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# JURISDICTION OF THE UNITED STATES SUPREME COURT: TIME FOR A CHANGE?\*

*Philip B. Kurland*†

We live in parlous times. The accelerating rate at which constitutional crisis piles on constitutional crisis is nothing short of terrifying. Democracy is a fragile instrumentality for the governance of a nation of such awesome dimensions as ours. We must be constantly concerned that the fabric of our government not be weakened to the point where it will necessarily be torn by pressures it was not built to withstand.

The essential difficulty is that, in times of crisis, institutional values are quickly subordinated to considerations of personal and party loyalties, to demands for accommodations that must properly be labelled as acts of expediency rather than judgments of principle. At times like these we frequently ask too much of those institutions which bear our greatest faith rather than those with the strength, if not the will, to resolve the issues that confront us.

I have said before and I have no hesitation to say now that the constitutional ailment from which we suffer greatly, and of which the mess called Watergate is our most prominent symptom—the undue accumulation of executive power in the White House—is too large and too important a problem to be settled by judicial actions. However much we have become accustomed to assuming that the basic problems of our society are justiciable, the fact remains that none of the major ills of our society has ever been solved by judicial action. The Supreme Court can, and indeed, has from time to time, pointed or blocked the way. But the nation has not always followed. A court can command individuals, largely because there are other branches of government to enforce its decrees and because public opinion commands them to support the court. But when the courts direct their orders to those other branches of government, it becomes clear why the judiciary is properly labelled the third branch. It may, because of its detachment and the special capacity of its members, assert greater moral

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force than do the political branches. But it requires no cynic to reveal that morality—even as embodied in judicial decisions—has not been the prime guide to government action.

This is said not to demean the proper role of the judiciary but to describe it. The judicial branch has become the prime protector of the rights of individuals against the impositions of government. It is not and has not been a prime force in the allocation of authority between legislature and executive.

Despite the impression I may have given, I have not departed from the assignment that was made to me to discuss the business of the Supreme Court and how reforms may be effected to assure that its business can be properly conducted. For I would insist that one cannot talk about the Court's business and its effective dispatch without defining the role that the Court has to play. We cannot decide what tasks may be assigned and assumed without knowing how those tasks are to be performed.

Nevertheless, I concede that the issues about which I would speak do not, at this moment, certainly, have the claim on one's attention that is properly made by yesterday's, today's, and tomorrow's newspaper headlines and the various worthy and unworthy actions that seem to take place daily in Washington. But it remains true that we must properly structure our government so that when our constitutional crises are resolved—and I devoutly hope that they will be resolved without destruction of our system of laws that is based on a devotion to governmental democracy and individual freedom—we shall have a viable structure of self-government based on law rather than fiat, on principle rather than expediency, on freedom rather than efficiency.

## I

### THE ROLE OF THE SUPREME COURT

To say that the Supreme Court does not have the ultimate power of government is not to say that it does not have an indispensable authority. And the question that I would now address is how to channel the Court's judicial business in such a manner as to permit it to perform its proper function as it should be performed.

There is a debate raging, or at least rampant, about whether the Supreme Court's business should be curtailed and, if so, how. It is of importance to recognize that there are two questions involved

here, not one. The first is whether, under existing jurisdictional and procedural standards, the Justices are so burdened as to endanger their capacity to perform their jobs adequately. The second is what means should be utilized to remove the undue burden if it does exist.

Antecedent to both questions, however, is that to which I have already alluded: what function is the Supreme Court to perform in our present governmental system?

Any appellate court has at least three distinct functions to perform. The first is that of correcting erroneous decisions rendered by judicial tribunals inferior to it in the judicial hierarchy. The second is to maintain a consistency among the decisions of those lower courts subordinate to it, so that the law is evenhandedly applied within the system. The third is the lawmaking function of creating and amending rules of law, not only so that they may be followed by the lower courts within the system, but also to provide guidance to lawyers and their clients as to the propriety of their behavior, their obligations, their duties, their rights, and their remedies. This last function—the lawmaking function—is the genius of the common law system that we inherited from our English forbears.

In the course of performing one or more of these functions, an appellate court is called upon to give effect to the will of the majority as expressed by the legislature of the particular jurisdiction. And it is also called upon from time to time to frustrate the will of the majority as expressed in legislative and executive action by keeping the executive and the legislature within the limitations imposed by the relevant constitution.

The Supreme Court is like any appellate court in terms of the business that it must dispatch in each of these categories. The problem derives from the fact that it cannot perform all these functions for all cases brought to it for review and, therefore, it must have some mechanism for restricting its business. The Supreme Court does not act as a court of errors and appeals; it does not sit for the purpose of curing error unless that error has serious connotations beyond its effects on the immediate parties. Correction of error, in the federal system, is essentially the obligation of the United States courts of appeals which must be, for most purposes, the ultimate appellate tribunal.

To a limited extent, more limited now than it once was, the Court still functions to unify the federal law by eliminating conflicts of decisions about the law among the eleven courts of appeals and

the fifty state high courts that are subject to its review. There are, however, other avenues for correcting such inconsistent rulings of these courts. The Congress of the United States, for example, at least in cases involving inconsistent interpretations of its statutes, can remove the ambiguities that give rise to such inconsistent interpretations.<sup>1</sup>

The primary function of the Supreme Court, however, must lie in the third of the categories that I have delineated. It must, as everyone concedes, confine its role at least to the decision of important cases, cases that have importance for the law as a whole and not those that merely happen to involve large sums of money, goods, services, or people. These important cases are largely constitutional cases and cases involving the construction of important federal statutes.

This function ought to be performed not by instinctive votes for one side or another, but on the basis of reasoning that at least purports to justify the result to be reached. In the course of such adjudication, it should be expected that the Justices will have ample time to think about the issues and the relevant factual data, to secure enlightenment from counsel by way of briefs and oral argument, to engage in research themselves and through their law clerks, and to exchange views and opinions with their brethren. The result of such a collegial process should be an opinion, or series of opinions, in each case that will undertake to justify the conclusion reached in such a manner as to afford guidance to lower courts and future litigants faced with similar but not identical problems.

Thus, the Supreme Court is not only an arbiter of disputes, but also the maker and remaker of laws, including the highest law of the land, the Constitution. If the task does not seem awesome to you, I can assure you that it is. The post of a Supreme Court Justice is honorific, but hardly a sinecure.

## II

### IS THE COURT OVERBURDENED?

The first question then is whether the Supreme Court is in fact overburdened by the docket that it is now called upon to manage.

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<sup>1</sup> *E.g.*, INT. REV. CODE OF 1954, § 74 (section on prizes and awards added to clarify judicial confusion); 18 U.S.C. § 610 (1970) (Federal Election Campaign Act of 1971 clarifies judicial confusion over Corrupt Practices Act).

There are perhaps two measures that might be used to respond to that question. One is to canvass the subjective opinions of the Justices themselves to determine whether the Justices feel that there is adequate opportunity to deal with the questions put to them. On this basis we have a mixed response. In 1960, in presenting an Irvine Lecture to an audience at this law school, Mr. Justice Douglas categorically denied that there was any excessive burden. He said then that "the idea that the Court is overworked" is a "myth."<sup>2</sup> And, to be sure, the myriad of other activities that Mr. Justice Douglas indulges in even while he serves on the Court is vivid testimony that the work of the Court is not burdensome to him. On the other hand, at the same period, when the Court was called on to deal with a total of 1,940 cases, as compared with a docket of 3,700 for the most recent term, Mr. Justice Stewart said: "This work load means, I am sorry to say, that there simply is not so much time as ideally there should be for the reflective deliberation so essential to the judicial process."<sup>3</sup>

At the same time, we have, in addition to Mr. Justice Douglas, the testimony of former Justice Goldberg,<sup>4</sup> of former Chief Justice Earl Warren,<sup>5</sup> and of present Mr. Justice Brennan<sup>6</sup> that the Court is fully capable of mastering its work load.

We also know that the incumbent Chief Justice, Mr. Justice Blackmun, and others now sitting believe that the Court cannot perform its proper functions under its present jurisdictional load.<sup>7</sup> This too is the assertion of the Freund Committee on the basis of interviews with the sitting Justices.<sup>8</sup>

It may well be that the question whether the work is too burdensome is a reflection of the differing attitudes on how the Court is to function. And perhaps this conflict of opinions is reflected in the positions taken in a particularly acrid debate between Professor Henry Hart of the Harvard Law School and

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<sup>2</sup> Douglas, *The Supreme Court and Its Case Load*, 45 CORNELL L.Q. 401, 402 (1960).

<sup>3</sup> Griswold, *The Supreme Court—Foreword, 1959 Term*, 74 HARV. L. REV. 81, 84 (1960) (quoting Justice Stewart from N.Y. Times, April 10, 1960, § 1, at 41, col. 3).

<sup>4</sup> Goldberg, *One Supreme Court*, THE NEW REPUBLIC, Feb. 10, 1973, at 14-15.

<sup>5</sup> Burger & Warren, *Retired Chief Justice Warren Attacks, Chief Justice Burger Defends Freund Study Group's Composition and Proposal*, 59 A.B.A.J. 721, 724 (1973).

<sup>6</sup> Brennan, *Justice Brennan Calls National Court of Appeals Proposal "Fundamentally Unnecessary and Ill Advised"*, 59 A.B.A.J. 835, 837 (1973).

<sup>7</sup> See A. BICKEL, *THE CASELOAD OF THE SUPREME COURT* (Domestic Affairs Study No. 21, 1973).

<sup>8</sup> STUDY GROUP ON THE CASE LOAD OF THE SUPREME COURT, FEDERAL JUDICIAL CENTER, REPORT 9 (1972) [hereinafter cited as FREUND REPORT].

Judge Thurman Arnold.<sup>9</sup> It was Professor Hart's view that a qualitative evaluation of the Court's work, as well as a statistical analysis that showed how little time was available to the Justices to respond to the questions placed before them, clearly demonstrated that the Court had too much on its plate.<sup>10</sup> Professor Hart concluded:

The opinions of the Justices, if one turns to them, confirm the conclusion that the Court is trying to decide more cases than it can decide well. Regretfully, and with deference, it has to be said that too many of the Court's opinions are about what one would expect could be written in twenty-four hours. There are able opinions, to be sure, including many that have manifestly taken much more time than that in thought and composition. But few of the Court's opinions, far too few, genuinely illumine the area of law with which they deal. Other opinions fail even by much more elementary standards. Issues are ducked which in good lawyership and good conscience ought not to be ducked. Technical mistakes are made which ought not to be made in decisions of the Supreme Court of the United States. The measured judgment of two thoughtful commentators expressed two years ago has lost none of its force in the two terms which have elapsed since: "The Court's product has shown an increasing incidence of the sweeping dogmatic statement, of the formulation of results accompanied by little or no effort to support them in reason, in sum, of opinions that do not opine and of per curiam orders that quite frankly fail to build the bridge between the authorities they cite and the results they decree." It needs to be said with all possible gravity, because it is a grave thing to say, that these failures are threatening to undermine the professional respect of first-rate lawyers for the incumbent Justices of the Court, and this at the very time when the Court as an institution and the Justices who sit on it are especially in need of the bar's confidence and support.<sup>11</sup>

Thurman Arnold, earlier a Yale law professor, a trust-buster, a judge of the Court of Appeals for the District of Columbia, but then a partner in the celebrated firm of Arnold, Fortas & Porter, gave the back of his hand to the Hart thesis.<sup>12</sup> His position was in effect that it was absurd to think that the Court needed time for deliberation and consultation. For, as one of the sponsors of the

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<sup>9</sup> See Arnold, *Professor Hart's Theology*, 73 HARV. L. REV. 1298 (1960); Hart, *The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959).

<sup>10</sup> Hart, *supra* note 9, at 94-100.

<sup>11</sup> *Id.* at 100-01, quoting Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 3 (1957).

<sup>12</sup> See Arnold, *supra* note 9.

legal realism of the 1930's, Arnold knew that judgment was not reached by reason but by instinct and that no amount of consultation or study would have any effect on changing the instinctive reaction of each Justice to each problem.<sup>13</sup> My colleague, Professor Wayne Booth, recently published a book with a title reminiscent of Arnold's attitude. It is called, *Now Don't Try To Reason With Me*.<sup>14</sup> I commend the book to you if not the Arnold article.

Erwin N. Griswold, then Dean of the Harvard Law School and later Solicitor General of the United States, appropriately remarked, in response to Arnold's piece:

Professor Hart refers to the time involved in "the maturing of collective thought." Judge Arnold ridicules this by repeated pejorative quotation. He even goes so far as to say: "There is no such process as this, and there never has been; men of positive views are only hardened in those views by such conferences." In this, it seems to me that Judge Arnold's argument wholly fails. Indeed, I must confess that I feel rather sorry for the outlook reflected in his statement. My own work in the law has been an exciting intellectual experience. I am not known for mildness of view, or for hesitance in expressing what views I have. But many times clearly held views of mine have been radically changed by discussion with associates or colleagues, often people with very different outlooks from mine. Nearly any class with Professor Thomas Reed Powell was an experience of this sort, even though I did not always accept all of Professor Powell's reasoning. To me, "the maturing of collective thought" is a profound reality. I can only express my regret that Judge Arnold has apparently not shared in this experience, and my even greater regret that the Supreme Court, because of pressure of time, does not have as much opportunity for it as, in the interest of the law and of the nation, that body should have.<sup>15</sup>

Is the Court overburdened? That apparently depends upon whether you regard the Court as a deliberative body, a collegial institution in which the Justices should pay heed to each other's expressions, or whether it is merely a debating society, with each Justice committed in advance to a conclusion which his law clerk justifies by the best debater's points that occur to him.

Obviously, from what I said at the outset about my concepts of the Supreme Court of the United States, I fall with those who share the view that the Court cannot adequately perform its functions properly under the burden of all of its present chores. But then,

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<sup>13</sup> *Id.* at 1312-13.

<sup>14</sup> W. BOOTH, *NOW DON'T TRY TO REASON WITH ME* (1972).

<sup>15</sup> Griswold, *supra* note 3, at 84-85 (citations omitted).



Thurman Arnold, if he were still alive, would tell you that my judgment can be attributed to the fact that I am a Frankfurter protégé, who is dedicated to that absurd proposition best stated, perhaps, by Dean Roscoe Pound, when he wrote: "Civilization involves subjection of force to reason, and the agency of this subjection is law."<sup>16</sup>

### III

#### REMEDIES FOR AN OVERBURDENED COURT

The remedies that might be appropriate to relieve an overburdened Court again will depend in no small measure on what one considers the function that a Justice of the Supreme Court is expected to serve. If one accepts the proposition that a Justice should decide the questions presented but should leave to his law clerks the recommendations as to which cases should be heard and the writing of opinions in support of his judgments, then indeed the answer to the problem of an excessive judicial load could be answered by the addition of several more law clerks in each set of chambers. If, however, one thinks that the decisions as to what cases should be heard and the writing of Supreme Court opinions are a nondelegable judicial task, the problem becomes more difficult of resolution. I wish that I could tell you that the law clerks do not write the opinions and do not decide on the grant or denial of petitions for certiorari. This I cannot do. For, although I believe that in every instance each Justice determines his own vote, I think it true that in some, if not most, instances the opinions are not of his hand and most votes on certiorari are based exclusively on law clerk memos.<sup>17</sup> If one were to utilize the tools of modern computers, one could readily prove that in many instances the putative author of an opinion is not, in fact, the author of that opinion. Only if you accept the Arnold thesis, that it is only the result and not the reasoning that counts, can one be sanguine in the face of these facts.

For purposes of considering reforms of the Court's functions, it is appropriate to divide the Court's business into two parts. The first part is the review of thousands of petitions for certiorari, to determine which cases will be called up for plenary consideration. The second part is the disposition of those cases that the Court has

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<sup>16</sup> Pound, *The Future of Law*, 47 YALE L.J. 1, 13 (1937).

<sup>17</sup> Cf. A. BICKEL, *supra* note 7, at 24-25; FREUND REPORT 43-45; Goldberg, *supra* note 4, at 15.

decided to decide. I put to one side the problem created by such compulsory jurisdiction which the Court purports to retain. The fact is that the Court doesn't seem to treat appeals any differently from the way it treats petitions for certiorari, the congressional mandate to the contrary notwithstanding. Moreover, everybody seems agreed that the Court's compulsory jurisdiction should be eliminated and that all cases should come by way of petition for certiorari.<sup>18</sup> The reduction of all cases to certiorari cases, however, will have no real effect in reducing the Court's work load.

If one looks at the statistics, it soon becomes evident that petitions for certiorari are growing in almost geometrical proportions each decade, but the number of cases determined on the merits remains fairly constant.<sup>19</sup> It is not surprising, therefore, that most suggestions for relieving the undue burden on the Supreme Court have been addressed to a reduction of the hardships imposed by the certiorari process. This has been true almost since the Court was given its great control over its own docket. Shortly after the enactment of the Judge's Bill in 1925<sup>20</sup>—the last major statutory reform of the Supreme Court's jurisdiction—Professor Felix Frankfurter, as he then was, wrote of the potential failure of the certiorari process because of the Court's inundation by certiorari petitions:

[W]hen, as has already happened, the Court is confronted with 500 petitions at a single term, the objective standards governing the exercise of discretion may unwittingly fail in numerous instances. The reports make abundantly clear that because of the quantity of these petitions and the conditions under which they must be scrutinized, they are sometimes granted when they should have been denied. Is it not likely, too, that petitions are occasionally denied when they should be granted? Their disposition rests inescapably upon judgment, and it is familiar experience that judgment is less sure in the later stages of a long series.<sup>21</sup>

Frankfurter was sanguine, however, about the availability of a cure for such a defect:

[I]f the present number continues or increases, experiment might show that more effective scrutiny would be secured if petitions for *certiorari* were assigned for reporting to individual members of the Court, as is true in writing opinions. Eventually,

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<sup>18</sup> See FREUND REPORT 25-26 and authorities cited therein.

<sup>19</sup> See *id.* Table III, Certiorari Cases at A3.

<sup>20</sup> Act of Feb. 13, 1925, ch. 229, 43 Stat. 936 (codified in various sections of 28 U.S.C.).

<sup>21</sup> F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 287 (1927).

also, the bar might be educated to conserve the Court's time by withholding unmeritorious petitions. In any event, the difficulties that experience may disclose are within the control of the Court's own flexible procedure.<sup>22</sup>

In 1958, Mr. Justice Harlan delivered the Cardozo Lecture at the Association of the Bar of the City of New York. He, too, was concerned about the growth of petitions for certiorari. He was less hopeful, however, that the Court could solve the difficulties by its own devices:

While it can therefore be said that the certiorari work, despite its continuing growth, is still within manageable proportions [in the 1957 Term there had been 1462 petitions acted upon], it would be shortsighted and unwise not to recognize that preserving the certiorari system in good health, and in proper balance with the other work of the Court, are tasks that will increasingly demand thoughtful and imaginative attention. As I have tried to show, the essence of the problem as things stand today is to guard against wasteful encroachments upon the Court's time by preventing an increase in, if not reducing, the volume of improvident applications for certiorari. Frankly, I doubt whether much can be accomplished towards this end through the administrative processes of the Court itself. The two administrative devices which most obviously suggest themselves as means for dealing with the situation, namely, to have petitions for certiorari disposed of by some procedure short of action by the full Court, or to impose a special cost penalty upon those filing patently improvident petitions, would seem to be either unacceptable or unworkable. The first would be objectionable because anything less than action as a unit would be foreign to the ways in which the Court has always functioned, and is hardly compatible with the proper discharge of its responsibilities as the Nation's highest judicial tribunal. The second would probably be impractical because of the well-known reluctance of American judges to put obstacles in the way of access to the courts, no matter how ill-advised a litigant's actions may be, and because such a rule would be especially difficult to administer in this instance.<sup>23</sup>

Mr. Justice Harlan concluded with the proposition that self-imposed restraint by members of the bar would be the best means of cutting down improvident applications for certiorari. He reached this conclusion, despite his earlier statement that "if a lawyer cannot assess with some degree of confidence the imponderables involved it is quite understandable that he should conceive it to be his duty to try for certiorari."<sup>24</sup>

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<sup>22</sup> *Id.* at 289.

<sup>23</sup> J. HARLAN, *MANNING THE DIKES* 27-28 (1958).

<sup>24</sup> *Id.* at 16.

The most recent and certainly the most controversial suggestion for relief of the Court's docket is also directed to the "certiorari problem." The Report of the Study Group on the Caseload of the Supreme Court, more commonly known as the Freund Report after the name of its illustrious chairman, suggested that some of the certiorari business could be sloughed off on another court to be created for the purpose. In its own summary, the Report calls for:

The establishment by statute of a National Court of Appeals, with a membership of seven judges drawn on a rotating basis from the federal courts of appeals and serving staggered three year terms. This Court would have the twofold function of (1) screening all petitions for certiorari and appeals that would at present be filed in the Supreme Court, referring the most review-worthy (perhaps 400 or 450 per Term) to the Supreme Court (except as provided in clause 2), and denying the rest; and (2) retaining for decision on the merits cases of genuine conflict between circuits (except those of special moment, which would be certified to the Supreme Court). The Supreme Court would determine which of the cases thus referred to it should be granted review and decided on the merits in the Supreme Court. The residue would be denied, or in some instances be remanded for decision by the National Court of Appeals.<sup>25</sup>

Once the present Chief Justice Burger seemed to put his imprimatur on the proposal<sup>26</sup>—he never really has—the battle over it became as fierce as could be expected from so dry a subject. Former Chief Justice Warren became captain of the other side and the law reviews and journals soon rang with denunciation and counterdenunciation.<sup>27</sup>

Much of the attack was emotional rather than reasoned. This is not to say that the Freund Report should be adopted, but rather that the reasons against it have savoured of the *ipse dixit*. Such arguments were advanced by eminent authorities as that, and I quote, "Power once lodged in a given court must be totally retained, not divided, not delegated."<sup>28</sup> When one asks, *why* must power once lodged in a given court "be totally retained, not divided, not delegated"? he gets no answer. This same pair of authorities tells us, with the same adequacy of reason, that "the power to decide cases presupposes the power to determine what cases will be decided."<sup>29</sup> Again, one is inclined to ask why, espe-

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<sup>25</sup> FREUND REPORT 47.

<sup>26</sup> Cf. Burger & Warren, *supra* note 5, at 721-24.

<sup>27</sup> See *id.* at 724-30; Brennan, *supra* note 6.

<sup>28</sup> Brennan, *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473, 485 (1973) (quoting with approval from Arthur Goldberg).

<sup>29</sup> *Id.* at 484.

cially in light of the fact that the Constitution assigns to Congress the function of defining the Supreme Court's appellate jurisdiction and that it was not until 1916 that wide certiorari jurisdiction was conferred on the Supreme Court. A third argument has even more illustrious support. Both Mr. Justice Harlan<sup>30</sup> and Judge Henry Friendly<sup>31</sup> have pointed out that this is not the way it has been done in the past and the wisdom of the past should be good enough for the present.

The third argument has validity not because we must continue to do things the way that we have done them in the past. Its validity rests on the fact that if change is to be brought about, the Freund Committee has not met the burden of proving that its proposal is the best alternative for solving the problem. I shall return to this proposition shortly.

The essence of the complaint against the Freund Report is that somehow it threatens to reduce the powers that have been exercised by the Supreme Court. The notion is that by delegating to other judges the selection of the four hundred and fifty-odd petitions for Supreme Court consideration, the Court will be turned from its libertarian bent, that it will be deprived of its opportunities to amend earlier positions, and that it will lose the opportunity for self-education in the highways and byways of the law, an education it is supposed to get from reading all the thousands of petitions that are now assigned to it. The chief argument, however, is that the power totally to choose among the cases proffered should not be delegated.

I should feel more sympathy for the criticism if it were based on fact. But the winnowing of the cases for judicial determination on petitions for certiorari has already been delegated by most of the Justices to their law clerks. With few exceptions, among whom Mr. Justice Brennan may be numbered, the Justices rely for their judgments on certiorari on one-page memoranda with a recommendation for grant or denial. Indeed, some of the Justices have pooled their law clerks so that each of the participating Justices is relying on the flimsy report of one law clerk who more often than not will not be his own clerk. If the essential question raised by the Freund Report is, as some of its critics would have it, whether it better comports with the dignity and power of the Court to delegate the resolution of the certiorari petitions to law clerks than to courts of appeals judges, I expect that each of us will have his own answer. I know what mine is.

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<sup>30</sup> J. HARLAN, *supra* note 23, at 27-28.

<sup>31</sup> H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 50-51 (1973).

Perhaps my personal bias is showing. As one who works pretty hard to fashion a petition for certiorari, sometimes with rather subtle arguments and appeals to the prejudices of individual Justices, I am resentful of the fact that my petition will not be read by members of the high court, that they will see only what their law clerks permit them to see. That such a carefully prepared brief should be so quickly reduced to pap before it can be consumed by those for whom it is intended hardly affords incentive for the kinds of briefs that the Court insists it wants.

It is only more recently that serious proposals have been put forth for relieving the Court docket by means other than amendment of the certiorari process. Essentially these call for a reduction of the Court's authority to deal with certain kinds of cases, *i.e.*, there would be a subject-matter limitation on the Court's docket.<sup>32</sup> Usually, these are joined with suggestions for the creation of an alternative forum or forums in which cases that could not be brought to the Supreme Court would be considered.<sup>33</sup> Thus, a few years ago, I suggested that the time had come when the business of the Court could properly be restricted to constitutional issues, with statutory questions to be taken elsewhere for consideration.<sup>34</sup> Despite Judge Friendly's statement that "it is scarcely possible to engage in deep constitutional contemplation all day long,"<sup>35</sup> I am still enamored of my own idea. I should ask Judge Friendly, to what better use could the Justices put their time than the serious, day-long contemplation of constitutional issues? But I am not so self-deluded as to suggest that the subject-matter limitation that I advocate is the certain or only answer.

Those of you who have attended earlier lectures in this series, are aware of the cogency of the argument for removing the criminal law jurisdiction of the Supreme Court to another tribunal. And there are additional alternatives that I would suggest merit consideration. One could, I submit, remove the tax jurisdiction, the review of certain administrative agencies, and certainly the diversity of citizenship cases, without damaging the interests of law or justice.

The essential difficulty that I have with the Freund Report is that it dismisses all the other possibilities for diminishing the

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<sup>32</sup> See FREUND REPORT 10.

<sup>33</sup> *Id.* at 11.

<sup>34</sup> Kurland, *The Court Should Decide Less and Explain More*, N.Y. Times, June 9, 1968, § 6 (Magazine), at 34.

<sup>35</sup> H. FRIENDLY, *supra* note 31, at 51.

Court's burden without explicit examination of them. Certainly, it should not have been so cavalier in its rejections without a statistical survey revealing exactly what the content of the Court's certiorari business is. The *ex cathedra* arguments of the Freund Committee are no more persuasive than those of its attackers.

#### IV

##### SOME BAND-AID RELIEF

I suppose it ill-behooves one honored by this lectureship simply to be critical of the suggestions of others. I do have, in addition to my earlier suggestion about limiting the Supreme Court to its constitutional function, a limitation that seems to have worked fairly well under the West German Constitution,<sup>36</sup> a few suggestions for internal experiments for the Court to indulge in limiting its business.

Before I list these for you, let me endorse—even if it is an act of supererogation—Judge Friendly's proposal that essentially the amount of certiorari business that will be imposed on the Supreme Court will be largely determined by the amount of business funneled through the court of appeals. Thus, unless that flood can be abated, there is no hope of saving the Supreme Court from resort to the procedures of other high courts, the affirmance and reversal of lower court cases without any reasons whatsoever being given for the judgments.

I would point out, too, that in large measure the heavy burden on the Supreme Court is one of its own creation. It has accomplished this essentially in two ways. First, it has continued to take for review the odd case as to which experienced lawyers would say that its chances for certiorari were not different from that of the proverbial "snowball in hell." It has thereby encouraged the filing of worthless petitions that occupy its time without adequate reason. Second, the Supreme Court has nationalized so much of American law that a very large part of the Court's business is now concerned with matters that would once have been the exclusive concern of the state judiciary. All libel law is now constitutional law;<sup>37</sup> the category of the federal common law is open-ended; expansive

<sup>36</sup> See generally Rupp, *The Federal Constitutional Court in Germany: Scope of its Jurisdiction and Procedure*, 44 NOTRE DAME LAW. 584 (1969).

<sup>37</sup> See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); Note, *Times Marches On: The Courts' Continuing Expansion of the Application of the "Actual Malice" Standard*, 47 NOTRE DAME LAW. 153 (1971).

construction of the Securities Exchange Act of 1934 has turned corporation law into a federal speciality;<sup>38</sup> and these are but examples. Moreover, the Court has created a multitude of claims and remedies, sometimes on the remnants of quiescent statutes, sometimes without them, with the result that the lower federal courts, and therefore the Supreme Court, have multiplied their business to the point where the Court must feel somewhat like the sorcerer's apprentice.

If the undue burden is one of the Court's own creation, it is, nevertheless, not one likely to be dissolved quickly. And I should like to conclude with some suggestions for Supreme Court experimentation with its own docket, experimentation that can be engaged solely at the Court's discretion and without the need for legislation. Let me concede the modesty of my goals, for I offer only palliatives and not cures.

1. The burden of having each Justice consider each of the almost four thousand petitions for review to come before the Court can be reduced in accordance with a suggestion made by Mr. Justice Frankfurter almost fifty years ago. He suggested that individual Justices would have to take responsibility for recommending whether a petition be granted or denied.<sup>39</sup> I should be prepared to go further. Since the problem of petitions for certiorari inhere not only in their numbers but in the fact that more petitions are granted than should be, I would suggest that the total group of petitions be arbitrarily divided into nine parts, each of which would be assigned to a Justice. I would have the understanding that the Justice receiving the petition should have authority to grant a proportionate number as he decides best, but not more than say fifteen each. Thereafter, the entire Court could dismiss as improvidently granted any case thus brought before it in which five Justices think that the petition was erroneously granted. I suggest that a single Justice who himself reads the petitions and makes the decision may be a better agent for this function than either the Freund Committee's delegation to an inferior tribunal or than the existing system by which the petitions for certiorari fall so heavily into the hands of the law clerks for determination.

2. I should have the Court decide and publicly announce that, for a given period of time, there are certain categories of cases that it will no longer review. Clearly it should be prepared to abandon

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<sup>38</sup> See Securities Exchange Act of 1934, § 10(b), 15 U.S.C. § 78j(b) (1970); SEC Rule 10b-5, 17 C.F.R. § 240.10b-5 (1973).

<sup>39</sup> F. FRANKFURTER & J. LANDIS, *supra* note 21, at 289.



diversity of citizenship cases in which petitions for certiorari are almost automatically denied now. It could choose among the other subject matter areas for similar rules that will govern its members in determining whether certiorari is available.

3. Much of the blame for the undue burden of certiorari petitions is placed on counsel who file such petitions with the knowledge that the case will not get to the high court unless Homer nods. The Court has refused to countenance the notion that only a specially qualified lawyer will be permitted to file petitions and has been equally adamant against imposing costs of any substantial amount against a party or his counsel who files a flimsy petition. In the absence of a distinct Supreme Court bar of experienced practitioners, it might be well to make public the Court's disposition of these grossly inadequate petitions. For some time, the Court has maintained a "dead list," a list of petitions with such an obvious lack of merit that no consideration will be given to them: If it were to publish such a dead list, along with the names of counsel who filed the cases, the bar would be educated as to the kind of case that the Court considers below its dignity to accept and the imposing lawyers might feel appropriately chastised by the publicity accorded their efforts.

4. The Court should abandon not its practice of multiple opinions, as some have suggested, but rather its practice of unduly lengthy opinions. Following some bad examples of the past, which include my revered mentor Felix Frankfurter, the Court has taken to attenuated opinions of extraordinary length that lead not to enlightenment but to obfuscation of the Court's true positions. It is not necessary or desirable to publish a law review article or an A.L.R. note every time a major case is decided. It should suffice if the real reasons for the Court's conclusions are delineated without the publication of the contents of a law clerk's research which may conceal rather than reveal the true bases of the Court's judgments. I have little or no doubt that an effective editor could reduce the recent pages of the United States Reports by fifty percent or more without losing an iota of substance. Perhaps the Court doesn't have the necessary time to write short opinions and, therefore, has to write long ones. In that event, it must cut down the number of cases granted review each term.

I have facetiously suggested that the answer to this problem would be the discharge of all law clerks and the requirement that every Justice confine his opinion to two thousand words. The more I hear myself talk, the more I am convinced that this would be a

step in the right direction toward more meaningful, and shorter, Supreme Court opinions.

5. I would suggest, too, that the petition for certiorari be combined with a brief on the merits. These should, of course, be separate arguments, but physically joined together so that the Court could more readily reach argument on the merits, if certiorari is granted and a plenary hearing is required. That procedure would also make it possible for quick disposal on the merits of some cases where oral argument is not required or where a short memorandum opinion is all that is necessary to dispose of the case.

6. Finally, I should suggest that the Court ban amici curiae briefs, including those filed by the Solicitor General. The practice of such briefs, which usually serve only the function of demonstrating to the Court that a group of its constituents demands a particular result, has been growing at a rapid rate. The Court is thus burdened with briefs that almost always raise and present no new arguments or insights but merely repeat what the parties' briefs have already shown. Besides, the process of lobbying a court, which is the primary role of such briefs, is unseemly. If those who would file these briefs are amici, they are amici not of the Court but of one of the parties. Certainly they can convey to those whom they support any ideas or arguments of which the parties themselves have not thought, which could be incorporated in the parties' briefs if they deemed it desirable. Certainly the Court has enough reading matter to guide it to decision without the thousands of additional pages of type represented by amici briefs each term.

#### CONCLUSION

I said that all that I have to offer here is temporary relief of a minor nature. The virtue of my suggestions, if they have any, is that they can be effected by the Court without the need for any legislative action. But I do not mean to suggest that we need not still search for a more permanent cure. That cure must, however, be based on solid proof of its potential for relief and not, as was the Freund Report, based solely on the opinions of some experts that their proposed system was the best system. Maybe the Freund proposal will yet prove to be the best one. But we cannot make that determination in advance of knowledge of the facts supporting its case as compared with the facts supporting the alternative solutions proffered by others.

Meanwhile we should not overlook Judge Friendly's demonstration that the Court's burden is a result of the mushrooming business of the lower federal courts which must, somehow, be stunted. Nor should we disregard Mr. Justice Frankfurter's dictum: "Fit legislation and fair adjudication are attainable. The ultimate reliance of society for the proper fulfilment of both these august functions is to entrust them only to those who are equal to their demands."<sup>40</sup>

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<sup>40</sup> F. FRANKFURTER, *SOME REFLECTIONS ON THE READING OF STATUTES* 29 (1947).