon, in his 1968 "law and order" campaign, was actively seeking in a Chief Justice. During that presidential election, Mr. Nixon claimed that courts had weakened law enforcement forces as opposed to the nation's criminal elements; he objected to judges employing legal technicalities which allowed apparently guilty persons to go free; he confidently denounced what he considered to be judicial usurpation of the legislative function. These cardinal beliefs harmonized with many of those expressed by Warren Burger as an appeals court judge. As Nixon plainly explained on the day after the nomination, Judge Burger had written lower court criminal procedure opinions which enunciated "what is now the minority view or has been the minority view of the Supreme Court. It happens to be my view."

There can be little doubt that Burger's criminal procedure outlook

---

222 See notes 2, 6-9 and accompanying text supra.
223 See note 8 supra.
was a significant consideration contributing to his 1969 appointment. And it is therefore not surprising that under Chief Justice Burger's leadership—and with three other Nixon appointees—the United States Supreme Court has assumed a less active stance on most criminal procedure issues than it did during the Warren era.\textsuperscript{225} Although some presidents have ultimately been unhappy with their selections for the Court, this is unlikely to be the case here. In view of Chief Justice Warren Burger's lower court opinions in criminal procedure, and in view of his career thus far on the Supreme Court, former President Nixon seems generally to have chosen the kind of Chief Justice that he campaigned on in 1968.