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Forum Juridicum: The Right of Appeal

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THE RIGHT OF APPEAL*

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Practically every appellate court in the United States has used the words, "The right of appeal is favored,"[1] and "Statutes should be liberally construed in furtherance of that right."[2] The courts in Louisiana have gone a little further. They have held that the right of appeal is a "constitutional right,"[3] that it is a "fundamental safeguard of justice,"[4] that an appeal must be maintained whenever possible,[5] and that it can be dismissed "only for substantial causes."[6]

Although great importance has been attached to the right of appeal, our Federal Constitution does not guaranty any such right. The United States Appellate Courts have held that the remedy of appeal actually is not a "right" at all in the constitutional sense, and that Congress or any state may refuse to provide such a remedy.[7]

Many legal students today wonder why the framers of our Constitution did not incorporate into that document the grant

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1. *See, e.g., In re* Goddard's Estate, 176 Kan. 495, 271 P.2d 759 (1954); Mercer v. Federal Land Bank of Louisville, 300 Ky. 311, 188 S.W.2d 489 (1945); Viser v. Viser, 243 La. 706, 146 So.2d 409 (1962); State *ex rel.* Weiss v. Moriarity, 203 Minn. 23, 279 N.W. 835 (1938); *In re* Moore's Estate, 354 Mo. 240, 189 S.W.2d 229 (1945); State v. Hammerquist, 67 S.D. 417, 293 N.W. 539 (1940).

2. *In re* Madonia, 32 F. Supp. 165 (E.D. Ill. 1940); St. Louis Southwestern Ry. v. Harrist, 241 Ark. 173, 406 S.W.2d 694 (1966); Wilbur v. Cull, 127 Cal. App. 2d 655, 274 P.2d 424 (1954); Schoutens v. Superior Court in and for Los Angeles County, 97 Cal. App. 2d 855, 218 P.2d 999 (1950); Mid-State Homes, Inc. v. Davis, 169 So.2d 404 (La. App. 4th Cir. 1964); Phillips v. West, 139 So.2d 274 (La. App. 1st Cir. 1962); Farmers Supply Co. v. Williams, 107 So.2d 544 (La. App. 2d Cir. 1958); *In re* Moore's Estate, 354 Mo. 240, 189 S.W.2d 229 (1945); Dirkmann v. Associates Discount Corp., 410 S.W.2d 695 (Mo. App. 1966); Hallahan v. Riley, 94 N.H. 338, 53 A.2d 431 (1947); McKenzie v. Ohio State Racing Comm'n, 5 Ohio St.2d 229, 215 N.E.2d 397 (1966).

3. *See, e.g.*, Harnishchfeger Corp. v. C. W. Greeson Co., 219 La. 546, 53 So.2d 488 (1951); State *ex rel.* Harvey v. Ristroph, 3 So.2d 202 (La. App. 2d Cir. 1941); Dorfer v. City of Natchitoches, 160 So. 807 (La. App. 2d Cir. 1935).

4. Jackson v. Kellogg Lumber Co., 14 So.2d 311 (La. App. 2d Cir. 1943).

5. Emmons v. Agricultural Ins. Co., 245 La. 411, 158 So.2d 594 (1963).

6. General Motors Accept. Corp. v. Deep South Pest Control, Inc., 247 La. 625, 173 So.2d 190 (1965).

7. Tinkoff v. United States, 86 F.2d 868 (7th Cir. 1937); United States v. St. Clair, 42 F.2d 26 (8th Cir. 1930); Williams v. United States, 1 F.2d 203 (8th Cir. 1924); United States v. Marrone, 172 F. Supp. 368 (D.C. Alaska 1959).

of such a right, and this inquiry prompted me to select as the subject of this discussion the background of some of our existing laws relating to appeals.

The right of appeal is strictly of civil law origin.[8] It was totally unknown to the common law.[9] It exists today only where it is specifically granted by constitutional or statutory authority.[10]

Under common law procedures, and with very few exceptions, the review of a trial court judgment could be obtained only if the unsuccessful litigant applied for and was granted a "writ of error."[11] This common law "writ of error" differed in many ways from the civil law right of appeal. The most important differences were that in civil law jurisdictions the litigant had the absolute right to appeal, the appellate court reviewed both the law and the facts, and the appeal was considered as a continuation of the same case in a superior reviewing court.[12] At common law the litigant did not have an absolute right to have his case reviewed, it being discretionary with the higher court whether such a review should be granted. If a writ of error was allowed the reviewing authority was empowered to review only questions of law. And, in common law proceedings the application for a writ of error was not considered as a continuation of the same case, but instead it was regarded as an entirely separate proceeding.[13]

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8. *See* Buessel v. United States, 258 F. 811 (2d Cir. 1919) ; 4 C.J.S. *Appeal & Error* § 18 (1964).

9. American Life Ins. Co. v. Powell, 259 Ala. 70, 65 So. 516 (1953) ; Robinson v. Clements, 409 S.W.2d 215 (Mo. 1966) ; From v. Sutton, 156 Neb. 411, 56 N.W.2d 441 (1953) ; Hager v. Weber, 7 N.J. 201, 81 A.2d 155 (1951) ; Warren v. City of Cincinnati, 113 Ohio App. 254, 173 N.E.2d 180 (1959) ; 4 C.J.S. *Appeal & Error* §§ 8, 18(a), 39 (1964).

10. Drury v. Franke, 247 Ky. 758, 57 S.W.2d 969 (1933) ; *In re* Tutorship of Kitchen, 162 So.2d 826 (La. App. 4th Cir. 1964) ; Stith v. St. Louis Public Serv. Co., 363 Mo. 442, 251 S.W.2d 693 (1952) ; Guenther v. Funk, 67 N.D. 543, 274 N.W. 839 (1937) ; Rea v. Rea, 195 Ore. 252, 245 P.2d 884 (1952) ; 28 U.S.C. § 1291 (1964) ; LA. CONST. art. VII, § 29; 4 C.J.S. *Appeal & Error* § 18 (1964) ; 4 AM. JUR. 2d *Appeal & Error* §§ 2, 4, (1964).

11. *See generally* A. CARTER, A HISTORY OF THE ENGLISH COURTS (7th ed. 1944) ; G. CRABB, A HISTORY OF ENGLISH LAW 185 (1829) ; T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW (4th ed. 1948) ; 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 664 (2d ed. 1898) ; 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 245, 643 (7th ed. 1956) ; L. ORFIELD, CRIMINAL APPEALS IN AMERICA 22-31 (1939).

12. Cunningham v. Neagle, 135 U.S. 1 (1890) ; Wiscart v. D'Auchy, 3 U.S. (3 Dall.) 321 (1796) ; Buessel v. United States, 258 F. 811 (2d Cir. 1919) ; State v. Hardy, 339 Mo. 897, 98 S.W. 2d 593 (1936) ; BLACK, LAW DICTIONARY 125 4th ed. 1951) ; 4 C.J.S. *Appeal & Error* § 17 (1964).

13. Sohland v. Baker, 15 Del. Ch. 431, 141 A. 277 (1927) ; People v. Barber, 348 Ill. 40, 180 N.E. 633 (1932) ; BLACK, LAW DICTIONARY 125 (4th ed. 1951) ; 4 C.J.S. APPEAL & ERROR §§ 9, 17, 21(b) (1964).

Several years before our Federal Constitution was drafted, the Continental Congress showed an inclination to depart from the old common law procedures by authorizing a legal remedy which corresponds to the civil law right of appeal. This occurred during the American Revolution.

General Washington, as Commander in Chief of the Continental forces, sent vessels out to prey upon British supply ships which were en route to beseiged Boston. A number of British ships were captured and they were claimed by Americans as prizes of war. All sorts of conflicting claims arose out of these captures, and these disputes were referred to General Washington for settlement. In 1775 Washington wrote to the Continental Congress suggesting that courts be established to decide these disputes,[14] and in response to that request, Congress adopted a resolution recommending that each of the colonial states establish courts and procedures to adjudicate claims arising out of captures on the high seas. The resolution stipulated that all such trials were to be by jury, and that *appeals could be taken directly from the state courts to the Continental Congress.*[15]

The state governments objected to that part of the resolution which provided that appeals could be taken from state courts to the Congress. They felt that it threatened the sovereignty of the states. And, in a few cases, where Congress reversed the decisions of the state courts, the states refused to respect the decrees rendered by Congress.[16]

This occurred in the famous *Olmstead* case.[17] The facts there were that a sailor named Olmstead, and three companions, while being held as prisoners on a British ship, overcame the master and crew and they seized the vessel. As they were bringing the ship in, and when actually in sight of a New Jersey harbor, they were overtaken and forceably brought into a Philadelphia port by a ship belonging to the State of Pennsylvania. Olmstead claimed the British ship as a prize of war, but the Pennsylvania trial court awarded him only one-fourth the prize money. The rest of the money was awarded to Pennsylvania and to other claimants. Olmstead appealed to the Continental Congress which reversed the state court and awarded the total

14. S. BLOOM, FORMATION OF THE UNION UNDER THE CONSTITUTION 347, 744 (1941).
15. *Id.* at 348.
16. *Id.;* The United States v. Judge Peters, 9 U.S. (5 Cranch) 115 (1809).
17. The United States v. Judge Peters, 9 U.S. (5 Cranch) 115 (1809).

amount to Olmstead and his crew. The State of Pennsylvania had already collected the money, however, and it refused to give it up. When the federal marshall tried to collect the amount of the judgment for Olmstead he was met by Pennsylvania state militiamen. Olmstead continued his litigation for the prize money due him, and he finally succeeded in collecting it 33 years later, when he was 83 years of age.[18]

When the State of Pennsylvania and other states refused to respect these judicial decrees of the Continental Congress, the Congress asserted its authority and adopted a strongly worded resolution declaring that it, or any tribunal appointed by it, *had the power to re-examine the facts and the law in any decision of a state court involving captures on the high seas.* A part of that resolution reads like this: "No finding of a jury in any court of admiralty . . . can or ought to destroy *the right of appeal and the re-examination of the facts* reserved to Congress: [and] . . . no act of any state can or ought to destroy the right of appeals to Congress in the sense above declared."[19]

Congress first appointed a committee of five members to hear and adjudicate these appeals, and later, in 1780, it created a court consisting of three judges which was called *"The Court of Appeals in Cases of Capture."*[20] This new court was empowered to hear all appeals from the state courts in admiralty cases. It was the first national appellate court. It was created seven years before the Constitutional Convention convened, and the procedure for appeal was patterned after the civil law.

When the Constitutional Convention met in 1787, battle lines were formed almost immediately between the Federalists and Anti-Federalists.[21] The former felt that a strong national government should be formed, and the Anti-Federalists believed in maintaining the sovereignty of the states. Early in the Convention these two groups took sharp issue over a proposal that the new constitution contain a provision for the establishment of an independent national judiciary, including trial courts. The Federalists favored such a plan, while the Anti-Federalists opposed it. The latter group felt that the establishment of an independent national judiciary would vest too much power in the federal government. They agreed that there should be a national Su-

18. *See* E. BATES, THE STORY OF THE SUPREME COURT 107 (chart. ed. 1962).
19. S. BLOOM, FORMATION OF THE UNION UNDER THE CONSTITUTION 348 (1941).
20. *Id.* at 349.
21. *See id.* at 350.

preme Court, but they proposed that there be no federal trial courts at all, that all cases be tried in state trial courts and that appeals be authorized from the state courts to the United States Supreme Court only when federal questions are involved.

There were five important questions relating to the judiciary which confronted the delegates to this convention. The manner in which those questions eventually were answered has had a tremendous effect on the development of our present form of government and on our society. These questions were: (1) Should a complete system of federal courts be established, separate and independent from the state courts? (2) Should the United States Supreme Court have the power to annul an act of Congress on the grounds that it is unconstitutional? (3) Should that court have the power to annul an act of a state legislature? (4) Should an absolute right of appeal to a superior tribunal be guaranteed to a litigant? and (5) Should appellate courts be granted the right to review facts as well as the law in cases appealed to them?

Although all five of these questions were considered by the Convention, the debates which took place centered largely around the first three: Whether an independent federal judiciary should be established, whether the Supreme Court should be empowered to annul acts of Congress, and whether that Court should have the power to annul acts of state legislatures.[22]

The delegates were unable to resolve their differences on any of these three questions, and it appeared for a while that the Convention would not be able to agree on a proposed constitution. Since no other solution could be found, the delegates finally decided to omit entirely from the Constitution any provisions relating to these three important questions, and instead to leave the determination of these controversial issues to Congress.

It is probable that the proposed constitution would not have been ratified by all of the thirteen states if it had contained provisions relating to the establishment of an independent federal judiciary or stipulations indicating that federal courts could annul acts of Congress or acts of the state legislatures. Several states almost refused to ratify the proposed constitution even though these controversial provisions had been eliminated from it. New York, for instance, ratified the Constitution by a

22. *Id.* at 354.

majority of only three votes. In New Hampshire and Virginia, it passed with majorities of ten votes, and in Massachusetts it carried by a majority of only 19 votes.[23]

The Constitution which was approved by the Convention and which eventually was ratified by the states created only one court, the Supreme Court, and it authorized Congress to create "such inferior courts as it may from time to time ordain and establish."[24]

It did *not* specify how many justices should be on the Supreme Court or how they were to be selected. It did not stipulate what types of inferior courts should be created, if any, or what the jurisdiction of those courts should be. It did not specify that there should be federal trial courts. And, it contained no provisions at all relating to the question of whether the Supreme Court could annul acts of Congress or acts of state legislatures.

Although the Constitution, as finally ratified by the states, made no determination of the above-mentioned issues, it did contain other important provisions pertaining to the judiciary. It provided that the Supreme Court should have *original* jurisdiction in four types of controversies,[25] and that it should have *appellate jurisdiction* in a very limited number of other types of cases.[26] By using the term "appellate jurisdiction," the framers of the Constitution intimated that at least in some cases a litigant should have an absolute right of appeal to the Supreme Court, as provided in civil law jurisdictions.[27] And, the Constitution specifically provided that in cases over which the Supreme Court was given appellate jurisdiction, its jurisdiction was to be *"both as to Law and Fact,"* such a provision obviously having been taken from civil law procedures.[28] The appellate jurisdiction of the Supreme Court, however, although limited to start with, was further restricted by the provision that it was subject to "such exceptions and under such regulations as the Congress shall make."[29]

Tremendous power relating to the judiciary was vested in Congress. It not only could create and control completely all

23. *Id.* at 26, 60.
24. U.S. CONST. art. III, § 1.
25. *Id.* § 2.
26. *See Id.*
27. *See* THE FEDERALIST No. 81 (A. Hamilton) in which Hamilton said: "A technical sense has been fixed to the term 'appellate' which, in our law parlance, is commonly used in reference to appeals in the course of civil law."
28. U.S. CONST. art. III, § 2; THE FEDERALIST No. 81 (A. Hamilton).
29. U.S. CONST. art. III, § 2.

inferior courts, but it also could control the Supreme Court. It, in practical effect, could actually abolish the Supreme Court through its unlimited authority to regulate and restrict its jurisdiction and to determine the number of justices who were to be on the court and how they were to be selected.

When the first Congress convened in 1789, the Senate appointed a committee of eight members "to bring in a bill for organizing the judiciary of the United States."[30] Six of the eight members of the committee were lawyers. Three of them had served as judges before Congress convened, and five of them had been members of the Constitutional Convention.

The committee undertook to answer the three controversial questions which the Constitutional Convention had left unanswered: Whether an independent system of federal courts should be established, whether the Supreme Court should have the power to annul acts of Congress, and whether that court should have authority to annul acts of the state legislatures. The Federalist leaders in the Senate favored all three of these proposals, while the Anti-Federalist leaders lined up against them. After much debate the Federalist view prevailed, and the committee, by a vote of five to three, decided to report a bill to the Senate which provided for a complete independent system of federal courts and which vested a great deal of power in the Supreme Court.

The bill was debated for almost four weeks in the Senate, and about an equal length of time in the House of Representatives. It was amended 63 times.[31]

The Federalists had a substantial majority of the votes in both the Senate and in the House, so the bill eventually passed by a vote of about two to one in both houses. It was signed by President Washington in 1789.

The Judiciary Act[32] which emerged from the first session of Congress established a complete and independent federal judiciary. It created a Supreme Court consisting of a Chief Justice and five Associate Justices. Thirteen district courts were created, with one district judge to be appointed for each such court. Three circuit courts were established, but these courts

30. S. BLOOM, FORMATION OF THE UNION UNDER THE CONSTITUTION 353 (1941).
31. *Id.* at 362.
32. 1 Stat. 73 (1789).

were not to be staffed with separate judges. Each circuit court was to consist of two justices of the Supreme Court and one district judge. The act required that a session of the circuit court be held in each of the thirteen districts at least twice a year, and since two justices of the Supreme Court had to sit on each such court, it became necessary for the justices to do a great deal of travelling throughout the thirteen states. The requirement that the justices do this travelling and sit with the circuit courts became so burdensome that in 1793 the act was amended to require that only one justice was required to sit with a district judge in order to constitute a circuit court.[33] The famous trial of Aaron Burr took place in such a court.

The Judiciary Act of 1789 vested in the Supreme Court greater jurisdiction than was authorized in the Constitution. It gave that court, for instance, the power to issue writs of mandamus, when no such authority had been granted by the Constitution. It required the justices to sit as members of circuit courts in the original trial of cases, although the Constitution provided that except for a few types of controversies the Supreme Court had only "appellate jurisdiction." And, in spite of the fact that the Constitution limited the court generally to appellate jurisdiction, the act at least implied that the Supreme Court was to try some cases since it provided that "the trial of issues in fact in the Supreme Court, in all actions at law against citizens of the United States, shall be by jury."

The Judiciary Act also provided that the Supreme Court should have appellate jurisdiction in certain cases over the circuit courts *"and courts of the several states."* It specifically stipulated that a final judgment in the highest court of a state which upholds the constitutionality of a state statute "may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error."[34] And it went on to provide that when the judgment of a state court should be reversed by the Supreme Court, then instead of remanding the cause for a final decision as was the required procedure when decisions of circuit courts were reversed, the Supreme Court could, in its discretion, "proceed to a final decision of the same, and award execution."

By the enactment of the Judiciary Act of 1789, therefore,

33. 1 Stat. 333 (1789).
34. 1 Stat. 73 (1789); E. BATES, THE STORY OF THE SUPREME COURT 38 (chart. ed. 1962).

the First Congress settled two of the five controversial questions relating to the judiciary which had been left unanswered by the Constitutional Convention. It established a complete system of federal courts, separate and independent from the state courts, and it specifically vested in the United States Supreme Court the power to annul acts of the state legislatures on constitutional grounds.[35] The act, however, did not provide a clear-cut or lasting answer to any of the other three related questions which were before the Congress. It, for instance, contained no provisions at all indicating whether the Supreme Court could annul acts of Congress. It granted an absolute right of appeal in some admiralty and maritime cases, but generally the only procedure for review provided in the act was one patterned on the old common law discretionary writ of error. And, it provided that in a case where a writ of error was granted the reviewing court was specifically prohibited from reversing "for any error in fact." As will be pointed out later the two provisions last mentioned were soon revised.

The Judiciary Act of 1789 has now acquired a status almost as exalted as the Constitution itself.[36] But regardless of how that act may be regarded now, it was unpopular and was much criticized shortly after it was enacted.

Representative Jackson of Georgia declared it an outrage on "the poor man." Sumpter of South Carolina saw it as "the iron hand of power." Samuel Livermore of New Hampshire denounced it as "a new-fangled system." Senator Maclay, of Pennsylvania, who was one of the three dissenters in the Senate Committtee which proposed the bill, called it "the gunpowder pot of the Constitution [designed to] swallow all the state constitutions by degrees and thus to swallow by degrees all the state judiciaries." Gerry of Massachusetts called it a "tyranny," and William Smith of South Carolina declared that "This constant control of the supreme federal court over the adjudication of the state courts would dissatisfy the people."[37]

This last prediction, at least, proved to be sound. Partly

35. Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) was the first case in which an act of a state legislature was annulled. *See also* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 653 (1926).

36. Williams v. United States, 289 U.S. 553 (1933); E. BATES, THE STORY OF THE SUPREME COURT 38 (chart. ed. 1962); C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 3 (1963).

37. For these and other expressions of opinion, *see* E. BATES, THE STORY OF THE SUPREME COURT 39 (chart. ed. 1962).

because of the unpopularity of this act the Federalists lost the presidency in 1801.

Shortly after the Judiciary Act was enacted several suits were filed against states by citizens of other states. The plaintiffs in all of these suits based their right to maintain such actions on Article III of the Constitution,[38] and on Section 13 of the Judiciary Act of 1789 which provided that the Supreme Court should have jurisdiction over controversies "between a state and citizens of other states."

One of the first such suits to be filed was entitled *Chisholm v. Georgia.*[39] There, two citizens of South Carolina, as executors of a British creditor, sued the State of Georgia in the United States Supreme Court for an alleged debt. The State of Georgia, being jealous of its sovereignty as were all of the other states, denied that the Supreme Court had jurisdiction and it refused to plead. The Supreme Court, with John Jay as its first Chief Justice, rendered judgment against the state, but Georgia still refused to surrender its sovereignty and it refused to pay the judgment. Soon after the decision was rendered a bill was introduced in the Georgia Legislature providing that any federal marshall or other person who attempted to execute the process of the Court should be adjudged "guilty of felony and shall suffer death, without benefit of clergy, by being hanged."[40] No process of any kind in that case was served on Georgia after that bill was introduced.

Other suits of a similar nature were filed against Maryland, New York, and Virginia, and these states reacted almost in the same manner as Georgia had done. The circumstance which infuriated the states most was the fact that when the Constitution was up for ratification the Federalist leaders had assured the states that they could not be sued under that provision.[41] Within two days after a decision was rendered in *Chisholm v. Georgia* a bill was introduced in Congress proposing an amendment to the Constitution providing that the judicial power of the United States did not extend to suits against a state by citizens of another state. The bill was promptly passed and the amendment was ratified by the states. It became the eleventh amendment.[42]

38. U.S. CONST. art. III, § 2, provides: "The Judicial Power shall extend to all cases in Law and Equity, . . . to controversies . . . between a state and citizens of another state."

39. 2 U.S. (2 Dall.) 419 (1792).

40. E. BATES, THE STORY OF THE SUPREME COURT 56 (chart. ed. 1962).

41. *See, e.g.*, Statements by Hamilton in THE FEDERALIST No. 81 (A. Hamilton) ; Statements by Madison in 3 ELLIOT'S DEBATES 533 (1861 ed.)

42. See discussion of this amendment in Parden v. Terminal Ry. of Ala. State Docks Dep't, 311 F.2d 727 (5th Cir. 1963).

The Judiciary Act was amended and revised in 1801, during the last days of the administration of President John Adams.[43] Adams was a staunch Federalist, and he believed in a powerful central government. In his bid for re-election in 1800 he was defeated by Thomas Jefferson, who was a strong Anti-Federalist, although the name of the party by that time had been changed to the Republican Party, no relation to the present party which bears that name. Jefferson was a firm believer in state sovereignty, and his views thus were diametrically opposed to those entertained by Adams.

Adams and the Federalist Congress wanted to perpetuate Federalist control of the courts. In an effort to do so the lame duck Congress, early in 1801 and shortly before Jefferson was to be inaugurated, enacted the famous "Midnight Judges Bill," more formally referred to as the Judiciary Act of 1801.[44] This statute substantially amended the original Judiciary Act. It provided that on the death of the next justice of the Supreme Court, a successor would not be appointed, but that the number of justices thereafter would remain at five instead of six. This provision obviously was designed to prevent incoming President Jefferson from appointing a justice to succeed the seriously ill and aging Justice Cushing. The act also relieved the justices of the Supreme Court from the necessity of riding circuit or of sitting as members of the circuit courts, a burdensome duty which the members of the Supreme Court justifiably disliked. The 1801 act also increased the number of circuits from three to six, and it provided for the appointment by the president of sixteen new circuit court judges to preside over these courts. Also, in a separate act passed at the same time, forty-two new Justices of the Peace were created for the District of Columbia, all of whom were to be appointed by the president.

Immediately after this act was passed Adams proceeded to appoint Federalists to fill these newly created judicial positions. Most of these appointments were made during the last few days of his administration, many of them having been made actually on the last day he was in office. Chief Justice Rutledge resigned shortly before the end of Adams' term, thus opening the way for Adams to make another important last

43. E. BATES, THE STORY OF THE SUPREME COURT 81 (chart. ed. 1962); C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 4 (1963).

44. 2 Stat. 89. *See also* E. BATES, THE STORY OF THE SUPREME COURT 81 (chart. ed. 1962); F. RODELL, NINE MEN 69 (1955).

minute appointment. Adams promptly appointed his good friend John Marshall to succeed Rutledge as Chief Justice of the Supreme Court. Marshall was a leader in the Federalist Party, and he, like Adams, believed in a strong federal government. He was serving as Secretary of State under Adams at the time of his appointment.

Since many appointments were made by Adams during his last days in office, the Secretary of State was unable to deliver commissions to some of the appointees before Jefferson was inaugurated. President Jefferson, immediately after his inauguration, instructed his new Secretary of State, James Madison, to withhold the delivery of commissions to some of Adams' appointees. One of the commissions so withheld pursuant to Jefferson's instructions had been issued to William Marbury who had been appointed to serve as a Justice of the Peace. Marbury promptly instituted a mandamus suit in the United States Supreme Court seeking to compel Secretary of State Madison to issue and deliver his commission as Justice of the Peace, and the famous case of *Marbury v. Madison* thus was begun.[45]

The position taken by the Secretary of State in that case was that the Supreme Court did not have the right to issue a mandamus to him. He conceded that Section 13 of the Judiciary Act of 1789 specifically gave that right to the Supreme Court, but Madison contended that that section of the act was unconstitutional since it went beyond the authority vested in the Supreme Court by the Constitution. The question was squarely presented to the Supreme Court, therefore, as to whether that court could declare an act of Congress unconstitutional.

In 1802, shortly after Jefferson had stopped the issuance of commissions to Adams' appointees, the new Republican Congress enacted a law repealing Adams' Judiciary Act of 1801, thus abolishing all of the new judgeships which had been created by that act.[46] President Adams, of course, had already appointed many persons to fill these positions. The repealing act passed at the beginning of Jefferson's Administration, if allowed to stand, would have had the effect of putting these recently appointed judges out of office. It also would have reinstated the old requirement that justices of the Supreme Court must ride circuits and sit as members of the circuit courts.

45. 5 U.S. (1 Cranch) 137 (1803).
46. 2 Stat. 132.

Immediately after Jefferson's repealing act was passed in 1802, it was attacked as being unconstitutional in the case of *Stuart v. Laird*,[47] which was then pending before the Supreme Court. The argument was made in that case that since the new judicial positions had been lawfully created by Congress in 1801, and the judges had been appointed and commissioned to serve during good behavior as provided in Article III of the Constitution, the attempt by the new Congress to abolish those offices by repealing the 1801 Act was unconstitutional. The Republican Congress, knowing that all of the justices of the Supreme Court were strong Federalists and that most of them had favored the enactment of the 1801 Act, feared that the court would declare the repealing act of 1802 unconstitutional, and thus permit the newly appointed Federalist judges to remain in office. The Congress undertook to forestall this anticipated unfavorable decision by enacting a statute prohibiting the Supreme Court from convening or rendering any decisions at all for fourteen months or until February, 1803.[48] The time set for the court to reconvene, by coincidence, happened to be about the time when the term of office to which Marbury had been appointed would expire.

Immediately after the court reconvened in 1803 arguments were heard in the case of *Marbury v. Madison*,[49] and less than two weeks later Chief Justice Marshall, as the organ of the court, handed down his famous decision, although the issue by that time had become moot. The Court held in that case that the Supreme Court *did* have the right to declare an act of Congress unconstitutional, that Section 13 of the First Judiciary Act passed by Congress was *invalid* as being in violation of the Constitution, and that the Supreme Court did not have the power to issue a writ of mandamus. Marbury, of course, never received his commission.

The decision in *Marbury v. Madison* had no practical effect insofar as the parties were concerned, because Marbury's term of office had expired. But, regardless of its practical effect, it ranks as the most important decision in all Supreme Court history, judged by its potency as a legal precedent.[50] The Court

47. 5 U.S. (1 Cranch) 299 (1803).

48. E. BATES, THE STORY OF THE SUPREME COURT 90 (chart. ed. 1962); 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 222 (1926).

49. 5 U.S. (1 Cranch) 137 (1803).

50. *See* E. BATES, THE STORY OF THE SUPREME COURT 87-94 (chart. ed. 1962); I. FRIBOURG, THE SUPREME COURT IN AMERICAN HISTORY 17-29 (1965); F. RODELL, NINE MEN 78-79 (1955); 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 231-68 (1926).

answered categorically one of the controversial questions relating to the reviewing power of the Supreme Court which the Constitutional Convention and the Congress had failed to answer, that is, whether that court could annul an act of Congress. It was the first exercise by the Supreme Court of its controversial veto power over Congress. It marked the first time that the highest judicial tribunal, anywhere, had annulled an act of the governing body which had the power to abolish and to regulate the jurisdiction of the very court which rendered that decree.

Some regard the decision as establishing the power of "judicial review," while others regard it as the usurpation of power by the Supreme Court. In any event, the decision in that case has never been overruled, and the Supreme Court continues to exercise greater powers of review than does any other court in existence.

Six days after the decision in *Marbury v. Madison* was handed down, the Supreme Court also decided the case of *Stuart v. Laird*,[51] that being the litigation in which the constitutionality of Jefferson's repealing act of 1802 was questioned. By the time that case was submitted to the Supreme Court, the validity of all three of the existing Judiciary Acts was being challenged. Issues were raised as to the constitutionality of the original Judiciary Act of 1789, the Amended Judiciary Act of 1801 adopted in Adams' lame duck session, and the 1802 repealing act which was passed under Jefferson's administration. The Supreme Court, to the delight of the Federalist leaders, held that Jefferson's Repeal Act of 1802 was *unconstitutional* because it purported to abolish six legally created circuit courts, and to put out of office the judges of those courts, all of whom had been appointed pursuant to the Constitution to hold office "during good behavior." The court held that Adam's Judiciary Act of 1801 was *constitutional* because it did not abolish any existing courts and it did not attempt to remove from office any judge who had been consitutionally appointed to that office during good behavior. And, finally, the court found that the Original Judiciary Act of 1789 was *unconstitutional*, because it provided that justices of the Supreme Court should sit as trial judges on the circuit courts whereas the Constitution provided that they were to have appellate jurisdiction only, *but* the court went on to hold that "practice and acquiescence" under the Judiciary Act of 1789 for several years *had fixed its construc-*

51. 5 U.S. (1 Cranch) 299 (1803).

tion and made it constitutional. Justice Patterson, as the organ of the court, said:

> "To this objection, which is of recent date, it is sufficient to observe, that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed."[52]

The decision in *Stuart v. Laird* perpetuated Federalist control over the Supreme Court for several more years. Following closely on the heels of *Marbury v. Madison*, it also firmly established the authority of the Supreme Court to annul acts of Congress, and that right has never been successfully challenged since that time.

It has already been noted that the Judiciary Act of 1789, with only a few exceptions, restricted a litigant's right to have a case reviewed to a procedure similar to the common law writ of error. As early as 1803, however, the absolute right of appeal was granted in some cases, and later litigant was granted the unqualified right to appeal from all final decisions of the district courts to the courts of appeal, and the absolute right to appeal in some cases to the Supreme Court. The discretionary remedy of review by means of a writ of error also was retained until 1928, when it was abolished. Since that time there have been three methods of obtaining a review by the United States Supreme Court, depending on the nature of the controversy. They are: By means of the absolute right of appeal, by a writ of certiorari which may be granted at the discretion of the court, and by certification.[53]

The circuit courts of appeal were established by the Everts Act in 1891[54] to relieve the Supreme Court of a hopeless backlog of cases. The bill, as originally introduced and passed by the House, provided that the old circuit courts were to be abolished with the creation of these new courts. The Senate refused to concur in the abolishment of the circuit courts, however, so the

52. *Id.* at 307.

53. 28 U.S.C. §§ 1252-1258 (1964). *See also* H. ABRAHAM, THE JUDICIAL PROCESS 159-65 (1962).

54. 26 Stat. 826.

bill was amended to allow the circuit courts to continue. For the next thirty years, there existed four tiers of courts in our federal system: The district courts, the circuit courts, the circuit courts of appeal and the Supreme Court. The circuit courts were abolished when the Judicial Code of 1911 was adopted,[55] and the jurisdiction of those courts was transferred to the district courts. The title of the circuit courts of appeal was changed to "courts of appeal" by the Revised Judicial Code of 1948.[56]

The creation of intermediate courts of appeal in 1891, and the enlarging of the jurisdiction of those courts in 1911, relieved the Supreme Court of some of its work load, but the relief was not sufficient to enable it to keep up with its docket. The "Judge's Bill" was enacted in 1925, therefore, which abolished the right of direct appeal to the Supreme Court except in a limited number of cases.[57] Since that time, although the right of appeal to the Supreme Court does exist in some cases, generally the procedure available for obtaining a review by the Supreme Court has been by application for a writ of certiorari. There still exists the absolute right of appeal from decisions of the district courts to the courts of appeal.[58]

Although the procedure for review authorized by the Judiciary Act of 1789 was limited almost exclusively to the common law writ of error, later legislation abandoned that type of remedy and instituted an absolute right of appeal which is patterned on civil law procedures.

The authority of the reviewing court to review facts as well as the law in appeals from non-jury cases has been recognized consistently in federal court procedures, although the law provides and jurisprudence establishes that findings of fact by the trial judge will not be set aside unless clearly erroneous.[59]

A different rule applies, however, in civil cases tried by jury. Amendment 7 of our Federal Constitution provides that "No fact tried by jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law." The United States Supreme Court has held that this means that in a civil jury case which has been appealed, the

55. *See* Maris, *The Federal Judicial System*, in 12 MODERN FEDERAL PRACTICE DIGEST 815, 817-18 (1960).
56. 28 U.S.C. §§ 1251-1333 (1964).
57. 43 Stat. 936.
58. 28 U.S.C. § 1291 (1964).
59. FED. R. CIV. P. 52.

appellate court can review only questions of law.[60] It also has held consistently up to this time that this amendment applies only to federal courts and that it does not apply to state courts.[61]

In Louisiana, our State Constitution authorizes appellate courts to review the facts as well as the law in all civil cases, even though tried by jury.[62] Some legal scholars believe, however, that recent rulings of the Supreme Court on other issues indicate that the seventh amendment must now be applied in state courts and that our state appellate courts can no longer review facts in these cases. That conclusion is based on recent holdings that because of the "due process of law" and "equal protection of the laws" provisions of the fourteenth amendment, the rights guaranteed in the first ten amendments must now be applied to the states in state courts.[63]

In a number of cases decided recently, however, the Supreme Court and the United States Courts of Appeal have held that the appellate review of facts found by a jury is permissible if the suit involves a claim that certain fundamental rights guaranteed by the Constitution have been violated.[64] In *New York Times v. Sullivan,* for instance, a case tried by jury and dealing with the right of freedom of speech, the Supreme Court held that it was proper for it "to review the evidence to determine whether it could constitutionally support a judgment for respondent."[65]

Shortly thereafter in *Associated Press v. Walker,* it said:

"We think it better to face for ourselves the question

60. Gallick v. Baltimore & Ohio R.R., 372 U.S. 108 (1963); Rogers v. Missouri Pac. R.R., 352 U.S. 500 (1957); Senko v. La Crosse Dredging Corp., 352 U.S. 370 (1957); Gardner v. Capital Transit Co., 152 F.2d 288 (D.C. Cir. 1945), *cert. denied,* 327 U.S. 795 (1946).

61. *See, e.g.,* Palko v. Connecticut, 302 U.S. 319 (1937); Hardware Dealers Mut. Fire Ins. Co. of Wisconsin v. Glidden, 284 U.S. 151 (1931); Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).

62. LA. CONST. art. VII, § 29.

63. *See, e.g.,* Miranda v. Arizona, 384 U.S. 436 (1966); Tehan v. United States, 382 U.S. 406 (1966); Griffin v. California, 380 U.S. 609 (1965); Escobedo v. Illinois, 378 U.S. 478 (1964); Malloy v. Hogan, 378 U.S. 1 (1964); School District of Abington Township v. Schempp, 374 U.S. 203 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963); Engel v. Vitale, 370 U.S. 421 (1962); Mapp v. Ohio, 367 U.S. 643 (1961); Gitlow v. New York, 268 U.S. 652 (1925). *See also The Gitlow Doctrine Down to Date:* 11, 54 A.B.A.J. 785 (1968).

64. Associated Press v. Walker, 388 U.S. 130 (1967); New York Times v. Sullivan, 376 U.S. 254 (1964); Napue v. People, 360 U.S. 264 (1959); Niemotko v. State, 340 U.S. 268 (1951); United States v. Thornburg, 111 F.2d 278 (8th Cir. 1940).

65. 376 U.S. 254, 284-85 (1964). *See also* Time, Inc. v. Hill, 385 U.S. 374 (1967).

whether there is sufficient evidence to support the finding we would require."[66]

And, in *Niemotko v. State of Maryland,* it ruled:

"In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will re-examine the evidentiary basis on which those conclusions are founded."[67]

These rulings to the effect that facts found by a jury may be re-examined and reversed by the appellate court have been applied in only a limited number of cases, and they can hardly be interpreted as overruling or materially changing the established general rule that under the provisions of the seventh amendment fact findings by a jury may not be reviewed in federal courts.

It is conceivable that at some time in the future the Supreme Court will decree that the seventh amendment must be applied in state courts. If that occurs, such a ruling will bring about a change in the laws of this state relating to appeals, and it will restrict our appellate courts solely to a review of questions of law in civil jury cases.

Attempts have been made from time to time to limit, restrict or, curtail the jurisdiction of the Supreme Court. About 1821, for instance, the southern states became fearful of the Supreme Court and they set out to limit its jurisdiction. One of the many measures introduced in Congress to accomplish that purpose was a bill proposing a constitutional amendment limiting the terms of the justices to six years, without reappointment except by agreement of both houses of Congress. Senator Johnson of Kentucky introduced a bill to remove from the Supreme Court appellate jurisdiction in cases involving an interpretation of the Constitution, and to vest that appellate jurisdiction in the *Senate.* Congressman Stevenson of Virginia introduced a resolution to repeal Section 25 of the Judiciary Act of 1789 and thus deprive the Supreme Court of most of the extensive powers of review which the first Congress had vested in it. Several resolutions to the same effect were introduced by other Congressmen. A resolution submitted by Senator Johnson requiring the concurrence of five out of the seven justices in constitutional cases was reported favorably by the Committee on the Judiciary in

66. 388 U.S. 130, 158 (1967).
67. 340 U.S. 268, 271 (1951).

the Senate, but it failed when it came up for final vote. And, in 1825 an unsuccessful attempt was made to "pack" the court.[68] None of the above mentioned proposals was enacted into law.

Other attempts have been made from time to time to limit the appellate jurisdiction of the Supreme Court, but most of these also have failed, the notable exceptions being that the appellate jurisdiction of that court was restricted by the 7th and 11th Amendments of the Constitution. Congress has seldom used the power vested in it by the Constitution to limit the jurisdiction of the court. Parts of the Judiciary Act have been decreed to be unconstitutional, of course, and it has been amended from time to time. It eventually was superseded by the Judicial Code of 1911.[69] The jurisdiction of our federal courts, however, has actually been greatly expanded and enlarged through the years rather than restricted.

The Supreme Court at various times has been composed of as few as five justices and as many as ten.[70] There have been nine members of the Court since 1869. From the very beginning the Court has been called upon to render decisions which have had far-reaching effects, such as the early cases of *McCulloch v. Maryland,*[71] *Gibbons v. Ogden,*[72] the *Dartmouth College* case,[73] the *Dred Scott* Decision[74] and others which have already been mentioned. Of great importance also are the more recent cases involving the integration of our public schools,[75] the School Prayer cases,[76] *Gideon v. Wainwright,* [77] the *Escobedo*[78] and *Miranda*[79] cases and others.

A number of proposed changes in our laws relating to appeals are currently being debated by legislators and legal scholars. One such proposal is designed to correct the disparity

68. E. BATES, THE STORY OF THE SUPREME COURT 126 (chart. ed. 1962); 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 652-85 (1926).

69. 36 Stat. 1168, § 297.

70. *See* H. ABRAHAM, THE JUDICIAL PROCESS 156 (1962).

71. 17 U.S. (4 Wheat.) 316 (1819). *See also* E. BATES, THE STORY OF THE SUPREME COURT 119-23 (chart. ed. 1962); I. FRIBOURG, THE SUPREME COURT IN AMERICAN HISTORY 30-44 (1965).

72. 22 U.S. (9 Wheat.) 1 (1824).

73. The Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

74. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

75. *See, e.g.,* Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

76. *See, e.g.,* Chamberlin v. Dade County Board of Public Instruction, 377 U.S. 402 (1964); School District of Abington Township, Pa. v. Schempp, Md. & Pa., 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962); West Virginia State Board of Education v. Barnette, 319 U. S. 624 (1943).

77. 372 U.S. 335 (1963).

78. 378 U.S. 478 (1964).

79. 384 U.S. 436 (1966).

and inequality of sentences.[80] The discussions centering around these proposals have led to a movement which is now underway to vest appellate courts with the power to review and to decrease or increase sentences.

Prior to 1891 the United States Circuit Courts had the power to review and change sentences, and they exercised that power.[81] On at least one occasion since that time a federal appellate court has set aside a legally imposed sentence solely because it concluded that the punishment was too severe under the facts and circumstances presented.[82] Generally, however, there can be no appellate review and modification of a sentence in our federal courts. In at least thirteen states, however, the appellate review and modification of sentences is authorized.[83] The military courts of the United States have always had that power. And the English Court of Criminal Appeals has had the authority to review and change sentences since 1907.[84] The United States, in fact, is the only nation in the free world where a sentence imposed by one judge is not subject to review by a higher court.[85]

At least eight bills are pending in Congress at this time authorizing the appellate review and modification of sentences in federal courts. A special committee of the Judicial Conference of the United States, after conducting surveys which included responses to questionnaires from federal judges, has gone on record as favoring the appellate review of sentences.[86]

In 1967 the Advisory Committee on Sentencing and Review of the American Bar Association, after conducting a fourteen

80. *See generally* D. KARLEN, APPELLATE COURTS IN THE UNITED STATES AND ENGLAND (1963); Brewster, *Appellate Review of Sentences*, 40 F.R.D. 79 (1965); George, *An Unsolved Problem: Comparative Sentencing Techniques*, 45 A.B.A.J. 250 (1959); *Seminar and Institute on Disparity of Sentences*, 30 F.R.D. 401 (1961); Youngdahl, *Institute on Sentencing*, 35 F.R.D. 381 (1964).

81. 20 Stat. 354 (1879); Kaufman, *Appellate Review of Sentences*, 32 F.R.D. 249, 259 (1962).

82. United States v. Wiley, 278 F.2d 500 (7th Cir. 1960).

83. ARIZ. REV. STAT. ANN. § 13-1717 (1956); CONN. GEN. STAT. ANN. §§ 51-194, 51-195, 15-196 (Supp. 1965); FLA. STAT. ANN. § 932.52 (Supp. 1966); HAWAII REV. LAWS § 212-14 (Supp. 1965); ILL. ANN. STAT. ch. 38, § 117-3(e) (Smith-Hurd 1964); IOWA CODE ANN. § 793.18 (1950); ME. REV. STAT. ANN. tit. 26, §§ 2141-2144 (Supp. 1966); MD. ANN. CODE art. 26, §§ 132-138 (1966); MASS. GEN. LAWS ANN. ch. 278, §§ 28A-28D (1959); NEB. REV. STAT. § 29-2308 (1964); N.Y. CODE CRIM. P. §§ 543, 764; ORE. REV. STAT. §§ 138.050, 168.090 (1963) (repl. part); TENN. CODE ANN. § 40-2711 (1955).

84. 7 Edw. 7, c. 23, § 3(c) (1907); Kaufman, *Appellate Review of Sentences*, 32 F.R.D. 249, 260 (1962).

85. Kaufman, *Appellate Review of Sentences*, 32 F.R.D. 249, 260-61 (1962).

86. *Id.* at 263.

month study, recommended legislation of that type for federal and state courts.[87]

The principal arguments advanced by the proponents of the measures are that appellate review will correct excessively harsh sentences, that it will eliminate the great disparity which now exists in sentences, and that it will induce greater respect for the laws. The opponents of the legislation argue that the trial judge is in a better position than is the appellate court to impose a proper sentence, that the appellate review of sentences will result in the standardizing of sentences which all criminologists say is not desirable, and that such a procedure would inundate appellate courts with frivolous appeals.

In view of the growing sentiment in favor of the appellate review of sentences it would not be surprising if legislation to that effect should be enacted by Congress, permitting such reviews in federal courts.

Another current problem which may provoke changes in some of our appellate procedures relates to the many devices which are now being used to obtain reviews of sentences long after the delays for appealing have expired. These procedures are referred to generally as post conviction remedies. The one most frequently used is the writ of habeas corpus, but others sometimes are the writ of error coram nobis, the motion for new trial on newly discovered evidence, the motion to vacate the sentence, the motion to correct an illegal sentence, the motion to withdraw a plea of guilty, and the motion to reopen an appeal.

In many of these cases the convicted person, long after the sentence has been imposed and the trial procedures have been completed, is permitted to raise in another procedure, and frequently in another court, the same questions which were or should have been raised on his original appeal.[88] In some cases

87. *See* AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES (1967).

88. *See generally* Tehan v. United States, 382 U.S. 406 (1966); Malloy v. Hogan, 378 U.S. 1 (1964); Lane v. Brown, 372 U.S. 477 (1963); Fay v. Noia, 372 U.S. 391 (1963); United States v. Morgan, 346 U.S. 502 (1954); Dowd v. United States, 340 U.S. 206 (1951); Labat v. Bennett, 365 F.2d 698 (5th Cir. 1964); Collins v. Walker, 329 F.2d 100 (5th Cir. 1964); *See* Meador, *Accommodating State Criminal Procedure and Federal Postconviction Review*, 50 A.B.A.J. 928 (1964) and authorities cited therein.

fact-findings of the court or jury are reviewed and judgments are set aside at least partially on factual issues.

The great number of cases which have been filed recently by parties seeking post conviction remedies has compelled many states to adopt special legislation to accommodate them. At least twenty-one states, as well as Congress, have enacted laws making special provisions for this type of remedy.[89]

In view of the many types of post conviction remedies which appear to be available to the convicted person, a case which results in such a conviction now seldom reaches a point where it can be said to have been finally concluded. Revisions of our procedural laws, both state and federal, are needed to provide a more standardized procedure for seeking post conviction remedies, and to set time limits within which this type of relief may be sought. It is hoped that most of these remedies eventually will be incorporated into our appellate procedures and that those which cannot be disposed of by appeal will be subjected to the requirement that they be litigated and disposed of before the case is finally determined on appeal. In any event, a time limit should be fixed for the disposition of these post conviction remedies so that at some point in the litigation the judgment rendered may actually become final.[90]

A proposal is being urged that our appellate procedures be changed to provide for an automatic appeal in some criminal cases, particularly in those which involve capital punishment. A modification of some of our procedural laws may be needed

89. ALASKA R. CRIM. P. 35 (Supp. 1963); ARIZ. REV. STAT. ANN. §§ 13-2001—13-2027 (1956); ARK. R. CRIM. P. 1 (1965); COLO. R. CRIM. P. 35 (1962); DEL. R. CRIM. P. 35 (1953); FLA. R. CRIM. P. 1 (1963); ILL. ANN. STAT. ch. 38, §§ 122-1—122-7 (1964); KAN. STAT. ANN. § 60-1057 (1964); KY. R. CRIM. P. 11:42 (1964); ME. R. CRIM. P. 35(b), following tit. 14 ME. REV. STAT. ANN. (Supp. 1966); MD. ANN. CODE art. 27, § 645 (Supp. 1965); MO. SUP. CT. R. 27.26 (1953); NEB. REV. STAT. §§ 29-3001—29-3004 (Cum. Supp. 1965); N.J. C. R. 3:10A (Supp. 1965); N.Y. Proposed Act §§ 517-28, 880-87; LEG. DOC. 65[L] (1959); N. C. GEN. STAT. §§ 15-217—15-222 (1965); OHIO REV. CODE §§ 2953.1-2953.24 (Supp. 1966); ORE. REV. STAT. §§ 138.510-138.680 (1963); Pa. Laws No. 554 (1965); UTAH STAT. ANN. tit. 13, §§ 7131-7137 (Law Pamphlet 1966); WYO. STAT. ANN. tit. 7, §§ 7-408.1—7-408.8 (1963); 28 U.S.C. § 2255 (1964); *See generally Post-Conviction Remedies*, in A.B.A. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE (1967).

90. *See* Badger, *A Judicial Cul-de-Sac: Federal Habeas Corpus for State Prisoners*, 50 A.B.A.J. 629 (1964).

now in order to enable indigent litigants to obtain a transcript of the trial proceedings for the purpose of appeal. The dockets in some of our appellate courts have become so heavy that several proposals have been made to limit appeals to certain types of cases and to those which involve more than a fixed minimum sum. Other amendments to our laws relating to appeals are being discussed now, and new proposals for the improvement of our appellate procedures doubtless will be submitted from time to time as conditions change or as the need for them becomes apparent.

A review of this kind emphasizes the need for us to constantly study and revise our judicial procedures. And, I think it also emphasizes the importance of preserving the right of appeal.

The judiciary is in a sense the guardian of the law and of the personal and property rights of our citizens. It is much further removed from the political arena than are administrative and legislative agencies. It is made up of men who are chosen for their ability and integrity, and these men are provided with a measure of tenure and security which is designed to insulate them from political pressure and stresses.

The absolute right of a litigant to have his case reviewed by a higher court gives him a little more assurance that he will not become the victim of human error, however sincere. It relieves him completely from the fear of being subjected to the whim or abuse of a tyrant. It gives time for sober second thoughts as to the issues which are presented, and it permits the case to be reconsidered in a calmer atmosphere, after the heat of battle is over. And, a review on appeal enlists the thinking and deliberation of more than a single mind in determining those issues. It is true that the exercise of the right of appeal delays the final disposition of the case, but when important personal or property rights are involved the greater assurance that justice will be accomplished in that case and in others more than offsets the injury occasioned by the delay.

Our procedures for administering justice will require and

unquestionably will be subjected to many more changes. I believe, however, that the absolute right of appeal is truly a fundamental safeguard of justice, and I sincerely hope that none of the changes which we may expect in the future will have the effect of impairing that right. Thomas Jefferson stated that the object of our judicial system was "Equal and exact justice to all men of whatever state or persuasion." We can come nearer approaching that objective by preserving the civil law concept of the right of appeal.