B+ Excellent paper. You grasped the point in each case. You used Law Reviews effectively. As to McKeiver not being a majority opinion, please see attached "Note". It is rather a plurality opinion. You cited very well considering that you are not an attorney. But don't use "L.Ed." when you can use "U.S."

MARSHALL A. LEVIN
JUDGE

AN ANALYSIS

OF

McKEIVER VS. PENNSYLVANIA
(403 US 528)

AND

UNITED STATES VS. SALERNO
(481 US-)

Patrick D. Weadon
October 21,1987

The United States Constitution has many facets worthy of praise and adulation, however, if one examines the total body of law that has guided our nation for most of its history one can seethat two important characteristics stand out. Number one is the durability and tenure of the document; the other os the generally consistent compliance with its tenets and principles. Both of these attributes depend on one another, and for the law to have any meaning it must be perceived as a constant presence. The longer the law exists the more legitimate it becomes. This is the basis of common law, however, the existance of the law itself is not enough. Many nations have constructed grand and glorious constitutions but they have more often than not proved to be nothing more than hollow shells, or to put it more succinctly, not worth the paper that they are printed on. This is because they fail to compel either the government or the populace to do what is spelled out. The United States has had a rich history of respect and admiration for its' Constitution. This has led to not only a long existence for the Constitution but, a reverance for what the law says and an effort to do exactly that.

This effort has not been an easy one, in fact, it has been and will continue to be a difficult struggle. The question of how to reconcile the demand of a document, that arguably is the greatest blow for human freedom since Magna Carta, with the

present demands of the twentieth century and beyond is not easily answered. This struggle will continue on ad infinitum but, it is through this struggle that we truly determine what the Constitution will be.

The purpose of this paper will be to focus on two cases which more than adequately demonstrate that the letter of the law and how society deals with the demands of the law itself are often two very different things. The first case is McKeiver vs. Pennsylvania, 403 US 528 (1971) and the second United States vs. Salerno, 95 L. ED. 2nd 697 (1987). The first deals simply with the question of a juveniles right to a jury trial and the second, the more recent decision, on pretrial detention.

Both are excellent examples of how our modern day Supreme Court deals with questions that demand much more than simple judicial interpretation. Both cases will be analyzed seperately, followed by a final comparison of the cases and a final summary.

The holding of the court in McKeiver vs. Pennsylvania was simply this. Juveniles in delinquency proceedings are not constitutionally entitled to the right of trial by jury.[1]

This case hinges very simply on the language of the Sixth Amendment which states explicitly "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed".[2]

What the court had to decide was whether or not this language applied to juveniles and, second, whether or not the

states under the Fourteenth Amendment are compelled to afford jury trials to juveniles.

As we have seen the majority ruled that juveniles do not have a constitutional right to a jury trial. This ruling is an entirely correct one for the simple reason that it leaves the decision largely up to the individual states. Time and time again the Supreme Court has had the opportunity to settle the question once and for all. In re Gault 387 US 1 and in re Winship 397 US 358, the United States Supreme Court declared that procedural due process requires that a juvenile be afforded the following:

1. The right to counsel.
2. The right to confront witnesses.
3. The right to have early notice of the charges against him.
4. The right to protection against self-incrimination.
5. The right to be found delinquent beyond a reasonable doubt.[3]

For some reason, however, the Court in these cases made no mention whatsoever of jury trials. Due to this "oversight" the question remained up in the air until 1968 when in Duncan vs. Louisiana 391 US 145, the Court held that in serious criminal cases the right to a jury trial must be recognized by the states. Once again though, the Court was silent on the application of the holding to juveniles. "The Duncan case was not conclusive on the question of whether a juvenile has a right to a jury trial. In addition to the absence of any language extending the right to a jury trial to juveniles the

Duncan court did not discuss whether a delinquency conviction was serious enough to require a jury trial."[4]

The most impressive argument for the ~~majority~~ plurality comes from Mr. Justice White who clearly stated for the majority, "In view of the differences of substance between criminal and juvenile courts due process does not require the states to afford jury trials in juvenile courts, although they are free to do so if they please".[5]

Justice White was expressing the idea that when the federal government is silent on an issue the states are free to legislate as they see fit. This argument is based on the Tenth Amendment which states that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states are reserved to the states respectively, or to the people."[6]

The idea that states should be free to handle their own affairs in juvenile matters is a good one. We have always allowed the states to regulate various aspects of juvenile life and behavior. Drivers' licensing requirement, alcohol consumption, and consent to marry, are but a few examples. Granted that the threat of incarceration is a far more serious matter than the drinking age, but had the Court seen fit to apply the Duncan[7] requirement to juveniles it would have made a grave error. Part of the reason the states have been permitted to have different regulations and views regarding juveniles is that the young offender in Utah can be a very different matter

from a juvenile law breaker in the South Bronx of New York. In both of these cases juveniles are involved, but to insist, as Mr. Justice Douglas in his dissent that both should be treated in an equal manner, is to deny that the various states have different needs and requirements for their juvenile justice systems. This is why Mr. Justice White is correct in leaving it up to the states to decide what is best in their respective situations.

OK

The ~~majority,~~ plurality in addition to Mr. Justice White's "states rights argument" gives other well thought reasons as well; among them:

1. Compelling a jury trial might remake the proceeding into a fully adversarial process.

2. The court has not heretofore ruled all rights constitutionally assured to an adult accused are to be imposed in a juvenile proceeding.

3. Jury trials would entail, delay, formality, and clamor of the adversary system and possibly a public trial.

4. Equating the adjudicative phase of the juvenile proceeding with a criminal trial ignores the aspects of fairness, concern, sympathy, and paternal attention inherent in the juvenile justice system.[8]

In analyzing the McKeiver case, it becomes obvious that the Court in its holding simply continued a hands off policy toward the rights of juveniles to jury trials. As mentioned before, the Court followed not so much precedence in its decision but the tradition of indecision that characterized the legal debate over the rights of juveniles. The fact that the majority had different reasons for their decision is in-

dictive of the fact that the court was not unified in their reasoning(dictum), so much as they were in their decision that the right to jury trial did not extend to juveniles.[9]

Often when the Court is divided on its reasoning, it provides fuel for the dissenting opinion and McKeiver was no exception. The history of this issue was not one of solid precedence. Rather as expressed earlier the only consistent aspect of the case history was the Courts refusal to issue a final decision, thus, the dissenters namely, Mr. Justice Douglas, Mr. Justice Black, and Mr. Justice Marshall, were free to express their opinions.[10] In this case it is my opinion that they were not so much urging the overturning of past decisions as they were attempting to write the final chapter on the rights of juveniles in the criminal arena. This is why when Mr. Justice Douglas in his opinion quotes Judge Deciantis, of the Family Court of Rhode Island, he is on solid ground: "indeed the child, the same as the adult, is in the category of those described in the Magna Carta 'no free man may be... imprisoned except by the lawful judgement of his peers, or by the law of the land' ".[11] In reviewing numerous law review articles it would seem that Mr. Justice Douglas has plenty of company. Hedy Bowan of the Villanova Law Review comments that in addition to the common law interpretation argument most of the negative aspects of a jury trial could be resolved in the pre hearing and dispositional stages. This is an interesting argument because it applies a nuts and bolts practicality answer rather than the broad "principled" approach

of many of the dissenters.

In conclusion my feeling is that we have not seen the last of the questions raised in McKeiver. The Court since Mr. Justice Warren has seen fit to expand the right of due process to numerous areas which they had hesitated on in the past. The pendulum has swung away from the idea that states have the capability to manage their affairs without a guiding hand from Washington. It is pure conjecture on my part, but, the only reason the Court has not seen fit to reverse itself on McKeiver and extend the Duncan protection to juveniles nation-wide is that the right case (i.e. Roe vs. Wade or Brown vs. Board) has not yet come up. It is my hope that if and when it does the Court will continue in the wisdom of Justice White and leave the question to the states where it belongs.

Now turn to an issue equally as volatial; the right of society to use the denial of bail and pre-trial detention to protect itself. Salerno vs. US (95 LED 20 697) like McKeiver is a sterling example of the constant struggle to fit the goals and principles of the Constitution into the confusing and chaotic world of criminal justice in the twentieth century America. This time it is the Eighth Amendment in question, and in a larger sense the due process clause of both the Fifth and Fourteenth Amendments to the Constitution.

The holding of the Salerno case specifically noted that the provisions of the Bail Reform Act of 1984 (18 USCS 3141 ET SEQ) allowing pretrial detention without bail on the grounds of dangerousness, was held not to violate bail clause of the

Eighth Amendment, or due process.[12]

The Court as in the earlier case of McKeiver was entirely correct. The upholding of the Bail Reform Act of 1984 was and is vital in maintaining the proper "balance" between the rights of the accused and the right of society to protect itself. It must be noted that "balance" in this case is a relative term. Basically when the majority relies on this to justify their holding, they are in effect saying that the law may spell out certain criteria, but that the absolute nature of the statue many times must be tempered by the reality in which the law must function. An example is the famous assertion that ones' right to free speech does not extend to having the priviledge to yell "fire!" in a crowded theatre or subway car.

The majority admitted that facially it appears that the law violates both due process and the Eighth Amendment. However, because the statute made clear that it is intended to be a regulatory vehicle and because it provides numerous procedural protections the Bail Reform Act of 1984 is not facially invalid.[13] The Court went further to state that " the challenger must establish that no set of circumstances exists under which the act might operate constitutionally".

The majority also noted that the Eighth Amendment was not violated for the simple fact that the Eighth Amendment does not require release on bail. The holding, then, rested on three important points:

1. The law was regulatory in nature.

2. Procedural protections were provided.

3. It was not binding on the lower court to grant bail. The majority, rather than rely on precedence (a difficult thing to do in this case since it involved a recently formulated and passed statute) used past case law to back up each of the three points.

The case of Bell vs. Wolfish (60 L ED 2nd 447) was used to demonstrate that the mere fact that a person is detained does not lead to the conclusion that the government had imposed punishment. They also utilized Schall vs. Martin (467 US AT 269) to show that it is the intent of the legislation that matters. Ludecke vs. Watkins (92 L ED 1881) and Moyer vs. Peabody (212 US 78) were among the many cases cited to prove that a tradition existed to which permitted the government to balance individual rights and societys protection.

The most convincing case in my opinion is Gerstein vs. Pugh (420 US 103) in which the police, under the doctrine of probable cause, can arrest an individual and hold him until a neutral magistrate can determine if probable cause truly was present.

The Salerno holding and the tenets of the Bail Reform Act of 1984 can be seen in my opinion as an extension of this doctrine.

The final point was the most succinct and brief. The majority simply claimed that the Eighth Amendment was derived from the English Bill of Rights Act which did not provide an absolute right to bail.[15] The majority also used the case of

Carlson vs. Landon (342 US 524) (1952) to present a more modern occurance of the same legal principle at work.

A further point was the simple fact that the act was only operable in cases where individuals who have been arrested for a specific category of extremely serious offences.[16]

In summary the Court seemed to be saying that dangerousness cannot be explicitly predicted, but (1) that when a serious crime occurs (2) enough factors(probable cause etc.) are present, (3) the suspect is provided appropriate procedural due process. Then the Judge may opt for pre trial detention provided the suspect is not punished, but merely held out of society for the purposes of public safety.

A word must be said at this point for the argument of the majority. Justice Douglas and Justice Marshall seemed to claim that the due process clause should be taken in a more absolute way. They present several situations in which the logic of the majority could get the nation in trouble (i.e. curfews), however, as Chief Justice Rehnquest claimed, finding instances where the act would be unconstitutional was not enough. The respondents would have to show that at no time could the act ever be constitutional. This is not possible due to the procedural safeguards, and the nature of crimes that the act addressed. Where the minority has a case, however, is in the contention that the case was moot.

Technically, I feel that the minority is correct. Salerno went from a dangerous criminal held under the Bail Reform Act

to a man who was free to walk the streets after the district judge released him on bail pending appeal. The fact that he had been sentenced to one hundred years makes this an unbeleivable situation. Vincent Cafaro, went Salerno one better, and became a government informer. He too was released(for medical reasons). Despite his turn around, he too was part of the case.

The whole situation has the look and aroma of an arranged case. The state wanted to prove a point and the Supreme Court was more than happy to oblige despite all the aforementioned facts.

As said before, technically, the case, it would seem is moot. However, as we have seen in the past, there are no set rules for mootness. It is a matter of judicial opinion and as long as there are some grounds to maintain the case, the side against the claim of mootness can always create elaborate and numerous legal arguments to show that the case is relevant.

Secondly. there have been from time to time issues in this nation's history which seem to stampede over conventional rules and attitudes. Courts are not supposed to create cases in order to settle these issues. We know from reality that sometimes the Court will bend the rules on mootness if the issue is considered vital enough. This may not be cricket but it is a legal reality.[17]

The lesson of McKeiver and Salerno are basically ones that show and demonstrate the difficulty in reconciling the "true"

meaning of the Constitution. Despite the fact that the issues involved are very different, the two cases are similar in that they are textbook examples of issues that are not found anywhere in the body of the Constitution. This forces the Court to decide what the law is going to be. This can be a treacherous undertaking but it is necessary if the law is to be kept vital and meaningful. At the same time, however, the Constitution sets guidelines and it is a judges' job to stay within these boundaries lest he be accused of usurping power from the legislature or chief executive.

The challenge then, as mentioned at the start of this endeavor, is to honor tradition and precedent while at the same time keeping the law relevant and fresh. Both McKeiver and Salerno fell within this challenge and as the nation grows and endures it is likely that there will be many more to come. I for one am looking foward to them.

Bibliography

1. (no author given), Juvenile Courts- Juveniles in Delinquency Proceedings Are Not Constitutionally Entitled To The Right of Trial by Jury - McKeiver vs. Pennsylvania (US 1971) 70 Michigan Law Review 171 (9171)

2. Constitution, Amendment XI

3. Hedy Moechling Bowman, Juvenile Criminal Law and Procedure- Pennsylvania Supreme Court Ruled that a Juvenile Does Not Have a Right to Trial by Jury, 16 Villanova Law Review 364 (1970)

4. Ibid., p. 365

5. McKeiver vs. Pennsylvania 403 US 528 (1971) p. 553

6. Constitution, Amendment X

7. Duncan vs. Louisiana 391 US 145

8. McKeiver vs. Pennsylvania 403 US 528 (1971) p.545,550

9. Hedy Moechling Bowman, Juvenile Criminal Law and Procedure- Pennsylvania Supreme Court Ruled That a Juvenile Does Not Have a Right To a Trial by Jury 16 Villanova Law Review 364,365 (1970)

10. James Carr, Juries For Juveniles: Solving The Dilemna 2 Loyola University Law Journal 5. (1971)

11. McKeiver vs. Pennsylvania 403 US 528 (1971) p. 563

12. United States vs. Salerno, 95 LED 2d 697, 107Ct. p. 697

13. Ibid, p.701

14. Ibid, p.703

15. Ibid, p.717

16. Ibid, P.711

17. Mermin, Samuel, Law and The Legal System. Little, Brown and Company, pp. 205-206

additional background information obtained:

Restricting the Right to Bail: Vermont's New Constitutional Bail Amendment, 8:347 Vermont Law Review 347-367 (1983)