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Managing the Supreme Court's Workload

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COMMENTARIES

Managing the Supreme Court's Workload

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The controversy over the establishment of a new federal appellate court to reduce the Supreme Court's workload continues unabated. The original proposal to create such a court, first advanced in the Freund Report,[1] has been modified considerably. Instead of a national appellate court with specially appointed judges who would screen and decide certiorari petitions, it has been proposed by Chief Justice Warren E. Burger that there be a five year experiment with a national appellate court of limited powers and sitting circuit judges.[2]

In a 1976 article in the *Hastings Constitutional Law Quarterly*,[3] I wrote in opposition to the creation of a National Court of Appeals either in the form proposed by the Freund Report or as recommended by the Hruska Commission,[4] which was appointed by Congress to consider the subject. The basis for my opposition was that a delegation of the exercise of the Supreme Court's jurisdiction would create, in effect, two Supreme Courts in violation of the declaration in Article III of the Constitution that there be but "one supreme Court."[5] I contended that even if this constitutional argument is questionable, what the Constitu-

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1. FEDERAL JUDICIAL CENTER, REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT (1972), *reprinted in* 57 F.R.D. 573 (1973).

2. *See* Burger, *Annual Report on the State of the Judiciary*, 69 A.B.A. J. 442 (1983).

3. Goldberg, *There Shall Be "One Supreme Court,"* 3 HASTINGS CONST. L.Q. 339 (1976).

4. U.S. COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE, AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE, *reprinted in* 67 F.R.D. 195 (1975).

5. In pertinent part, U.S. CONST. art. III, § 1 provides: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." (emphasis added).

tion does not command, it may still inspire.[6]

There is great value in the principle that every person may take a claim involving basic rights and liberties to the Supreme Court of the United States for consideration and final action without reference to any other tribunal. It is this belief by citizens that inspires respect for and reliance upon the Supreme Court as a palladium of liberty and a citadel of justice.[7] Thus, I noted that almost everyone who has sat on the Court has recommended the elimination of diversity jurisdiction as an anachronism,[8] as well as the abolition of direct appeals to the Supreme Court.[9] This recommendation would leave all cases subject to certiorari procedures.

I further objected to a new National Court of Appeals because I was unconvinced that the Supreme Court has the staggering burden which the Chief Justice has referred to on numerous occasions.[10] However, in light of the agreement among a majority of the Court's present Justices that the current number of cases is too onerous to permit deliberate consideration of all cases on the Court's docket,[11] it appears academic to argue that this is not so.

While the Chief Justice's proposal seeks to overcome some of the objections raised in connection with the Freund Report and the Hruska Commission recommendations, I remain convinced that structural reforms are not the answer to the problem. In this Article, therefore, I venture to suggest additional reforms designed to lighten the Court's docket. These reforms can be accomplished by the exercise of self-discipline on the part of the Court and by a simple change in the Court's rules and procedures. My proposals would not require the creation of a fourth tier in our federal judicial system. An additional layer to the judiciary simply would lead to even longer delays and greater expense than now prevail; furthermore, another court with powers that might usurp the Supreme Court's function would be subject to constitutional challenge. Like the proposals of Chief Justice Burger, I deem my suggested reforms to be an experiment; I too would limit the experimental period to five years.

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6. Goldberg, *supra* note 3, at 339.

7. *Id.*

8. *Id.* at 342.

9. *Id.* The specific recommendation in my earlier article was the elimination of direct appeals from three-judge courts to the Supreme Court. In light of the continuing concern over the Court's workload, I now suggest that the Supreme Court's discretion to hear a case be extended to all appeals to the Court.

10. *See, e.g.*, Burger, *supra* note 2, at 443.

11. *See* Hellman, *The Proposed Intercircuit Tribunal: Do We Need It? Will It Work?* 11 HASTINGS CONST. L.Q. 375, 379 (1984).

In the exercise of self-discipline, the Court should limit drastically the number of grants in certiorari applications. There were 123 signed opinions in the 1980-81 Term; during the 1981-82 Term, that figure was 151—an increase of twenty-eight opinions.[12] Either number is too great for thoughtful and deliberate decision of cases on the merits. In exercising its discretionary certiorari jurisdiction, the Supreme Court should limit the number of certiorari grants to no more than 100. There simply are not 100 cases that warrant consideration by the Supreme Court on their merits.

An examination of the argument docket in recent years shows that the Court has been granting certiorari in many cases not worthy of Supreme Court adjudication. After all, our nation's highest tribunal is not a court of error. The Supreme Court's basic function is to decide important issues involving constitutional and statutory construction. Mere errors are properly subject to correction by the federal courts of appeals or the highest court of a state.

As an aid to the exercise of self-discipline, the Court should revise the "rule of four" in considering petitions for certiorari. This rule, simply put, is that certiorari is granted if four Justices vote in favor of the petition. I propose that five votes be necessary for a certiorari grant. This is a reasonable change, since all cases decided on the merits require a majority vote. This simple reform would curtail the argument docket of the Supreme Court and the number of signed opinions. In response to anticipated complaints by lawyers about this proposal, I am compelled to say that during my tenure on the Supreme Court, the Justices rarely changed their positions from the vote on certiorari to the final vote on the merits after briefing and argument.

A second exercise of self-discipline would be to curtail significantly the length and proliferation of writing by members of the Court. Reference to the official reports during Justice Holmes' tenure indicates that the average length of a Holmes' opinion generally was about four and one-half pages.[13] No one can plausibly argue that the great Yankee from Olympus did not adequately deal with the basic issues in the decisions he authored. In contrast, present majority opinions are much longer and, if anything, less enlightening.

12. For sake of comparison, it should be noted that in 1953, the first year of Chief Justice Warren's tenure, there were only 65 signed opinions.

13. *See, e.g.*, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (regulation of property that goes "too far" will be recognized as a taking) (two pages); Schenck v. United States, 249 U.S. 47 (1919) ("clear and present danger" test set forth) (four and one-half pages).

In addition to majority opinions that are overly lengthy, there is far too much unnecessary writing in concurring and dissenting opinions.[14] Many concurrences do not actually present a different point of view from that expressed in the opinion written for the Court. Where there are real differences that cannot be reconciled and compel a concurrence, such differences should be more succinctly and briefly stated. Differences rarely necessitate several concurrences sounding the same note.

These criticisms are particularly applicable to dissenting opinions. I value dissenting opinions. During the Court's history, many views expressed in dissent ultimately have prevailed.[15] What I find unnecessary are dissenting opinions that more or less repeat the same thesis. By agreement among the dissenters, in most cases, a single dissenting opinion could be filed. If some Justices in dissent would like greater emphasis on certain points, they should negotiate with the main dissenter to have their views incorporated into one opinion.

If these reforms do not substantially alleviate the Court's workload, I then propose a more drastic reform: the creation of panels of three Justices empowered to consider and rule on petitions for certiorari by a majority vote of the panel. This would considerably lighten the burden on the whole Court. It may be argued that petitioners would be deprived of the judgment of the entire Court; my response is that panel consideration by three of the Justices is infinitely better than disposition of certiorari petitions by law clerks, which increasingly has become the practice. If there is a genuine conflict among the circuits, the three-Justice panels should be empowered to refer certiorari petitions raising such conflicts to the full Court for resolution.

Although screening certiorari petitions is highly important, it is not the most crucial part of the Court's work. The vast majority of certiorari petitions raise no significant legal issue. The most important and time consuming aspect of a Justice's work is the hearing and determination of cases on the merits.

It must be emphasized that the drastic solution of a three-Justice panel should be pursued only if my first suggestion is unavailing. The Court should seek to avoid structural reform. By exercising greater discipline and changing the rule of four, the number of cases decided on

14. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam opinion together with concurrences and dissents totaling 294 pages).

15. *See, e.g.*, The Civil Rights Cases, 109 U.S. 3, 37-44 (1883) (Harlan, J., dissenting) (private organization carrying out a public function should constitute state action).

the merits would be reduced and the workload of the Supreme Court appreciably lightened.

No legislation is required to achieve the reforms I suggest. Reforms similar to those proposed here may be the only alternative because the dearth of legislative history since the Freund Report shows that Congress is reluctant to enact changes. Perhaps the greatest virtue of all is that the suggestions offered here would preserve the Supreme Court as a guarantee to all citizens of every estate, race, or color that our highest Court remains open to their claims that equality of justice under the Constitution has been denied.