

Enormous powers are given to the Justices of the Supreme Court. They are not given the power to command, but to persuade (Lewis, p.50). To them, the power is given to interpret the Constitution and the laws of the United States. But how does the Supreme Court make policy? Should the Court take an active part in creating the laws of the United States or should they employ Judicial restraint?

In their decision to overturn *Betts v. Brady*, the Supreme Court made policy and interpreted the Constitution and laws through 1) the selection of the Gideon case, 2) how the case was argued, and 3) the types of evidence considered in the *Betts* and Gideon cases. Then, as well as today, the rule of *stare decisis* and the Doctrine of political questions play an important role in the decisions of the Supreme Court.

First, it is a fact that the cases selected by the Supreme Court play a central role in the Court's policy-making decisions. Since the Court normally does not have original jurisdiction, they must first wait for someone with standing to come to them. Clarence Earl Gideon had standing. This was because the decision of the lower court not to give him counsel directly affected him. He appealed through the lower courts and ended up at the Supreme Court. He then petitioned for *Certiorari*, proceeding in *forma pauperis* status. The Court law clerks saw the case as being important, so they suggested the case to the Justices. In a private Friday conference, the Justices decided to accept the case.

With thousands of cases each term, every stage of this process is important, since the petition can be stopped at any time. If the Court sees the case as a "ripe" one compared with the cases as a whole, they may grant the petition. Through this process of choosing cases, the Justices can select cases to implement their policies and priorities.

Second, the way the cases are argued in the Court is central to the Supreme Court's policy-making decisions. Not only the selection, but also most of the argument for and against Gideon's case was done through paperwork and briefs. First, the record of all the lower court proceedings was submitted. Abe Fortas, Gideon's lawyer, was allowed to include Gideon's original trial in this record. Both sides - Fortas and Jacob - then proceeded to file their briefs - 50-100 page documents which argued their sides of the case. Fortas' brief was an attack on the *Betts* case while Jacob's argued that Gideon was not entitled to counsel and considered evidence to oppose Fortas' view that *Betts v. Brady* should be overruled. Jacob submitted petitions for the states to file *amicus curiae* ("friend of the court") briefs for his position, but his petitions backfired and 23 states filed briefs in favor of Gideon to overturn the *Betts* case while only 2 filed briefs were filed in favor of *Betts v. Brady* and states' rights. Finally came the oral argument, which is often seen by the lawyers as not as important as the briefs. The truth is, in fact, that this oral argument is the opportunity for the Justices to present their questions and is often central to the

case as it was in Gideon's.

The procedure for argument in other cases is similar to that in the Gideon case. Through the briefs filed and the oral arguments given, Justices can be influenced and policy can emanate from the Court.

Third, the Supreme Court makes policy by determining the types of evidence considered. As evidence, they considered the lower court proceedings, the transcript of Gideon's case, the briefs by both sides, including the *amicus* briefs, the ruling of previous cases, as well as the results of any research done (for example, Ralph Temple submitted 5 pages on the "history and contemporary picture of the right to counsel in England")(Lewis p. 54).

The decision to allow the transcript of Gideon's case into the Supreme Court's case file may have been a factor that influenced the decision of the Court. To the Supreme Court, the evidence did not have to show whether Gideon was guilty, but whether or not his constitutional rights had been protected. Through both what the justices allow as evidence and the evidence provided by lawyers, the Supreme Court creates policy.

Fourth, the rule of *stare decisis* plays a big role in the way the Supreme Court makes decisions. *Stare decisis* is "the rule of precedent whereby a rule of law contained in a judicial decision is commonly viewed as binding on judges whenever the same question is presented" (Burns et al, p. 721). Justices Harlan and Frankfurter were among the supporters of *stare decisis*. In the Gideon case, for example, Justice Harlan struggled whether to stick with the previous decision of *Betts v. Brady* or to vote to overrule it. However, he saw the issue of counsel as more important than precedent and voted in favor of Gideon. *Stare decisis* plays an important role among the Justices of the Supreme Court, but the rule of precedent is often *less* important than the issues involved.

Fifth, Justice Frankfurter's Doctrine of political questions suggested that, instead of the Supreme Court making political decisions, the state and national legislators should. Justice Frankfurter believed that relying too much on judges "sapped the strength of democracy by distracting attention from the political forum where unwise practices should be corrected" (Lewis, p. 86). To Justice Frankfurter, the question posed by Gideon's case (whether or not all those on trial had the right to counsel) was a political question that should be decided by legislatures. Frankfurter felt legislators better represented the voice of the people. This doctrine of political questions leads to judicial restraint, which causes the Court to declare unconstitutional only those legislative and executive actions that clearly violate the words of the Constitution.

While Justice Frankfurter was on the side of judicial restraint in his time as a Justice, Justice Hugo Black was on the side of judicial activism. Those in favor of judicial activism believe that it is the duty of judges to preserve individual liberty.

They believe Justices should interpret the Constitution to keep it reflecting the current values of the American people. The proponents of judicial activism make the following arguments: 1. That deference of policy-making responsibility to other branches of Government leads to a lack of action on behalf of minorities or others. 2. That Legislators may not represent of the voice of the people due to the distorted state legislative districts or because of the disproportionate distribution of power in Congress. 3. That the Judiciary's purpose is to intervene on behalf of individual freedom. 4. If the Congress and White House cannot work out a national problem among themselves, then the courts should attempt to resolve the problem. 5. The Supreme Court provides a forum for those who have little or no say in the legislature. (Such as minorities and criminals) 6. Finally, even if the Court makes an unpopular decision, it can be reversed through checks by Congress (Such as constitutional amendments) (from Lewis, pp. 86 - 87, 221 and Burns et al, pp. 531-532). So we see that the Supreme Court can serve to preserve individual rights and liberties. The case of *Gideon v. Wainwright* was an example of a time that the Court preferred judicial activism. The Court stood for the rights of the convict Clarence Earl Gideon while it could have left the determination of whether Gideon should have had a lawyer or not up to each individual state legislature or even up to the U.S. Congress.

Critics of judicial activism question why nine appointed lawyers should play such a large role in lawmaking in a country that calls itself a democracy. Those opposed to judicial activism make the following arguments: 1. Social, political, and economic reform should be left up to the *elected* legislative branch, as opposed to the *appointed*, non - democratic Supreme Court. 2. Relying too much on the Justices to protect our freedom sap the strength of democracy. Unwise policies should be corrected through the political forum (Lewis, p. 221, Burns et al, p. 532). The case of *Betts v. Brady* emphasized the Court's exercise of judicial restraint. It left the most of the power to the states and legislators to decide on which course of action to take when deciding whether a defense has a right to a lawyer.

Still others, such as Justice Stone, argue that the judicial system should only intervene on policy making when 1. legislation restricts the process by which decisions are made or 2. when legislation restricts the rights of minorities (such as criminals)(Burns et al, p. 532).

The Supreme Court was correct in considering Gideon's case. Judicial activism is important because, in Gideon's case, he had nowhere to turn to except the Supreme Court. His Habeas Corpus appeal to the Florida Supreme Court failed. Criminals had little or no representation in the Florida legislature. The Supreme Court was his only hope to a fair trial. An active Supreme Court can serve as a vehicle to protect the rights of those not represented in the legislatures of this country.