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RATIONING JUSTICE—THE SUPREME COURT'S CASELOAD AND WHAT THE COURT DOES NOT DO*

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“Thou shalt not ration justice” thundered Learned Hand,¹ as only he could thunder. Like all sweeping generalizations, this statement is doubtless too sweeping. But there are few who would question the essence of Judge Hand’s directive. Within wide limits, we should not ration justice. But that is exactly what we have been doing, for many years, with worsening results, at the highest level, in our arrangements for the jurisdiction of the Supreme Court of the United States.²

I

THE PROBLEM REVIEWED

The jurisdiction of the Supreme Court has been a perennial topic for discussion and for action in our governmental history. On at least two occasions, the problems caused by the Court’s heavy caseload have become so serious that Congress has made radical changes in the assignment of the Court.³ The first of these changes

* This Article was delivered as part of the fifty-seventh Frank Irvine lecture series at the Cornell Law School on October 30, 1974.

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¹ Address by Learned Hand before the Legal Aid Society of New York, Feb. 16, 1951 (9 NLADA BRIEFCASE 5 (1951)). I am indebted to Professor Yale Kamisar for help in locating the source of this quotation.

² Judge Hand’s admonition was delivered in a context of making counsel available through Legal Aid. But counsel are not of much use in a case which a court is unable to hear because refusing to hear is the device used for keeping the court’s docket within the limits of its time and capacity. Rationing is rationing, wherever it occurs.

³ See Rehnquist, *The Supreme Court: Past and Present*, 59 A.B.A.J. 361 (1973).

was in 1891 when the Circuit Courts of Appeals were established.⁴ The second change was in 1925 when much of the Court's jurisdiction was placed on a discretionary basis by the "Judge's Bill."⁵ That change was made at the instance of the Justices of the Court, and no one questions today that it was necessary and for a considerable period of time successful.

Nearly fifty years have passed since the Judge's Bill was enacted, and the pressures are intense again. As a result, there have been extensive studies and discussions of the problem over the past several years. The most important of these was *The Report of the Study Group on the Caseload of the Supreme Court*,⁶ prepared by a committee appointed by the Chief Justice, as Chairman of the Federal Judicial Center, with Professor Paul A. Freund as chairman. This Report, often known as the Freund Report, focused attention on the problem, and provided a base for further discussion and consideration. That discussion has been extensive.⁷ Much thought and effort have been contributed to the problem, and some emotions have been aroused.

I will not undertake here to review all of the discussions that have appeared in print, nor the various proposals that have been made, first by the Freund Committee itself, and later by others who sought to meet some of the objections which were raised against proposals made in the Freund Report. That would be tedious. It would not help those who have followed the problem in detail, nor would it be useful to those who have only a general interest in the questions. My purpose in this lecture is to try to

⁴ Act of March 3, 1891, ch. 517, 26 Stat. 826.

⁵ Act of Feb. 13, 1925, ch. 229, 43 Stat. 936.

⁶ FEDERAL JUDICIAL CENTER, REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT (1972) [hereinafter cited as FREUND REPORT].

⁷ See, e.g., A. BICKEL, THE CASELOAD OF THE SUPREME COURT—AND WHAT, IF ANYTHING, TO DO ABOUT IT (Domestic Affairs Study 21, American Enterprise Institute for Public Policy Research (Nov. 1973)); Alsop, *A Policy Assessment of The National Court of Appeals*, 25 HASTINGS L.J. 1313 (1974); Black, *The National Court of Appeals: An Unwise Proposal*, 83 YALE L.J. 883 (1974); Brennan, *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473 (1973); Casper & Posner, *A Study of the Supreme Court's Caseload*, 3 J. LEGAL STUDIES 339 (1974); Freund, *Why We Need The National Court of Appeals*, 59 A.B.A.J. 247 (1973); Freund, *A National Court of Appeals*, 25 HASTINGS L.J. 1301 (1974); Friendly, *Averting the Flood by Lessening the Flow*, 59 CORNELL L. REV. 634 (1974); Gressman, *The National Court of Appeals: A Dissent*, 59 A.B.A.J. 253 (1973); Haynsworth, *A New Court to Improve the Administration of Justice*, 59 A.B.A.J. 841 (1973); Hufstedler, *Courtship and Other Legal Arts*, 60 A.B.A.J. 545 (1974); Kurland, *Jurisdiction of the United States Supreme Court: Time for a Change?*, 59 CORNELL L. REV. 616 (1974); Poe, Schmidt & Whalen, *A National Court of Appeals: A Dissenting View*, 69 NW. U.L. REV. 842 (1973); Rehnquist, *Whither the Courts*, 60 A.B.A.J. 787 (1974); Warren, *Let's Not Weaken the Supreme Court*, 60 A.B.A.J. 677 (1974). See also H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW (1973); Griswold, *The Supreme Court's Case Load: Civil Rights and Other Problems*, 1973 U. ILL. L. FORUM 615.

change the focus of the discussion somewhat, and to advance a proposal which differs in important ways from those which have been made before.

Out of the discussions so far, certain rules for progress can, I think, be distilled. In setting these out, I draw heavily on a similar list which Judge Hufstедler advanced in her address before the Fellows of the American Bar Foundation last February.⁸ The tests which a plan must meet if it is to have any chance of favorable consideration appear to include the following:

1. There must be no interference with the power of the Supreme Court to control its own docket.
2. There must not be, for cases generally, four tiers of courts, and the appellate process must not be unduly prolonged.
3. There should not be a specialized tribunal.
4. There should not be discrimination, either in fact or in appearance, against classes of litigation.
5. The federal judiciary should not be unduly expanded.
6. The method of selecting the judges for any new tribunal should not be subject to dominance by any administration or political party.
7. Any new court should be one on which able judges are willing to sit.

II

THE BURDEN ON THE COURT

Much of the consideration of the problem has focused on the size of the Supreme Court's caseload. This was the main foundation of the Freund Report; and it did show quite clearly, as was, of course, well known, that the number of cases taken to the Court had greatly increased in recent years. Without going back to earlier years, the Freund Report showed that the number of cases filed in the Court was 1,234 in 1951, and had nearly tripled to 3,643 in the 1971 Term.⁹ We can now add that these figures have continued to increase over the two most recent Terms. New filings were 3,741 in the 1972 Term, and 4,186 in the 1973 Term just completed.¹⁰

⁸ Hufstедler, *supra* note 7, at 547-48.

⁹ FREUND REPORT 2.

¹⁰ See 43 U.S.L.W. 3085 (1974). It should be noted that the figure for the 1973 Term is subject to qualification, since that Term did not end until July 25, 1974. This will distort the figures somewhat, adding perhaps 300 filings in the 1973 Term (and making a corresponding reduction for the 1974 Term). The rate of increase may have slowed down somewhat,

Consideration of the work load of the Justices is consistent with historical precedent.¹¹ Modern discussion of the problem can perhaps be said to begin with Professor Henry M. Hart's article in 1959,¹² when he showed how little time the Justices could possibly spend in consideration of many of the cases before them. And that related to the 1958 Term, when there were 1,819 cases filed, or less than half of the number at the present time

But the difficulty with this approach is that some of the Justices deny that they are overburdened. Justice Douglas immediately responded to Professor Hart, with a lecture here at the Cornell Law School, where he strongly asserted that there was no overburden on the Court.¹³ More recently, speaking from the bench, Justice Douglas has said that "[t]he case for our 'overwork' is a myth."¹⁴ Justice Brennan has denied the suggestion of overwork in more guarded terms, but with considerable feeling.¹⁵ The last published word by Chief Justice Warren was likewise an affirmation of the Supreme Court's capacity to meet its responsibilities.¹⁶ On the other hand, Chief Justice Burger,¹⁷ and Justices Powell and Rehnquist¹⁸ have indicated that they feel there is a problem.¹⁹ I have no doubt in my own mind—having watched the matter rather closely from the outside—that there is a problem, and a very serious one. But I have slowly come to the conclusion that we have been looking at the wrong problem. As long as influential members of the Court say that they are not overworked, and as long as many people feel that the effort to bring about

but the fact remains that the Supreme Court has at least three times as many cases filed each year today as it did in 1951. From any point of view, that is a serious matter which requires careful attention.

¹¹ In 1887 and 1888, Attorney General Garland made a plea "that something be done" to relieve the Supreme Court of that day. Chief Justice Waite, and Justices Harlan and Field "sought to enlist public opinion to secure Congressional action." See F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 96-97 (1928). This crisis was resolved by the adoption of the Circuit Court of Appeals Act in 1891. See Act of March 3, 1891, ch. 517, 26 Stat. 826.

¹² Hart, *The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959).

¹³ Douglas, *The Supreme Court and Its Case Load*, 45 CORNELL L.Q. 401 (1960).

¹⁴ *Tidewater Oil Co. v. United States*, 409 U.S. 151, 174 (1972) (Douglas, J., dissenting). He went on to refer to "the vast leisure time we presently have" (409 U.S. at 177), and concluded that "[w]e are vastly underworked." 409 U.S. at 178. For any one other than Justice Douglas, this would seem to be hyperbole.

¹⁵ Brennan, *supra* note 7.

¹⁶ Warren, *supra* note 7.

¹⁷ See Address by Chief Justice Burger, Fiftieth Annual Meeting of the American Law Institute, May 16, 1973 (41 U.S.L.W. 2627 (1973)).

¹⁸ Rehnquist, *supra* note 7.

¹⁹ See generally Harlan, *Manning the Dikes*, 13 RECORD OF N.Y.C.B.A. 541 (1958).

revisions in the Court's jurisdiction is in some way an attack on the Court, it is hard to develop a satisfactory cure for an illness the existence of which is vigorously denied.

It is the purpose of this lecture to suggest that we have been looking at the wrong illness. As I have said, I think there is overwork, with serious consequences. But that is not all of the problem, and if we cannot make progress in terms of overwork, we should look further and see what else is worthy of consideration. In short, we have focused so closely and intensely on the question of overwork that we have almost entirely failed to see that the real problem is inadequate final appellate capacity in this country.

III

OUR PRESENT SYSTEM SEVERELY RATIONS JUSTICE

To the extent that the Court is in fact not overworked, it is only because we have been rationing justice at the Supreme Court level. We began to do that when the concept of certiorari was introduced in 1891.²⁰ Discretionary review by the Supreme Court was extended considerably in 1925.²¹ But it was still realistic. At that time there were less than a thousand cases on the Court's docket. Now there are over four thousand. That figure alone really tells the story. And many more cases would be brought to the Supreme Court if there were any prospect that the Court could review them.

Accepting the assertion of some members of the Court that they are not overworked—which, as a practical matter we must—we should recognize that this situation exists because, under the certiorari statute, and the practices of the Court, the Court controls its own docket, as far as cases heard on the merits are concerned. The Court was hearing about 150 cases on the merits in 1925; it was hearing about 150 cases on the merits twenty-five years ago.²² It hears about 150 cases on the merits today.²³ It is cases on the merits, say members of the Court, which take up most of their time. For various reasons, the consideration of applications for

²⁰ See note 4 and accompanying text, *supra*.

²¹ See note 5 and accompanying text, *supra*.

²² FREUND REPORT, Tab. IV, at A7.

²³ The statistics published by the Clerk show that 177 "cases" were argued at the 1973 Term. 43 U.S.L.W. 3085 (1974). But often two or three or four or more cases are heard at a single argument, and amount in terms of "caseload" to a single argument. These are questions of judgment and degree, but I think that a total of about 150 "cases heard" is reasonably accurate.

review—petitions for certiorari and jurisdictional statements on appeals—is not a very time-consuming task. So the Court is not overworked, because it controls its own docket.

But what is the cost? I suggest that the cost is substantial. It is not much recognized by the Court, because they are busy with what they are doing, and understandably they have no time for cases they cannot review. It is not recognized very clearly by outsiders, because the individual instances of non-review are just that—they are individual instances; and they do not get into the reports. So it is hard to see just what is going on. I would like to suggest in this lecture that there is a default in the system, and that the time has surely come to do something about it. I will also make some observations about what I think can be done.

A. *Discretionary Cutting of the Court's Docket Has Become Extreme*

The inevitable effect of the system under which the Court operates is that it has had to ration justice. Or, to put it another way, it is only by rationing justice that the Court has kept from being overworked. That this is so can be shown in several ways. The number of cases filed with the Court has approximately tripled since 1951.²⁴ It is not an answer to say that the great increase has come in *in forma pauperis* cases, for the increase in paid cases has been nearly proportional.²⁵ The number of cases argued orally in 1951 was 128.²⁶ The number of cases argued orally at the 1973 Term was 170.²⁷ But there were a considerable number of occasions when two or more cases were heard at a single argument. Thus, there were approximately 150 oral arguments, and this number has been more or less constant for a number of years. It is, in fact, the maximum number that the Court can be expected to hear on the merits.

What has been happening is that as the number of cases filed has steadily increased, the Court has been forced to make its cut at a higher and higher point on the overall list.²⁸ This means inevita-

²⁴ The total number of cases filed in 1951 was 1,234. FREUND REPORT, Tab. II, at A2. The total number of cases filed in the 1973 Term was 4,186. 43 U.S.L.W. 3085 (1974).

²⁵ The number of paid cases filed in 1951 was 717. FREUND REPORT, Tab. II, at A2. The number of paid cases filed in the 1973 Term was 2,068. 43 U.S.L.W. 3085 (1974).

²⁶ FREUND REPORT, Tab. IV, at A7.

²⁷ 43 U.S.L.W. 3085 (1974).

²⁸ One is reminded of the situation which has arisen with respect to admission to law schools. When a school has 7,000 applications with only 550 places available, it is forced to decline applications from large numbers of persons who are well qualified, and whom the school would very much like to have as students. But the school has no choice where its

bly that cases which would have been regarded as worthy of review fifty or twenty years ago cannot be heard today. In other words, they must be rationed out. Indeed, it is even worse than the figures alone indicate. With paid cases, at least, there can be no doubt that the overall mixture has been enriched, for many cases which would have been filed in the Supreme Court twenty years ago are not filed now simply because counsel know how unlikely it is that certiorari will be granted in any except certain types of cases, and it is many times concluded that the considerable expense of filing is not justified.²⁹

Putting it another way, about eighteen percent of paid cases (appeals and certiorari) were heard on the merits twenty years ago, while about six percent of paid cases were heard on the merits during the 1973 Term.³⁰ What became of the other twelve percent of the paid cases? They were of a quality or caliber which would have entitled them to review only twenty years ago. But they were lost in the 1973 Term simply because of inadequate appellate capacity to hear cases on a national basis.

B. *Lack of Precedents Impairs the Functioning of an Effective Appellate System*

It is a rather astonishing fact that less than one percent of the cases decided by our courts of appeals are reviewed on the merits by the Supreme Court.³¹ Of course I think the courts of appeals are very competent and hard-working courts, and many of their judges are among the most distinguished in the nation. And I would agree that a litigant does not have a right to a second appeal. Nevertheless, I do not think that this is a good way to run a legal system.

The courts of appeals know that the chance that any decision they write will be reviewed is very slight, and this has led, I think, to a considerable lack of what I would call institutional responsibil-

intake is fixed, with selection to some extent inevitably on an arbitrary basis. Some schools try to deal with this by such procedures as those involved in *DeFunis v. Odegaard*, 416 U.S. 312 (1974). Can there be any doubt that similar considerations enter into Supreme Court grants of certiorari—that is, that there is an appreciable amount of “affirmative action” in certiorari consideration?

²⁹ There is the cost of counsel, the cost of printing a petition, and a filing fee of \$100 for a “paid” case on the appellate docket. It would be a rare case where these would aggregate less than \$1,000.

³⁰ Of petitions filed, 10.6% were granted. See *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 43, 277 (1974). But these include a considerable number of cases which were summarily disposed of without brief, oral argument, or opinion in the Supreme Court.

³¹ Hufstедler, *supra* note 7, at 546-47.

ity on the part of many court of appeals judges. The district judges keep reasonably well in line because they know that the courts of appeals are reviewing their work. And the courts of appeals can be expected to follow a decision of the Supreme Court which is directly in point. But with so few cases being reviewed by the Supreme Court, there are, in many fields, few decisions directly in point. The tendency to press beyond what the Supreme Court has done has often been irresistible.³² And there is no stability in the make-up of the courts of appeals. Some of them now have fifteen judges, together with a number of senior judges. What judge will be on a panel is a pure matter of chance. Besides, there are now a large number of roving judges—district judges and judges from other circuits—so that the bench one gets in a court of appeals is a kind of lottery. Some of the panels pay little attention to the decisions of other panels; and some of the courts seem to have little or no concern for inconsistencies in the decisions of different panels.³³ This results in increased litigation all along the line, for if the law of the circuit is uncertain, counsel cannot conscientiously recommend to his client that he should not litigate. And where less than one percent of the decisions of the courts of appeals are reviewed by the Supreme Court, it is hard to say that there is any national law on many subjects. Moreover, conscientious counsel often cannot recommend against litigation, even if there is a decision in his circuit, for who knows what may happen? The lightning of review may strike in some case from another circuit. Even though few circuit cases are reviewed, the chance that one may be makes it impossible to rely on any circuit court decision.

If ten percent of the court of appeals cases were reviewed by a court with national authority, the law would soon be clarified and stabilized, and the amount of litigation could be markedly reduced. Americans who have long lived with their system, which was adequate in the past, do not readily realize how chaotic it has become under current conditions of sharply rationed review by the Supreme Court.

There are other ways in which the situation may be tested. As

³² See Note, *Lower Court Disavowal of Supreme Court Precedent*, 60 VA. L. REV. 494 (1974). Cf. *United States v. Mason*, 412 U.S. 391 (1973). See also Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421 (1974).

³³ The logistical problem in holding hearings en banc in a court made up of 15 judges based in widely scattered cities is obviously very great. Yet the Fifth Circuit regularly holds a number of such hearings, and is obviously concerned with harmony in the law of the circuit. On the other hand, the Ninth Circuit recently went for more than two years without holding a single hearing en banc. *Davis v. United States*, 417 U.S. 333 (1974), illustrates the consequences.

I read the decisions of the Supreme Court in the Term just ended, there were 146 decisions by full opinion of the Court.³⁴ Of these more than ninety, or close to two-thirds, were decisions of constitutional questions—due process, equal protection, various questions under the first amendment, ranging from obscenity, through flags worn on pants, oaths, and the right to require a newspaper to publish a reply, questions of jury trial, prison rules, segregation, search and seizure, self-incrimination, confrontation, ballot access, and the eleventh amendment. Most of the other cases were standard federal specialties—federal criminal law, federal taxation, National Labor Relations Board, bankruptcy, federal arbitration act, Indians, civil service, and admiralty, among others. There was one government contract case, one case involving the use of inside information, one case involving trade secrets (though the issue there was whether there was a federal pre-emption through the patent laws), and one case involving equity procedure.

As I have observed before,³⁵ I do not think that the public or the bar is fully aware of the extent to which the Supreme Court of the United States has become a civil rights court. This is fine. It is a terribly important function for our highest court, and this is particularly true in a country which has the constitutionally expressed ideals that we have. I do not denigrate this part of the Court's work one bit. But I do suggest that it is not the whole of the function which should be performed on a national basis in a highly industrialized country of over 210 million people. If all our Court can do is to handle the most important civil rights cases, and a few others, then we are rationing justice and should be prepared to do something about it.

C. *Too Few Government Cases Can Be Reviewed*

There is another point of view from which I have seen the problem. For six Terms, from 1967 until June 1973, I served as Solicitor General of the United States, where it was a part of my responsibility to pass upon nearly every case where any officer or agency of the government had lost a case in a lower court and

³⁴ This does not include the cases disposed of by summary affirmance or reversal, without hearing, of which there were a considerable number. Indeed, the fact that so many cases are decided on the merits, but without hearing by the Court, is another illustration of how justice is now rationed because of the pressures on the Court.

The *Harvard Law Review* statistics show 157 written opinions, of which 17 were "per curiam opinions containing substantial legal reasoning." *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 43, 277 (1974). Many of the per curiam cases are decided without briefs on the merits or oral argument.

³⁵ Griswold, *supra* note 7, at 618.

wanted to take the case to the Supreme Court, either by appeal or by certiorari. In effect, the Solicitor General does most of the screening which is done in other cases by the Supreme Court,³⁶ for he tries to take to the Court only cases which, based upon his close observation of the work of the Court, he thinks that the Court will accept. On this basis, the Solicitor General usually files about thirty-five petitions every year, most of which are in fact granted. But in the process he has two serious problems: (1) there are a fair number of cases which he thinks are really worthy of final appellate review, but where he does not file because he knows that the pressures on the Court now are such that it probably will not be able to take the cases; and (2) in the process, the Solicitor General incurs the dislike, sometimes rather intense, of a good many other government lawyers, both within and outside the Department of Justice. Indeed, one of the last things I did in my service as Solicitor General was to appear before the House Committee on Interstate and Foreign Commerce in an effort to head off a bill which would provide that the so-called independent agencies could have direct access to the Supreme Court, without having to seek the approval of the Solicitor General.³⁷ I think that would be bad policy for the government under present circumstances. But I would also say, from close personal experience, that there are at least twenty government cases every year which are fully worthy of review by an appellate court with national jurisdiction and that the government and the legal system suffer from the rationing we now impose, and from the lack of authoritative decisions which would come from such review and would serve as a guide to government agencies and the lower courts.

D. *"Appeal by Right" Has Virtually Disappeared*

Another way in which justice has been rationed under current conditions is found in the virtual disappearance of the distinction between certiorari and appeal. Congress has clearly provided that there shall be a class of cases in which there is appeal as of right.³⁸

³⁶ And this affects the Court's statistics.

³⁷ *Hearings on H.R. 550 and H.R. 340 (Securities Exchange Act Amendments of 1973) Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 93d Cong., 1st Sess., ser. 93-50, pt. 1, at 272-96 (statement of Erwin N. Griswold, Solicitor General of the United States).

³⁸ Appeals from state courts are provided for by 28 U.S.C. §§ 1257(1), (2) (1970). Similarly, appeals from the Supreme Court of Puerto Rico are provided for by 28 U.S.C. §§ 1258(1), (2) (1970). Appeals from courts of appeals are provided for by 28 U.S.C. § 1254(2) (1970). There are other provisions authorizing appeals, including 28 U.S.C. § 1252 (1970), where a federal court has held an act of Congress unconstitutional; 28 U.S.C. § 1253

In other classes of cases, Congress has provided for discretionary review by certiorari. This was, for example, the situation in 1925, when "over 80 percent of the matters argued in open court, or about 250 cases a year" came to the Court on writ of error, now known as appeal.³⁹ At that time, "[t]he remaining 20 percent of the argued matters consisted of about 60 to 70 cases in which petitions for certiorari had been granted, out of about 500 such petitions annually directed to this discretionary jurisdiction of the Court."⁴⁰ It will be noted that in 1925 the Court heard many cases on appeal, and also granted from twelve to fourteen percent of the relatively small number of petitions for certiorari before it.

Now, all this has changed. With few exceptions, appeals are treated as discretionary, and are routinely dismissed "for want of a substantial federal question." When this phrase was developed, it had a real meaning. It expressed a judgment by the Court that the question sought to be raised by the appeal was not arguable, because it had already been disposed of by decisions of the Court. In the time of Chief Justice Hughes, such orders also included either a line or two of reasons,⁴¹ or the citations of cases which showed the basis for the Court's conclusion that the issue was not arguable.⁴²

Very slowly, over a period of many years, the Court's approach to appeals has completely changed, due, of course, to the pressure brought to bear on the Court by the great number of cases filed. In most cases, there is no longer any practical distinction between appeal and certiorari, despite the fact that Congress, which has power to regulate the jurisdiction of the Supreme Court, has given the Court no discretion with respect to appeals.⁴³ Ap-

(1970), providing for appeals from three-judge courts; 18 U.S.C. § 3731 (1970), providing for appeals by the United States in criminal cases; and 49 U.S.C. § 45 (1970), providing for appeals from district court decisions in antitrust cases.

³⁹ See R. STERN & E. GRESSMAN, *SUPREME COURT PRACTICE* 147 (4th ed. 1969).

⁴⁰ *Id.* The Stern and Gressman figures are drawn from Frankfurter & Landis, *The Supreme Court Under the Judiciary Act of 1925*, 42 HARV. L. REV. 1, 10, 13 (1928). See also Burton, *Judging Is Also Administration*, 33 A.B.A.J. 1099, 1102 (1947).

⁴¹ See, e.g., *Healy v. Ratta*, 289 U.S. 701 (1933).

⁴² See, e.g., *Antonoplos v. John Eichleay, Jr., Co.*, 289 U.S. 703 (1933); *Miller v. State Bd. of Dental Examiners*, 287 U.S. 563 (1932).

⁴³ In *Dillenburg v. Kramer*, 469 F.2d 1222, 1225 (9th Cir. 1972), the court of appeals said: "A summary affirmance without opinion in a case within the Supreme Court's obligatory appellate jurisdiction has very little precedential significance." In *National Liberty Life Ins. Co. v. Wisconsin*, 62 Wis. 2d 347, 364, 215 N.W.2d 26, 35 (1974), the court said that a dismissal of an appeal by the Supreme Court "is considered a decision on the merits although in practical terms it may be of no greater precedential value than a denial of certiorari."

peals are now subject to "the rule of four," the same as petitions for certiorari—that is, at least four Justices must vote to take the case before it will be heard. Many appeals are disposed of on the merits summarily, without briefing or oral argument. Even the statistics prepared by the Office of the Clerk of the Supreme Court no longer draw a distinction between cases brought to the Court by appeal or by certiorari. All cases on the docket are listed simply as "Cases granted review," or as "Cases denied, dismissed, or withdrawn."⁴⁴ There is also a category of "Cases summarily dismissed" of which there were 147 during the term just closed.⁴⁵

This amounts to a further rationing of justice. Even where Congress has provided that there shall be an appeal as of right (which was the basis of the problem in 1925), the Court has taken it upon itself to rewrite the statute and to treat most appeals as the equivalent of petitions for certiorari, subject only to discretionary review. As indicated, the reasons for this are obvious, and are important. The Court would be in an impossible situation if it accepted full compulsory review in all cases where appeal is provided by statute. The Court has acted in self-defense, even though it has essentially ignored the statutory provisions in doing so. One can have great sympathy for the Court. Yet, it is clear that this is another, and important, way in which the Court has rationed justice as part of the process of keeping itself from being overworked.

IV

THE CASES WHICH ARE NOT REVIEWED

What is the consequence of this rationing? What cases are not heard that should have been heard? That is a very difficult question to answer, for no one is in a position to make the judgment, on a discretionary basis, that has been allocated to, or undertaken by, the Supreme Court of the United States. Even if one were to undertake the task, it would be an enormous enterprise, involving the review of the papers in all of the 3,514 cases in which the Court did not grant review at the 1973 Term. It may well be that many of these would be easily disposed of as unworthy of review on any basis, but others would present great difficulties. And of course no one would agree on the exact cases in which review would have

⁴⁴ See 43 U.S.L.W. 3085 (1974).

⁴⁵ *Id.*

been granted if the Court could hear on the merits twice as many cases as it hears now.

An enterprise of this sort was undertaken by Professor Fowler Harper and associates more than twenty years ago.⁴⁶ Even though the Court then had less than a third as many cases on its docket as it has now, Professor Harper found much to criticize: many cases in which review was denied though it would seem that the case met the Court's stated tests for the granting of certiorari. If that was the case then, it would seem clear that the situation cannot be any better now when three times as many cases are taken to the Supreme Court, including three times as many cases on the "paid" or appellate docket. The loss is not merely in the arbitrary or haphazard nature of the justice which results, including almost complete denial of appellate review in various aspects of the law, but it is also a very important institutional loss through the lack of a substantial number of authoritative appellate decisions for the guidance and control of the lower courts, thus leaving the courts of appeals, in particular, rather at large in many fields.

I have not undertaken such a case-by-case review of the petitions and jurisdictional statements where the Court did not grant review. First, I have not had available either the facilities⁴⁷ or the time.⁴⁸ Second, even if the task were accomplished, the results would be highly criticized on one ground or another, so that the effort would probably be ineffective, as Professor Harper's work was. Finally, such a laborious sifting of many cases is not necessary, because it is obvious that if the Court could hear on the merits twice as many cases as it now does, the cases are there for selection. The result would be a diminution of the present system of rationing of justice between parties, and an increase in the number of nationally binding appellate decisions for the guidance and control of the lower courts and of counsel in their basically important work of advising clients. Counsel are so accustomed to the fact that "no one knows the answer" in many areas that they accept it as inevitable, and are hardened to it. There can only be acceptance when no one sees a way out. But it is a fact, I believe, that our

⁴⁶ Harper & Rosenthal, *What the Supreme Court Did Not Do in the 1949 Term—An Appraisal of Certiorari*, 99 U. PA. L. REV. 293 (1950); Harper & Etherington, *What the Supreme Court Did Not Do During the 1950 Term*, 100 U. PA. L. REV. 354 (1951); Harper & Pratt, *What the Supreme Court Did Not Do During the 1951 Term*, 101 U. PA. L. REV. 439 (1953).

⁴⁷ Undertaking this task could be done only with ready access to all of the papers, and this could be done only in the Clerk's office.

⁴⁸ I would estimate the amount of time involved to be at least 400 hours of rather dreary work. Even that would allow an average of only seven minutes per case.

appellate system is not working well, and one of the basic causes is that appellate review by the Supreme Court has become so sharply rationed.

One recent study has moved in the direction I have in mind.⁴⁹ This is the article by Professors Gerhard Casper and Richard A. Posner entitled *A Study of the Supreme Court's Caseload*. The authors have conducted a detailed review, based on digest paragraphs in the *United States Law Week*, of all the "paid" cases filed in the Supreme Court at the 1971 and 1972 Terms, ending in June 1973. This shows, as would be expected, a sharp change in the kinds of cases in which the Court's review is sought. They use the 1957 and 1958 Terms as a base for comparison. They show that there are many areas in which there has not been an increase in the cases filed. These include taxation, Power Commission, Trade Commission and Interstate Commerce Commission, immigration, Department of Justice antitrust, eminent domain, tort claims, diversity cases, and civil actions from state courts, among others. Filings in this overall group have decreased from a total of 746, for the 1957 and 1958 Terms combined, to a total of 629 for the 1971 and 1972 Terms combined.⁵⁰ But then there is another group of cases, all civil cases on the appellate or "paid" docket, where the aggregate filings increased from 198 at the 1957 and 1958 Terms combined, to 880 at the 1971 and 1972 Terms combined.⁵¹ The cases in this group include military, National Labor Relations Board, Civil Rights Acts (which increased from 8 to 111), education (which increased from 0 to 40), reapportionment (which increased from 0 to 29), elections (which increased from 2 to 63), private antitrust, private SEC, and government personnel.

These data support what I have said about a great shift in the nature of the cases now coming before the Supreme Court, and the extent to which the Court has become not only a constitutional law court but also a civil rights tribunal. Though they shed much light on the nature of the cases which come to the Court (affected in very large measure, I suspect, by the small prospect that anything other than a civil rights case will obtain review), they give no light at all on the nature of the cases which are accepted for review, and particularly on the number and kinds of cases which are not accepted for review. I do not criticize Professors Casper and

⁴⁹ Casper & Posner, *A Study of the Supreme Court's Caseload*, 3 J. LEGAL STUDIES 339 (1974).

⁵⁰ *Id.* at 356.

⁵¹ *Id.* at 357.

Posner for this, for the task is a forbidding one; and I note with pleasure at the close of their article that their research is continuing, and that they feel there is a possibility that they may be able to develop some materials along the lines I have suggested.⁵² In the meantime, the work they have done is important, and is, I think, entirely consistent with the thesis that I am advancing here, namely that—because we have not been able to avoid it—justice is too much rationed in this country at the highest appellate level. To put the same point another way: we are, I think, suffering materially, both in terms of individual justice and in terms of the institutional effectiveness of an appellate system, from a serious lack of nationally binding appellate capacity in this country.

V

A PROPOSAL FOR A NATIONAL COURT OF THE
UNITED STATES

If this view is sound, or even if it is worthy of serious consideration, what can be done about it? It is little use to play Cassandra. If there is a problem, is there any solution which has enough merit to make it worthy of consideration?

Many good people have worked hard and long on this question, starting with the Freund study group, which proposed what came to be called a "mini court," with responsibility to screen the cases which are heard by the Court on the merits, thus relieving the Court from the arduous task of reviewing thousands of applications for review.⁵³ This would preserve its time and energy for the presumably more important tasks of judging on the merits, and opinion writing.

When the Freund proposal was attacked, others advanced the suggestion of a nationwide division of the United States Court of Appeals, with its jurisdiction conferred by the Supreme Court by rule within boundaries set by Congress.⁵⁴ Further thought has led me to the conclusion that this proposal, and my variation of it,⁵⁵ have serious defects or problems. Two of these in particular may

⁵² *Id.* at 374-75.

⁵³ FREUND REPORT 18-24.

⁵⁴ A proposal along these lines was made by the Advisory Council on Appellate Justice, and was approved by the House of Delegates of the American Bar Association. See Hufstедler, *supra* note 7. I espoused such a proposal, with some variations, in the David C. Baum Memorial Lecture at the University of Illinois Law School. See Griswold, *supra* note 7, at 628-32.

⁵⁵ See Griswold, *supra* note 7, at 628-32.

be mentioned: First, it is very hard to formulate the precise categories of cases which will be heard by the National Panel, and to develop a method for selection. Second, the selection of judges for the National Panel is a matter of great difficulty. Various suggestions were made for the allocation of judges of the courts of appeals for terms,⁵⁶ but it was not clear that all judges would welcome such assignments. And many of us felt that a bench made up of rotating judges would lack the permanence and stability which it was highly desirable to have on such a court. The objective is not merely to decide cases, but to provide precedents which will be a reliable guide for lower courts and for counsel.

The question of judicial selection was made especially difficult at the time because of a generally prevailing hesitation under then existing circumstances to have this done with Presidential participation. Now times have changed, and this aspect of the difficulty may have eased, though all would agree that selection of such a court should not be dominated or controlled by a single administration or party.

Is there a better plan? I think there is, and I will try to outline it briefly here.

I propose the establishment of a new tribunal, to be known as the National Court of the United States. It will have status above the courts of appeals, which will remain regional courts as they are now, and below the Supreme Court of the United States, which will remain the one Supreme Court as provided in the Constitution.

All petitions for certiorari and all appeals will be filed in the Supreme Court of the United States, just as they are now, and all will be considered and passed upon by the Supreme Court, just as they are now. The Supreme Court, and only the Supreme Court, will decide which cases will be heard on the merits. We are told that this task is not unduly time-consuming, and it would seem that it can be continued, with the Supreme Court working out the way in which it will be handled, as it does now.

Now we come to the first change that I propose. This is that the Supreme Court will grant review in about twice as many cases as it does now, and will at the same time assign half of the cases granted to the National Court of the United States for decision. Presumably this would be about 150 to 160 cases; and the Supreme Court would retain a similar number for its own decision. This would double the national appellate capacity of the United States, without increasing the burden on the Supreme Court. Presumably, the

⁵⁶ Cf. Hufstедler, *supra* note 7, at 548.

most important cases would be retained by the Supreme Court for decision by it on the merits, and the next tier of cases, still important, though of lesser importance, would be assigned to the National Court. The cases going to the National Court would all be cases which do not receive review now.

This plan has the merit that it does not interfere in any way with the Supreme Court. That Court would still decide everything that it does now. It also has the merit that it makes it unnecessary to try to frame jurisdictional lines as to what cases would be heard by one court and what cases by the other. The allocation would be made by the Supreme Court in its discretion—just as it now denies review entirely in this second tier of cases, again in its discretion.

The cases which would go to the National Court of the United States would presumably include most tax cases, many patent and antitrust cases, some diversity cases, NLRB cases, and some Power Commission and Trade Commission cases, among others. Most constitutional cases would continue to be heard directly by the Supreme Court, but some of these, particularly cases involving an application of already established constitutional principles, would be assigned to the National Court. However, this need not be spelled out, for it would be done by the Supreme Court in its discretion. The guiding principle would simply be: The 150 most important cases, more or less, will stay with the Supreme Court for decision on the merits, and the next most important 150 cases, more or less, will be allocated to the National Court.⁵⁷

The decisions of the National Court will be subject to review by the Supreme Court. But it can be expected that very few of them will be so reviewed. The decisions of the National Court will be nationally binding, so there will be no question of conflict of decision. In the tax field, for example, they will give the certainty which is now so often lacking. The cases will, by hypothesis, be of secondary importance, so they would rarely merit being reviewed in the first tier of Supreme Court business.

Review of the decisions of the National Court by the Supreme Court could be by certiorari, in which case there would be, to that extent, a fourth tier of review. But this could be done by filing in the Supreme Court the briefs used in the National Court, together with the National Court's opinion, on a shortened time schedule. It

⁵⁷ I would eliminate the formal distinction between appeal and certiorari in most cases. But the situation should be regularized. We should not continue to have a system where there are many appeals "as of right," but where administration is, for the most part, on a discretionary basis. See note 38 *supra*.

is very likely that only a fraction of the cases decided by the National Court would be brought before the Supreme Court. Or review by the Supreme Court could be simply by having a rule that all opinions of the National Court are filed with the Supreme Court—the Supreme Court could call for further argument on review if it wished—and decisions of the National Court would become final after a stated period unless the Supreme Court had entered an order granting review, or extending the time within which it might consider granting review (for use over the summer recess, for example).

If a National Court is established, it might have five or seven judges. I think I would prefer seven, so that it could handle about as many cases on the merits as the Supreme Court now does, without having to consider applications for review which would remain the task of the Supreme Court. I think, too, that the judges should be nominated by the President and confirmed by the Senate, holding tenure on the same basis as the Justices of the Supreme Court. (They might be known as judges rather than as justices, to distinguish them from the Supreme Court.) I do not like the idea of rotating judges. We have too many roving judges today as it is. It should be a great distinction to be a judge of the National Court, and many judges of the present courts of appeals should be eligible for consideration. But the judges, when appointed, should be appointed to the bench of the National Court and nowhere else. They should not sit elsewhere, except possibly after retirement. The National panel should have a continuity and stability like that of the Supreme Court. Of course it will change from time to time, but those changes should be rare and developments should be slow, just as they are now in the Supreme Court.

There is a problem, of course, in having one President name the entire original bench. But the most difficult aspect of that problem is eliminated by recent changes in the presidency. And the requirement of confirmation by the Senate should, under present circumstances, assure nominees, or at least confirmees, of high quality, and divergent background and view. If some of the original appointments were of relatively senior judges already on the bench of the courts of appeals, vacancies would be occurring from time to time. To that extent, the continuity and stability which I regard as important might be lost; but this might be more than compensated for by the caliber of such appointments; and the problem would be a transient one anyway.

This plan meets, I think, all of the considerations or requirements which were stated earlier in this lecture:

1. It would not interfere with the power of the Supreme Court to control its own docket.⁵⁸
2. There would not be, for cases generally, four tiers of courts (although a relatively small number might be involved in four tiers), and it would not prolong the appellate process at all for most cases (those in which review was denied, and those which were heard on the merits by the Supreme Court itself). The additional time required would be slight in the small number of cases decided by the National Court which might be heard thereafter by the Supreme Court.
3. There would not be a specialized tribunal.⁵⁹
4. There would not be discrimination, either in fact or in appearance, against classes of litigation. All discriminations would be made by the Supreme Court, and would be fewer than now exist, since, under the plan, a considerable number of cases would be heard on the merits which are now denied national appellate review entirely.
5. The federal judiciary would not be unduly expanded.
6. The method of selecting the judges would not be unduly subject to domination if the Senate carefully performs its constitutional duty of advice and consent.
7. The court would be one on which able judges are willing to sit.

ENVOI

Many words and much thought have been expended on this subject. One is perhaps unduly bold to offer further discussion. But the problem continues and is important. The fact is, I think, that we have been unduly rationing appellate justice in this country, and it is an obligation of the bar to help the Congress to find a

⁵⁸ Thus the concern expressed by Chief Justice Warren in *Let's Not Weaken the Supreme Court*, 60 A.B.A.J. 677 (1974), and by others, would be met.

⁵⁹ A good many years ago I wrote an article proposing that there should be a special court to hear appeals in tax cases. Griswold, *The Need for a Court of Tax Appeals*, 57 HARV. L. REV. 1153 (1944). The suggestion met strong opposition because, among other things, it would establish a specialized tribunal in tax cases. The present proposal would appear to meet all the objectives of my plan of 30 years ago, but the tribunal suggested would not in any sense be a specialized court. It would be available to decide many tax cases which are now decided by a national appellate court, but it would also decide cases in many other fields, indeed, in any field, as the cases were assigned to it by the Supreme Court.

better way. My effort has been to shift the discussion from the burden on the Supreme Court—which I believe is real, but which has proven to be controversial—and to try to focus attention on what I now think is the heart of the problem, namely the fact that we lack adequate appellate capacity in this country on a national level, and that, as a consequence, we have been unduly rationing justice.

On this problem, it is not what the Supreme Court does which is important, but what it cannot do. There is, I think, a ready way to double the national appellate capacity of the country, without in any way impairing the work or function of the Supreme Court. The plan I suggest is simple, understandable, draftable, and capable of administration, without jurisdictional lines, or other elements which would engender purely procedural litigation. I hope that my effort to focus on the problem of our present highly restricted appellate capacity is consistent with Judge Hand's admonition, and that it is worthy of consideration.