Touro Law Review

Volume 3 | Number 1 Article 2

1986

The State of New York's State Federal-Judicial Council

Hon. George C. Pratt

TOURO
LAW REVIEW

Vol. 3, No. 1 Fall 1986

ARTICLES

THE STATE OF NEW YORK'S STATE-FEDERAL JUDICIAL COUNCIL

Hon. George C. Pratt*

INTRODUCTION

Although theoretically envisioned as two independent legal systems, in practice our federal and state courts regularly experience friction at points of overlapping jurisdiction. To promote better relations in these areas of tension and to provide a forum for discussion between the two judiciaries, many states have created state-federal judicial councils. These councils, composed in large part of members of the state and federal judiciary, seek "to improve and expedite the administration of justice by state and federal courts . . . to promote and harmonize the relationship between these courts and to eliminate or minimize any conflicts which may have developed or could

* United States Circuit Judge, United States Court of Appeals for the Second Circuit. I acknowledge with gratitude the invaluable assistance of Anne Y. Shields, Esq. and Thomas J. Murphy, Esq. without whom this article could not have been prepared.

develop from the operation of the dual federal and state judicial system."[1]

In 1985, I was honored to be appointed to a three-year term on the New York State-Federal Judicial Council (the "council"). In the spirit of the council's efforts to educate and inform members of the bench, bar, and general public, I would like, through this article, to review how the council has evolved to its present role and to reflect on how it may be useful in the future.

A specific focus of the council over the last three years has been to provide a forum for discussion of matters affecting both the public in general and judges and attorneys practicing within the two systems in particular. To that end, I will discuss some of the problems that have been addressed by the council and, in many cases, successfully resolved, due, at least in part, to its efforts. In particular, the results of the council's statistical analysis of federal habeas corpus review of state criminal convictions are offered to provide a factual context for assessing this area of strongly perceived conflict. At bottom, that survey suggests that the degree of federal intervention in the state criminal process is far less obtrusive than is commonly believed.

I. NEW YORK'S STATE-FEDERAL JUDICIAL COUNCIL

Established in 1971, the council, like those set up in over one-half of the states, was formed in response to Chief Justice Burger's suggestion in his 1970 State of the Judiciary message that such councils would promote harmonious relations by " 'maintain[ing] continuous communication on all joint problems.' "[2] Despite early enthusiasm and a prestigious membership including then Chief Judges Friendly and Fuld, New York's council failed to meet with any regularity, which, by 1981, led a commentator studying state-federal judicial councils to describe New York's council as "dormant."[3]

Approximately one year later, however, the council was revitalized at the joint initiative of Chief Judge Wilfred Feinberg of the Second Circuit and then Chief Judge Lawrence Cooke of the New York Court of Appeals.[4] At a meeting on October 28, 1982 at the Association of the Bar of the City of New York, the participants agreed

1. Minutes of the first meeting of the Delaware Federal-State Judicial Council, February 23, 1971.

2. Winkle, *Toward Intersystem Harmony: State-Federal Judicial Councils*, 6 JUST. SYS. J. 240, 241 (1981).

3. *Id.* at 243.

4. *See* Flanders, *A New Approach Revitalizes State-Federal Judicial Council*, N.Y.L.J., Oct. 4, 1984, at 1, col. 3.

that Judge Ellsworth Van Graafeiland of the Second Circuit would serve as chairman. The other federal seats on the council were held by Judge Richard J. Cardamone of the Second Circuit, and Chief Judge Jack Weinstein of the Eastern District of New York. The state seats were occupied by Judge Sol Wachtler, then Associate Judge of New York's Court of Appeals, Justice Vito Titone, then Associate Justice of New York's Appellate Division, Second Department, and New York State Supreme Court Justice Martin Evans.

Since 1982, the chair of the council has alternated between federal and state judges. Judge Van Graafeiland was succeeded by now Chief Judge Sol Wachtler who, in turn, was succeeded by Judge Cardamone. The council is currently headed by Judge Judith Kaye of New York's Court of Appeals, who was elected by the members of the council in December 1985. The other jurists currently serving on the council are Chief Judge Charles Brieant of the United States District Court for the Southern District of New York, Justice Theodore Kupferman of the New York State Appellate Division, First Department, and Justice Edwin Kassoff of the New York State Supreme Court.

Consistent with its revitalization in 1982, the council now meets approximately once every two months. In addition to the members listed above, meetings are frequently attended by Donald Sheraw, the Clerk of the New York Court of Appeals, and Steven Flanders, the Circuit Executive for the Second Circuit. Both Mr. Sheraw and Mr. Flanders and their respective staffs, as well as the staffs of the Second Circuit and district court clerks' offices, have generously extended their resources to help study issues and suggest possible solutions to various problems. In short, the cooperation in recent years of members of the state and federal judiciary as well as the administrative staffs of both court systems has resulted in the formation of a vital organization that, it is hoped, will continue to have a positive effect on relations between New York's state and federal courts.

A. *Issues Addressed by the Council*

Issues slated for discussion in 1982 ranged from mundane procedural problems such as the handling of scheduling conflicts of attorneys practicing in both systems, the sharing of facilities such as libraries, and the use of a single list of citizens to serve as jurors, to more substantive questions such as the possibility of instituting a procedure for certifying questions of state law to the New York Court of Appeals, and encouraging state court judges to write opin-

ions in criminal cases to facilitate more meaningful review of federal habeas corpus petitions. On each of these topics substantial progress has been made.

Both Steven Flanders and Donald Sheraw have made themselves available to handle scheduling conflicts. A notice of their continuing availability for this purpose is published periodically in the *New York Law Journal* and, although such conflicts have not presented an acute problem in the past, the recently instituted individual assignment system in the state courts will likely create new concerns for practitioners.

The use of a single computerized pool for prospective jurors in both systems is a subject that is presently under active discussion. Most counties in the state compile juror pools from voter registrations, motor vehicles records, and state tax rolls. In contrast, the federal district courts currently use only voter registration lists. A single, shared list, in addition to cutting costs to both systems, should result in a larger pool of jurors for the federal courts, while minimizing the duplication of efforts in locating potential jurors.

A substantial achievement — although not one that can be attributed solely to the efforts of the council — is the institution of a procedure for the federal courts to certify questions of state law to the New York Court of Appeals. Since the powers of New York's highest court stem from the state constitution, which limits the Court of Appeals' jurisdiction to "the review of questions of law" in specific cases,[5] a constitutional amendment was required to establish the certification procedure.

New York's voters approved such an amendment in November 1985, allowing the Court of Appeals to "adopt and from time to time . . . amend a rule to permit the court to answer questions of New York law certified to it."[6] In turn, the Court of Appeals adopted such a rule,[7] under which certification may be sought by "the Supreme Court of the United States, any United States Court of Appeals, or a court of last resort of any other state [whenever it appears] that determinative questions of New York law are involved."[8] Adoption of this mechanism aligns New York with the growing number of states that employ such a certification procedure, and should reduce the guesswork that in the past has been required

5. N.Y. CONST. art. VI, § 3.
6. N.Y. CONST. art. VI, § 3b(9).
7. N.Y. COMP. CODES R. & REGS. tit. 22, § 500.17 (1986).
8. *Id.* § 500.17(a).

under the doctrine of *Erie Railroad Co. v. Tompkins*[9] when a federal court must predict how the New York Court of Appeals would rule on an issue of state law. In fact, at the request of the Second Circuit, the New York Court of Appeals has just recently accepted the first certification pursuant to the new procedure, in a case requiring interpretation of section 104-b(2) of New York's Social Services Law.[10]

As noted above, the council seeks to achieve its goals by providing a forum for discussing issues that arise as a result of our dual federal system. With that in mind the council sponsored a program in May 1985 to discuss the then-impending institution of the individual assignment system in the state courts. As expected, the meeting was well attended and provided an opportunity for judges and practitioners to learn about and discuss the system, long employed in the federal courts, in an effort to ease the state court's transition. Other programs sponsored by the council included a 1983 conference held at Pace University featuring panel discussions on the merits of the individual assignment system, various voir dire practices, and criminal sentencing difficulties. The success of these and other events has convinced the council to sponsor additional programs. For instance, forums featuring one federal and one state speaker are soon to be scheduled at universities and other institutions.

The council's recent successes might indicate that there is little left to do; nevertheless, several topics have been suggested as prime areas for future consideration. For example, the conflicts and problems that inevitably arise from federal supervision of local jails[11] and from application of the automatic stay provision of the bankruptcy code[12] are likely to be on the agenda in the future. In addition, the council has been mentioned as a potentially useful vehicle for resolving prosecutorial squabbles in areas of jurisdictional overlaps. Had they found it desirable, either of the judges recently confronted with the much-publicized argument between state and federal prosecutors over who would proceed to trial first on the corruption allegations against Bronx Democratic party leader Stanley Friedman could have turned to the council for either direct mediation or simple advice. Certainly, the council is available to assist with similar problems in the future.

---

9. 304 U.S. 643 (1938).

10. *See* Kidney v. Kolmar Laboratories, 808 F.2d 955 (2d Cir. 1987).

11. *See, e.g.*, Benjamin v. Malcolm, 803 F.2d 46 (2d Cir. 1986).

12. *See, e.g.*, Note, *Clean-Up Orders and the Bankruptcy Code: An Exception to the Automatic Stay*, 59 ST. JOHN'S L. REV. 292, 292-95 & nn.1-12 (1985).

II. FEDERAL HABEAS CORPUS REVIEW OF STATE COURT CRIMINAL CONVICTIONS

A common misperception of federal habeas corpus review of state convictions underlies an oftentimes raw point in state-federal judicial relations. The public often views the granting of the "Great Writ" as nothing more than the freeing of a convicted criminal by a "liberal" federal judge. To members of the state judiciary, when a single federal judge orders the release of, or a new trial for, an incarcerated defendant whose case has been considered by as many as thirteen state judges, it is, figuratively, a slap in the face. A survey conducted by the council, however, reveals that in considering petitions for habeas corpus, federal courts give the utmost deference to the state courts, with the result that applications for the writ are rarely granted.

A. *Procedural Limitations on Federal Habeas Corpus Review*

It should be noted preliminarily that the grounds for granting the writ are quite narrow. A federal writ of habeas corpus may properly be entertained only if it is found that the petitioner is being held "in custody in violation of the Constitution or laws or treaties of the United States."[13] Even if a petitioner clears this threshold requirement, however, numerous reasons remain for denying the writ.

Two of the more obvious limitations are the requirement that the federal petitioner first must exhaust his claims before the state courts[14] and the provision that, with limited exceptions, federal courts must presume the correctness of written findings of fact made by a state court.[15] In addition, the well-known doctrines of *Stone v. Powell*[16] and *Wainwright v. Sykes*[17] completely foreclose federal habeas corpus review in certain instances. Thus, even a cursory review of the statutory and judicial roadblocks that must be negotiated before a state criminal defendant may have his claim substantively reviewed by a federal judge demonstrates the deference federal courts pay to their state counterparts' abilities to protect federal constitutional rights.

---

13. 28 U.S.C. § 2254(a) (1982).
14. *See* Ex parte Royall, 117 U.S. 241 (1886).
15. *See* 28 U.S.C. § 2254(d) (1982).
16. 428 U.S. 465 (1976).
17. 433 U.S. 72 (1977).

B. *The Work of the Council*

1. *Appellate Division Affirmances With Opinion*

Recognizing the importance of the earlier state proceedings to meaningful, less obtrusive habeas corpus review, the council passed the following resolution in May 1984:

> The State/Federal Judicial Council recognizes that the appellate process requires that appellate courts state reasons for their decisions. Litigants and the public are reassured when they can see that the determination that emerged at the end of the reasoning process is explicitly stated rather than in a court order that says nothing more than "judgment affirmed." In addition, an opinion issued by an intermediate appellate court assists courts of last resort in determining whether further discretionary review is available and serves to insulate criminal convictions against collateral attack. On the other hand, it is also recognized that pressures of volume preclude the expenditure of energy and time on opinion writing in all instances.
>
> Accordingly, the State/Federal Judicial Council recommends, in order to reduce the burden created by attacks in federal court on state criminal judgments, that intermediate appellate courts in New York state reasons for the decision reached in criminal cases, however brief, to the extent caseload and practicalities permit, and whenever possible, indicate whether an affirmance rests upon a procedural deficiency.

The issue was discussed with justices of all the appellate divisions to solicit their views. While the absence of a writing can often reduce habeas corpus review to guesswork, the appellate division justices agreed that simply mandating a writing in every case was not the solution. The sheer volume of the appellate divisions' dockets made a universal writing requirement impossible. Also, the idea, circulated among the appellate division justices, of using "form" opinions was rejected because of the obvious increase in workload without any clear indication of a resultant benefit to the body of the criminal law. Although no appellate division has formally agreed to write in every case, the second department has in practice come close to that objective, and in all departments the exchange of information has heightened the justices' awareness of the later federal problems created by a silent affirmance, and this, in and of itself, is a substantial achievement.

On the federal side of the problem, the Second Circuit, in light of *Wainwright v. Sykes*, [18] has attempted to ease the state courts' burden by invoking the presumption that "an affirmance without opin-

18. 433 U.S. 72 (1977).

ion by a New York Appellate Court, in which the argument of procedural waiver was advanced, was on procedural grounds."[19] Although this doctrine is not without its exceptions,[20] the presumption affords state appellate courts the opportunity reasonably to determine what view the federal court will take if the state court opts for a silent, unexplained affirmance.

2. *The Results of the Federal Habeas Corpus Survey*

At the request of the council, Mr. Flanders' staff recently coordinated a study of section 2254 petitions from New York's federal courts to determine, over the course of two statistical years, the number granted, the number denied, and the grounds for the federal court's action. The results of that survey further demonstrate the extreme deference that federal judges afford the criminal judgments of the state courts.

The study covers the Second Circuit's disposition of habeas corpus petitions filed by incarcerated prisoners pursuant to judgments of New York State courts for statistical years 1983 and 1984 (July 1, 1982 to June 30, 1983 and July 1, 1983 to June 30, 1984). The total number of petitions disposed of during that period was 158. That figure does not, however, represent the total number of petitions filed during that time in the four district courts covering New York, since the right to appeal a denial of the writ is not available in every case. Rather, a petitioner may appeal in only those cases in which the district judge or a circuit judge has issued a certificate of probable cause,[21] which may be granted only when the petitioner has made a " 'substantial showing of the denial of [a] federal right.' "[22] By reducing the number of frivolous appeals, this requirement minimizes abuse of the writ and the resultant interference with state procedures. Thus, the simple fact that so many petitions never come before the circuit court makes the following statistics even more impressive.

During the two-year period, the vast majority of cases (110 of 158) were disposed of by summary order rather than by opinion. In the Second Circuit, summary orders do not constitute opinions of the court and are used in lieu of formal opinions when the "decision is

19. Rodriguez v. Scully, 788 F.2d 62, 63 (2d Cir. 1986).

20. *See* Hawkins v. LeFevre, 758 F.2d 866, 871-73 (2d Cir. 1985).

21. *See* 28 U.S.C. § 2253 (1982).

22. Barefoot v. Estelle, 463 U.S. 880, 893 (1983) (quoting Stewart v. Beto, 454 F.2d 268, 270 n.2 (5th Cir. 1971), *cert. denied*, 406 U.s. 925 (1972)).

unanimous and each judge of the panel believes that no jurisprudential purpose would be served by a written opinion."[23] The court affirmed the district court's denial or dismissal of the petition in 99 of the 110 cases resolved by summary order. Of the remaining eleven cases, ten were remanded to the district court, primarily with instructions to dismiss the petition for failure to exhaust state remedies. In a single case the circuit court affirmed a conditional grant of the writ, a procedure which allows the state to remedy the constitutional defect by holding a new trial within a reasonable time.

The other forty-eight habeas corpus appeals to come before the Second Circuit from the district courts within New York were disposed of by written opinion. Thirty-one of those dispositions resulted in outright affirmances of the district court. In twenty-six cases the circuit court affirmed the district court's dismissal or denial of the petition. In five, the circuit court agreed with the district court that constitutional error committed at the state court level mandated that the writ be granted; however, two of those five were only conditional grants.

Of those seventeen cases in which the circuit court disagreed in whole or in part with the district court's disposition, in eight, the circuit reversed the district court's granting of the writ. In four, the circuit court reversed the denial of dismissal of the petition and remanded the case to the district court. Two of those remands were with directions to address the merits of the petition, while the remaining two instructed that the petitioner be allowed to amend his complaint. Moreover, one of those four was reversed not because the writ should have been granted but because the petitioner, challenging the conditions of his confinement, had stated a valid claim under 42 U.S.C. § 1983.[24]

The circuit court granted the writ and ordered the release of the petitioner in only two cases, and, there, only conditioned on the state's failure to hold a new trial within a reasonable time. Of the remaining three cases, one was remanded for further proceedings; one was affirmed in part and reversed in part, thereby negating the grant of the writ; and one was remanded for failure to exhaust state remedies.

Statistically, then, of the circuit court's total disposition of cases arising in New York, unconditional release of the petitioner was ordered in 1.9% (3 of 158); in only 3.2% (5 of 158) did the circuit

23. 2d Cir. R. § 0.23.

24. *See* Moorish Science Temple of America v. Smith, 693 F.2d 987 (2d Cir. 1982).

court order a conditional release, giving the state the opportunity to hold a new trial. In 90% of the cases the circuit court simply affirmed the district court's denial of the writ.

These statistics are set out more fully in the appendix to this article, and considering, as noted above, that the cases in the survey necessarily included only those case in which a certificate of probable cause was granted, the percentage of successful writs is certainly considerably less than 1% of the total number of applications filed.

A brief look at the district court dispositions in New York further demonstrates the limited interference imposed by federal habeas corpus review. Of the known dispositions (approximately 97%) in the Southern, Eastern, and Western Districts of New York in statistical years 1985 and 1986 (no statistics were available for the Northern District), only 3.77% of all cases resulted in dispositions favorable to plaintiffs. Because the category dubbed "dispositions for plaintiffs" does not differentiate based on type of dispositions, some percentage of that 3.77% of all cases undoubtedly represents conditional grants of the writ. In sum, therefore, prisoners in state custody are rarely released by federal judges. This is due partially to statutory and case law constraints, but in large part, it results from the respect and regard that federal judges have for the fine work done by their state colleagues.

Conclusion

To the extent that the elimination of minor conflicts between our state and federal judiciaries promotes a more positive atmosphere for all participants in the legal system and serves to focus our judicial resources on the truly important matters, our system of justice is made better. The revivified State-Federal Judicial council in New York has experienced considerable success in the past few years in addressing intersystem problems both large and small. This article has attempted to demonstrate the efficacy of this endeavor by pointing to past successes and suggesting possible avenues of future investigation. Because the council has no fixed mandate or jurisdiction, its importance and utility can expand or contract depending on the need of the moment. Its potential success is inevitably linked to the willingness of judges and practitioners to bring new concerns to the attention of the council and to cooperate in their solution.

APPENDIX

NEW YORK STATE HABEAS CORPUS APPEALS DISPOSED OF BY THE SECOND CIRCUIT COURT OF APPEALS

(July 1, 1982 to June 30, 1984)

DISPOSITION METHOD	NUMBER	PERCENTAGE
BY SUMMARY ORDER	110	
Affirmed District Court's Denial/Dismissal of a Petition for a Writ of Habeas Corpus	99	90%
Remanded case to District Court	10	9%
Affirmed District Court's Granting of a Petition for a Writ of Habeas Corpus	1	1%
BY PUBLISHED OPINION	48	
Affirmed District Court's Denial/Dismissal of a Petition for a Writ of Habeas Corpus	26	54%
Reversed District Court's Granting of a Petition for a Writ of Habeas Corpus	8	17%
Affirmed District Court's Granting of a Petition for a Writ of Habeas Corpus	5	11%
Reversed District Court's Denial/Dismissal of Petition for a Writ of Habeas Corpus and Remanded	4	8%
Reversed District Court's Denial/Dismissal of a Petition for a Writ of Habeas Corpus	2	4%
Affirmed in Part, Reversed in Part District Court's Granting of a Petition for a Writ of Habeas Corpus	1	2%
Vacated District Court's Grant of a Petition for a Writ of Habeas Corpus and Remanded for further proceedings	1	2%
Vacated District Court's Denial of a Petition for a Writ of Habeas Corpus and Remanded with instructions to dismiss for failure to exhaust State remedies	1	2%