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# A National Court of Appeals\*

By PAUL A. FREUND\*\*

**T**HE mission of the Supreme Court is as unique as it is essential: in the decision of actual controversies, to advance, clarify and rationalize the law for an entire nation, and to do so through opinions that are as invulnerable and persuasive as they can be made by research, reflection, collaboration, mutual criticism and accommodation. Does the caseload of the Court present a problem for the effective performance of that function? If so, what measures of relief would be most appropriate? Those are our two questions, and I shall address myself briefly to both of them.

In 1959, Justice Harlan, after four years on the Supreme Court, expressed his concern over the Court's capacity to discharge its responsibilities under the mounting caseload of petitions for certiorari:

At the time the Act of 1925 was passed the rapid growth of the Court's *certiorari* business could hardly have been foreseen. During the past eight Terms the number of petitions dealt with by the Court has grown from about 1,000 to approximately 1,500. Increasingly, the time required to handle the *certiorari* work and that needed for adjudication of cases, and more particularly for the writing of opinions, are coming into competition. This is something that gives food for thought. On the one hand, the willingness of Congress to relinquish to the Court what in practical effect amounts to control of its appellate docket naturally presupposed that the Court would exercise this responsibility with a proper degree of deliberation. . . . On the other hand, *certiorari* would be self-defeating if its demands upon the Court's time were allowed to impinge upon the processes involved in the adjudication of cases. For after all the Court exists to decide cases, and *certiorari* is but an ancillary process designed to promote the appropriate discharge of that duty. It would be most unfortunate were the demands of *certiorari* permitted to lessen the number of cases on its calendar which the Court had time to decide, to consider on a plenary basis, or to dispose of with full-scale opinions.

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\* The present paper is adapted from remarks at the annual meeting of the American Bar Association in Philadelphia, August 7, 1973.

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It would be still more serious if the demands of *certiorari* should ever reach the point of making significant inroads in the time which individual members of the Court can afford to devote to reflection upon the decision of important issues. I think it can fairly be said that none of these things has come about so far. . . . While it can . . . be said that the *certiorari* work, despite its continuing growth, is still within manageable proportions, it would be shortsighted not to recognize that preserving the system in good health, and keeping it in proper balance with the other work of the Court, are matters that will increasingly demand thoughtful and imaginative attention.<sup>1</sup>

Since the halcyon days of 1959, when Justice Harlan spoke, the docket has swelled from 1500 to over 4600 cases, of which over 3700 were newly filed during the term. The increase is not explainable simply as an increase in the *in forma pauperis* filings. Those have indeed risen dramatically, but the paid cases have risen almost as rapidly—from 890 new filings in 1961 to 1713 in 1971—almost doubled in a decade. At the same time, the number of petitions granted has remained substantially level, so that the percentage of grants has dropped overall from 17.5 percent in 1941 to 11.1 percent in 1951 to 7.4 percent in 1961 and 5.8 percent in 1971. The *paid* petitions granted dropped from 19.4 percent to 15.4 percent to 13.4 percent to 8.9 percent during the same period.<sup>2</sup>

But statistics are only the beginning of an assessment. After listening to every member of the present Court on the subject of the current caseload, the Study Group appointed by the chief justice under the auspices of the Federal Judicial Center concluded without dissent and without doubt that there was a serious problem—though not every member of the Study Group had come to the assignment with that preconception. One member of the Court, to be sure, stated to us, as he has stated publicly before and since, that the Court is vastly underworked.<sup>3</sup> But it is fair to say that he is, in a number of ways, an exceptional judge.

Our judgment that, put conservatively, the Court has reached the saturation point, did not rest on the views merely of the newer jus-

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1. Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States*, 33 AUSTRALIAN L.J. 108, 113-14 (1959).

2. The figures are taken from the Report of the Study Group on the Case Load of the Supreme Court (1972). Copies are available from the Federal Judicial Center, Washington, D.C.

3. See, e.g., *Tidewater Oil Co. v. United States*, 409 U.S. 151, 174-78 (1972) (Douglas, J., dissenting). Mr. Justice Douglas, noting his dissents from denials of *certiorari*, would have had the Court hear some 460 cases per term, beyond the approximately 175 actually taken. See A. BICKEL, *THE CASELOAD OF THE SUPREME COURT* 26-27 (1973).

tices. One of the senior justices remarked sadly and trenchantly that decision-making had become for the Court an event rather than a process. Another senior judge was able to cope with the docket because he had given up all outside activities—lecturing, writing, summer institutes—and worked evenings as well; because of his experience, he explained, he is able to consider petitions now in the same time as he required for half the number when he began (it is difficult to see on this evidence how he could perform the function if he were newly appointed today). Another senior justice observed that when he came to the Supreme Court from another court he thought that now he would be able, as he had not been before, to plumb every case to its bottom; that proved to be an illusion, he acknowledged, since the load was even greater on the Supreme Court. But, he said, you learn to numb yourself to it. In this sense, of course, the caseload is not impossible or intolerable. That conclusion is hardly reassuring.

One justice who has not numbed himself to it is Mr. Justice Powell. In April of last year, at the Fifth Circuit Judicial Conference, he said:

The conditions cited in the Committee's [study group's] report pose the question whether the Court can continue acceptably to discharge [its] responsibility. As a new member of the Court, moving there directly from a long experience at the bar, I can say without qualification that I find the situation disquieting. Near the beginning of its Report, the Committee made this perceptive comment: "The indispensable condition for the discharge of the Court's responsibility is adequate time and ease of mind for research, reflection, and consultation in reaching a judgment, for critical review by colleagues when a draft opinion is prepared and for clarification and revision in light of all that has gone before." (p. 1)

This indispensable condition simply does not exist. Petitions are filed with us on the average of 70/75 per week, 52 weeks in the year; each Justice is responsible for a personal judgment as to every petition, however much he may delegate to his clerks; these petitions vary in size from a few pages in a frivolous IFP to printed records of many thousands of pages, with multiple briefs; we will hear arguments in some 175 cases, write opinions for the Court (in addition to per curiams) in some 130, plus scores of concurrences and dissents; each Justice must review and take a reasoned position on all circulated opinions; we have all-day conferences virtually every Friday; and each of us has substantial responsibilities as a Circuit Justice. . . .

But in all truth, my concern is not personal. As I said to our colleagues on the Fourth Circuit last summer, I have worked 6 to 6½ days per week throughout my professional career. My concern therefore is for the Court as an institution. It is one we all revere. Its problems, addressed by the Freund Committee,

now merit the best thinking of our profession.<sup>4</sup>

And Chief Justice Burger, addressing the American Law Institute in May, 1973, was equally frank:

Until someone perfects an eight- or nine-day week or a thirty-hour day, the enormous increase in the Court's work over the past twenty years must produce undue stress somewhere and ultimately affect the quality of the product. To wait to do something about this problem until someone can empirically demonstrate that three or four thousand cases cannot be processed as well as one thousand is not my conception of how we on the Court should fulfill our responsibility to the Court as an institution.<sup>5</sup>

The Court is, to be sure, abreast of its docket. We are all familiar with the two great crunches that help to keep it so. The first crunch is at the beginning of term, when 800 or 900 petitions and appeals, the summer carry-over, are disposed of in a few days. (Of course not all are actually considered at conference; only about 30 percent are put on the "discuss" list, the others being denied because no justice votes to consider them at conference. But every justice must make up his mind on every application and must presumably be prepared to discuss the 30 percent of 800 or 900 during the few days of conferences). The second crunch is at the close of term when in a few weeks dozens of major decisions are handed down, usually with a spate of separate opinions, suggesting, to paraphrase Cicero, that if there had been more time there would have been, if not shorter, at any rate fewer opinions.

The Court has already taken a number of remedial measures, and so, incidentally, has confirmed the existence of a genuine problem. The time for oral argument has been reduced to a half hour. A third law clerk for each justice was provided, at the Court's request, in 1969. Records have been dispensed with on petitions for certiorari (making the inexorable weekly tide of paper in seventy-five cases look less formidable, but at a cost in less informed and even improvident actions by the Court). Recently four or five justices have pooled the law-clerk resource, using one law clerk to screen and write memoranda on petitions for the bloc of justices.

Another internal change that has been suggested, but not in fact adopted, is the use of panels for the consideration of petitions for certiorari. No longer would every justice pass upon every petition, pur-

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4. Address of Mr. Justice Powell before the Fifth Circuit Judicial Conference, El Paso, Texas, April 11, 1973.

5. Burger, *Retired Chief Justice Warren Attacks, Chief Justice Burger Defends Freund Study Group's Compilation and Proposal*, 59 A.B.A.J. 721, 723 (1973).

suant to the assurance given to Congress at the time the Judiciary Act of 1925 was enacted. This has been a sensitive point, as Justice Holmes recognized four years after the act came into force, when he confided in a letter to Sir Frederick Pollock:

We have to consider the *certiorari* because it was only after effort that we got a bill passed that makes an appeal to our court dependent upon our discretion in many cases in which until lately it was a matter of right. Let it ever be understood that the preliminary judgment was delegated, I should expect the law to be changed back again very quickly with the result that we should have to hear many cases that have no right to our time; as it is we barely keep up with the work.<sup>6</sup>

The use of panels composed of three justices for the purpose of dividing the task of examining petitions and jurisdictional statements would not, the Study Group believed, be acceptable to the profession or the public. Moreover, while some saving of time would be achieved, the gain would be all too slight. At the present level of filings, using the conservative figure of 3750, each panel (and therefore each justice) would consider about 1250 applications for review. It is assumed that where there was a division within the panel (two votes for or against a grant), and possibly where there was a solid vote of three to grant review, the case would be referred to the full Court and taken up at its conference. About 30 percent of all petitions now go to conference because at least one justice so votes. If anything, a panel procedure is likely to increase this percentage, since a justice serving on a panel would presumably be more liberal in his view of review-worthiness in order not to keep marginal cases from the attention of the other six justices. If we posit a rate of 40 percent of the total applications for referral to the full Court, we arrive at a number of about fifteen hundred that would require the attention of each justice, of which two-thirds, or one thousand, would be new to him, over and beyond his initial consideration of about 1250.

An alternative internal procedural change that has been advanced is the creation of a small senior staff that would do the preliminary screening. Such a measure is, I believe, the one most likely to be adopted if relief in the form of a National Court of Appeals is not provided. The effectiveness, or "success," of a senior staff would depend on the substantial acceptance of its recommendations, growing out of confidence in its judgment. Such a development—and, in some measure, the use of panels—would be the natural response of a bureaucracy to its increasingly heavy responsibilities: more and more delegation within

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6. 2 HOLMES-POLLOCK LETTERS 251 (M. Howe ed. 1942).

the organization, the while clinging to the nominal responsibility at the top, thereby widening the gap between the function and its discharge.

That course, it is submitted, is exactly the wrong direction for the Supreme Court to take. Justice Brandeis in plain language explained the prestige of the Court by saying, "we do our own work." Some commentators on the Report of the Study Group have accused us of violating our own principle by proposing to "delegate," as they put it, part of the Supreme Court's work to another agency. But, with respect, that comment completely misses the point. The point is one of principle, even, it is not too much to say, of official morality. A National Court of Appeals would have its own authoritative responsibilities. It would be a visible, legitimated tribunal also "doing its own work," albeit work that would relieve the Supreme Court of some of its burden. Appearance and reality in decision-making would coincide. We would not be fostering an illusion of responsibility, as we are likely to be doing if a way out is sought through greater assignment of functions to a permanent senior staff.

The Study Group turned its attention, then, from internal procedural changes to the question: Of what functions could the Court most appropriately be relieved? The Group put aside the idea of specialized courts of appeals, not because in some fields (taxation, for example) a good case might not be made for them, but because they would have only a marginal effect on the Supreme Court's caseload. An exception would be a national court of criminal appeals, provided its denials of review were made final, since applications for direct and collateral review of criminal convictions now constitute a majority of the petitions for review on the Supreme Court's docket. The Study Group rejected a specialized criminal court for several reasons. Inasmuch as there is a high correlation between criminal cases and petitions *in forma pauperis*, to single out this category of cases for insulation from Supreme Court review would appear as an invidious classification based on, or coinciding with, the financial plight of the applicant. Moreover, while the absolute percentage of review-worthy cases in this category is low, the category does contain cases that present questions of fundamental law second to none in importance. Finally, there would be a particularly unfortunate risk, in a specialized court of criminal appeals, of the polarization of its members and the politicization of the appointing process around a single set of issues. A court of generalists is greatly to be preferred.

Another suggestion—to limit the Supreme Court to so-called constitutional cases—also seemed seriously objectionable: it would re-

quire new national courts for all nonconstitutional cases; it would be awkward to administer that bifurcation; it would deprive the Court of important issues of procedure and statutory construction; it would encourage counsel and perhaps justices to inflate issues to constitutional dimensions; and it would reinforce the idea of the Court as a super-legislature. Emancipated from the conventional tasks and constraints of lawyers and judges, who must rub their noses in matters of practice, of legislative history, and of the harmonious reading of complex codes, the justices would be led to reinforce the most free-wheeling impulses.

The Study Group focused then on two tasks whose transfer, in its judgment, would not sacrifice the Court's essential function: preliminary screening of applications for review and the resolution of conflicts between circuits that ought to be resolved but not necessarily by the Supreme Court. These are the basic functions of the proposed National Court of Appeals. The court would be expected to pass on to the Supreme Court some 400 to 500 petitions, from which the Supreme Court would take for argument about 150 to 175, as at present.

How much time would be saved to the Supreme Court? As Justice Rehnquist said in a recent address, he could not quantify it but he was satisfied that the proposal "would save the Supreme Court some of the time which it now spends in screening cases and that the time so saved could be devoted to deliberation and writing opinions. . . ."<sup>7</sup> Instead of the stack of 75 new cases pouring in every week, there would be perhaps ten—certainly a very large difference in psychological scatteration and oppressiveness.

While experience under the proposed plan will furnish the most reliable data on time saved, an approach to the question can be made by determining approximately how much time per week is now spent in the consideration of applications for review. Several of the justices who appeared before the Study Group were able to offer estimates.<sup>8</sup> One senior member estimated it at one-fifth of his working time. Another senior justice said fifteen hours a week. Still another said up to a third of his time. A newer member of the Court said two hours every evening. The time spent is, and should be, considerable. How much of it will be saved by having, say, six-sevenths of the petitions

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7. Rehnquist, *The Supreme Court: Past and Present*, 59 A.B.A.J. 361 (1973).

8. See A. BICKEL, *THE CASELOAD OF THE SUPREME COURT* 23 (1973). The statement of Mr. Justice Douglas made in *Tidewater Oil Co. v. United States*, 409 U.S. 151, 176 (1972) (dissenting opinion), that the Court's time "is largely spent in the fascinating task of reading petitions for certiorari and jurisdictional statements," is perhaps not intended to be taken seriously.

screened out in advance cannot be foretold with any precision. While the more obviously unmeritorious petitions will have been screened out, leaving the more arguably review-worthy and time-consuming, among those surviving there will be found some that as clearly merit review as some that were screened out clearly did not merit it. And, of course, the saving in pressure, apart from hours and days, would be no less real for being incommensurable.

How busy or inactive would the National Court of Appeals be? It would have jurisdiction to grant review and decide on the merits of cases presenting a conflict of decisions among the circuits. It is very likely that the National Court of Appeals would decide more such cases than are now taken by the Supreme Court. If, as seems not improbable, the new court had time for the decision of still other cases, the Supreme Court could be empowered to send to it non-conflict cases that merit review by a national court but not necessarily by the Supreme Court. The new court might, at an estimate, decide on the merits some one hundred cases a year—surely an important contribution to a body of national law. I envisage an experimental period and an evolving relationship to the Supreme Court and perhaps indeed an evolving method of selection of the judges of the new court.

What should be the linkage of the National Court of Appeals to the Supreme Court? It is here that the greatest differences of opinion have arisen in response to the Study Group's report. Decisions on the merits by the National Court of Appeals could be made the subject of petitions for certiorari without too great an inroad on the plan as a whole. It would be expected that very few such petitions would be granted. If, however, petitions could be filed to review the denials of certiorari, numbering in the thousands, the plan would clearly be undermined. The Study Group recommended that denials be made final.

A countersuggestion has been advanced that the denials lie on the table of the Supreme Court for, say, sixty days, within which period the Supreme Court on its own motion might grant review. This suggestion has a certain plausibility as a compromise between finality and freedom to file a further petition. The difficulty emerges as a clear inquiry is made into the lying-on-the-table procedure. What would be the responsibility of the individual justices toward the several thousand cases thus open to inspection? Short of engaging in the present procedure, how would certain cases come to the attention of the justices? Would they resort to chance references, through press accounts, conversation, and the like? Would this ultimate screening

function be performed by a senior staff about which we have previously expressed reservations? These questions would require clarification as a matter of principle.

It has been argued by some commentators that to make denials of review final in the National Court of Appeals would destroy the time-honored image of the Supreme Court as the palladium of our liberties, to which the humblest person has ready access. With the annual filings in the Court approaching 4,000, it has to be asked how meaningful this access really is, and whether a widening breach between symbol and reality will not, so far from maintaining the prestige of the Court, produce disillusionment and cynicism. It should be asked, also, whether an arguably meritorious petition will not benefit from being highlighted through inclusion in the 400 or 500 cases that would survive the initial screening in the Court of Appeals. It must be added, with respect, that to see in this jurisdictional question an issue of safeguarding civil liberties is to lose perspective. If the vote of three out of seven members of the National Court of Appeals would suffice, as our Study Group proposed, to certify a petition to the Supreme Court so that five of seven judges would be required to deny a petition, it is at least as likely that sensitivity to issues of human rights will actually be enhanced by the process as that such sensitivity will be blunted.

It has also been argued that finality would prevent certain cases from reaching the Supreme Court that would serve as vehicles for important change of doctrine but would not be recognized by the National Court of Appeals as having this potential. But when the Supreme Court issues thunderbolts they rarely come out of a cloudless sky. The Supreme Court, through its rules, through expressions in its opinions and in dissents, would have abundant opportunity to signal the vitality of certain issues. Moreover, when the Supreme Court has made a somewhat unexpected re-examination of doctrine it has done so characteristically in a case that was one of a series reaching the Court. If the decision in *Erie Railroad Co. v. Tompkins*<sup>9</sup> was unexpected, still there would have been opportunities to overrule *Swift v. Tyson*<sup>10</sup> in the numerous cases that would have been certified to the Court by a National Court of Appeals if one had existed during the regime of a federal common law. Similarly, the new doctrine announced in *Gideon v. Wainwright*<sup>11</sup> could have been promulgated

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9. 304 U.S. 64 (1938).

10. 41 U.S. (16 Pet.) 1 (1842).

11. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

in any of the right-to-counsel cases that would have been certified to the Supreme Court under the pre-existing constitutional standards. Again, a vehicle for the *Miranda*<sup>12</sup> rules could have been found in any of the cases that would have reached the Supreme Court for review under the prior tests of voluntariness of confessions.

Since some suggestion has been made that there is a constitutional barrier to a preliminary screening process, brief note should be taken of the point. Since Article III of the Constitution mandates "one Supreme Court," the argument runs, the Supreme Court must be given final authority to review cases decided by lower federal courts; otherwise, they and not the Supreme Court would be "supreme." If this argument is seriously applied, all of the Judiciary Acts from the beginning to the present have been unconstitutional. For at no time has the full scope of the judicial power of the federal courts been linked to review in the Supreme Court. Congress has always exercised its power under Article III to confer appellate jurisdiction on the Supreme Court "with such exceptions, and under such regulations, as Congress shall make." At the beginning, for example, there was a higher jurisdictional amount for appeal to the Supreme Court than for access to the district courts. Even if the argument is tailored to apply only to constitutional and other federal questions it is undermined by history. For a hundred years, until 1891, federal criminal cases could not be appealed to the Supreme Court except where there was a certificate of division in the circuit court below. In all such cases it could be said that the lower court was "supreme," but Article III never received any such reading. The Supreme Court remained supreme in the pertinent sense: no other court had authority to overrule or reverse its decisions, and in the event of inconsistency a decision of the Supreme Court prevailed. But the scope of its appellate jurisdiction, in contrast to its original jurisdiction, has been set by Congress.

A somewhat modified form of the objection drawn from Article III is that a court, or at any rate the Supreme Court, must have power to decide what cases it chooses to decide, and that the preliminary decision cannot be "delegated." But this, with respect, begs the question. The Supreme Court has no authority or responsibility with re-

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12. *Miranda v. Arizona*, 384 U.S. 436 (1966). In some ninety-five cases pending on the docket that raised the same issue, the Court, with Justices Black and Douglas dissenting, denied the petitions, thus indicating that concern for particular litigants was not a paramount consideration. See, e.g., *Johnson v. New Jersey*, 384 U.S. 719 (1966).

spect to cases where a statutory condition precedent to its jurisdiction has not been met. Suppose that Congress, instead of conditioning criminal appeals for a century on a certificate of division, had required a certificate of probable cause from the circuit court. Then suppose that, to make the plan more just, Congress vested the certifying function in circuit judges other than those who decided the case. Would such a plan have been more vulnerable constitutionally than the one actually employed? Article III imposes no such imported limitations on the administration of the appellate system. The choice is in truth open.

The choice is really between two models for the Supreme Court. One model is that of a bureaucratic agency, which copes with a mounting work load by greater and greater separation of responsibility for a function and its actual performance, retaining nominal responsibility at the top while delegating actual judgment to others. The other model is that of a small community of thinkers, who keep themselves free for their central task by shedding ancillary and less essential responsibilities. If the Supreme Court is regarded as an assembly-line operation, a high-speed, high-volume enterprise, the bureaucratic model is appropriate. If its function is different, if its duty is to clarify and advance our highest law through the most deliberative of procedures, then the other model is the more appropriate.

Perhaps in a choice of models I have been unduly influenced by my introduction to the work of the Supreme Court through a clerkship with Justice Brandeis, underscoring as it did the deliberative side of the judicial process. Justice Brandeis spoke appreciatively of having been allowed the full time of a conference to lead a discussion on depreciation accounting. If a draft opinion was ready for circulation in the middle of the week he withheld it until the beginning of the next week, so that his colleagues would not be rushed in considering it before conference. When Justice Sutherland returned a draft opinion with a number of queries on the statement of facts and the law, Brandeis asked me to check the queries carefully. After doing so I reported somewhat condescendingly that they were all unfounded and that Justice Sutherland might have saved time by not raising them. Justice Brandeis cut me off, saying that he was very glad Justice Sutherland had written as he did, because it showed he was doing his job.

The caseload presents, in an ideal sense, an insoluble problem. Some sacrifices are involved in any solution, as was true when circuit-riding was abolished, when regional courts of appeals were established

in 1891, and when discretionary instead of obligatory review became the pattern in 1925. Vehement objections were raised to each of these reforms. It is important to keep one's perspective, to perceive what is most essential and to eschew the hyperbole of doom. What has been written about a reform enacted in 1731 in England, making English the language of court proceedings, strikes the right note:

The nation at large needed it, some wise men predicted it would ruin England, some still wiser men seized upon minor inconveniences that resulted from it as quite sufficient to damn it, and succeeding generations wondered why it had not passed a century earlier.<sup>13</sup>

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13. 1 P. WINFIELD, CHIEF SOURCES OF ENGLISH LEGAL HISTORY 13 (1925).