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The Business of the Supreme Court, O.T. 1982

Philip B. Kurland† and Dennis J. Hutchinson††

For at least the past decade, the workload of the Supreme Court of the United States has been too great to dispatch efficiently and thoughtfully within an annual term. Ten years ago, almost everyone except the Justices themselves agreed that there was a serious problem. (The Court, of course, was divided.) The only question was what, if anything, should be done about it. Today, the Court is virtually united, but only in recognizing the existence of a problem. At the conclusion of October Term 1981, seven Justices—speaking individually and extrajudicially—certified that they had too much to do each year to perform at a level that the profession and the country are entitled to expect. But the question remained, what to do?

Before any debate—if there is to be a serious debate and not simply an annual end-of-term amusement on the op-ed pages—focuses exclusively on remedies, it is necessary to look more carefully at the problems. The right answer depends on the right question. Too often, the Court and its critics define the problems in terms of numbers: too many petitions for certiorari,

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The Editors of the *Review* have kindly invited all members of the faculty to submit articles in celebration of the 50th anniversary of the independence of *The University of Chicago Law Review*. The kindness of the invitation lies particularly in the license it gives to write an editorial piece rather than an analytical one. An editorial, as we all know, is an expression of opinion that need not be justified by reasons. Most of our colleagues who have contributed to this issue have done better. Their academic standards are not so easily shucked. But we have taken our cue not from scholarly colleagues, but from the speech of Justices who are forbidden by their code to speak about substantive issues of law except through their judicial opinions. We do not pretend to express new ideas, better analysis of old ones, or even deconstruction of Supreme Court opinions. We offer only an “op-ed” piece, off the tops of our heads and by the seats of our pants. This essay, then, is rather like an amicus curiae brief in the Supreme Court of the United States: we are serious about what we say, but we cannot expect to be taken too seriously.

too few decisions on the merits, too many individual opinions, and too much time between the date of filing a case and the date of its disposition. These are important factors, but only because they are symptoms of deeper problems. The real trouble with the Court's workload is the effect on the quality of the Court's work product. The Court's response to a greater workload has been to hire more staff and to have its staff produce more, and longer, opinions. Unfortunately, the opinions inform less and less, adding to confusion at the bar and in the lower courts and, ironically, breeding yet more litigation. Along the way, the authority of the Court has eroded as the authoritativeness of its opinions has diminished.

The declining authority of the Court's output is not solely a function of bureaucratization. Part of the reason the Court is talking so much, both on and off the bench, is that it is adrift—not only ideologically, but also with respect to its proper role. The Court cannot at once be both a court of appeals and errors and a court of ultimate constitutional interpretation. As long as the Court tries to be the former, it will surely lack the time and perspective to be the latter.

I. ACROSS HISTORY ON HORSEBACK

A. "The Past is Prologue"

Almost from the beginning of its history, the Supreme Court has been vexed by a workload that has threatened its capacity to perform its functions well. There have always been disputes as to whether judges are overworked, for there are no quantitative standards, much less qualitative ones, by which to measure the judicial product. Measurement has tended to be subjective rather than objective. At the founding, controversy raged over the question whether Supreme Court Justices could assume the burden of riding circuit as well as sitting en banc on the highest court of the land. Even when Supreme Court dockets were sparse, circuit riding was a chore, a danger to life and limb if not a challenge to intellectual capacity. When the Court came to have more on its own plate than could readily be consumed, it abandoned circuit-riding duties without a nod to congressional hegemony over judicial duties.¹

Even after the Judges' Bill of 1925²—the most extensive limitation on the right of access to the Supreme Court since its crea-

¹ F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 25 (1927).

² Act of Feb. 13, 1925, 43 Stat. 936 (repealed in part, codified in part in scattered sections of 28 U.S.C. (1976)).

tion—sought to relieve the Justices of most of their compulsory appellate jurisdiction by giving them discretion to choose which cases they would hear,³ the controversy about too much business has surfaced frequently. The cancer-like growth of certiorari business has put the Court in the position of the Sorcerer's Apprentice: petitions for certiorari come in an ever growing stream. The Justices won't close the valve; Congress hasn't tried.

When Franklin Roosevelt sought to cut back on the Supreme Court's power to interfere with the New Deal's social and economic legislation, he used the patently false excuse of excessive business. The Court itself, through a letter from Chief Justice Hughes joined by Justices Van Devanter and Brandeis, met the attack in terms of its capacity to perform the business with which it was charged.⁴ In essence, these Justices said that the Court was current with its business and the proposed additional judges would make it more, rather than less, difficult to perform its chores. By the measures used by Hughes, Van Devanter, and Brandeis, the Court has continued to be current in its business. At least down to the 1982 Term, it has carried over no cases ready for decision. ("Ready for decision" means that briefing is completed and oral arguments have been heard; it does not mean that all cases in which certiorari has been granted have been disposed of. This backlog has, indeed, been increasing.)

But early in the life of the Judges' Bill it became apparent that the growth of certiorari business would soon enervate the Court's capacity to afford ample attention to its function of providing judgments supported by reasons.⁵ And by 1959, the Court's certiorari business was far more extensive than anything contemplated by the 1925 law. Professor Henry Hart, in *The Time Chart of the Justices*,⁶ demonstrated that the Justices had little or no time to think about what they were doing. Judge Thurman Arnold argued, in response, on the basis of his "realistic jurisprudence" and his judicial experience, that judges didn't need time to think because judicial responses to arguments were visceral rather than rational.⁷ By way of rejoinder, Dean Erwin Griswold supported the possibility that rational argument could, indeed, change minds; it

³ F. FRANKFURTER & J. LANDIS, *supra* note 1, at 260-73.

⁴ See L. BAKER, *BACK TO BACK* 157-61 (1967).

⁵ F. FRANKFURTER & J. LANDIS, *supra* note 1, at 287.

⁶ Hart, *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959).

⁷ Arnold, *Professor Hart's Theology*, 73 HARV. L. REV. 1298 (1960).

had even happened to him.⁸ Unfortunately, this controversy, like so many before and since, was regarded as a conflict between the benighted disciples of Frankfurter and the enlightened followers of Douglas. The chief of the enlightened "liberals" entered the fray directly. In 1960, Douglas made it clear that the Court was, if anything, underworked.⁹ The best evidence on this score was his own example of dispatching his judicial work quickly and without much effort while carrying on all sorts of other activities at the same time.

The problem of an underworked Court cannot be so easily disposed of by rhetorical responses. Some Justices of quick minds can reduce complex problems to ready resolution by formulas that can be changed to meet the facts of each case. Not all the Justices, however, have had the capacity for such ready answers that Justice Douglas had. Some were not as bright. The intelligence of others showed them the complexity, rather than the simplicity, of cases. Some couldn't write as easily. Some thought it appropriate to consult with their colleagues. An electronic machine could dispose of more cases than the Court sees each year, but arbitrary conclusions without reasons do not afford guidance for the resolution of future disputes. Nevertheless, the 1960's alarms and excursions about the business of the Court soon passed into obscurity.

The problem surfaced once more a decade later, when the Freund Commission brought in a report suggesting that an additional court be created to help in the certiorari process and to determine some cases of importance, but not of such great importance as to warrant decision by the Supreme Court.¹⁰ The Justices again expressed themselves forcefully on the question. They were, of course, divided.¹¹ The Freund Report foundered, but the prob-

⁸ Griswold, *The Supreme Court, 1959 Term—Foreword: Of Time and Attitudes—Professor Hart and Judge Arnold*, 74 HARV. L. REV. 81 (1960).

⁹ Douglas, *The Supreme Court and Its Case Load*, 45 CORNELL L.Q. 401 (1960); cf. J. HARLAN, MANNING THE DIKES (1958), reprinted in 2 BENJAMIN N. CARDOZO LECTURES (n.d.) (stating that the Court remained current in its business but warning that continued growth in certiorari practice could someday endanger the Court's ability to decide important issues).

¹⁰ FEDERAL JUDICIAL CENTER, REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT (1972) (Paul A. Freund, chairman), reprinted in 57 F.R.D. 573 (1972).

¹¹ See, e.g., Brennan, *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473 (1973); Goldberg, *One Supreme Court*, THE NEW REPUBLIC, Feb. 10, 1973, at 14; *Justice Brennan Calls National Court of Appeals Proposal "Fundamentally Unnecessary and Ill Advised"*, 59 A.B.A. J. 835 (1973); *Retired Chief Justice Warren Attacks, Chief Justice Burger Defends Freund Study Group's Composition and Proposal*, 59 A.B.A. J. 721 (1973).

Alexander M. Bickel, who had been a member of the Freund Commission, produced a

lem refused to go away.

In 1973, Congress created a Commission on Revision of the Federal Court Appellate System, chaired by Senator Roman L. Hruska, with a broader mandate to consider the crush of business throughout the federal courts but, nonetheless, with strong emphasis on the Supreme Court's troubles. This time the group was untainted by Frankfurter epigoni. Its members were appointed by the Senate, the House, the President, and the Chief Justice. The make-up was different, but the recommendations were substantially the same. The Commission, too, recommended a National Court of Appeals to relieve the Supreme Court of a part of its burdens.¹² The Justices were polled by the Commission, and again the Court was divided. The Chief Justice and Justices White, Blackmun, Powell, and Rehnquist seemed to agree on the existence of the problem, if not on the solution. Justices Douglas, Brennan, Stewart, and Marshall thought that whatever problems might exist were soluble by minor adjustments, a finger in the dike here or a stuffed rathole there.¹³

Shortly thereafter, Professor (now Dean) Gerhard Casper and Professor (now Judge) Richard A. Posner did a study of the problem for the American Bar Foundation.¹⁴ Their conclusion was that "we are not persuaded that the Supreme Court's workload has reached the point at which radical changes in the Court's jurisdiction or in the structure of federal appellate review should be contemplated."¹⁵ This conclusion was confirmed by their follow-up study of the 1975 and 1976 Terms.¹⁶ Thus, if by 1976 the Freund and Hruska reports were not sunk without a trace, they were, at best, derelicts on the sea of judicial reform.

B. The Summer and Fall of '82: The Justices Take to the Hustings Again and Senator East Offers Some Solutions

Speechmaking to bar associations and law schools is a normal part of the judicial calendar, and it is emphasized during the sum-

sterling defense of the report. A. BICKEL, *THE CASELOAD OF THE SUPREME COURT* (1973). But the joinder of Bickel with Freund led again to the characterization of this action as a Frankfurterian conspiracy.

¹² COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, *STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE* (1975).

¹³ *Id.* at 172-88.

¹⁴ G. CASPER & R. POSNER, *THE WORKLOAD OF THE SUPREME COURT* (1976).

¹⁵ *Id.* at 117.

¹⁶ Casper & Posner, *The Caseload of the Supreme Court: 1975 and 1976 Terms*, 1977 SUP. CT. REV. 87.

mers and particularly at the meetings of the American Bar Association. The speeches on these occasions frequently take the form of explanations or excuses for some dubious judicial behavior at the previous Term.¹⁷ Where the Justices, burdened as they are, find the time for such extracurricular activities remains something of a mystery. But their attendance at many moot court arguments, bar association talks, testimonial dinners, and law school lectures cannot be gainsaid. It may be that a little "moonlighting" is necessary to stave off the hardships of inflation.¹⁸

In 1982, the festival of autumnal speeches seemed concentrated on the subject of the burden of business.¹⁹ There was, of course, no consensus about solutions, and some of the Justices even expressed the heterodoxy that Congress should address the problem,²⁰ perhaps as it did in 1925. But it should be remembered that the 1925 law was written by the Justices, particularly by Justice Van Devanter, even though it was a congressional enactment. There is some real danger to the Court's function as ultimate arbiter of the Constitution—an assumed function to be sure—if Congress were to act without the Court's guidance. National legislators have already suggested the desirability of reducing the Court's jurisdiction, particularly in the areas of abortion, school prayer, and school busing.²¹ It may indeed prove temerarious to invite Con-

¹⁷ Consider the remarkable extrajudicial and post-hoc opinions of Justices Blackmun, Stevens, and Powell on *Gannet Co. v. DePasquale*, 443 U.S. 368 (1979). See Denniston, *Closed Trial Ruling Hit by Blackmun*, *Washington Star*, Aug. 28, 1979, at A73, col. 3; Greenhouse, *Stevens Says Closed Trials May Justify New Laws*, *N.Y. Times*, Sept. 9, 1979, at 41, col. 1; Kiernan, *Ruling on Press Shows High Court Confusion*, *Washington Post*, Sept. 17, 1979, at C1, col. 1.

¹⁸ The Justices have done their best to ensure continued increments in their salaries. See *United States v. Will*, 449 U.S. 200 (1980).

¹⁹ See White, *Challenges for The U.S. Supreme Court and the Bar: Contemporary Reflections*, 51 *ANTITRUST L.J.* 275 (1982); Remarks of Justice Brennan, Third Circuit Judicial Conference (Sept. 9, 1982) (on file with *The University of Chicago Law Review*); Remarks of Chief Justice Burger, Arthur T. Vanderbilt Dinner (Nov. 19, 1982) (on file with *The University of Chicago Law Review*); Speech by Justice Powell, Division of Judicial Administration, American Bar Association (Aug. 9, 1982) (on file with *The University of Chicago Law Review*), reprinted in modified form in Powell, *Are the Federal Courts Becoming Bureaucracies?*, 68 *A.B.A. J.* 1370 (1982); W. Rehnquist, *Are the True Old Times Dead?*, Mac Swinford Lecture, University of Kentucky (Sept. 23, 1982) (on file with *The University of Chicago Law Review*); Remarks of Justice Stevens, American Judicature Society Annual Banquet (Aug. 6, 1982) (on file with *The University of Chicago Law Review*).

²⁰ *E.g.*, White, *supra* note 19, at 281-82; Remarks of Justice Stevens, *supra* note 19, at 11-15.

²¹ See Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 *HARV. L. REV.* 17 (1981). See also G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW I* (Supp. 1982).

gress to limit the Supreme Court's burden of cases, especially when the cure for the expansive and expanding docket may lie within the control of the Justices themselves.

1. *The Certiorari Practice.* When Justice Stevens revived the notion that the certiorari process be delivered to another court for the selection of cases for Supreme Court decision,²² he was, of course, familiar with the sorry history of the Freund and Hruska reports. And if this is the most radical suggestion for extrajudicial action—it would require congressional legislation—it is also the most likely long-term remedy. The proposition is that if the certiorari selection process were given to other judges, the Supreme Court Justices could put their energies and talents where they belong: resolving important cases on the merits and writing opinions that justify their judgments. It would, incidentally, eliminate the prejudgment of cases that inheres in the two-step process—certiorari and merits—in a single court.

There is no indication that Stevens has swung any of his Brethren's votes to this goal. But if the proposal is not considered solely on its own but as one of several alternatives that Congress may choose to reduce the Court's business, it may look better to some Justices than it does now.

Justice Brennan's obdurate opposition to surrendering the certiorari process to another court²³ seems a bit disingenuous in light of the facts. Brennan regards the certiorari process as an essential part of the Supreme Court's judging function. It is by this means that the Court is kept abreast of the growth in the law, especially with regard to new problems and new solutions. Moreover, it is asserted that the process can only function when the participants are experienced judges. Since Justice Brennan is one of the few (and perhaps the only one) of The Nine who reads the petitions for certiorari for himself, he has standing to assert the importance of the process being manned by the Justices. But the fact of the matter is that the certiorari process as it exists now in most of the Justices' chambers is left to the rather inexperienced—however bright—recent graduates of law schools, who rely on summer clerkships with law firms to supply the wisdom of experience that Brennan suggests is essential.

Justice Stevens described the actual process rather than an idealized one in his James Madison Lecture at the New York Uni-

²² Remarks of Justice Stevens, *supra* note 19, at 11.

²³ Brennan, *supra* note 11, at 476; Remarks of Justice Brennan, *supra* note 19, at 11-15.

versity Law School.²⁴ Speaking of the legislative history of the 1925 Judges' Bill, Stevens said:

Several features of the Court's practice were emphasized in order to demonstrate that the discretionary docket was being processed in a responsible, nonarbitrary way. These four are particularly worthy of note: (1) copies of the printed record, as well as the briefs, were distributed to every justice; (2) every justice personally examined the papers and prepared a memorandum or note indicating his view of what should be done; (3) each petition was discussed by each justice at conference; and (4) a vote was taken, and if four, or sometimes just three, justices thought the case should be heard on its merits, the petition was granted.²⁵

That is the process on which the opposition to removal of the certiorari process from the Supreme Court is based. But what was true in 1925 is no longer true. Time has brought successive and fundamental changes in the process:

In the 1947 Term, when I served as a law clerk to Justice Rutledge, the practice of discussing every certiorari petition at conference had been discontinued. It was then the practice for the Chief Justice to circulate a so-called "dead list" identifying the cases deemed unworthy of conference discussion. Any member of the Court could remove a case from the dead list, but unless such action was taken, the petition would be denied without even being mentioned at conference.²⁶

Since 1947, the certiorari process has disintegrated even further with regard to the Justices' participation:

In the 1975 Term, when I joined the Court, I found that other significant procedural changes had occurred. The "dead list" had been replaced by a "discuss list"; now the Chief Justice circulates a list of cases that he deems worthy of discussion and each of the other members of the Court may add cases to that list. In a sense, the discuss list practice is the functional equivalent of the dead list practice, but there is a symbolic difference. In 1925, every case was discussed; in 1947

²⁴ J. Stevens, *The Life Span of A Judge-Made Rule*, The James Madison 1982 Lecture, New York University Law School (Oct. 27, 1982) (on file with *The University of Chicago Law Review*).

²⁵ *Id.* at 20-22 (footnotes omitted).

²⁶ *Id.* at 23-24.

every case was discussed unless it was on the dead list; today, no case is discussed unless it is placed on a special list.²⁷

Perhaps the change from “dead list” to “discuss list” may be said to be merely “symbolic.” But when those lists are not, in fact, determined by the Justices but by their law clerks, there is a basic distinction between the two processes. As Stevens noted:

It is no longer true that every justice personally examines the original papers in every case. . . . Today law clerks prepare so-called “pool memos” that are used by several [six?] justices in evaluating certiorari petitions. The pool memo practice may be an entirely proper response to an increase in the volume of certiorari petitions from seven or eight per week when the judges’ bill was passed in 1925 to approximately 100 per week at the present time. It is nevertheless noteworthy that it is a significant departure from the practice that was explained to the Congress in 1924.²⁸

The proposal for transferring the certiorari process to another court would clearly require congressional action. Congress could bring this about without the acquiescence of the Justices themselves, but it is highly unlikely that Congress would act over the objections of a majority of the Court. And it would appear plain that Stevens’s call may be a voice crying in the wilderness. In any event, none of the other Justices who spoke to the question in recent days seems willing to endorse the proposition.

2. *The Problem of Bureaucracy and the “Puisne Court.”* The Justices are cognizant of the contention that the difficulties in operating the Court are due to the bureaucratization of the institution. The argument is that the judicial function of the Supreme Court has been reduced to supervision of staff operations by each Justice in his own chambers—that the Justices act like Cabinet and sub-Cabinet officers in the executive branch, commanding the production of answers, which they approve or disapprove, but in which the Justices have little or no input. The suggestion is that the law clerks make the initial determination as to the grant of review and that the law clerks draft the opinions for which they seek the imprimatur of their respective masters.

Although Justice Powell purported to address the problem of bureaucratization in his ABA speech, he skirted it in favor of

²⁷ *Id.* at 24.

²⁸ *Id.* at 24-25.

warning that the increasing business of the courts would ultimately result in bureaucratization which, he said, hadn't quite taken place yet, so far as the Court was concerned. He asserted that, "although the assistance of able law clerks is essential, the decisions and opinions are those of the Justices."²⁹ We should be better informed to make our own judgment were it possible to see what the roles of the law clerks really are, admitting that they will differ from chambers to chambers.

Judge Learned Hand, at least once, told a law clerk who asked to draft an opinion that he could do so as soon as he was nominated by the President, confirmed by the Senate, and commissioned by the Secretary of State. Until then, the law clerk was told, it was for Hand to make the decisions and write the opinions, subject to correction by the law clerk who had the task of reading the record. How much of the Supreme Court Justice's opinion is *informed* by the law clerk's memorandum and how much of it *is* the law clerk's memorandum is probably correctly kept within the bosom of the Justice's chambers. It would be interesting to some, however, to turn the analysts loose with their electronic counters to see whether consistency of style and prose could assure us that the same writer was at work from Term to Term and within each Term.

3. *Specialized Courts and the Conflicts Problem.* For some Justices, the problem of an overburdened certiorari docket and, indeed, an overburdened plenary docket is attributable in large measure to the number of conflicting rulings by the twelve federal courts of appeals (and the high courts of the states). There is, in fact, little hard evidence that actual conflicts of decision exist in large numbers. Certainly, reading the opinions of the Court does not reveal a large number of cases in which certiorari has been granted to resolve such conflicts. The fact is that there is no agreement among the Justices as to when such a conflict exists.³⁰ In any event, the proposed intermediary court to screen certioraris is not confined to this question, and so a different legislative answer to avoid conflicting rules by way of creation of new courts has been suggested by Justice White and endorsed by Justice Brennan.*

²⁹ Speech by Justice Powell, *supra* note 19, at 16, *reprinted in modified form in* 68 A.B.A. J. at 1372.

³⁰ *Castorr v. Brundage*, 103 S. Ct. 240, 240 (1982) (Stevens, J., respecting the denial of the petition for writ of certiorari).

* The Chief Justice has, since this paper was prepared, suggested the creation of a new national court to which some, if not all, conflicts among the circuits might be referred. See Burger, *Annual Report on the State of the Judiciary*, 69 A.B.A. J. 442, 447 (1983). Cf.

Justice White, in his remarks, suggested that a "national court of appeals" was not a live possibility. He pointed out that a bill to create such a court has been pending in Congress without going anywhere. But, he said, there are other alternatives to consider:

Rather than one Supreme Court, there might be two, one for statutory issues and one for constitutional cases; or one for criminal and one for civil cases. If the resolution of conflicting decisions is at the root of the problem, there is also the option of creating new courts of appeal [sic] that would hear appeals from district courts countrywide in certain kinds of cases.³¹

The possibility of two Supreme Courts would, of course, require constitutional amendment. The notion of statutorily created specialized appellate courts, like the Emergency Court of Appeals, at least drew the interest of Justice Brennan.³² What the jurisdiction of such courts would be is far from clear. Should there be a specialized court of appeals for tax cases, or labor cases, or section 1983 cases? Could such courts, in effect, replace the several courts of appeals whose jurisdiction is geographically rather than substantively distinguished? We are a long way from the structure of specialized appellate courts. But there is no reason why the proposition doesn't deserve some attention.

The specialized courts, however, would be an answer to but one of the pressures on the Supreme Court. Essentially, the argument is that where there are conflicts of judgments between or among courts of appeals and/or high state courts on federal questions, the Supreme Court must resolve them in order for the federal law to be uniform throughout the nation. Some Justices would not regard the problem as serious. Why not different rules for different parts of the country? But the more difficult question is when does such a conflict exist?

Justice White had an alternative solution for this conflict problem. He suggested that a court of appeals be required to sit en banc before rendering a decision in conflict with that of another circuit. He would then make the en banc opinion the governing rule for the entire nation until changed by the Supreme Court. Justice Walter V. Schaefer has another solution. He suggests that

Hutchinson, *Burger Needs to Define His Court Before Creating New One*, L.A. Times, Feb. 9, 1983, at II-5, col. 1.

³¹ White, *supra* note 19, at 281. See Kurland, *Jurisdiction of the United States Supreme Court: Time for a Change?*, 59 CORNELL L. REV. 616 (1974).

³² Remarks of Justice Brennan, *supra* note 19, at 15.

there ought to be no such thing as a "rule for the circuit," that a Sixth Circuit opinion should be just as binding in the Eighth Circuit as an Eighth Circuit opinion now is.³³ Obviously there are answers to the conflict problem that do not necessitate the restructuring of the judicial system. As Justice Stevens told the American Judicature Society: "the number of unresolved conflicts is exaggerated."³⁴ To the degree that there are conflicts among decisions construing congressional statutes, Stevens would leave their resolution to congressional action. Perhaps Stevens is not adequately conscious of the difficulties of congressional enactment of any law. The law of inertia is probably the most important governing principle of legislative action. The fact that different circuits have read congressional language differently is not likely to move Congress to action, any more than it has been moved to action by Supreme Court decisions glaringly inconsistent with the language, legislative history, and plain intent of Congress.³⁵

4. *Compulsory Jurisdiction.* Apparently all of the Justices are agreed that a statute abolishing appeals of right is devoutly to be wished. How much time would thus be saved is a matter of dispute. Whether appeals are treated differently from petitions for certiorari is hardly clear. The rule of four is apparently equally applied to appeals as to petitions for certiorari. But there is little disagreement about the proposed change.

5. *Congressional Relief.* Several of the Justices seem to have thrown up their hands and invited Congress to address the problem of the Court's workload. This is a little like the sheep inviting the wolf to afford them protection. There are many congressmen ready to oblige.

Senator East, chairman of the Senate Judiciary Committee's Subcommittee on Separation of Powers—the onetime bailiwick of Senator Sam Ervin—has already introduced S. 3018.³⁶ The testimony of the Justices on the desirability of the bill would surely be enlightening. The bill proposes the following:

(1) It would forbid Supreme Court review of "any case wherein any party claims the abridgement by a State, or by any political subdivision, agency, or any other authority of a State, of

³³ Schaefer, *Reducing Circuit Conflicts*, 69 A.B.A. J. 452 (1983); see also Schaefer, *Foreword: Stare Decisis and the "Law of the Circuit,"* 28 DE PAUL L. REV. 565, 568-69 (1979) (contending that intercircuit conflict can deprive litigants of equal protection as guaranteed by the Constitution).

³⁴ Remarks of Justice Stevens, *supra* note 19, at 13.

³⁵ See, e.g., *United Steelworkers v. Weber*, 443 U.S. 193 (1979).

³⁶ S. 3018, 97th Cong., 2d Sess. (1982).

any right secured by the first eight amendments to the Constitution of the United States";³⁷ it would also deny lower federal court jurisdiction over any such actions.³⁸ In sum, the first eight amendments would be returned to the pristine purity they enjoyed when first promulgated of being applicable only to the national government and not to the states. Surely this would substantially reduce the business of the federal courts as well as the civil liberties of the people.

(2) The bill would eliminate the "exclusionary rule" under the fourth amendment, i.e., evidence secured in violation of the fourteenth amendment might constitutionally be admitted.³⁹ While this would eliminate some federal court business, the concomitant provision to protect against police abuses of the rights against invalid arrest, search, and seizure would probably add considerable business. The bill provides that any violation of these protections should be subject to punishment for contempt of court in summary proceedings.⁴⁰ Thus, the bill would sacrifice both the civil rights of criminal defendants and those of accused officers of the law.

(3) Habeas corpus for persons in custody pursuant to a judgment of a state court would be available in federal courts

only on a ground which presents a substantial Federal constitutional question, and then only if—1) it was not previously raised and determined, 2) there has been no fair and adequate opportunity to raise it and have it determined, and 3) it cannot thereafter be raised and determined in a proceeding in a State court, by an order or judgment subject to review by the Supreme Court of the United States on a writ of certiorari.⁴¹

(4) Cases arising under section 1983,⁴² certainly a prolific provider of federal cases, would be limited to cases asserting rights directly under the Constitution or under federal statutes "providing for equal rights," provided there is no adequate remedy at state law.⁴³ Surely we have here a substantial answer to the overweight problem of the Supreme Court docket.

(5) Attorneys' fees would no longer be awarded to prevailing

³⁷ *Id.* § 111(a).

³⁸ *Id.* § 112(a).

³⁹ *Id.* §§ 121-122.

⁴⁰ *Id.* § 123.

⁴¹ *Id.* § 131.

⁴² 42 U.S.C. § 1983 (1976).

⁴³ S. 3018, *supra* note 36, § 141.

parties in civil rights actions.⁴⁴ This presumably would act as a disincentive to bring such suits.

(6) No causes of action could be implied from statutes unless the statute "expressly grants such a cause of action."⁴⁵ Whether this would, in fact, reduce the number of actions considered is dubious. The federal courts are thoroughly adept at finding causes of action in the most unlikely language of federal statutes. They need only label them as express rather than implied grants.

(7) General federal question jurisdiction would be abolished, but diversity jurisdiction would be preserved.⁴⁶

(8) Class actions would be cut back to what they were before the Federal Rules of Civil Procedure spawned their growth.⁴⁷ Surely this would cut down on business.

(9) No injunction could be issued against a state or state agency except by a three-judge court.⁴⁸ The substitution of three-judge courts for one-judge courts would not only burden the trial system, it would result in more direct appeals to the Supreme Court without review by the courts of appeals. It is exactly this direct appellate jurisdiction that almost every member of the Court has been anxious to abolish as unduly burdening its docket.

Then, to keep the judiciary in line, there would be a congressional Joint Committee of Judicial Conduct to oversee the proper functioning of the federal judiciary. The federal courts should be required to meet the constitutional standard of "good Behaviour."⁴⁹ According to the bill, this standard prohibits

- (1) abuse of judicial authority;
- (2) improper exercise of judicial function;
- (3) neglect or refusal to perform the duties of office;
- (4) usurpation of the authority of the Congress, the President or the States;
- (5) exercise of will instead of judgment by substituting the pleasure of the judge for that of the legislature—either Congress or the ratifiers of the Constitution of the United States, as the case may be—rather than declaring the sense of the law; and
- (6) any other conduct which constitutes a failure to meet

⁴⁴ *Id.* § 151.

⁴⁵ *Id.* § 171.

⁴⁶ *Id.* § 161.

⁴⁷ *Id.* § 191.

⁴⁸ *Id.* § 181(a).

⁴⁹ U.S. CONST. art. III, § 1.

the standard of good behavior at common law at the time of the adoption of the Constitution.⁵⁰

The joint committee would review the official conduct of each federal judge every ten years. The committee would have the power of taking testimony and commanding the attendance of witnesses and the production of books and records. When the standard of good behavior is not met, the committee would recommend impeachment proceedings to be brought in the House, but the existence of the committee would not foreclose the origination of impeachment proceedings by the House without benefit of committee advice.⁵¹

Supreme Court Justices would be appointed geographically, so that any appointee shall have been a resident for at least five years of one of the circuits in which his predecessor served as Circuit Justice. Finally, the bill would require that federal magistrates be appointed by the President with the advice and consent of the Senate.⁵²

Clearly, Congress has the power to solve the problems of an overburdened Court, as here, by removing a large part of its powers and reducing its independence by legislative oversight. Surely the concept defined as "good behavior" is horrendous. The quality of the federal judiciary is not now at its highest level. To what it would be reduced by such congressional action is fearful to contemplate.

Senator East's proposals are probably not exactly what those Justices seeking succor from Congress had in mind. Surely they sought abolition of three-judge courts, not their expansion; they thought of elimination of the diversity rather than the federal question jurisdiction; they might be desirous of some relief from habeas corpus petitions by imposition of some notions of *res judicata* or exhaustion of remedies; they might be interested—although they were themselves responsible for the expansion of section 1983—in some cutback in the scope of that statute. They would, I think, be horrified at the abolition of suits against the states under the Bill of Rights. The exclusionary rule is of their own creation and could be cut back by them if they wished. So far, they have not wished and would, I think, be dismayed at the alternative remedy of direct contempt proceedings. So, too, the "implied causes of

⁵⁰ S. 3018, *supra* note 36, § 202(b).

⁵¹ *Id.* §§ 202, 203, 207.

⁵² *Id.* §§ 221, 231.

action" notion is a creature of the Court, not likely to be abandoned voluntarily.

Senator East's revolutionary proposal, which has all the subtlety of Madame Defarge's cure for the evils of the nobles of eighteenth-century France, is unlikely to become law. If Senator East and his colleagues are trying to send the Court a message, they would be well advised to make sure that the point does not backfire. Every time Congress proposes to teach the Court a lesson but fails—due either to crudity or to lack of conviction—the message returned is that the Court is beyond control. In the end, the Court's power and the pattern of its exercise are not questioned but confirmed, and we are left where we started.

6. *Status Quo Ante*. All in all, despite the effusion of judicial rhetoric, it was to be expected that the Court would muddle through. Speaking to the Antitrust Section of the ABA, Justice White predicted the maintenance of the status quo ante, at least unless and until the bar decided otherwise:

Ladies and gentlemen, the Court will go on writing our 150 opinions per year and granting those cases that four Justices think must be decided. I shall leave it to you and your colleagues in the profession to help decide whether more cases should be decided in a timely manner and if so what the preferred course to that end might be.⁵³

The assumption implicit in White's paper is that the problem is that the Court doesn't decide enough cases on the merits. Here, too, the Court is not of one mind. Stevens told us that "any mismanagement of the Court's docket has been in the direction of taking too many, rather than too few, cases."⁵⁴

We cannot tell, of course, how many worthy cases were denied review in recent Terms. It is quite apparent, however, from a simple reading of the *United States Reports*, that far too many unworthy cases have been granted review. Unless the function of the Court is to correct errors below, a huge proportion of its docket is concerned with cases that do not belong there because they have little or no significance for anyone other than the parties to the litigation. It is apparent that a large motivating force for the grant of certiorari is to correct error, especially where that error is committed against the Court's special wards. Protecting the needy, the minority, even the criminal defendant against governmental abuse

⁵³ White, *supra* note 19, at 282.

⁵⁴ J. Stevens, *supra* note 24, at 28.

surely is an important function of government. Whether such largesse can be afforded by a Court no longer a mere dispute-resolving agency but a principal lawmaker of the nation is a different question with a different answer.

It is certainly ironic that a Court whose Justices spent part of the summer lamenting the lack of time to consider and to decide major issues are now devoting substantial resources not only to filing dissents from denials of certiorari, but also concurrences in denials of certiorari.⁵⁵ It is difficult enough, as most of the Justices told us after the last Term ended, to make responsible decisions on the merits and to explain them soundly; it is impossible to gloss every lower court opinion that strikes an imprecise note. And if the court spent its time writing sounder opinions that provided clearer guidance, it would be faced with fewer temptations "to say what the law is"⁵⁶ without the necessary predicate of exercising its jurisdiction.

II. PHYSICIAN, HEAL THYSELF

If, as several of the Justices seem to believe, the problem of the Supreme Court's workload is that the Court cannot decide all the cases that plainly call for decision each Term, there can be no final resolution short of congressional inhibitions on the jurisdiction of some or all of the federal courts. Without such change, the prospect is for a Court falling further and further behind on its dockets until it has to stop functioning. When that crisis arises, Congress is almost certain to impose a solution, and whether it is as horrendous as Senator East's or not will be determined by the mood that dominates at the time.

If, however, as Justice Stevens has told us, with the apparent concurrence of Justice Brennan, the Court is not deciding too few cases on the merits but too many, there are internal changes that might alleviate the problems, other than delegating judicial duties to more and more functionaries to be performed in the names of the Justices. Justice Powell has told us that the Supreme Court is not a bureaucracy—yet.

⁵⁵ *E.g.*, *Kerr-McGee Chem. Corp. v. Illinois*, 103 S. Ct. 469, 469 (1982) (Blackmun, J., respecting the denial of the petition for writ of certiorari); *James v. United States*, 103 S. Ct. 465, 465-67 (1982) (Brennan, J., respecting the denial of the petition for writ of certiorari); *Castorr v. Brundage*, 103 S. Ct. 240, 240 (1982) (Stevens, J., respecting the denial of the petition for writ of certiorari); *Singleton v. Commissioner*, 439 U.S. 940, 942 (1978) (Stevens, J., respecting the denial of the petition for writ of certiorari).

⁵⁶ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

A. "The Rule of Four"

The Supreme Court itself has its hand on the valve that determines the flow of cases to it for decision. It takes most cases only at its own discretion. This power was conferred by the 1925 Act exactly to give the Court control of its own docket. Since the 1925 Act, the self-regulating rule of the Court has been that if four Justices want a case to be heard, it will be heard. The rule of four has been in existence since before the 1925 Act. But

[t]he "rule of four" is not a command of Congress. It is a working rule devised by the Court as a practical mode of determining that a case is deserving of review, the theory being that if four Justices find that a legal question of general importance is raised, that is ample proof that the question has such importance. This is a fair enough rule of thumb on the assumption that four Justices find such importance on an individualized screening of the cases sought to be reviewed.⁵⁷

Obviously, the description of the certiorari process afforded us by the Justices does not suggest that such "individualized screening" is in fact afforded. In any event, the question of the sufficient importance of the case is not resolvable by an absolute standard, but only by a comparative one. And the principle stated by Justice Frankfurter would be equally valid if the number were "three" or "two" or "five" or "six" rather than four. The rule of four is a device by which a minority of the Court can impose on the majority a question that the majority does not think it appropriate to address. Whatever merit there may be in such a proposition, it is highly questionable when that imposition endangers the capacity of the Court to deal with cases in which five, six, or more of the Justices think that review is essential.

The Court is in a position to know what outsiders can only guess: how many cases have been granted review because four Justices have voted for review, how many because five have done so, and so on. It is also in a position to know how many cases can be adequately decided on the merits without straining the fabric of meaningful adjudication: judgment, not will or force. Having set the number of cases it can adjudicate with some measure of quality, the Court can then reset the "rule of four" to become the "rule of five" or "the rule of six." Nor would the change be chiseled into stone any more than was the rule of four. In theory, at least, we are

⁵⁷ *Roger v. Missouri Pac. R.R.*, 352 U.S. 500, 529 (1957) (Frankfurter, J., dissenting).

concerned not with mere numbers, but with the far more important question of the quality of the Court's output. There surely is evidence over the past decades that the quality of quality is indeed strained.

The Justices can close down the valve. They need no congressional action here.

B. The Irresponsibility of the Bar

A large part of the Court's problem is that it is burdened with so many unmeritorious demands on its time. Justice White said that sixty percent of the petitions for certiorari are totally without merit. Justice Stevens put the figure at eighty percent. Nor is it petitions for certiorari alone that impose on the Court; one need look only at petitions for rehearing to get a far larger number than eighty percent.

The problem is that these demands on the Court's time are comparatively costless to clients and are remunerative to counsel. Perhaps some substantial costs should be imposed on those who file meritless petitions. Perhaps, too, the names of counsel who file these time-consuming but otherwise valueless documents should be published. It is easy enough for the Court to list separately the denials of certiorari in cases that never made it to the conference room and those that did. Lawyers would then be better informed about the Court's standards in this area and would have a basis for telling their clients that they cannot take a fee for a worse than useless act.

There are problems with such a solution. First, it requires confidence by the Justices in their law clerks' recommendations that prevent a case from going to conference. Second, it would assume some real standards on the part of the Court itself. One reason that counsel cannot guarantee a negative reaction by the Court is that the Court does, from time to time, grant review in cases patently beyond the pale.

What is needed, but not likely to be brought about, is a real Supreme Court Bar, the equivalent of Queen's Counsel, selected on the basis of experience and reputation, but chosen from those who apply for the status. As of now, irresponsibility of counsel is a prime cause of the undue mass of litigation that the Court is required to handle, even if disposition of some of it is most cursory.

C. Oral Argument

It may be that the function of oral argument, as one of the

Justices hinted, is to allow the Justices to be seen in public in the full panoply of their gowns and chains in the most august setting that the capital of our nation can afford. Certainly, it is true that the Court in session is an awe-inspiring sight. The awe, however, derives from the sight and not from the sound. For the most part, the oral arguments presented to the Supreme Court are less impressive than those heard by the Justices in their attendance on law school moots.

The oral argument is an anachronism surviving from the days when the only arguments presented to the Court were in oral rather than written form. The courts were not so burdened in those days, the jurisprudence was more easily encapsulated, and there was a Supreme Court bar including such worthies as Daniel Webster and Luther Martin. There are a few cases in which oral argument serves as a means of discovery by the Justices. But there is no reason why this discovery could not be conducted better by interrogatories than by oral deposition. Surely the answers would be more meaningful, and the demeanor of the witness is not in question.

Oral argument wastes a large part of the Justices' limited time. It probably cannot be justified in terms of the enlightenment it affords the Justices. It may be justified because the pageantry involved really does enhance the image of an institution that is regularly a target of its political peers and its critics in the press and academia.

D. *Amicus Curiae* Briefs

It is probably true that the Justices do not see most of the *amicus curiae* briefs that are filed with the Court. If that is so, the Court is playing a cruel hoax on those who request their counsel to file them. But to the degree that the Justices or their henchmen do read *amicus* briefs, they are generally wasting valuable time. For the most part, *amicus* briefs add nothing to the arguments that are made by the parties. Frequently they are no more than a registration of the votes of a constituency on one side or other of the case, underlining the legislative rather than judicial function of the Court. Perhaps a retreat only to *amicus* briefs filed at the request of the Court or by parties to litigation pending below whose cases are likely to be resolved by the Supreme Court's decision would afford some respite from an unnecessary chore. Instead, the present Court's rules and their application encourage what is, for the most part, a waste of time, effort, and money in a useless function.

E. Supreme Court Terms

Obviously the long summer break is anything but a full vacation for the Justices. The mailbags of petitions for certiorari may still follow them wherever they go, as they used to do. But even if the Justices receive only the clerks' memos on the petitions for certiorari, they have a great quantity of orders to dispose of at their pre-October Term opening.

Nevertheless, the closing of one Term in June or July and the opening of the next in October does create a discontinuity of significant proportions and can be attributed only to a history when Terms were meaningful and when Washington was a torrid, disease-ridden summer location. The most immediate problem the Term creates is the perceived need to finish up all opinions by the June or July deadline. It is quite apparent from the large numbers of important cases that come down at one time—late June or early July—that judicial craftsmanship would be enhanced by the removal of the “decision by deadline” syndrome. So far as affording themselves adequate time to escape the onerous tasks that are theirs, the Justices could do what they do in the winter—recess for three or four weeks and then return to their chores. Surely, six weeks' vacation, which could be a real vacation, would suffice for R & R. It is obvious that continuous confinement in one building frays tempers, but surely a Justice will be no more aroused by what he considers the inanities of a colleague if they are proffered to him in summer than in winter. And Court sessions may have the additional advantage of providing an excuse for not attending bar association meetings at which the Justices are expected to say something meaningful but not substantive.

F. Opinions

Perhaps the principal consequences of the overburdened Supreme Court is the sleaziness of the opinions on the merits. The opinions are long because the Justices lacked the time to write short ones. It may well be that the Justices are following Marshall Field's motto to give the customer what he wants. If so, they are mistaking fashion for desire. The life of the law may not be logic, but neither is it the experience of producing wordy law review pieces with thousands of footnotes purporting to be encyclopedic in their coverage of the subject.* (Perhaps if the opinions were

* See, e.g., *Smith v. Wade*, 103 S. Ct. 1625 (1983), and especially Justice O'Connor's dissent, *id.* at 1658-59.

shorter they would be able to be published in the *United States Reports* before they became redundant by the cases of an intervening Term or two.) The syndrome is not confined to the Supreme Court, but neither are any of the problems of an overwhelming docket. Judge Alvin Rubin of the United States Court of Appeals for the Fifth Circuit put the problem and its solution cogently:

Let me mention one other time-consuming task of judges that appears to me to be an obsessive preoccupation. It is our concern, particularly at the appellate level, with trying to write the kind of opinion that we think law school teachers will consider scholarly. American judicial opinions surpass in verbiage, in length and in citations those written anywhere else in the world. Every judge should be required to give his reasons for a decision, and these reasons should be sufficient not only to explain the result to the litigants but also to enable other litigants to comprehend its precedential value and the limits to its authority. It would suffice to do this if we adopted a standard style of opinion, if we did not strive to cite authority for elementary propositions and if we did not try to emulate law review articles or impress our colleagues and the bar by our scholarship. Occasionally each of us may render a decision, perhaps in a highly significant case, that demands exposition of the full palette of our talents, but I fear that much of our time and the time of our clerks is spent merely in seeking felicitous expression, adding citations and attempting to produce works of art. It would be worthwhile for judges to experiment with much simpler opinion models. We will succeed, however, only if we deinstitutionalize the demand for scholarly opinions. A good motto for us might be: Sufficient unto the case is the decision thereof.⁵⁸

Some lengthy opinions do provide an unworthy service of concealing the reasons for the decision or of treating a case as an idiosyncrasy rather than as a potential precedent. But it is more likely that there is merit to the proposition about cooks and the broth, and too many law clerks spoil the opinions. It is, indeed, unfortunate that of all of Frankfurter's worthy traits, his successors should imitate him in his weaknesses rather than his strengths. For lengthy opinions are created not only at inordinate cost to the chambers of the Justice who writes them, but also to

⁵⁸ Rubin, *Bureaucratization of the Federal Courts: the Tension Between Justice and Efficiency*, 55 *NOTRE DAME LAW.* 648, 655 (1980).

the time of the other Justices on the Court, whether they need only read them, need to explain their agreement in result but not in opinion, or need to write a dissent ticking off the majority opinion's propositions point by point ad infinitum.

More than anywhere else, the Court's mismanagement of its own resources in the face of higher demands on its time manifests itself in opinions that fail their primary obligation to explain and to persuade. An A.L.R. note is written when a few paragraphs would do;⁵⁹ multiple opinions are filed that fail to provide any guidance;⁶⁰ and, worst of all, opinions are issued that appear to be ad hoc and divorced from other related bodies of law created by the Court.⁶¹ There is no evidence that the proliferation of staff in the last decade means that the Justices do not know what they are saying, but there is a growing suspicion that they do not mean what they say, or least do not mean it for more than the case at hand. More is at stake than fastidiousness about doctrine or the legitimate exercise of judicial power: the more the Court fails to persuade its public, the more vulnerable are its own authority and, eventually, its own power.

III. CONCLUSION

The Supreme Court is in a crisis, but it is largely a crisis of its own making. The flood tide of business that currently faces the Court is different in degree but not in kind from the problems that have faced the Court from its inception. The issues are hoary, if not intractable. But they go to the essence of the Court's role and to the nature of the responsible exercise of power, not to questions of mechanics or structure. We can no longer say, as our colleagues Dean Casper and Judge Posner said, "not to worry" (and in any event, the cure is worse than the disease). The Court's power rests on its reputation. When that reputation falls far enough, another

⁵⁹ Almost any recent case involving state power over interstate commerce serves as an example. For an especially prolix treatment of what the Court viewed to be a very simple question, see *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429 (1978). See also *Board of Educ. v. Pico*, 102 S. Ct. 2799 (1982).

⁶⁰ For a recent example, see *Northern Pipeline Constr. v. Marathon Pipe Line Co.*, 102 S. Ct. 2858 (1982). See also Baird, *Bankruptcy Procedure and State-Created Rights: The Lessons of Gibbons and Marathon*, 1982 SUP. CT. REV. 25. Cf. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982). See generally Davis & Reynolds, *Judicial Cripples: Plurality Opinions in the Supreme Court*, 1974 DUKE L.J. 59.

⁶¹ For a particularly troubling recent example, see *Plyler v. Doe*, 102 S. Ct. 2382 (1982), and Hutchinson, *More Substantive Equal Protection? A Note on Plyler v. Doe*, 1982 SUP. CT. REV. 167. See also *Zobel v. Williams*, 102 S. Ct. 2309 (1982), discussed in Hutchinson, *supra*, at 193-94.

branch will step in and sort things out. There are signs that Congress, and perhaps a genial President, are prepared to do so.