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ON THE REFORM OF APPELLATE PROCEDURES OF THE UNITED STATES SUPREME COURT

BORRIS M. KOMAR*

THIS CONTRIBUTION is offered solely for the purpose of discussion, as it is appreciated that the problems here presented may be capable of other solutions. It is hoped that the Congress, the bench and the bar will acknowledge the presence of the problems here indicated, the fact that the principle of true justice requires their solution, and that the existence of the problems unsolved is a serious defect in the present federal judicial system.

This article will deal solely with the appellate jurisdiction of the Supreme Court in general litigation in the federal courts. Nothing here discussed has any reference to the original jurisdiction of that court or to jurisdiction conferred by special statutes in special situations.

The Constitution of the United States defines the general appellate jurisdiction of the Supreme Court thus:

In all the other cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, *and under such Regulations as the Congress shall make.*¹

The expression, "in all the other Cases before mentioned," refers to Clause I of Section 2, Article III, which reads as follows:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; —to all Cases affecting Ambassadors, other public Ministers and Consuls;—& to all Cases of admiralty and maritime Jurisdiction; —to Controversies to which the United States shall be a Party; —to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States;

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¹ U.S. Const. art. III, § 2, cl. 2 (Emphasis added).

—between Citizens of the same State claiming Lands under Grants of different States, and between a State or the Citizens thereof, and foreign States, Citizens or Subjects.

The founders did not intimate that only some individual litigants should be entitled to the benefit of judicial determination by one supreme tribunal of last resort under the authority of the United States.

Thus, for example, Alexander Hamilton said:

Laws are a dead letter without courts to expound and define their true meaning and operation. The treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import, *as far as respects individuals*, must, like all other laws, be ascertained by judicial determinations. To produce uniformity in these determinations, they ought to be submitted, in the last resort, to one supreme tribunal. And this tribunal ought to be instituted under the same authority which forms the treaties themselves. These ingredients are both indispensible.²

The same idea was expressed in *Martin v. Hunter*³ where the Supreme Court said:

This leads us to the consideration of the great question as to the nature and extent of the appellate jurisdiction of the United States. We have already seen that appellate jurisdiction is given by the Constitution to the Supreme Court in all cases where it has not original jurisdiction, subject, however, to such exceptions and regulations as Congress may prescribe. It is, therefore, capable of embracing *every case* enumerated in the Constitution.⁴

The appellate jurisdiction of the Supreme Court, prior to 1891 when the Circuit Courts of Appeal were created, was well described by the Court in *Forsyth v. Hammond*.⁵

Up to the time of passage of the Act of 1891, creating the Circuit Courts of Appeal the theory of federal jurisprudence had been a single appellate court, to wit, the Supreme Court of the United States, by which a final review of all cases of which the lower Federal Courts had jurisdiction was to be made. It is true there existed certain limitations upon the right of appeal and review, based on the amount in controversy and other considerations; but such limitations did not recognize or provide for the existence of another appellate court, *and did not conflict with the thought that this court was to be the single tribunal for reviewing all cases and questions of a Federal nature*.⁶

² Hamilton, The Federalist XXII, p. 143 (Wesleyan University Press 1961) (Emphasis added).

³ 1 Wheat. 304, 4 L. Ed. 97 (1816).

⁴ *Id.* at 337, 4 L. Ed. at 105 (Emphasis added).

⁵ 166 U.S. 506, 41 L. Ed. 1095 (1897).

⁶ *Id.* at 511-2, 41 L. Ed. at 1097-8 (Emphasis added).

The Act of 1891, besides conferring on the Supreme Court the power to review by certiorari "any . . . case as is hereinbefore made final in the Circuit Court of Appeals,"⁷ also gave litigants the absolute right to appeal to the Supreme Court in the following instances either by petition for an appeal or by a writ of error.

In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision.

From the final sentences and decrees in prize cases.

In cases of conviction of a capital or otherwise infamous crime.

In any case that involves the construction or application of the Constitution of the United States.

In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.

In any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States.⁸

It should be noted that the right of appeal applied to all litigants⁹ in the federal courts irrespective of the fact of the public importance of their litigation.

Until 1925, when this section was abolished,¹⁰ the number of cases annually reviewed by the Supreme Court during the preceding ten years was as follows:

| | |
|------|--------------------|
| 1916 | 1169 |
| 1917 | 1114 |
| 1918 | 1077 |
| 1919 | 988 |
| 1920 | 941 |
| 1921 | 1012 |
| 1922 | 1128 |
| 1923 | 1093 |
| 1924 | 1291 |
| 1925 | 1282 ¹¹ |

By the Act of February 13, 1925,¹² Congress abolished all appeals as of right to the Supreme Court except for appeals from

⁷ 26 Stat. 826, c. 517.

⁸ *Id.* at § 5.

⁹ The term "private litigants" will hereafter be used to refer to those litigants whose cases involve issues that do not have a "public interest" within the meaning of that term as fixed by the decisions of the Supreme Court of the United States.

¹⁰ Act of Feb. 13, 1925, c. 229, 43 Stat. 938.

¹¹ Frankfurter & Landis, *The Business of the Supreme Court of the United States—A Study in the Federal Judicial System*, 40 Harv. L. Rev. 835, n. 5 (1927).

¹² *Supra* note 10.

decisions invalidating acts of Congress¹³ and direct appeals from decisions of three judge courts.¹⁴ Other appeals were allowed only in the discretion of the Court on petitions for writs of certiorari.

It is interesting to note that in all the discussion of this Act in Congress consideration was given to the heavy, delayed docket of appeals in the Supreme Court and the overburdened tasks of the justices thereof.¹⁵ The duty of the Court to supply judicial service for the country's economic life, increasing by leaps and bounds, and its growing population, in search for justice in the application of the existing laws, was not even hinted at. The achievement of justice where only private litigants were concerned was impliedly rejected.

The Act of February 13, 1925 was supplemented by Rule 38 of the Supreme Court, which, in so far as the federal courts were concerned, provided:

5. A review or writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are *special and important reasons therefor*. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons which will be considered:

b. Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this Court; or has decided a federal question in a way in conflict with applicable decisions of this Court; or has so far departed from the accepted and usual course of the judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.¹⁶

The Rule is misleading in its language. The words "special and important" do not necessarily mean "of general public interest."¹⁷ However, while issues in a litigation between private

¹³ Now codified in 28 U.S.C.A. § 1252 (1966).

¹⁴ Now codified in 28 U.S.C.A. § 1253 (1966).

¹⁵ Frankfurter, *The Business of the Supreme Court of the United States—A Study in the Federal Judicial System*, 39 Harv. L. Rev. 53, 325, 587, 1046 (1925-26); Frankfurter & Landis, *The Business of the Supreme Court of the United States—A Study in the Federal Judicial System*, 40 Harv. L. Rev. 431, 834, 1110 (1926-27).

¹⁶ Originally Rule 38 was codified in 28 U.S.C.A. as U.S. Sup. Ct. Rule 35. It is now codified in 28 U.S.C.A. as U.S. Sup. Ct. Rule 38 (1966).

¹⁷ According to Webster, Third New International Dictionary (unabr. 1964), these words could have the following meanings:

litigants may be of a special and important nature, it is the practice of the Supreme Court to deny petitions for writs of certiorari when such issues, in the opinion of the Court, do not present matters of general public interest.

The practice was originated even before the Act of February 13, 1925. Mr. Justice Brewer said in 1906:

In this case there is no sufficient ground for a writ of certiorari. The application comes within none of the conditions therefor declared in the decisions of this court. However important the case may be to the applicant, the question involved is not one of gravity and general importance.¹⁸

The Supreme Court again unanimously repeated this reasoning in *Layne & Bowler Corp. v. Western Well Works, Inc.*¹⁹ and later in *Rice v. Sioux City Cemetery*.²⁰ In *Layne* the Court stated through Chief Justice Taft:

If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles, the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.²¹

The rule today is still more rigorous as to private litigants in federal courts. Said Mr. Justice Frankfurter in *Rice v. Sioux City Cemetery*:

A federal question raised by a petitioner (in certiorari proceeding) may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But

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- | | |
|-----------|---|
| Special | "3a: relating to a single thing or class of things: having an individual character or trait. . . ." (at p. 2186). |
| Important | "1a: marked by or possessing weight or consequence: valuable in content or relationship. . . ." (at p. 1135). |
| General | "2: involving or belonging to every member of a class, kind or group. . . ." (at p. 944). |
| Public | "1a: of, relating to, or affecting the people as an organized community. . . ." (at p. 1836). |
| Interest | "2a: the state of being concerned or affected esp. with respect to advantage or well being. . . ." (at p. 1178). |

Therefore, the phrase "special and important" is not necessarily synonymous with the phrase "general public interest" and could refer to cases where only private litigants are concerned.

¹⁸ *Fields v. United States*, 205 U.S. 292, 296, 51 L. Ed. 807, 808 (1906).

¹⁹ 261 U.S. 387, 67 L. Ed. 712 (1923).

²⁰ 349 U.S. 70, 99 L. Ed. 897 (1955).

²¹ *Supra* note 19, at 393, 67 L. Ed. at 714.

this Court does not sit to satisfy a scholarly interest in such issues. *Nor does it sit for the benefit of the particular litigants.*²²

In other words, cases of private or particular litigants in the federal courts, even if they involve the questions enumerated in Rule 38 of the Supreme Court, are excluded from the operation of the Act of Feb. 13, 1925, if in the opinion of the Supreme Court they do not raise issues of general public interest. The Supreme Court will not even exercise its powers of supervision over lower federal courts, in such excluded cases, where the lower court's decision was wrong. Said Mr. Justice Brennan: "Very often I have voted to deny an application (for a writ of certiorari) when I thought that the (lower) court's result was very wrong."²³ Presumably, other justices voted and continue to vote simply because the litigation was and is between private parties. Thus, the rule permits only a single class of cases to come before the Supreme Court. However, ". . . the Constitution has not singled out any class (of cases) on which Congress are bound to act in preference to others."²⁴ If the Congress cannot single out a class of cases for special treatment, on what constitutional basis can the Supreme Court?

The question can be stated: "Is it just to deny this opportunity to private litigants in the federal courts just because in the opinion of the Supreme Court the issues in their cases may not be of sufficient general public interest?"

It is submitted that the main purpose of any judicial system should be to seek justice in every case that comes up for disposition by its courts. By "justice" is meant correct application of the existing law to the facts in issue in the case and not abstract or ethical justice. It is believed that this primary duty of the courts cannot be and should not be subjected to the limitation of the general public interest rule.

It is not the duty of a private litigant to spend funds and efforts on litigation having general public interest. The duties of

²² *Supra* note 20, at 74, 99 L. Ed. at 901.

²³ Brennan, *Supreme Court Review of State Court Decisions*, 38 Mich. St. B. J. No. 11, 14, 18 (1959).

²⁴ *Martin v. Hunter*, 1 Wheat. 304, 320, 4 L. Ed. 97, 103 (1816).

a private litigant are fully performed when he conducts litigation solely for his private interest.

Is it just to deny an appeal to a private litigant when the lower court may have departed from the accepted and usual course of judicial proceedings merely because the issues in his case do not involve questions of general public interest? Is it just in the case of a private litigant to let stand a decision of a circuit court of appeals in conflict with a decision or decisions of another or other courts of appeals on the same matter, merely because the questions of general public interest are absent? Is it just to foreclose a review of an erroneous decision on an important question of state or territorial law, merely because said decision was made in a litigation between private parties? Is it just to leave unsettled an important question of federal law just because the decision of that question will affect only private litigants in a federal court and is unlikely to arise in general litigation at a later time? Is it just to subject private parties in a federal court to any decision which is in conflict with applicable decisions of the Supreme Court merely because its wrongfulness affects one particular case and not the general public?

These are important questions in view of the small percentage of writs for certiorari that are granted. The rejection en masse of petitions of private litigants for writs of certiorari may account for the small percentage of the writs granted as compared with the petitions filed:

| | |
|------|---------------------|
| 1953 | 7.9% |
| 1954 | 10.5% |
| 1955 | 10.2% |
| 1956 | 12.4% |
| 1957 | 9.8% |
| 1958 | 8.9% |
| 1959 | 11.7% |
| 1960 | 7.5% |
| 1961 | 8.5% |
| 1962 | 11.0% |
| 1963 | 9.7% |
| 1964 | 12.7% |
| 1965 | 15.2% ²⁵ |

²⁵ Douglas, *The Supreme Court and Its Case Load*, 45 Cornell L.Q. 401, 409 (1960). Note annual reviews of the work of the United States Supreme Court in the Harvard Law Review.

Nevertheless, the appellate docket of the Supreme Court has remained at 1172 cases in 1965 as compared with 1200 cases in 1915-25,²⁶ despite the enormous increase in business activity and in the population of this country.

This author does not believe that these statistics are in conformity with the sole purpose for the existence of the courts—to serve and aid the people in their quest for justice. Congress, in passing the Act of Feb. 13, 1925, assumed the inviolability of the present structure of the Supreme Court and sought to relieve the overburdened justices in complete disregard of the interests of the people of the United States as represented by the litigants in the federal courts. A review of about fifteen percent of the thousands of petitions for writs of certiorari filed annually in the Supreme Court does not answer the chief appellate needs of the present generation of litigants in the federal courts.

Are there any means whereby the appellate jurisdiction of the Supreme Court may be broadened without overburdening its judicial and administrative machinery?

This author has two suggestions.

It is recognized that the Constitution of the United States expressly provides for only *one* Supreme Court.²⁷ But in so far as the appellate jurisdiction of the Supreme Court is concerned, the Constitution expressly provides that it should be exercised by the Supreme Court “under such Regulations as the Congress shall make.”²⁸ This clause has been uniformly held to confer on the Congress wide powers to regulate not only the number of justices and the procedure of the Supreme Court, but also its jurisdiction in appellate practice. The clause was enacted “to enable Congress to regulate and restrain the appellate power, as the public interest might, from time to time require.”²⁹ Therefore, the appellate powers of the Supreme Court are given by the Constitution but are limited by the Judicial Act and other Acts passed by Congress.³⁰ In *Baltimore Contractors, Inc. v. Bondinger*,³¹ it was stated

²⁶ *Id.* at 409.

²⁷ U.S. Const. art. III, § 1.

²⁸ U.S. Const. art. III, § 2.

²⁹ *Martin v. Hunter*, 1 Wheat. 304, 4 L. Ed. 97 (1816).

³⁰ *Durousseau v. United States*, 6 Cranch 307, 3 L. Ed. 232 (1814).

³¹ 348 U.S. 176, 99 L. Ed. 233 (1955).

that "Congress is in a position to weigh the competing interests of the dockets of the trial and appellate courts, to consider the practicability of savings in time and expense, and to give proper weight to the effect on the litigants."³²

This author suggests the following as a possible solution. A new statute should be passed by Congress, enlarging the number of the Supreme Court Justices to seventeen, fixing the quorum of the Supreme Court for all and any of its official duties at five Justices and authorizing it to function either jointly or severally in one or more divisions designated by the Chief Justice. The Chief Justice should then designate three divisions of the Supreme Court and the Justices to preside in them for each term. The Chief Justice should also assign business to each division. For example: Division One—all cases of original jurisdiction and appellate cases of general public interest; Division Two—all cases of criminal law and all appeals involving administrative rulings of executive governmental bodies; and Division Three—all other appellate cases. Divisions Two and Three, either on their own motions or on the application of any party to an appeal, may transfer any appeal to Division One because of a finding of general public interest. The Chief Justice may also assign more than five Justices to hear cases of great national importance.

In this manner the Supreme Court would have almost twice the present manpower to deal with its dockets and to meet its responsibility to the tremendous rise of the country's business activity and its increase in population.

There still remains the further question of whether or not the present method of appeal by writ of certiorari should continue to be regulated by the discretion of the Supreme Court.

The Supreme Court, of course, should continue to exercise such discretion. However, it is urged that the class of cases in which litigants in the federal courts may appeal as a matter of right be increased. The right of appeal is a valuable and important right which should not depend entirely on an unknown manner of dispensation secretly administered.³³ The Supreme Court

³² *Id.* at 181, 99 L. Ed. at 238.

³³ ". . . [T]he objective standards governing the exercise of discretion may unwittingly be influenced by the subjective standards of the Justices."

should have the courage to admit that in certain instances an appeal to it should always be proper and desirable to assure a just result and provide a true administration of justice. Besides, the Supreme Court has many means at its disposal to keep its dockets down and undeserving appeals out, such as motions to dismiss for lack of jurisdiction, for absence of a federal question, for designating a ground unsupported by facts, for lack of merit as covered by prior decisions or on other grounds.³⁴

It is therefore proposed that appeals as of right be permitted by statute to litigants in the federal courts in all cases:

1. Where an issue is timely and duly raised as to the denial of any right protected by the Constitution of the United States;
2. Where the decision of the federal court below is arrived at by a divided court;³⁵
3. Where the federal court below has decided a federal question in a way in conflict with applicable decisions of the Supreme Court;
4. Where a federal court below has rendered a decision in conflict with the decisions of any other federal appellate court on the same matter;
5. Where the federal court below has departed from the accepted and usual course of judicial proceedings.³⁶

This first suggested solution may satisfactorily solve the problem presented in this article; however, an alternate solution such as follows may be just as feasible. All petitions for writs of certiorari to the Supreme Court could be abolished, except as to applications relating to the decisions of state courts. Instead, in the instances just recommended for granting an absolute right of appeal, a statute should grant a right to a rehearing in the federal court of appeals en banc within the circuit.³⁷ Within fifteen days after

tingly fail in numerous instances." Frankfurter & Landis, *The Business of the Supreme Court of the United States—A Study in the Federal Judicial System*, 40 Harv. L. Rev. 834, 866 (1927).

³⁴ See, e.g., Stern & Gressman, *Supreme Court Practice* (3d ed. 1962).

³⁵ Compare section 6 of the Act of April 29, 1802 entitled an "Act to Amend the Judicial System of the United States" in force for over half of a century.

³⁶ While appeals from the state courts are not considered here, the statute should add to the appeals as of right those where Supreme Court Rule 38 now permits applications for writs of certiorari.

³⁷ The Supreme Court now sometimes returns appealed cases to the courts of appeals for rehearing en banc. *United States ex rel. Robinson v. Johnaston*, 316 U.S. 649, 86 L. Ed. 478 (1942); *Civil Aeronautics Bd. v. American Air Transport, Inc.*, 344 U.S. 4, 97 L. Ed. 4 (1952). See 28 U.S.C.A. § 46(c) & (d).

The following quotation of the Court is also pertinent here:

Hence, insofar as possible, determinations en banc are indicated whenever it seems likely that a majority of all the active judges would reach a different result

filing a notice of rehearing to the court en banc either party to such notice may move in such appellate court for leave to appeal instead to the Supreme Court on the ground that the issues in the appeal are of general public interest. On the denial of such a motion by the federal appellate court, a similar application could be made in the Supreme Court. The denial of these applications would not affect the right to a rehearing in the appellate court en banc, but no appeal would lie in any case to the Supreme Court from the decision of the federal court of appeals en banc. The grant of the motion to appeal to the Supreme Court would terminate the right to a rehearing in the federal court of appeals en banc.

In this manner, the Supreme Court would be relieved of the consideration of the thousands of petitions for writs of certiorari now filed with it, and the litigants would have a statutory right of double appeal equally with those more fortunate of them who would be allowed an appeal to the Supreme Court. Of course, the grounds for appeals to the Supreme Court from the decisions of the highest state courts cannot apply to this appellate system. On the other hand, there may have to be an increase in the number of circuit appeal judges and provisions made for special sessions of the courts of appeals en banc.

The present method of allowing appeals to the Supreme Court only in cases involving, in its opinion, questions of general public interest results in only some litigants enjoying the benefit of two appeals granted to all litigants and the people of the United States by the Federal Constitution. Is it proper to grant or deny this important and valuable right to one class of litigants and deny it to another in the mere unfathomed discretion of the Court? Whatever solution may be finally found, it is hoped that interest has been aroused in proper congressional and judicial circles in the need for reform in the present appellate procedures of the Supreme Court.

than the panel assigned to hear a case or which has heard it. Hearings en banc may be a result also in cases extraordinary in scale—either because the amount involved is stupendous or because the issues are intricate enough to invoke the pooled wisdom of the circuit. *Western Pac. R.R. Corp. v. Western Pac. R.R. Co.*, 345 U.S. 247, 270, 97 L. Ed. 986, 997 (1953).

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