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TRANSMISSION OR RESISTANCE: OPINIONS OF STATE ATTORNEYS GENERAL AND THE IMPACT OF THE SUPREME COURT

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INTRODUCTION

The federal judiciary of the United States has been described as the "least dangerous branch" of government.[1] The most important consideration giving rise to this description is the fact that the courts can do very little by themselves. Like the Pope, they have no divisions. Because federal judges cannot enforce their decisions, people must voluntarily comply with court mandates. When citizens refuse to comply, governmental officials—Presidents, governors, attorneys general, prosecuting attorneys, school superintendents or policemen—must enforce them. However, under certain circumstances, even governmental officials do not choose to enforce court decisions.

The factors promoting or retarding such compliance, noncompliance, enforcement and non-enforcement have been the subject of several recent studies by political scientists and judicial scholars.[2] Notable has been Stephen Wasby's integration of the re-

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1. *E.g.*, A. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962).

2. Some prominent examples include THE IMPACT OF SUPREME COURT DECISIONS (T. Becker & M. Feeley eds. 1973); R. JOHNSON, THE DYNAMICS OF COMPLIANCE (1967); J. PELTASON, FIFTY-EIGHT LONELY MEN (1961); Abraham & Benedetti, *The State Attorney General: A Friend of the Court*, 117 U. PA. L. REV. 795 (1969); Barth, *Perception and Acceptance of Supreme Court Decisions at the State and Local Level*, 17 J. PUB. LAW 308 (1968); Beany & Beiser, *Prayer and Politics: The Impact of Engel and Schempp on the Political Process*, 13 J. PUB. LAW 575 (1964); Katz, *Patterns of Compliance with the Schempp Decision*, 14 J. PUB. LAW 396 (1965); Miller, *On the Need for "Impact Analysis" of Supreme Court Decisions*, 53 GEO. L.J. 365 (1965); Murphy, *The Problem of Compliance by Police Departments*, 44 TEXAS L. REV. 939 (1966); Patric, *The Impact of a Court Decision: Aftermath of the McCollum Case*, 6 J. PUB. LAW 455 (1957); Petrick, *The Supreme Court and Authority Acceptance*, 21 WEST. POL. Q. 5 (1968); Sorauf, *Zorach v. Clauson: The Impact of a Supreme Court Decision*, 53 AM. POL. SCI. REV. 777 (1959); Stumpf, *Congressional Response to Supreme Court Rulings: The Interaction of Law and Politics*, 14 J. PUB. LAW 376 (1965); Vines, *Federal District Judges and Race Relations Cases in the South*, 26 J. POL. 337 (1964); Note, *The Impact of the*

sults of these studies in an explicit effort to build toward a theory of impact.[3] This is another study of the forces affecting impact. Specifically, attention here is focused upon the role of southern state attorneys general in facilitating or resisting federal court policy on questions of the legal segregation of the races. This study will attempt to test several of the propositions advanced in Wasby's theory-building endeavors.

The relationship of the state attorney general to the impact of federal court policy deserves study because the office of attorney general is peculiarly situated at the middle of several legal forces. Each state attorney general is the lawyer for the officials of state government and is charged with defending them when their actions are challenged on legal grounds. At the same time, he is also the lawyer for all of the people of the state. Moreover, as an attorney, especially as the chief attorney in the state, he serves as an officer of the court.[4] When not engaged in litigation, the attorney general must do what all lawyers do for their clients—advise them of their rights and obligations under the law. State officials and citizens alike turn, then, to the attorney general for a delineation of the existing law.

By being in such a position, the attorney general is well situated to help or hinder compliance with court decisions. The advisory opinions of the attorney general offer firm evidence of his willingness to aid or impede the impact of court decisions. Richard Johnson writes in *The Dynamics of Compliance*:

> Separate from the formal judicial structure but occupying a strategic position as message-transmitter are the states' attorneys general, the chief legal officers of the states. It is customary for attorneys general when requested, to handle legal questions of interpretation and application of Supreme Court rulings. The opinions rendered . . . are generally followed as controlling until a court of law holds otherwise. In quantitative terms, these officials play a more sig-

Supreme Court Section 103 Cases on the Standard of Patentability in the Lower Federal Courts, 35 GEO. WASH. L. REV. 818 (1967); *Interrogations in New Haven: The Impact of* Miranda, 76 YALE L.J. 1519 (1967).

3. S. WASBY, THE IMPACT OF THE UNITED STATES SUPREME COURT: SOME PERSPECTIVES (1970) [hereinafter cited as WASBY].

4. *See In re* Lord, 225 Minn. 370, 97 N.W.2d 287 (1959).

nificant transmission role than does the court system.[5]

Henry Abraham and Robert Benedetti[6] concur with Johnson's assessment. In commenting upon the importance of action by the state attorney general regarding the school prayer cases,[7] they maintain:

> Whatever the motivation of an attorney general's action, his policy sets the tone for state response to the decision. In the vast majority of cases his opinion was requested by the state commissioner of education who thereafter acted in full accord with that opinion. State commissioners even followed the attorney general's lead when he advised action contrary to the face of the Court's order.[8]

Abraham and Benedetti hypothesize that the opinions of the attorney general attempt to strike a balance between federal court edicts and public opinion in their states.[9] They believe that political pressures—notably the expectations of the electorate—influence the actions of the attorneys general.[10] On the other hand, Samuel Krislov's examination of southern attorneys general leads him to conclude that the officials' actions are very much a function of the views of their constituents and not balanced by considerations of federal court policy.[11] He writes:

> As time went on, those on the fence have generally been forced to espouse a more anti-desegregation stand. . . . As the southern attorney general has moved into line with public opinion, his office has tended to become a clearing house for resistance.[12]

Krislov finds the reason for this behavior in the fact that the attor-

5. JOHNSON, *supra* note 2, at 63.

6. Abraham & Benedetti, *supra* note 2.

7. In these cases, the Supreme Court found that prayer and Bible-reading exercises in public schools were unconstitutional. Abington School Dist. v. Schempp, 374 U.S. 203 (1963) (Bible-reading); Engel v. Vitale, 370 U.S. 421 (1962) (prayer).

8. Abraham & Benedetti, *supra* note 2, at 815.

9. *Id.* at 820.

10. *Id.*

11. Krislov, *Constituency Versus Constitutionalism: The Desegregation Issue and Tensions and Aspirations of Southern Attorneys General*, 3 MIDWEST J. POL. SCI. 75 (1959).

12. *Id.* at 77-78.

ney general's reference groups are local and that his career goals are at the state and not the national level.[13]

These few studies which have focused on the attorney general and compliance indicate that the attorney general's role is an important one and that his opinions are a source of that importance. Yet the studies have not systematically examined any large body of attorneys general's opinions with the purpose of trying to find the factors which accompany their use in facilitating or resisting the implementation of federal court policy. It is to that purpose that this article is addressed.

Attorneys General's Opinions

Before analyzing the opinions that represent the basic data of this article, a consideration of the powers and characteristics of attorneys general's opinions is in order. The attorney general's opinion has qualities of both a lawyer's advice to his client and a judge's opinion. Yet it is different from each in several ways.

One distinctive feature of the attorney general's opinion is that it is his personal decision. The opinion represents essentially the thinking of one man, although the attorney general's legal staff may aide in its preparation. Hence, the decision-making process is unlike that of an appellate court since it is not collegial in nature. Moreover, there is no legitimate way to assure that the process will take into consideration competing views of the law. There are no adverse parties which present their cases to the attorney general. Indeed, there probably is no "case or controversy" involved in the legal sense of the term. Neither may amicus curiae briefs be filed with the attorney general. He makes the decision, and he makes the decision in secret.

A report of the National Association of Attorneys General comments on these facets of the opinion-writing process:

> The preparation of an attorney general's opinion places a great responsibility on the author. Opinions do not involve an adversary proceeding nor a formal investigation. The author alone must analyze both sides of the question, research the problem carefully, and reach a conclusion. A

13. *Id.* at 89-92.

> Wisconsin study compares an opinion to a law review article, in that it is "a well documented piece of legal research by an author who is familiar with his subject." The study argues that the opinion procedure is faster, cheaper and more objective than an adversary proceeding, because the decision is not influenced by outside pressures or the skill of advocates. Minnesota's instructions on writing opinions note that this absence of adversary proceedings "puts a heavy burden on the writer to see the question in perspective, to request and evaluate further information when needed, to discern future problems, and to research thoroughly without the prod of potential courtroom embarassment."[14]

Some states have sought to have opinions exposed to many legal minds before they are circulated. No attorney general's office, however, sends its opinions outside of the jurisdiction of the attorney general before they are issued.[15] Some states such as North Dakota, South Dakota and Wisconsin require that the opinions be read by every staff member before they are issued.[16] Ohio uses an "office court" procedure for examining opinions.[17] An assistant assigned the task of writing an opinion circulates his draft among other staff members. The chief assistant then calls all staff members together to formally discuss the legal issues raised by the opinion. If a substantial majority of the staff believe the draft to be meritorious, it is sent to the attorney general for revision and publication. Otherwise, it returns to the staff member who wrote it or to another staff member for rewriting.[18]

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14. NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, THE OFFICE OF ATTORNEY GENERAL 258 (1971) [hereinafter cited as OFFICE OF ATTORNEY GENERAL].

15. *Id.* at 260-62.

16. *Id.* at 260. *See also* Christenson, *The State Attorney General*, 1970 WIS. L. REV. 298, 328.

17. Interview with Robert D. Macklin, Chief Counsel, Ohio Attorney General's Office, in Columbus, Ohio, Aug. 14, 1970.

18. An excellent commentary on the opinion process in Texas indicates an even more developed approach there. Dickson, *Vital Crucible of the Law: Politics and Procedures of the Advisory Opinion Function of the Texas Attorney General*, 9 HOUSTON L. REV. 495 (1972). An opinion request is initially sent to the attorney general's opinion committee. The committee assigns the actual preparation function to that division of the attorney general's office which deals with the subject matter in question. In addition, all other divisions of the office are informed of the opinion request. The division preparing the opinion is required to prepare

Another salient feature of attorneys general's opinions is that the attorney general himself may initiate the opinion process. While an attorney general's opinion is usually written after he has been requested to do so by a public official or, in some jurisdictions,[19] a private person, attorneys general in the majority of the American states may render legal opinions on their own initiative.[20] This self-initiated activity contrasts sharply with the normal activity of an attorney—waiting for clients to bring business his way. The ability of the attorney general to so push on others his own legal interpretations may be a violation of judicial as well as professional ethics.[21] However, the laws in most of the states do not prohibit such practices.[22] While there is no record of how often attorneys general actually initiate the opinion process themselves, the practice is a source of great potential influence for the attorney general.

A third important feature of attorneys general's opinions is

two opinions which advance counter arguments. Research on the two opinions is separately pursued by different assistant attorneys general. The division chief then chooses one opinion as the preferred opinion and returns both to the opinion committee. The chairman of the opinion committee then appoints a committee of five assistant attorneys general to review both opinions. The five are chosen because of their special knowledge and interest in the subject matter. An attempt is made to staff review committees with persons of conflicting outlooks. In addition, each member of the attorney general's staff is placed on a review committee at some time. The review committee holds hearings on the opinions. Persons outside the office may attend and even file their own briefs, although this part of the procedure is infrequently utilized. However, there is no provision for informing all potentially interested parties of the review committee meetings and hearings. The opinion committee next accepts an opinion upon the recommendation of the review committee. The opinion is sent to the executive assistant attorney general and then to the first assistant and finally to the attorney general himself. If the attorney general does not accept the opinion, it is returned to the opinion committee for further review. Otherwise the attorney general signs the opinion and releases it to the requesting party and to the public. *Id.* at 501-07.

19. Georgia, Kentucky, Louisiana, New York and North Dakota. OFFICE OF ATTORNEY GENERAL, *supra* note 14, at 253-54.

20. The exact number of states where the attorney general's opinions may be rendered on his own initiative is difficult to determine. A publication of the National Association of Attorneys General reveals that in over one-half of the states the possibility for such action exists. *See* NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, TABULATION OF QUESTIONAIRE DATA Table 4.3(a) (1970) [hereinafter cited as QUESTIONAIRE DATA]. However, in many of the jurisdictions such action would not be taken or would only rarely be taken as a matter of office policy.

21. Canon 28 of the Canons of Ethics of the American Bar Association provides:

> It is unprofessional for a lawyer to volunteer advice to bring a lawsuit. . . . Stirring up strife and litigation is not only unprofessional, but it is indictable at common law.

ABA CANONS OF PROFESSIONAL ETHICS No. 28.

22. *See* QUESTIONAIRE DATA, *supra* note 20, at Table 4.3(a).

their public nature. In contrast to the British practice,[23] the opinions of the attorneys general in the United States are considered public documents. It is this public nature that gives the opinions a significance for transmitting or resisting the impact of federal legal policy. It is also this public nature of the opinions which brings importance and prestige to the role of the attorney general.

The prestige factor was recognized as early as 1818 when the incumbent attorney general of the United States, William Wirt, determined that all past opinions should be published, as well as all opinions to be issued in the future.[24] An increase in the prestige and usefulness of the office accompanied this decision by Wirt.[25] More recently, a study conducted by the National Association of Attorneys General for the purpose of strengthening the role of the attorneys general in law enforcement recommended that "formal opinions should be published at least annually" and that copies of the opinions "should be available to the public when issued."[26]

Forty-four states now issue bound volumes of opinions periodically and all states make opinions available to the public in one form or another.[27] Eighteen states publish digests of opinions as well.[28] Moreover, most states have some procedure for indexing

23. The opinions of the attorney general of the United Kingdom respect the privacy of the attorney-client relationship. As an advisor to the crown and to the crown agencies, the attorney general acts in complete confidence with his clients. Opinions are secret matters between the chief law office and individual government officials. Sir Hartley Shawcross writes:

> That form of advice is sometimes given orally at a meeting of the cabinet, but sometimes it is given in writing in answer to a formal case that is submitted, and then it is circulated to the members of government. It is confidential. Sometimes the opinions are disclosed, but, I am glad to think that this only happens long after the event and not in the lifetime of the Attorney General who has given the opinion, so that when it is eventually published he is immune to criticism.

Shawcross, *The Office of Attorney-General*, 7 PARLIAMENTARY AFFAIRS 380, 383 (1954). This secrecy is especially valuable in guarding the recipients from opinions that are motivated by extraneous political pressures. Certainly, the opinion-writing process could not be utilized as a device for future electoral campaigns by the writer. But the British practice is not followed in any American jurisdiction.

For another description of the British confidentiality see Jones, *The Office of Attorney-General*, 27 CAMBRIDGE L. REV. 43, 43-53 (1969).

24. *See* H. LEARNED, THE PRESIDENT'S CABINET 168-72 (1912).

25. *Id.* at 168.

26. OFFICE OF ATTORNEY GENERAL, *supra* note 14, at 6.

27. *Id.* at 265.

28. *Id.*

opinions so that they can be found by any official or citizen wishing to know their contents.[29] A few states have even placed opinions on computer tape for automatic retrieval.[30]

While the ease of locating opinions varies from state to state, as a general rule, the opinions are sufficiently available for public officials and attorneys in a state to be cognizant of their existence. Such public availability alone gives the attorney general's opinions great effect. When faced with conflicts, individuals tend to reduce the realm of the unknown to the known wherever possible. If one state has not resolved a dispute while others have, the officials of that state may rely heavily upon the decisions taken by the other states. A judge will usually follow precedent even if logic might dictate another course of action. And so also a public official or an attorney facing an unresolved issue will be likely to follow an attorney general's opinion, even an opinion in another state, merely because it has the form of law where no other law is likely to exist.

Attorneys general's opinions are likely to be followed for other reasons as well. A state official possibly subject to litigation would be disinclined to repudiate the opinion of the lawyer who would be charged with representing him in court if the likelihood arose. Moreover, even if a state official would be inclined to follow directions not prescribed by the attorney general, he may be forbidden by law to do so. In several jurisdictions, there is a binding quality to an attorney general's opinion. For instance, a Pennsylvania statute provides: "It shall be the duty of any department . . . having requested and received legal advice from the Department of Justice to follow the same . . . ."[31] Pennsylvania courts have taken the effect of the statute a step further and required that an opinion be followed even if the opinion was not requested by the official.[32] The Supreme Court of Oklahoma held in *Rasure v. Sparks*[33] that "it is the duty of public officers . . . when in doubt as to the construction of an act of the legislature, to follow, and not disregard, the advice of the Attorney General . . . ."[34] Several other jurisdictions make

29. *Id.* at 263.
30. *Id.*
31. PA. STAT. ANN. tit. 71, § 192 (Cum. Supp. 1974).
32. *See* Commonwealth *ex rel.* Sennett v. Minehart, 44 Pa. D. & C.2d 657 (Dauphin County Ct. 1967); Commonwealth *ex rel.* Shockley v. Ross, 53 Dauph. 329 (Pa. C.P. 1943).
33. 75 Okla. 181, 183 P. 495 (1919).
34. *Id.* at 186, 183 P. at 498.

opinions binding on all state officials until they are specifically overruled by courts.[35] Additionally, the Michigan Attorney General recently issued an opinion declaring that his opinions were binding upon local government officials as well as state officials.[36]

Besides the effect of precedent and the binding quality of the opinions in some states, attorneys general's opinions are likely to be followed for still another reason. Where a state official acts in accordance with the advice of the attorney general, legal immunity may accompany such action. Three states—Alabama,[37] Mississippi[38] and Pennsylvania[39]—have statutes which specifically give the recipients of opinions immunity from prosecution when they follow the opinion's advice. For instance, the Alabama statute states:

> The written opinion of the attorney general . . . secured by an officer or agency legally entitled to secure such opinion shall protect such officer . . . from liability to either the state, county, or municipal subdivisions of the state, because of any official act . . . performed as directed or advised in such opinion.[40]

Courts in other jurisdictions have held that immunity is given even without the specific benefit of a statute. In *State ex rel. Smith v. Leonard*,[41] the Arkansas Supreme Court ruled that a letter of the attorney general which authorized the state treasurer to make a settlement against a bank holding state funds absolved the treasurer from any liability for the settlement. The letter was held to afford a "complete defense."[42] The court insisted:

> If this were not so, state officials could not afford to accept the advice of the attorney general. They would be compelled to act upon such advice at their own peril.[43]

35. These jurisdictions include Connecticut, Florida, Georgia, Maryland, Michigan, Minnesota, Mississippi, Montana, New Hampshire, New Jersey, New York and Ohio. *See* QUESTIONAIRE DATA, *supra* note 20, at Table 4.71.

36. The Detroit Free Press, April 23, 1972, at 1, col. 1.

37. ALA. CODE tit. 55, § 241 (Cum. Supp. 1969).

38. MISS. CODE ANN. § 7-5-25 (1972).

39. PA. STAT. ANN. tit. 71, § 192 (Cum. Supp. 1974).

40. ALA. CODE tit. 55, § 241 (Cum. Supp. 1969).

41. 192 Ark. 834, 95 S.W.2d 86 (1936).

42. *Id.* at 839, 95 S.W.2d at 88.

43. *Id.* at 840, 95 S.W.2d at 88.

The Oregon high court concurred with this logic in *State ex rel. Moltzner v. Mott*.[44] It held that the Secretary of State was not liable for funds he appropriated for prosecution of Blue Sky laws as he was advised to do by the attorney general.[45] The court said:

> If the law were otherwise, few responsible administrative officers would care to assume the hazards of rendering close decisions in public affairs. Officers acting in good faith have a right to rely on the opinion of the attorney general, as he is the officer designated by law to render such service for their guidance and protection.[46]

The effect of immunity may extend even beyond formal opinions. In *Hastings v. Thurston*,[47] for example, the Arizona Supreme Court maintained that an official of the state highway department was relieved from liability on a contempt-of-court charge when he demonstrated that he had followed the advice of a member of the attorney general's staff in refusing to answer questions during the taking of his deposition.[48] While the question of whether immunity accompanies compliance with an attorney general's ruling is yet to be answered in all states, no state has recently held that a state official following such a ruling would be liable if the ruling were erroneous.[49]

A combination of factors, then, makes the attorney general a powerful decision-maker and a significant link between the federal courts and the ultimate objects of federal court decisions. The attorney general renders opinions in isolation without having to consider competing legal viewpoints, and he may himself initiate the opinion-writing process. Opinions are public documents; their availability makes their acceptance by state officials very likely. In addition, their acceptability is greatly increased in those states that make such opinions binding upon their recipients and grant immunity to persons that follow the opinions. The opinions certainly offer a source of data which should be considered by political scientists and judicial scholars interested in the impact of federal court policy.

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44. 163 Ore. 631, 97 P.2d 950 (1940).
45. *Id.* at 635, 97 P.2d at 954.
46. *Id.*
47. 100 Ariz. 302, 413 P.2d at 767 (1966).
48. *Id.* at 308, 413 P.2d at 773.

COURT POLICY ON SEGREGATION OF THE RACES

The subject of this study is compliance with federal court policy in the area of segregation of the races. This study does not attempt to map out the impact of one or two specific cases of the United States Supreme Court as do most other impact studies.[50] Rather, it attempts to assess the "transmission" of a general line of federal court decisions since 1954. This line of cases has consistently broadened the basic policy that public or publicly-sponsored racial barriers are unconstitutional.[51] The *Brown v. Board of Education*[52] ruling in 1954 was probably the most important Supreme Court decision of our century. However, the Supreme Court's resolve to desgregate public education was not a singular episode in constitutional law. The year after the *Brown* case, the Supreme Court rendered a second *Brown v. Board of Education*[53] decision in which it declared that the desegregation process must proceed with "all deliberate speed."[54] The first dramatic effort to defy these court rulings came in Little Rock, Arkansas, in 1956 when Governor Orville Faubus refused to permit public schools to operate on a desegregated basis. Further Supreme Court action was required to determine that a governor did not have the authority to so defy the federal courts.[55] In the 1960's, southern efforts to circumvent desegregation by plans such as "freedom of choice"[56] or "transfer provisions"[57] led to further

49. However, for cases to the contrary see 5 AM. JUR. *Attorney General* § 6 (1963); 7 C.J.S. *Attorney General* § 6 (1937).

50. *E.g.*, Beany & Beiser, *supra* note 2; Katz, *supra* note 2; Patric, *supra* note 2; Sorauf, *supra* note 2; *Interrogations in New Haven: The Impact of* Miranda, *supra* note 2.

51. In cases decided after the period of time studied here, the Supreme Court indicated that this line of cases may be broken. In 1971, it ruled that the City of Jackson, Mississippi, was entitled to cease operation of a municipal swimming pool in order to avoid the prospect of integrating such recreational facilities. Palmer v. Thompson, 403 U.S. 217 (1971). And, only recently the Court decided that cross-district busing for purposes of racial balance is not an acceptable remedy for segregation in most situations. Milliken v. Bradley, 94 S. Ct. 3112 (1974).

52. 347 U.S. 483 (1954).

53. 349 U.S. 294 (1955).

54. *Id.* at 301.

55. Cooper v. Aaron, 358 U.S. 1 (1958).

56. "Freedom of choice" plans permitted school children to enroll in any school within the school system. In response to demands for integration of its schools, Prince Edward County, Virginia, closed all public schools in 1959. The next year the county and the state provided tuition grants to the school children to permit them to enroll in a non-sectarian school of their choice outside of the county. The Supreme Court declared this circumvention of its intent unconstitutional. Griffin v. School Bd. of Prince Edward County, 377 U.S. 218

adjudication and further resolve by the Supreme Court not to back off from its general policy of promoting desegregation of the schools.

The desegregation litigation has also affected institutions other than the schools. Public facilities of all kinds have been desgregated: beaches,[58] golf courses,[59] parks[60] and public halls.[61] Moreover, the courts have upheld federal and state legislative policies requiring equal treatment of the races in certain private facilities.[62] The courts have also acted to end racial barriers to marriages,[63] sales of property[64] and voting rights.[65]

The entire thrust of these cases has been to firmly establish the existence of a federal court policy to end public segregation and publicly-sponsored segregation. It is the attorneys general's responses to this policy which are analyzed in this article.

Attorneys General's Opinions on Segregation of the Races

The opinions analyzed in this study were reported in the Vanderbilt University Law School's *Race Relations Law Reporter*. The twelve volumes of the *Reporter* recorded the many legal events in the desegregation field from 1954 through 1968. Sixty-three opinions of attorneys general in states which maintained segregated schools and other public institutions were reported.[66] The opinions covered

(1964). New Kent County, Virginia, had also operated a dual system consisting of two segregated schools. When ordered to integrate in 1965, the county instituted a plan that allowed each pupil to choose between the two schools of the district. While refusing to hold all such plans unconstitutional, the Supreme Court did decide that "freedom of choice" in itself was an ineffective tool of desegregation and hence not permissible for New Kent County. Green v. School Bd. of New Kent County, 391 U.S. 430 (1968).

57. School districts which had operated segregated school systems were forced by *Brown* to rezone their districts without reference to race. Some districts responded by allowing students to request a transfer from their newly-assigned school back to their former segregated school where they would be part of a racial majority again. These "transfer provisions" were declared unconstitutional in Goss v. Bd. of Education of Knoxville, 373 U.S. 683 (1963).

58. *E.g.*, Mayor & City Council of Baltimore v. Dawson, 350 U.S. 877 (1955).

59. *E.g.*, Holmes v. City of Atlanta, 350 U.S. 879 (1955).

60. *E.g.*, New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958).

61. *E.g.*, Johnson v. Virginia, 373 U.S. 61 (1963).

62. *E.g.*, Heart of Atlanta Motel v. U.S., 379 U.S. 241 (1964).

63. *E.g.*, Loving v. Virginia, 388 U.S. 1 (1967).

64. *E.g.*, Reitman v. Mulkey, 387 U.S. 369 (1967).

65. *E.g.*, Harper v. Bd. of Education, 383 U.S. 663 (1966); Louisiana v. U.S., 380 U.S. 145 (1965); Gomillon v. Lightfoot, 364 U.S. 339 (1961).

66. The states include nine of the eleven states of the old Confederacy plus the border states of Delaware, Kansas, Kentucky, Maryland, Missouri and Oklahoma. No opinions were

several topics. Twenty-five dealt with aspects of school segregation. Sixteen were concerned with service in public accommodations; six with voting rights and elections; three with public meetings; and three with interracial marriages. Other opinions dealt with topics such as separate assessment lists for white and black-owned property, registration of persons advocating integration and the cooperation of state agencies with the United States Civil Rights Commission.

Each of the sixty-three opinions was placed into one of two groups. Twenty-seven (42.9 percent) were considered to be opinions which facilitated compliance with federal court policy. Thirty-six (57.1 percent) were deemed to be opinions which aided resistance to such policy. Twenty-six attorneys general in fifteen southern and border states issued the sixty-three opinions. Nine of these men promulgated only facilitative opinions, while another nine wrote opinions in each category. The remaining eight attorneys general wrote only resisting opinions.

An opinion was determined to be a facilitating opinion if it recommended or otherwise approved of action to remove barriers separating the races.[67] Non-facilitating opinions were judged to be those which ascertained that public barriers promoting segregation were permissible.[68] Although a measure of subjectivity attended the

reported from Alabama, South Carolina or the border state of West Virginia. Additional opinions not analyzed included ones which could not be categorized as either facilitating or resisting federal court policy.

67. Examples of facilitating opinions include those that held as follows: schools may integrate even though state law specified that they must be segregated (1 RACE REL. L. REP. 277 (1956)); school integration should proceed without the adoption of a formal plan by a school board (1 RACE REL. L. REP. 1155 (1956)); public meeting segregation laws do not apply to Parent Teacher Association meetings (2 RACE REL. L. REP. 558 (1957)); truancy laws do not apply to blacks who refuse to attend segregated schools (7 RACE REL. L. REP. 1304 (1962)); Black teachers must receive equal treatment in integration plans (7 RACE REL. L. REP. 1303 (1962)); racial designations must be removed from candidates' names on elections ballots (1 RACE REL. L. REP. 461 (1956)); a tavern owner cannot refuse to serve blacks (8 RACE REL. L. REP. 336 (1962)); and interracial marriages are permissible (12 RACE REL. L. REP. 1723 (1967); 12 RACE REL. L. REP. 2302 (1967)).

68. Examples of non-facilitating opinions include those that held as follows: the *Brown* decision is ultra vires (1 RACE REL. L. REP. 462 (1956)); an act permitting parents to keep children out of integrated schools is constitutional (4 RACE REL. L. REP. 812 (1959)); public funds may be used to pay the tuition of students attending private segregated schools (6 RACE REL. L. REP. 1227 (1961)); public funds may be expended for the distribution of publications advocating segregation (2 RACE REL. L. REP. 1049 (1957)); a state training school may con-

categorization, the issues raised and resolved by the opinions were in most cases quite clear-cut.

Testing the Theory of Impact

In Stephen Wasby's concern for moving political science toward a theory of the Supreme Court's impact, he categorized under several broad headings some 136 hypotheses he was able to draw from the existing literature on impact.[69] The hypotheses are not tightly knit together, nor are they highly structured or conceptually well-developed. Concerning the state of impact theory, Wasby concluded that "the holes are sufficiently large that one will be making a valuable contribution by starting just about anywhere, even if this seems to reinforce the anarchic nature of the social sciences."[70]

However, rather than continuing the attempt to improve upon the theoretical structures surrounding the study of impact, another course of action will be taken here. Wasby asked that "someone" deal with the propositions he discusses.[71] The data discussed above will be utilized to test several of the hypotheses he advances. Theories must be guided by great insights and by minds which can link widely divergent notions into compact frameworks of explanation. However, theory must also rest upon a broadened basis of substantive factual knowledge. It is hoped that by testing several hypotheses here the body of substantive knowledge regarding impact can be so broadened.[72]

The hypotheses tested will be placed into three rather wide groupings. The first grouping relates to the constituencies of the attorneys general, the second to their personal characteristics and the third to the nature of the particular issues involved in the opinions.

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tinue to operate on a segregated basis (4 Race Rel. L. Rep. 1087 (1959)); teachers can be dismissed for joining the National Education Association, an organization advocating integration (6 Race Rel. L. Rep. 1228 (1961)); and meetings of the League of Women Voters must be segregated (1 Race Rel. L. Rep. 1156 (1956)).

69. Wasby, *supra* note 3, at 243-68.

70. *Id.* at 266.

71. *Id.* at 268.

72. Technically this article deals not with impact per se, but rather with the transmission of court decisions, a major prerequisite for impact.

Constituencies of the Attorneys General

A. *The Population*

Wasby hypothesized that the more controversial the subject of a Supreme Court opinion, the greater the likelihood of some action aimed against it.[73] Moreover, he advanced the proposition that "if a Supreme Court decision is seen as bringing about a crisis, reaction will be more immediate than if it is not so seen."[74] Additionally, he proposed that "when local preferences reinforce a judge's personal views, he is less likely to follow the Supreme Court than when this is not the case."[75] A corollary to this hypothesis would hold the same for the state attorney general.

From these hypotheses, it might be expected that attorneys general's opinions regarding court decisions on segregation will be more likely to be non-complying in those jurisdictions where segregation was most entrenched as a social value. In these jurisdictions the *Brown* and subsequent decisions would be most condemned and most likely to precipitate crises when implemented. In all of the states studied a modicum of crisis attended the implementation of court-ordered desegregation. However, the same degree of reaction was not forthcoming from each state. As indicators both of the level of crisis which the policies of the Supreme Court might have produced in the southern states and of the strength of commitment to traditional values regarding segregation, the percentage of non-whites in the state (1960) and the percentage of vote for George Wallace in the 1968 presidential election are utilized. Also examined is the percentage of the population born within the state.[76]

Table I-A shows that these indicators are highly related in expected ways with whether or not the attorneys general's opinions

73. WASBY, *supra* note 3, at 253.

74. *Id.*

75. *Id.* at 261.

76. Factors such as the three utilized here are often used by political scientists to gauge constituency attitudes and influence over political phenomena. Particularly noteworthy is V. O. Key's treatment of party activity in the South as a concomitant of the percentage of non-whites in southern states. *See* V.O. KEY, SOUTHERN POLITICS IN STATE AND NATION (1949). Another study utilized the percentage of votes given Strom Thurmond's presidential candidacy in 1948 as an indicator of southern separatism in racial policy. *See* M. COMMINGS, CONGRESSMEN AND THE ELECTORATE (1966). *See also* W. SHANNON, PARTY CONSTITUTENCY AND CONGRESSIONAL VOTING (1968).

facilitated compliance with court policy. Of the fifteen states with opinions examined here, the five states with the largest Wallace vote (each giving him over one-third of their vote) produced two facilitating opinions and fourteen non-facilitating opinions. Attorneys general in the next five states (states which gave Wallace from 19 percent to 31 percent of their vote) wrote nine facilitating and twelve non-facilitating opinions. The attorneys general in the five southern and border states which least approved of the Wallace candidacy gave greatest approval to federal court policy. Sixteen of their opinions favored compliance, while ten did not.

In the states with over 20 percent non-white population, Table I-B indicates that an excess of four-fifths of the opinions resisted desegregation decisions. The opinions of the attorneys general in states with a non-white population between 10 and 20 percent were non-facilitative in 47.6 percent of the cases, whereas only one-third of the opinions in states with under 10 percent non-white population were non-facilitative.

A further indication of the strength of local feelings is provided by the percentage of persons who are natives of the state. Table I-C demonstrates that attorneys general's opinions were more facilitative of court policy where people born within the state constituted a smaller percentage of the state's population. Attorneys general in states with a native-born population of over 80 percent rendered resisting opinions over 70 percent of the time, while those in states with a native population of under 65 percent gave resisting opinions only 45.5 percent of the time. These results suggest that attorneys general respond to constituent values when they exercise the option of complying with or resisting federal court directives. Stronger consistuency values supporting segregation apparently make compliance with integration more crisis-like in states with higher proportions of non-white citizenry, Wallace voters and citizens born within the state boundaries.

TABLE I

CHARACTERISTICS OF THE STATE CITIZENRY AND ATTORNEYS GENERAL'S OPINIONS ON RACE RELATIONS

	Facilitating Opinions	Non-Facilitating Opinions	Total
A. 1968 Presidential Vote for George Wallace			
Over 33% (5 States)	2 (12.5%)	14 (87.5%)	16 (100%)
19%-31% (5 States)	9 (42.9%)	12 (57.1%)	21 (100%)
Under 18% (5 States)	16 (61.5%)	10 (38.5%)	26 (100%)
B. 1960 Census Percent Non-White			
Over 30% (2 States)	1 (11.1%)	8 (88.9%)	9 (100%)
20%-30% (4 States)	3 (20.0%)	12 (80.0%)	15 (100%)
10%-20% (5 States)	11 (52.4%)	10 (47.6%)	21 (100%)
Under 10% (4 States)	12 (66.7%)	6 (33.3%)	18 (100%)
C. 1960 Census Percent Born Instate			
Over 80% (5 States)	6 (27.3%)	16 (72.7%)	22 (100%)
65%-80% (6 States)	9 (47.4%)	10 (52.6%)	19 (100%)
Under 65% (4 States)	12 (54.5%)	10 (45.5%)	22 (100%)
TOTAL	27 (42.9%)	36 (57.1%)	63 (100%)

B. *Election Considerations*

The impact of local values should be expected to affect elected officials more than non-elected officials. Wasby advanced the hypothesis that "visibility of reaction by government officials is a function of the time until the next election."[77] This proposition may be operationalized by asking how close the attorneys general were to the electorate. Non-facilitating opinions should be more likely to come from attorneys general who have been elected to other offices in the past, who have come to the attorney generalship through elections and who look forward to future election contests.

77. WASBY, *supra* note 3, at 263. This hypothesis is also a major theme in studies of political ambition. *See* J. SCHLESINGER, AMBITION AND POLITICS (1966); Thompson, *A Theoretical and Methodological Inquiry into Ambition Theory: Reassessment and Redirection*, 1 POL. INQUIRY 96 (1973); Thompson, *An Analysis of the Legislative Ambitions of State Constitutional Convention Delegates* (paper presented to the 1974 Annual Meeting of the American Political Science Association, Chicago, Illinois, Aug. 30, 1974).

Figures in Table II-A reveal that attorneys general who held previous elected offices were less likely to facilitate court decisions ordering desegregation than were attorneys general who had not held such offices. Just over 40 percent of the opinions of those with earlier election experience were facilitative, compared with 47.6 percent of the opinions of the other attorneys general. Unexpected was the finding in Table II-B that 51.2 percent of the opinions of those elected to the attorney generalship were facilitative, while only 27.3 percent of the opinions of those appointed to the office were facilitative. Since most of the appointments were vacancy appointments made by governors who led segregation battles, the findings should not be considered too shocking.

As indicated in Tables II-C and II-D, data on the future election plans of the opinion writers are more consistent with the hypothesis. Over one-half (13 of 25) of the opinions of those who afterwards did not seek another elected term as attorney general were facilitative, while only 14 of 38 (36.8 percent) opinions by those who did seek election were facilitative. Similarly 39.3 percent of the opinions of attorneys general who were gubernatorial aspirants were facilitative, as compared with 45.7 percent of the opinions of less politically ambitious attorneys general. Moreover, only two opinions which facilitated compliance were written by successful gubernatorial aspirants. Six of the non-complying opinions had such authors. Compliance with federal court policy on desegregation, it appears, is made at a political cost to the attorney general when such compliance involves a repudiation of traditional state practices.

TABLE II

ELECTORAL CONSIDERATIONS AND ATTORNEYS GENERAL'S OPINIONS ON RACE RELATIONS

	Facilitating Opinions	Non-Facilitating Opinions	Total
A. Did Attorney General Hold Previous Elective Office?			
Yes	17 (40.5%)	25 (59.5%)	42 (100%)
No	10 (47.6%)	11 (52.4%)	21 (100%)
B. Became Attorney General By:			
Popular Election	21 (51.2%)	20 (48.8%)	41 (100%)
Appointment (Regular or to Replace Vacancy)	6 (27.3%)	16 (72.7%)	22 (100%)
C. Number of Times the Attorney General Sought Reelection Subsequent to Issuing Opinion			
None	13 (52.0%)	12 (48.0%)	25 (100%)
Once	12 (54.5%)	10 (45.5%)	22 (100%)
Twice	2 (15.4%)	11 (84.6%)	13 (100%)
Three Times	0 (0.0%)	3 (100%)	3 (100%)
D. Did Attorney General Seek Governorship After Writing Opinion?			
Yes	11 (39.3%)	17 (60.7%)	28 (100%)
No	16 (45.7%)	19 (54.3%)	35 (100%)
TOTAL	27 (42.9%)	36 (57.1%)	63 (100%)

Personal Characteristics of the Attorneys General

Several personal and political background characteristics of the authors of the opinions can be examined in an effort to substantiate or reject hypotheses on impact.

A. *Nativity*

It would be expected that the attorney general whose background indicates that he identifies most with his constituents will be most likely to oppose court policy which challenges values held by those constituents. For instance, those attorneys general who are natives of their states should have attitudes closer to their constituents than those born out-of-state. Places of birth as well as places of the legal education of the attorneys general were surveyed. The data in Table III offer some support for the expected relationships. Of the opinions written by attorneys general born within their state,

40.7 percent were facilitative, while three of four opinions written by attorneys general born out-of-state were facilitative. The same tendency is true for the place of the attorneys general's legal education. Those educated instate wrote facilitating opinions 38.3 percent of the time. In contrast, the opinions of those educated out-of-state transmitted court policy 56.2 percent of the time.

B. *Urban-Rural Background*

Urban backgrounds can be expected to generate compliance more than rural backgrounds for several reasons. Wasby pointed out that the values of public segregation have been more entrenched in rural areas of the South than in urban areas because certain private factors, most notably patterns of residential segregation, have rendered much of the public policy on segregation superfluous in rural areas.[78] Moreover, he hypothesized that non-compliance would be greater in areas with homogeneous values than in areas of more heterogeneous values.[79] Since the size of the community certainly affects the homogeneity of local values, it is expected that attorneys general born in large cities would be more likely to comply with court policy than attorneys general from more rural areas.

Population data on the birthplaces of the attorneys general confirm the expectations. Table III-F indicates that six attorneys general who were born in cities of over 50,000 population wrote 9 facilitating opinions and 2 non-facilitating opinions. Those seven who were born in cities of 5,000 to 50,000 wrote ten facilitating and ten non-facilitating opinions. The thirteen attorneys general born in communities of under 5,000 population wrote eight facilitating opinions, but twenty-four non-complying opinions.

C. *Concern for Court Decisions in Other Areas of the Law*

Wasby hypothesized as follows: "Those unhappy at the Court for earlier decisions will be more likely to attack current ones than will others."[80] In a similar vein, he proposed that "individuals are more likely to resist Court decisions when they have done so in the past than when they have not done so."[81]

78. WASBY, *supra* note 3, at 182-83.
79. *Id.* at 262.
80. *Id.* at 258.
81. *Id.*

Available data do not permit a direct testing of these hypotheses since the totality of past activity of the attorneys general in relation to federal court policy cannot be determined. However, it might be inferred from some personal characteristics or experiences that certain attorneys general have had a longer history of opposition to federal court policy than others.

The Supreme Court in the 1950's and through the 1960's was especially active in broadening the rights afforded persons accused of crimes,[82] attacking the legality of state action in the field of legislative apportionment,[83] and negating state-sponsored religious activities such as school prayers[84] and direct aid to parochial schools.[85] It might then be expected that an attorney general whose beliefs regarding church-state relations were challenged by court actions and attorneys general who had to defend state actions regarding prosecution of persons accused of crimes or schemes for legislative apportionment would be the most resistant to court policy in the segregation area. Of course, court action in these other areas took place simultaneously with many of the opinions studied here. Therefore, the veracity of the hypotheses tested can only be hinted at by examining the background characteristics of the attorneys general.

82. *E.g.*, Miranda v. Arizona, 384 U.S. 436 (1966) (confessions); Pointer v. Texas, 380 U.S. 400 (1965) (confrontation of witnesses); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel); Mapp v. Ohio, 367 U.S. 643 (1961) (searches).

83. *E.g.*, Reynolds v. Sims, 377 U.S. 533 (1964); Wesberry v. Sanders, 376 U.S. 1 (1964); Baker v. Carr, 369 U.S. 186 (1962).

84. *E.g.*, Abington School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

85. *E.g.*, Lemon v. Kurtzman, 403 U.S. 602 (1971).

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TABLE III

PERSONAL CHARACTERISTICS AND ATTORNEYS GENERAL'S OPINIONS ON RACE RELATIONS

	Facilitating Opinions	Non-Facilitating Opinions	Total
A. Was Attorney General Born Instate?			
Yes	24 (40.7%)	35 (59.3%)	59 (100%)
No	3 (75.0%)	1 (25.0%)	4 (100%)
B. Does Attorney General Possess Bachelor's Degree?			
Yes	22 (50.0%)	22 (50.0%)	44 (100%)
No	5 (26.3%)	14 (73.7%)	19 (100%)
C. Does Attorney General Hold National Law School Degree?			
Yes	8 (53.3%)	7 (46.7%)	15 (100%)
Has Degree from Other Law School	15 (41.7%)	21 (58.3%)	36 (100%)
Has No Law Degree	4 (33.3%)	8 (66.7%)	12 (100%)
D. Did Attorney General Attend Law School Instate?			
Yes	18 (38.3%)	29 (61.7%)	47 (100%)
No	9 (56.2%)	7 (43.8%)	16 (100%)
E. Was Attorney General a Member of a Law Firm?			
Yes	16 (51.6%)	15 (48.4%)	31 (100%)
No	11 (34.4%)	21 (65.6%)	32 (100%)
F. Size of Birthplace of Attorney General			
Over 50,000	9 (81.8%)	2 (18.9%)	11 (100%)
5,000 to 50,000	10 (50.0%)	10 (50.0%)	20 (100%)
Under 5,000	8 (25.0%)	24 (75.0%)	32 (100%)
G. Religion			
Catholic	3 (30.0%)	7 (70.0%)	10 (100%)
Baptist	1 (11.1%)	8 (88.9%)	9 (100%)
Other Protestant	17 (56.7%)	13 (43.3%)	30 (100%)
Unknown	6 (42.9%)	8 (57.1%)	14 (100%)
TOTAL	27 (42.9%)	36 (57.1%)	63 (100%)

1. Religion

Religious affiliations of twenty-one of the twenty-six attorneys general who wrote opinions could be determined. Three were Roman Catholics, four Baptists, four Presbyterians, three Methodists, three Episcopalians and four belonged to other Protestant denominations.

As Table III-G indicates, a preponderance of the opinions written by the Catholic and Baptist attorneys general resisted court policy on desegregation. Most of the opinions written by the less fundamentalist Protestants urged compliance with the federal policy.

Perhaps the school prayer issue has had a greater effect upon Baptists and other more fundamentalist religious groups than on groups such as Methodists and Presbyterians. Moreover, constitutional attacks upon various kinds of aid to religious schools have been levied most directly against Catholic schools. The data, then, might be offered as speculative evidence for confirmation of the hypotheses advanced. The numbers are not large enough to justify firm conclusions.

2. Service as prosecuting attorney or assistant attorney general

Local government attorneys and attorneys for the state government, both agency attorneys and assistant attorneys general, have received the brunt of much United States Supreme Court activity. These lawyers have had to defend state actions in the law enforcement area, in the area of public religious exercises and in the area of legislative apportionment. The attacks upon state and local governmental practices in the past twenty years have been many. As a result, attorneys general who had previously served as state or local government attorneys would be expected to resist desegregation decisions more than attorneys general without such previous experience.

Nine of the attorneys general had previous experience as lawyers for the state government. Table IV-A indicates that 70 percent of their opinions were non-facilitative of federal court policy in the segregation area. Only 45 percent of the opinions of the seventeen other attorneys general were non-compliant opinions.

Table IV-B shows smaller differences regarding experience as local attorneys. Forty-one percent of the opinions of the seventeen attorneys general who previously were local government attorneys were facilitative, compared with 45 percent of the opinions of the nine attorneys general who had not served in such positions.

As the state attorney general has had to fight many federal encroachments upon state prerogatives, it could be further surmised that length of service as attorney general would be related to the

attorney general's outlook upon federal court policy. Data in Table IV-C indicate support for the supposition. The data show that facilitating opinions were more likely to be written by attorneys general during their earlier years of service than later in their tenure. The twenty-seven facilitating opinions were written an average of 3.7 years after the attorney general came to his office. The thirty-six non-facilitative opinions were written an average of four and a half years after service in office commenced. Thirty-three percent of the opinions of the more experienced attorneys general were supportive of the courts, while 50 percent of the opinions of those serving in their first four years were facilitative.

However, the age of the attorneys general when writing the opinions was unrelated to the content of the opinions. The average age of the authors of facilitative opinions was 49.8 years. The non-facilitative opinions were written by attorneys general with an average age of 49.6 years.

3. Legislative service

State legislative service seems to encourage compliance. Table IV-D shows that 50 percent of the opinions written by attorneys general with such experience were facilitative, compared with 40.4 percent of the opinions of the other attorneys general. While it might be expected that persons serving in a body which has been beseiged by adverse court decisions would be skeptical of court actions, the data do not suggest this. Although the differences found were not overly large ones, an alternative explanation may be that legislators were not as obliged to represent and defend state governmental policies as were state lawyers. In addition, perhaps service in legislative bodies permits a broader consideration of national policies than does service as a state or local government attorney.

D. *Judicial Service*

Wasby abstracted from the literature on impact a hypothesis that "judges are more likely to follow Supreme Court opinions than are other governmental officials."[86] Moreover, he asserted: "Those seeking higher office in the judicial system will be more likely to comply with Supreme Court decisions than those in other posi-

86. WASBY, *supra* note 3, at 260.

tions."[87] Wasby indicated that these hypotheses "follow from the role of judges—that they are supposed to follow both precedent and the rulings of higher courts, particularly the highest court of the land."[88] He did suggest, however, that local pressures may pull the judges in directions other than compliance.[89]

To test the propositions advanced, the contents of the opinions written by attorneys general with judicial experience and by attorneys general who sought subsequent seats on the bench were examined. In both cases, the results indicate, contrary to expectations, that judicially-oriented attorneys general are more likely to be non-facilitators than are other attorneys general.

Table IV-E reveals that only one-third of the opinions of attorneys general with previous judicial experience were facilitative. Over 45 percent of the opinions of the others were supportive of court decisions. Additionally, of the attorneys general who subsequently sought seats on the bench, only 26.3 percent of their opinions were supportive compared with 50 percent of the opinions of those without judicial ambitions. This scant evidence would seem to lead to the rejection of the hypothesis advanced above. An explanation for this finding might be that all of those seeking court seats were seeking places on the state bench. To obtain such seats, these attorneys general were probably more dependent upon state political forces than were other attorneys general. Hence, it might be suggested that they placed attachment to their state's values above any considerations of judicial role identification. Getting there was more firm in their minds than any thoughts about being there.

E. *Standing in the Legal Profession*

The lawyer as well as the judge has a role in upholding "the law." Lawyers traditionally have been "officers of the court." Accordingly, Wasby has hypothesized that "lawyers are more likely to comply with Supreme Court decisions than are non-lawyers."[90] Subsequently, he hypothesized that "the higher the degree of professionalization of a public agency, the less amenable it is to influence

87. *Id.* at 261.
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.* at 263.

from outside with respect to compliance."[91] As a corollary to these propositions, it could be expected that those attorneys general with higher standing in the legal profession would be more likely to comply with court policy than attorneys general without high professional standing.

Possession of bachelor's degrees, graduation from national law schools and memberships in law firms have been utilized in previous studies as indicators of prestige and standing in the legal profession.[92] Greater compliance should therefore be expected from attorneys general with these attributes.

The data support the expectations, as shown in Tables III-B, III-C and III-E. Fifty percent of the opinions written by attorneys general who held bachelor's degrees were facilitative, compared with only 26.3 percent of the opinions of other attorneys general. Facilitative opinions were also more likely to have been written by attorneys general who graduated from national law schools. Fifteen opinions were written by attorneys general who had graduated from one of the fifteen national law schools.[93] Eight of these opinions supported court policy on desegregation. Fifteen of thirty-six opinions written by other attorneys general with law degrees were facilitative. Only four of twelve opinions written by attorneys general without law degrees supported the courts.

Facilitative opinions were also much more likely to have been written by attorneys general who had been members of law firms, offering a further degree of evidence that high professional standing fosters the facilitation of federal court policy. Over one-half of the opinions by attorneys general with previous law firm membership were facilitative, compared with only eleven of the thirty-two opinions written by attorneys general who had not practiced with firms.

92. *See* R. WATSON & R. DOWNING, THE POLITICS OF THE BENCH AND THE BAR (1969); Ladinsky, *Careers of Lawyers, Law Practices and Legal Institutions*, 27 AM. SOCIO. REV. 47 (1963); Hourani, *Lawyers and Politics* (unpublished Ph.D. dissertation, Michigan State University, 1966).

93. For the purposes of the analysis, the fifteen national law schools are considered to be those which publish law reviews which are cited in all of the state court citators published by Shepard's Citations, Inc. The schools are California (Berkeley), Chicago, Cornell, Columbia, Duke, Harvard, Michigan, Minnesota, Northwestern, New York University, Pennsylvania, Stanford, Texas, Virginia and Yale.

F. *Attachment to Political Parties*

Attachment to political party organizations can be expected to affect the content of the opinions written by the attorneys general. It could be expected that strong ties to parties would foster non-compliance.[94]

Experience in holding three party offices during tenure as attorney general is utilized as an indicator of party attachment. The three offices are national convention delegate, national committeeman and state party chairman. The data examined reveal that fourteen of the attorneys general held one of these positions, and twelve did not. As indicated in Table IV-G, the fourteen wrote six facilitative opinions and nineteen non-facilitative opinions. The twelve non-party office holders were much more compliance-oriented. They wrote twenty-one facilitative opinions and seventeen non-facilitative opinions, thus confirming the expectations.

94. WASBY, *supra* note 3, at 189. *See also* Vines, *supra* note 2, at 350-51.

TABLE IV

PERSONAL POLITICAL CHARACTERISTICS AND ATTORNEYS GENERAL'S OPINIONS ON RACE RELATIONS

	Facilitating Opinions	Non-Facilitating Opinions	Total
A. Prior Service as State Attorney			
Yes	9 (30.0%)	21 (70.0%)	30 (100%)
No	18 (55.6%)	15 (44.4%)	33 (100%)
B. Prior Service as a Local Government Attorney			
Yes	17 (41.5%)	24 (58.5%)	41 (100%)
No	10 (45.5%)	12 (54.5%)	22 (100%)
C. Opinion Written Before Fourth Year as Attorney General	18 (50.0%)	18 (50.0%)	36 (100%)
Opinion Written In or After Fourth Year	9 (33.3%)	18 (66.7%)	27 (100%)
D. Prior Service as Legislator			
Yes	8 (50.0%)	8 (50.0%)	16 (100%)
No	19 (40.4%)	28 (59.6%)	47 (100%)
E. Prior Service as Judge			
Yes	4 (33.3%)	8 (66.7%)	12 (100%)
No	23 (45.1%)	28 (54.9%)	51 (100%)
F. Sought Future Service			
Yes	5 (26.3%)	14 (73.7%)	19 (100%)
No	22 (50.0%)	22 (50.0%)	44 (100%)
G. Party Offices: Was Attorney General National Delegate, Committeeman or State Party Chairman			
Yes	6 (24.0%)	19 (76.0%)	25 (100%)
No	21 (55.3%)	17 (44.7%)	38 (100%)
TOTAL	27 (42.9%)	36 (57.1%)	63 (100%)

Nature of the Issues

This study can be distinguished from many other impact studies because it considers the public officials' responses to a general federal court policy rather than responses just to one or two specific court decisions. By examining sixty-three attorneys general's opinions as a group, emphasis is placed on the similarity of the opinions.

All the opinions have been concerned with one form or another of public or publicly-endorsed segregation of the races.

This last section will address itself to differences among the issues raised in the opinions. Existing studies of impact have suggested that the nature of an issue can affect whether or not there will be compliance with federal court policy. Wasby, for example, was led to hypothesize that "non-compliance will be greater when there is an economic component to a decision than when there is not."[95] The amount of government involvement in the issue has also been pointed to as a factor affecting compliance. A hypothesis was advanced that "non-compliance will be greater when patterns of activity by bureaucracies must change than where bureaucracies are less involved."[96] Additionally, it was suggested that "units of government are less likely to comply with court rulings than are individuals."[97]

A corollary concerning the opinions of attorneys general might be derived from the substantive message of these latter two hypotheses. It might be expected that attorneys general will be more likely to facilitate federal court policy in areas of law involving individual citizens than they will where that policy affects governmental units. The attorney general's commitment to defend the values and practices regarding segregation in his state will be greatest, if he feels any commitment at all, where the practices are those of governmental units. This is because he is charged with the duty of defending these units in actual litigation when their actions are constitutionally challenged, while he has no such obligation to defend private citizens for their actions.

The corollary is well supported by the data. Thirty-nine of the opinions related to practices of governmental units. Of these, fourteen (35.9 percent) were facilitative, while twenty-five (64.1 percent) were not. On the other hand, thirteen (54.2 percent) of the twenty-four opinions involving actions of private citizens were facilitative. Table V indicates the types of opinions and their disposition.

95. WASBY, *supra* note 3, at 247.
96. *Id.* at 257.
97. *Id.* at 259.

Valparaiso University Law Review, Vol. 9, No. 1 [1974], Art. 3

TABLE V

SUBJECTS OF RACE RELATIONS OPINIONS AND COMPLIANCE

	Facilitating Opinions	Non-Facilitating Opinions	Total
OPINIONS AFFECTING GOVERNMENT PRACTICES			
School Segregation	10	15	25
Voting Rights	1	5	6
Welfare and Employment	0	4	4
Intergovernmental Cooperation	1	1	2
Property Assessment	1	0	1
Registration of Integrationists	1	0	1
TOTAL	14 (35.9%)	25 (64.1%)	39 (100%)
OPINIONS AFFECTING PRIVATE INDIVIDUALS			
Public Accommodations	7	9	16
Public Meetings	1	2	3
Miscegenation	3	0	3
Housing	2	0	2
TOTAL	13 (54.2%)	11 (45.8%)	24 (100%)

CONCLUSION

The purpose of this article has been to reveal conditions which are associated with the facilitation or resistance of federal court policy by state attorneys general. It is hoped that the conditions identified will add to the substantive knowledge of impact. The associations that were found in an examination of attorneys general's opinions on questions of the segregation of the races can be placed into three different categories: those involving the constituencies of the attorneys general, those involving the characteristics of the attorneys general and those involving the nature of the particular issues transmitted. It was found that facilitation or resistance of court decisions was associated with the attributes of the constituencies of the attorneys general. Personal characteristics and experiences of the attorneys general were also influential in determining whether the opinions would aid or impede court-ordered desegregation. Some of the associations between the personal characteristics of the attorneys general and the facilitating or resisting content of their opinions support the hypothesis that officials "unhappy at the

Court for earlier decisions will be more likely to attack current ones than will others."[98]

In contrast, a hypothesis suggesting that judicial service fosters facilitative efforts by officials was not supported. Both attorneys general with prior service as judges and attorneys general who held subsequent judgeships resisted the federal court policy of desegregation more than their counterparts. However, high standing in the legal profession was related to the facilitation of court policy. Service to a political party—in terms of holding a party office during tenure as attorney general—was highly associated with the resistance of federal court policy. An examination of the types of issues raised in attorneys general opinions revealed that opinions affecting the powers and activities of governmental units were more likely to foster resistance of court policy than were opinions which affected only the activities of private citizens.[99]

Before a theory of impact can stand in political science as a full-fledged scheme for explaining the execution of court-directed public policy, many well-defined concepts must be drawn together into a body of tightly knit hypotheses. It is hoped that the information revealed in this article can be of use to those who will further embark upon that difficult task.

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98. *Id.* at 258.

99. The data reported in this study must be regarded as data which can only suggest or fail to suggest the validity of the hypothesis advanced. The number of cases (63) examined does not permit definitive conclusions regarding the absolute validity or the rejection of the propositions. The data are expressed with percentages only. No indicators of statistical significance are used. This omission is made for several reasons. First, where cell frequencies are very small, the indicators of significance are not accurate measures. Second, where the frequencies are larger, the indicators of significance could be deceptive. They could easily be misconstrued to mean that the relationships demonstrated were definitive indications of the validity of the propositions advanced. Third, and most important, given the nature of the cases examined, tests of significance might not be properly applied. The 63 cases do not in any sense represent a random sample of another universe. It cannot be inferred from the relationships shown here that these relationships exist in a broader reality of attorneys general's race relations opinions. Rather, the study covers the universe—all opinions on race relations deemed important enough to receive attention by the *Race Relations Law Reporter*. For good discussions of the use of tests of significance with total population data see S. LIPSET, M. TROW & J. COLEMAN, UNION DEMOCRACY 480-85 (1956); J. WAHLKE, H. EULAU, W. BUCHANAN & L. FERGUSON, THE LEGISLATIVE SYSTEM 455-63 (1962); Selvin, *A Critique of Significance in Survey Research*, 22 AM. SOCIO. REV. 519 (1957).

The data on attorneys general's backgrounds and careers are drawn from a larger study by the author. Thompson, *Steppingstones: An Analysis of the Political Ambitions of State Attorneys General* (unpublished Ph.D. dissertation, University of Missouri—Columbia, 1972).

The findings presented in this article certainly highlight the value of pursuing explanations of public policy in the United States within a framework of impact theory. Such findings are further proof that the decisions of the Supreme Court are neither automatically obeyed by citizens nor uniformly accepted by governmental officials. The courts must rely upon others to carry out their mandates. Comparative examinations of particular groups of significant "others" such as state attorneys general can help students of the judiciary to understand the conditions which facilitate or retard compliance with court actions. American government is portrayed to be a "government of laws," not a "government of men." This portrayal should not be allowed to blind observers from the reality that human agency is intrinsic in the application of all law. To the end that such human agency can be better understood, impact theory can aid in reducing the randomness of such human behavior. Government can thereby move more closely toward the condition of uniformity connoted in the concept "government of laws."

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