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IN the establishment of the national government, the Constitution provided that the legislative power should be vested in *a* Congress. That provision assures that all national legislation shall be the product of a single national body, deliberating as such, and that no part of the legislative power may be delegated to regional legislative bodies, legislating for parts of the nation. The executive power was vested in a President, and unity in that function is thus assured. But as to the third great function of government, the judicial power, the Constitution was not so specific. It vested the judicial power in *one* Supreme Court and in such inferior courts as the Congress might establish. The creation of *one* Supreme Court was suggestive of unity, comparable to the unity of one Congress and one Executive. But the Constitution makers did not contemplate that all the judicial business of the new national government should be done by the one Supreme Court. They provided only that it should have original jurisdiction in a few specified kinds of cases, cases which would obviously constitute only a small fraction of the judicial business which the Constitution placed within the judicial power of the national government. They provided that Congress might create inferior federal courts, and that the Supreme Court should have such appellate jurisdiction as Congress might give it.[1]

There was, then, in the federal judicial area the possibility that Congress might create regional federal inferior courts and make their decisions final simply by not providing for appeal from them to the Supreme Court. There was also the possibility, even more ominous, that Congress would not provide for appeal to the Supreme Court of the United States from State court decisions involving questions of federal constitutional or statutory law. If in fact early Congresses had repented of the momentous step which the people of the nation had taken in the direction of creating a viable national government, and had concluded that the interpretation and application of the Constitution and statutes of that government should be subject to a measure of local adjustment to local conditions and sentiments, they could have

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[1] U. S. CONST. art. III, §§ 1-2.

made that conclusion effective by not providing any central clearing house through which the decisions of the regional federal courts and the state courts, on questions of federal law, would have to pass. If Congress had so failed to provide, our knowledge of subsequent history tells us that the newly formed union would, in all probability, have disintegrated for lack of the unifying force of an authoritative and uniform body of federal law.

However, the first Congress, acting within a year after the new Constitution had become effective, enacted the Judiciary Act of September 24, 1789.[2] This Congress contained many members who had been members of the Constitutional Convention, or of one of the State Ratification Conventions, or of both. The Judiciary Act of 1789 was surprisingly comprehensive and detailed, when one considers the relatively short space of time in which it was drafted and debated and enacted. That Act did, to a certain extent, create the instruments and the procedure necessary to give unity and uniformity to our federal law as it would be developed, case by case, in the inferior federal courts created by the act. It also created the procedure necessary to prevent diverse decisions of State courts on federal questions from Balkanizing our federal law.

The 1789 Act created 13 federal districts, with a one-judge district court for each, and three circuits, each consisting of several of the districts, and provided that a circuit court, consisting of two Supreme Court Justices and the district judge, should be held twice each year in each district. The conditions of travel and communications in those days made the circuit court task of the Supreme Court Justices an onerous one.

The district courts were given jurisdiction in the smaller civil and criminal cases, and in certain kinds of cases their decisions seem to have been final. The circuit courts were given appellate jurisdiction over the decisions of the district courts in some cases, and original jurisdiction in certain more important cases. Review by the Supreme Court of circuit court decisions in civil cases involving more than 2000 dollars was provided. But apparently there was no Supreme Court review in criminal cases, and in civil cases involving 2000 dollars or less.

Under the Act of 1789, then, there were a good many cases which were finally determined either in the district courts or the circuit courts. Since there was no Supreme Court review of such cases, a lack of uniformity in federal law as applied in different parts of the country was possible.

[2] Ch. 20, 1 Stat. 73 (1789).

As to review by the Supreme Court of decisions of the highest courts of the states involving the federal constitution, or a federal treaty or statute, or a right claimed under these federal documents, the 1789 Act was specific. The Supreme Court was given jurisdiction to review if the State court decision denied the federal claim.[3]

During the years from 1789 to 1891 Congress provided, by separate enactments, for Supreme Court review of district court and circuit court decisions in several specific instances which seemed to Congress to be worthy of Supreme Court attention. There were still many district and circuit court decisions which could not be reviewed in the Supreme Court.

By the Act of March 3, 1891,[4] Congress created in each circuit a circuit court of appeals consisting of three judges, and provided that the decisions of these courts should be "final" in a specified list of types of cases, some of which were prolific subjects of litigation. The Act also provided that the cases in another list of types of cases might still be appealed directly from the district or then existing circuit courts to the Supreme Court. Then the Act introduced an important innovation into federal procedure. It provided that in the cases as to which the circuit court decisions were to be "final," the Supreme Court, by a *writ of certiorari* or otherwise, could require a case to come to it for review and decision. As to other cases, not included in the foregoing two categories, the Act said that they could, as of right, be taken to the Supreme Court if they involved more than 1000 dollars.[5]

The 1891 Act left a substantial number of types of cases which the Supreme Court had no power to review, no matter how important the legal question involved may have been. But the useful device of the certiorari, giving discretionary appellate jurisdiction without imposing obligatory jurisdiction, was to be the wave of the future. Under it the Supreme Court's attention could be called to conflicts between the decisions of different circuit courts of appeals, to misinterpretations of the Constitution or federal statutes, or to any reason why the Supreme Court should take a case and decide it. A long step had been taken in the direction of bringing order and uniformity into federal decisional law.

The Act of March 3, 1911,[6] "codified, revised and amended" the federal statutes relating to the judiciary. It did not make significant changes with regard to the appellate jurisdiction of the Supreme Court.

[3] Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 85.

[4] Ch. 517, 26 Stat. 826 (1891).

[5] Act of March 3, 1891, ch. 517, §§ 5, 6, 26 Stat. 827-28.

[6] Ch. 231, 36 Stat. 1087 (1911).

The Act of December 23, 1914[7] made the first important change since 1789 with regard to the Supreme Court's appellate jurisdiction in cases decided by State courts involving asserted federal rights. The 1789 Act provided for Supreme Court review only if the State court had denied the federal claim. Thus, in the probably rare case in which a State court had gone too far in the direction of recognizing an asserted federal right, the Supreme Court could not correct that error and bring that State's law into harmony with that of the other states. The 1914 Act provided that in such a case the Supreme Court could, by certiorari, review the State court decision.[8]

The Act of September 6, 1916[9] substantially reduced the obligatory appellate jurisdiction of the Supreme Court in the State court decision cases. It provided that in cases not involving the validity of a treaty or statute of the United States, but only involving a claim under federal law, appellate review would be by certiorari, that is, discretionary, no matter whether the State court decision was against, or in favor of, the asserted claim.[10] In the present era, when so many federal rights are asserted in State court litigation, particularly criminal litigation, and so large a proportion of such claims have no legal merit, it would be an unbearable burden on the Supreme Court to require it to take and fully hear and decide all those cases in which the asserted claim has been denied by the State courts.

In connection with the bill which became the Act of February 13, 1925,[11] Chief Justice Taft and Associates Justices Van Devanter, McReynolds and Sutherland appeared before the House of Representatives Committee on the Judiciary[12] and also before a subcommittee of the Senate Committee on the Judiciary.[13] The Report of the Senate Committee says: "The bill was prepared by a committee of the members of the Supreme Court after a long and careful study of the subject, at the suggestion of the American Bar Association. . . ." [14] The record of the Senate Subcommittee hearing quotes Senator Cummins as saying that both the analysis and review of the bills were prepared by the

[7] Ch. 2, 38 Stat. 790 (1914)

[8] *Ibid.*

[9] Ch. 448, 39 Stat. 726 (1916)

[10] Act of Sept. 6, 1916, ch. 448, § 2, 39 Stat. 726, amending § 237 of the 1911 Judicial Code.

[11] Ch. 229, 43 Stat. 936 (1925).

[12] *Hearing on H. R. 8206 before House Committee on the Judiciary*, 68th Cong., 2d Sess. (1924).

[13] *Hearing on S. 2060 and S. 2061 before a Subcommittee of the Senate Committee on the Judiciary*, 68th Cong., 1st Sess. (1924)

[14] S. Rep. No. 362, 68th Cong., 2d Sess. 1 (1924).

members of the Supreme Court for the use of the Committee. The analysis and review were lengthy, careful and detailed documents.

The direct part which the Supreme Court took in drafting and advocating this legislation was, it seems, unprecedented. It is worth mentioning because it shows that the Chief Justice and the members of the Court were fearful that the Court would be so overwhelmed by the steadily increasing volume of its business that the delay in the disposition of its cases, which was already considerable, would become intolerable. The principal evil was the considerable volume of obligatory appellate review which was still left upon the Supreme Court, in spite of the provisions of the Acts of 1891 and 1916 for discretionary review in specified types of cases.

I do not here discuss the details of the changes made by the 1925 Act. They must have fairly well accomplished their purpose because the intolerable situation which the Justices feared for the future, in which the Court would be unable to do what the statutes required it to do, has not become a reality.

If the Justices of the Supreme Court, in 1925, could have foreseen the number of cases which, twenty-five years later, would in each year be tendered to the Supreme Court for disposition, their 1925 situation would have seemed easy by comparison.[15] How then, has the Court in recent years coped with the problem? Can it dispose of more than two thousand cases, presented to it by persons from every section of the country, from every level of social and economic life, with reasonable assurance that federal rights are receiving judicial protection effectively and uniformly throughout the country? Can nine human beings, though they have unusual ability and diligence, really know what is happening to the federal rights of the people of this country?

It is obvious that the principal legal device which makes it possible for the Court to dispose of so many cases is the writ of certiorari. There is, of course, no magic whatever in the Latin word. In this connection it means nothing more or less than that the Court may, in its discretion, take and fully hear and consider a case which it is requested to take, or decline to take it. Mr. Justice Van Devanter, in discussing with the House Committee the bill which became the act of Feb. 13, 1925[16] said that when certiorari is authorized by statute

> the Court is invested with a discretion to deny a review unless it appears that the questions presented are of public importance or of wide general

[15] See Note, *The Supreme Court, 1961 Term, 76* HARV. L. REV. 78 (1962), for statistics for the Supreme Court's 1961 term. Table I shows that 2,142 cases were finally disposed of. The number of cases will be substantially larger for the 1963 term.

[16] Ch. 229, 43 Stat. 936 (1925).

interest, or that in the interest of uniformity that court [the Supreme Court] should consider and decide them.[17]

Justice Van Devanter further said, as reported on page 8 of the hearing cited *supra:*

> While the authority of the Supreme Court to take cases on petition for certiorari is spoken of as a discretionary jurisdiction, this does not mean that the court is authorized merely to exercise a will in the matter but rather that the petition is to be granted or denied according to a sound judicial discretion. What actually is done may well be stated here with some particularity. The party aggrieved by the decision of the circuit court of appeals and seeking a further review in the Supreme Court is required to present to it a petition and accompanying brief, setting forth the nature of the case, what questions are involved, how they were decided in the circuit court of appeals, and why the case should not rest on the decision of that court. The petition and brief are required to be served on the other party, and time is given for the presentation of an opposing brief. When this has been done copies of the printed record as it came from the circuit court of appeals and of the petition and briefs are distributed among the members of the Supreme Court, and each judge examines them and prepares a memorandum or note indicating his view of what should be done.
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> In conference these cases are called, each in its turn, and each judge states his views in extenso or briefly as he thinks proper; and when all have spoken any difference in opinion is discussed and then a vote is taken. I explain this at some length because it seems to be thought outside that the cases are referred to particular judges, as, for instance, that those coming from a particular circuit are referred to the justice assigned to that circuit, and that he reports on them, and the others accept his report. That impression is wholly at variance with what actually occurs.
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> We do not grant or deny these petitions merely according to a majority vote. We always grant the petition when as many as four think that it should be granted, and sometimes when as many as three think that way. We proceed upon the theory that, if that number out of the nine are impressed with the thought that the case is one that ought to be heard and decided by us, the petition should be granted.[18]

This language of Justice Van Devanter, quoted above, spoken almost 40 years ago, accords closely with many statements made by Justices on more recent occasions, in their efforts to explain to the bar the purpose and the operation of the Court's certiorari procedure.[19] What the

[17] *Hearing on H. R. 8206 before House Committee on the Judiciary,* 68th Cong., 2d Sess. 7 (1924)

[18] *Id.* at 8.

[19] See the Supreme Court's Revised Rules, 346 U. S. 951 (1954). Rule 19 is entitled "Considerations Governing Review on Certiorari." The observations of Mr. Justice Frankfurter in Maryland v. Baltimore Radio Show, 338 U. S. 912 (1950), those of Chief Justice Vinson in an address to the American Bar Association in 1949, 69 S. Ct. *v,* and those of Mr. Justice Brennan in Ohio *ex rel.* Eaton v. Price, 360 U. S. 246 (1959), are interesting and pertinent.

procedure meant then, and what it means now, is that if the country is to have a unified and uniform system of Constitutional and statutory justice, there must be a single tribunal with power to decide what the federal law is, and to supervise, and correct, if necessary, the actions of other tribunals which have decided cases involving federal questions. Since it is physically impossible for any single tribunal to take all, or even any large fraction of such cases and give them the full consideration, including the reading of extensive briefs and the listening to oral argument, which an appeal in the usual sense involves, the country must be satisfied with the best that can be done, in the circumstances. No one has suggested that the Supreme Court could, if it were more diligent, take and give full consideration to more cases than it now takes.

Since what we are getting is the best that it is practicable to give us, we may examine more closely what it is that we get. We do not get the imprimatur of the Supreme Court upon the justice, in either the legal or the moral sense, of the decision in the lower court, which decision the Supreme Court has declined to review by a full hearing. However, in practically all such cases, a trial court and an appellate court have already dealt with the problem, and there is a strong probability that the decision of the appellate court is right. Just as the fact that the decision sought to be reviewed may be or is wrong does not mean that the Supreme Court will take it for review, if the problem is not of public importance, so also the fact that the lower court decision is right will not keep the Supreme Court from taking the case for review if the decision is in conflict with decisions of other federal courts, or is a State court decision of a federal question and is contrary to the decisions of other State courts. This is to assure the publicly important objective of nationwide uniformity of national law.

If it be said that it is small comfort to one who has suffered an unjust deprivation of his federal rights to be told that because a trial court and a State supreme court in State X have both decided that his claimed federal right is an illusion, he must be content to forego Supreme Court review because his case may not be one of public importance, the answer is that the certiorari process does not operate that way. If his petition for certiorari indicates that the question which he presents is a new one, and a plausible one, it is a matter of public importance that ought to be decided by the Supreme Court and certiorari will probably be granted. And if it is an old question, answered favorably to the petitioner by a former decision of the Supreme Court, again it is a matter of public importance that State courts should not disregard Supreme Court decisions on federal questions and certiorari

will be granted and the case will be decided with only brief discussion, on the basis of the precedent.

It must be that the consideration by Justices of the Supreme Court, with whatever assistance they may accept from their law clerks, of the hundreds of petitions for writs of certiorari, is somewhat hurried and superficial. It is probable, however, that any significant point contained in a petition would catch the attention of one or more of them, and if it did, it would be discussed in the confidence of the Court and get the attention of all the Justices. Perhaps the Justices would readily concede that some petitions are denied which should have been granted. When one considers, however, the range and variety of the cases which the Court does take and decide with full exposition of reasons, one must conclude that it has not declined to take many cases of public importance.

The manner in which the Court has been authorized by Congress to use, and does in fact use, the certiorari device, is not consistent with the Court's insistence, which has been repeated from the time of Chief Justice Marshall, that it sits to decide law-suits, and not to make law. Cases are selected, under the certiorari process, because they involve questions on which law needs to be made. There is, of course, already a constitutional or statutory text, but the construction of the text in its relation to facts of current life needs to be expounded. It is expounded by the Court, not even primarily for the benefit of the prevailing litigant, but as an addition to the body of the law.

If the Constitution is to be an enduring document, in a world undreamed of by its authors, there must, if our federal experiment is to fulfill its promise, be in perpetual session a sort of Constitutional Convention. That body cannot be constituted of spirits of another age, nor of gods. It must, of necessity, be made up of human beings. That body is the Supreme Court of the United States. It would be an unfortunate day for the country if the Court were so overwhelmed with judicial business that it could not do its work carefully and thoughtfully. The ancient writ of certiorari has served to prevent the coming of such a day.[20]

[20] The writer has not discussed the procedure by which the Supreme Court, even in the cases still within its obligatory jurisdiction, *i. e.*, cases which, under the statutes, may be taken by appeal to the Supreme Court, avoids unnecessary and time consuming consideration of cases obviously lacking in merit. See STERN & GRESSMAN, SUPREME COURT PRACTICE §§ 4-28, 29 (3d ed. 1962) This excellent book also contains a detailed treatment of the certiorari practice in the Supreme Court.