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## ROBERT L. STERN AND EUGENE GRESSMAN: SUPREME COURT PRACTICE

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## BOOK REVIEWS

**SUPREME COURT PRACTICE:** By Robert L. Stern and Eugene Gressman. Washington, D.C.: The Bureau of National Affairs, Inc. Fifth edition 1978.

*Reviewed by Robert B. McKay\**

The first edition of this remarkable combination of scholarship and practical wisdom was published in 1950 as the collaborative effort of two experts on Supreme Court practice. The literary partnership of Robert Stern and Eugene Gressman has extended almost three decades, which must be a near record for collaboration in the field of legal scholarship.

The work has been hailed from the beginning as a significant contribution to an understanding of the Supreme Court of the United States, unquestionably the most important judicial institution in the world today. Judge Charles Fahy concluded that the first edition was "beyond criticism. I can find no fault in it."<sup>1</sup> Others were somewhat more restrained, but not much. Frederick Bernays Wiener described it as:

[A]n excellent practice manual which will serve as a valuable checklist to assist the experienced Supreme Court practitioner, and which will be ideal for the lawyer who is faced with the occasional case which must go to the Supreme Court, but who is unable to do what he does when confronted with an unfamiliar question in his local practice . . . ask the clerk or inquire of an older hand at the bar.<sup>2</sup>

Reviewing the same edition, Professor Henry M. Hart, Jr., called it "an extraordinarily concise handbook—a *tour de force* of condensation . . . containing only 353 pages of text in large print on small pages."<sup>3</sup>

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1. Fahy, Book Review, 64 HARV. L. REV. 1400 (1951).

2. Wiener, Book Review, 19 GEO. WASH. L. REV. 112 (1950).

3. Hart, Book Review, 27 IND. L.J. 145, 146 (1951) (citation omitted).

That comment might be regarded as damning with faint praise of smallness, not the tone of a highly complimentary review. Certainly comments on the fifth edition must emphasize the comprehensiveness of the current volume, which includes:

- 17 pages of summary check lists and time charts for certiorari, appeal, and cases accepted for argument
- 934 pages of text
- 138 pages of forms
- 44 pages of Rules of the Supreme Court
- 41 pages of the text of all relevant statutes
- 15 pages listing the libraries with copies of briefs, appendices and records filed in the Supreme Court

More important than the quantity is the quality, which accomplishes the almost unmanageable. Each edition seems to get better than its already excellent predecessors. The authors have not been content to rest on past laurels. They are quite right in the Preface to assert that the fifth edition "has been thoroughly updated since the fourth edition appeared in 1969. . . ." <sup>4</sup> Hundreds of new cases are cited in the current edition, demonstrating not only the diligence of the authors, but also the rate of change in Supreme Court jurisdiction and practice. In recognition of the difficulty of keeping up with future developments as they occur, the publisher has provided a pocket on the inside back cover for a supplement to be inserted when issued "as the occasion demands." <sup>5</sup>

In several important areas the current edition has been extensively revised. As the authors note:

Chapter 1 considers for the first time the greatly enlarged workload of the Court in recent years and its effect on the practicing lawyer. Chapter 2 has been recast to reflect the repeal of most of the federal direct appeal statutes and to analyze the few surviving and little-known provisions for direct appeals from lower federal courts. Chapter 3 deals with the ever-troublesome problems of finality that confront the lawyer seeking review of a state court decision. More detailed consideration has been given the vexing problems arising from the Court's summary disposition of both appeals and certiorari costs. Recent decisions have required reconsideration of the previously simple question as to when a cross-petition and a cross-appeal need be filed. The pro-

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4. *Preface* to R. STERN & E. GRESSMAN, *SUPREME COURT PRACTICE* at vi (5th ed. 1978) [hereinafter cited by page number only].

5. *Id.* Such supplement may soon be necessary as Congress continues to limit the mandatory jurisdiction of the Court.

cedures to be followed in *in forma pauperis* cases and the principles that control bail and stay applications have been accorded increased emphasis. And the elimination by the Court of the need to file a certified record of the proceedings below unless and until the court accepts a case for full briefing and argument has necessitated important revisions in the discussions of the docketing, record, and appendix procedures.<sup>6</sup>

*Supreme Court Practice* is not intended to be read straight through at a single sitting, as the publishers of novels often claim for their products. Probably few will read it entirely. Rather it is a research tool, a self-contained, one-volume treatise on a subject so special, so arcane that even the most experienced practitioner needs the expert guidance that is uniquely available in this volume.<sup>7</sup>

Although Messrs. Stern and Gressman may not have intended the book to be read consecutively from beginning to end, anyone interested in the Supreme Court is likely to read much more than those parts that skillfully answer immediately urgent questions. There are interesting bits of information about the early sessions of the Court; changes in jurisdiction to put an end to the onerous Circuit riding of the early years; the procedures in the Justices' conferences; and even a guided tour of the Supreme Court building (including a reminder that no tipping is permitted at the check room).

The important thing about this volume is the care which has been taken to anticipate all questions and to answer them as concisely as possible, as fully as necessary, and always with careful documentation. Everything is included, from the jurisdiction of the Court to the preparation and printing of the brief and appendix containing the record. Sound advice is given about oral argument and its importance, as well as about the advisability of filing a petition for rehearing after an unfavorable decision.

Nothing that I can think of has been omitted. Everything is

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6. *Id.*

7. There are other good treatises on federal practice and procedure, including MOORE'S FEDERAL PRACTICE (2d ed. 1948) (updated with pocket parts); C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE (1969) (updated with renewed volumes and pocket parts); and R. ROBERTSON & F. KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES (2d ed. R. Wolfson and P. Kurland, 1951). But the Moore and Wright works are multi-volume treatises dealing with many subjects in addition to Supreme Court practice, thus denying the reader compact discussion of the Supreme Court; and the Robertson-Kirkham volume has not been updated recently enough to be fully reliable.

handled in the same clear, crisp style characteristic of the best writing of the legal profession. The book is indispensable to one who seeks either to be heard in the Supreme Court or to deny that opportunity to others. If all aspirants to Supreme Court review would study this book and take its lessons to heart, the workload of the Court should be materially reduced by the exclusion of a considerable portion of the present frivolous appeals and petitions for certiorari.<sup>8</sup>

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8. In this respect, we are advised that only those petitions for certiorari considered *prima facie* to be of merit are discussed in Conference. The cases that do not make the "Discuss List," which may eliminate more than 70% of the total at a particular conference, are denied review without discussion or vote. P. 8 n.103. Mr. Justice Brennan ordinarily does not even utilize his law clerks in the preliminary securing process, because he can dispose of a substantial number of petitions just by reading the "Questions Presented." P. 49.