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# REINING IN THE SUPERLEGISLATURE: A RESPONSE TO PROFESSORS CARRINGTON AND CRAMTON

*Daniel J. Meador*†

Unlike a traditional court of law in the Anglo-American legal world, the United States Supreme Court chooses the cases and issues it will decide. It selects them from the many thousands of petitions presented to it annually, declining to decide all but a tiny percentage. The Court is obliged to decide none. In fact, it currently provides review in fewer than seventy cases each year, half as many as it reviewed three decades ago. Professors Paul Carrington and Roger Cramton, in a wide-ranging survey of the federal judiciary's transformation, see the Court's unlimited discretion as having converted it into a "superlegislature." This development has given rise to public clamor for political accountability of the Justices, as though they were legislators, threatening the kind of judicial independence essential to a regime of law. They have put forward a bold proposal to pull the Court back toward a law court model by sharply curtailing its discretionary choice of business and providing it with a large measure of mandatory jurisdiction.<sup>1</sup> In this Response, I critique their proposal.

## I

First, a bit of background and disclosure. The federal judiciary's transformation began in the late 1960s. The cause of almost all changes at all levels since then has been the huge, unrelenting growth in litigation. The impact of this growth was first felt most acutely at the intermediate appellate level. There were two threats: erosion in the integrity of the appellate process and lack of uniformity in national decisional law. The initial response to those concerns came from the American Bar Foundation in its 1968 report entitled *Accommodating the Workload of the United States Courts of Appeals*.<sup>2</sup> Professor Carrington served as director of that study, and he followed it up with an influential law review article.<sup>3</sup>

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<sup>1</sup> Paul D. Carrington & Roger C. Cramton, *Judicial Independence In Excess: Reviving the Judicial Duty of the Supreme Court*, 94 CORNELL L. REV. 587 (2009).

<sup>2</sup> AMERICAN BAR FOUNDATION, *ACCOMMODATING THE WORKLOAD OF THE UNITED STATES COURT OF APPEALS* (1968).

<sup>3</sup> Paul D. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542 (1969).

With concerns growing over those matters, the Federal Judicial Center and the National Center for State Courts in 1971 jointly established the Advisory Council for Appellate Justice. Its mission was to advise those two centers on the appellate challenges of the day. The Council, chaired by the late Professor Maurice Rosenberg, consisted of some of the country's ablest appellate judges, lawyers, and law professors. Professors Carrington and Cramton were members, and it was my privilege to serve with them on that body. Its work culminated in the 1975 National Conference on Appellate Justice.<sup>4</sup> In the meantime, Congress, with increasing concern about the capacity of the intermediate courts to manage the rising case volume, created the Commission on Revision of the Federal Court Appellate System (Hruska Commission). Professor Cramton was a member. It submitted reports in 1973 and 1975.<sup>5</sup>

Over the four decades since those early years of the "crisis of volume"<sup>6</sup> there have been numerous congressional hearings, conferences, law review articles, and studies addressing the federal intermediate courts.<sup>7</sup> Throughout, Professors Carrington and Cramton have been involved in those efforts and have been among a small group of legal academics who have constantly sought (without much success) to preserve the essential role of the appellate courts and to achieve nationwide uniformity in federal decisional law. Over these many years I have labored with them in these appellate vineyards in various ways and on numerous occasions. Thus I bring to this critique of their latest effort a long familiarity with and admiration for their work, as well as a presumption that their ideas for judicial reform are entitled to serious consideration.

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4 On Behalf of the Advisory Council, Professor Carrington prepared four volumes of reading material distributed in advance to all conferees. A fifth volume included the conference proceedings. ADVISORY COUNCIL FOR APPELLATE JUSTICE, APPELLATE JUSTICE: 1975. Earlier the council issued two reports. ADVISORY COUNCIL FOR APPELLATE JUSTICE, EXPEDITING REVIEW OF FELONY CONVICTIONS AFTER TRIAL (1973); ADVISORY COUNCIL FOR APPELLATE JUSTICE, STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS (1973). Council members served as advisors for the first study conducted on the use of appellate staff counsel and truncated internal processes. See DANIEL J. MEADOR, APPELLATE COURTS: STAFF AND PROCESS IN THE CRISIS OF VOLUME (1974).

5 COMM'N ON REVISION OF THE FED. COURT APPELLATE SYS., THE GEOGRAPHICAL BOUNDARIES OF THE SEVERAL JUDICIAL CIRCUITS: RECOMMENDATIONS FOR CHANGE (1973); COMM'N ON REVISION OF THE FED. COURT APPELLATE SYS., STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE (1975).

6 This phrase was used to describe the unprecedented rise in appellate filings. See MEADOR, *supra* note 4.

7 Much of the activity concerning federal judicial reform in the 1970s and 1980s is described in Daniel J. Meador, *The Federal Judiciary—Inflation, Malfunction, and a Proposed Course of Action*, 1981 BYU L. REV. 617. Among the later studies were COMM. ON LONG RANGE PLANNING JUDICIAL CONFERENCE OF THE U.S., PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS (1995); COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FED. COURTS OF APPEALS, FINAL REPORT (1998); REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (1990).

## II

Their current proposal is reminiscent of, though different from, an earlier effort addressed to the Supreme Court's certiorari jurisdiction. That effort came in the midst of the flurry of activity just mentioned from 1968 to 1975. It was launched, by the Federal Judicial Center, by creating the Study Group on the Caseload of the Supreme Court (Freund Committee).<sup>8</sup> That committee addressed the burden placed on the Supreme Court Justices in reviewing several thousand certiorari petitions annually to determine which to grant. In its report, submitted in 1972, the Committee recommended the establishment of a new entity to be called the National Court of Appeals.<sup>9</sup> This proposed court would screen all certiorari petitions, deny most, and send on to the Supreme Court several hundred from which the Court would select its cases. The report was leaked to the press a month before its official release date, and it provoked an immediate firestorm of adverse criticism.<sup>10</sup> The result was that the report was stillborn. This episode squelched any further thought about altering the structure or jurisdiction of the Supreme Court's certiorari process. As is often said of Social Security, the Court's processes became a "third rail," politically untouchable.<sup>11</sup> That is, until now.

The Carrington-Cramton duo has now moved in where for thirty-six years others have feared to tread.<sup>12</sup> Unlike the Freund Committee, however, their concern is not primarily with the Justices' heavy task of reviewing certiorari petitions. Rather, their proposal stems from their perception (hardly novel) that the Court unfortunately has been transformed into a superlegislature, a role inconsistent with the intended role of a law court, and that this threatens its essential independence as well as that of other courts. A major cause, as they see it, is the Court's complete freedom to decide what it wants to decide. Their remedy is to reduce this freedom, if not altogether to eliminate it, and to provide the Court with a sizeable mandatory docket.

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<sup>8</sup> See generally Warren E. Burger, *The Time Is Now for the Intercircuit Panel*, 71 A.B.A. J., Apr. 1985, at 86.

<sup>9</sup> FEDERAL JUDICIAL CTR., REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT (1972).

<sup>10</sup> See Arthur John Keeffe, *A Mini Supreme Court or a Maxi Appeals Court?*, 59 A.B.A. J., Feb. 1973, at 182.

<sup>11</sup> In 1986, there was a published study of the Justices' certiorari practices, but it did not touch on the Court's structure or jurisdiction with recommendations for internal change. SAMUEL ESTREICHER & JOHN SEXTON, *REDEFINING THE SUPREME COURT'S ROLE* (1986).

<sup>12</sup> This is not their first effort concerning the Supreme Court. In 2006 they proposed that the Justices' terms be limited to eighteen years, staggered so that a term would expire every two years, thus giving each president the opportunity to appoint two Justices. ROGER C. CRAMTON & PAUL D. CARRINGTON, *REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES* (Carolina Academic 2006).

Moreover, Professors Carrington and Cramton implicitly recognize that it would be difficult, if not impossible, to achieve this through jurisdictional legislation alone. Any effort to define by statute the types of cases to which the Court would be required to devote its limited resources would likely be either over-inclusive or under-inclusive. This reality, among other considerations, led Congress over the course of the twentieth century to give the Court full discretionary control over its docket. So, Carrington and Cramton have developed an imaginative scheme by which to confine the Court to a mandatory jurisdiction defined annually on a case-by-case basis.

To do this, they would have Congress create a "certiorari division" within the Supreme Court. It would consist of thirteen United States circuit judges sitting by assignment for limited terms of years. All certiorari petitions would come to this division. It would grant approximately 120 a year and deny all others. Those 120 cases would constitute the Court's obligatory business. The Court would have no discretion to decline to decide any, and it would have had no hand in selecting them, thus restoring it to the position of traditional law courts.

Among those with long memories in the struggle for judicial improvements, the proposal will no doubt bring to mind the much maligned (at the time) Freund Committee proposal, but with significant differences. The similarity is that both proposals place the certiorari screening process in hands other than those of the nine Justices. Thus it is likely to encounter one of the major objections advanced in opposition to the Freund report, namely, the argument that the Justices' authority to decide what they will decide cannot be delegated or placed elsewhere. Justice William Brennan and other influential judicial and legal figures asserted forcefully and unambiguously that the Court's jurisdiction to decide cases necessarily includes the authority to choose what cases to decide.<sup>13</sup>

With respect to the eminence of some of those who made that argument, it must be said that it is unsupported historically. Allowing an appellate court discretion to pick and choose what it will decide is a relatively recent innovation in the Anglo-American legal order. Eighteenth- and nineteenth-century jurists would have found the concept novel and inconsistent with the role of a court, especially in a separation-of-powers regime. Giving the Supreme Court Justices discretion to select their cases is a twentieth-century statutory development, an authority conferred by Congress, culminating in the 1988

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<sup>13</sup> William J. Brennan, Jr., *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473, 474 (1973).

Act,<sup>14</sup> which eliminated almost all obligatory jurisdiction.<sup>15</sup> That development was endorsed by the Justices, legal scholars, and others; it met no significant objection. But now Professors Carrington and Cramton have come forward to point out a serious, unintended consequence, unrecognized in the 1980s. To claim that this discretion is inherent in and inseparable from the Justices' jurisdiction to decide cases on their merits is to confuse the familiar with the necessary. What Congress gives, Congress can take away. Nothing in the Constitution immunizes this statutorily conferred discretion from change by legislation.

The Court's discretion to deny review to thousands of cases that come within its jurisdiction annually is also inconsistent with Chief Justice John Marshall's justification of judicial authority. In *Marbury v. Madison*,<sup>16</sup> he explained that when a case is brought before the Court, and is within its jurisdiction, the Court must decide the questions necessary to its resolution. The Court, he said, is not free to decline to do so. Giving the Court discretion to do so, which it currently has, sets it up for a legislative-type role. As Professors Carrington and Cramton point out, choosing what issues to decide inescapably involves policy judgments and ideological views appropriate for legislators but not for judges on a traditional court of law.

The Freund Committee proposal also met an objection that it would violate the "one Supreme Court" language of Article III.<sup>17</sup> Whatever the merits of that argument as addressed to the proposed separate National Court of Appeals, the argument would not appear to be persuasive here. The Carrington-Cramton proposal does not vest certiorari screening in another judicial body. Rather, it places it within a division of the Supreme Court itself. Congress has broad authority to control the structure, personnel, and processes of the Court. Throughout our history, the Court's Justices and jurisdiction have been altered legislatively from time to time. Article III expressly makes the Court's appellate jurisdiction subject to "such Exceptions, and under such Regulations as the Congress shall make."<sup>18</sup> For decades Congress prohibited many types of cases in the lower federal courts from being reviewed at all by the Supreme Court.<sup>19</sup> If Congress can shut off review entirely in selected case categories, there would

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<sup>14</sup> Act of June 27, 1988, Pub. L. No. 100-352, §§ 1, 2(c), 5(a), 102 Stat. 662, 662-64 (codified as amended in scattered sections of 28 U.S.C.).

<sup>15</sup> This development is described in Bennett Boskey & Eugene Gressman, *The Supreme Court Bids Farewell to Mandatory Appeals*, 121 F.R.D. 81, 97 (1988).

<sup>16</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>17</sup> See Eugene Gressman, *The National Court of Appeals: A Dissent*, 59 A.B.A. J., Mar. 1973, at 253.

<sup>18</sup> U.S. CONST. art. III, § 2.

<sup>19</sup> Act of Feb. 16, 1875, 18 Stat. 315.

appear to be no good reason why Congress cannot install a procedure within the Court to regulate the flow of cases to the Justices. There would appear to be no constitutional objection to enactment of the following statute: "The Supreme Court shall consist of nine Justices and thirteen circuit judges."

Nevertheless, Professors Carrington and Cramton are likely to be confronted with the same "one Supreme Court" and non-delegation arguments that confronted Freund. Like all judicial reform proposals, this one will encounter instinctive opposition—the human tendency to resist change—and those arguments will provide an aura of respectability for the opposition. It would be surprising if the nine Justices did not respond negatively. Power is not relinquished easily. But the Court ultimately belongs to the people, not to the Justices. Although their views are to be accorded considerable weight, they cannot be controlling.

### III

There remain, of course, questions as to the wisdom and practical efficacy of the Carrington-Cramton proposal, questions more useful to discuss than those of constitutionality. Their proposal appears to have two objectives: (1) to require the Court to decide a larger number of "mundane" non-constitutional cases, such as resolving inter-circuit conflicts, correcting errors in statutory interpretation, and controlling the administration of justice in the lower courts; and (2) to curtail the "kingly power" of the Court as a superlegislature through which it makes far-reaching social and political policy.

The first objective rests on the assumption that federal and state courts—as well as the lawyers—throughout the country need more definitive guidance from the top than they are now getting as to the mass of non-constitutional business that forms the grist of their everyday work. That is a relatively non-controversial proposition. The certiorari division would serve that end by increasing the Court's annual caseload from about seventy to 120, most of which would be of those currently neglected non-constitutional cases. As a practical matter, thirteen circuit judges, one from each circuit, acting collectively would be in better position to identify such cases than the nine Justices, isolated as they are in their "Taftian temple." Those appellate judges sitting all across the country at the intermediate level would, in effect, serve as representatives of the Supreme Court in the field, spotting issues of real concern that would not be of interest to the Nine in Washington because of the small caseload they have chosen and their overriding attraction to more glamorous matters. Drawn from every circuit, those judges (each with at least ten years experience) would not only bring geographical diversity to the case selection process, but

they would also bring insights into the full array of federal judicial business, which varies from one circuit to another. For example, what the D.C. Circuit adjudicates differs substantially from what the Ninth Circuit does. Indeed, no two circuits have identical dockets.<sup>20</sup> But all would be represented in the certiorari granting process. It could be argued that the proposed certiorari division could supply a valuable and needed “real world” perspective and body of expert judgment in enhancing the quality and usefulness of the Supreme Court’s work.

Achieving the second objective is more doubtful. While the certiorari division might deny review in more of the “hot button” social cases than the Court now does, it can hardly deny them all. Indeed, it seems likely that the division over time would grant certiorari in many of the types of celebrated and controversial cases the Court has been deciding over the last few decades. Such cases seem to be pressed on the Court insistently year after year, demanding its attention. The thirteen circuit judges making up the division can hardly continually deny them all. Also, it seems likely that when such petitions are granted the Court will decide those cases in the way that it has been deciding them unless the Justices move back from the superlegislative style that the authors decry. However, that will likely come about only through a gradual change in the Court’s membership. In short, the certiorari division could rein in the amount or degree of superlegislative activity, but it is difficult to see how it could eliminate it.

In this connection, the authors exhibit ambivalence. It is clear that they approve of some of the Court’s superlegislative decisions while disapproving of others. They are like the American population in general. Some of the decisions of this type are applauded by many people but denounced by others. Results seem to govern public attitude to a high degree. Given this reality, is it possible to agree on a certiorari policy that would put before the Court only “appropriate” cases of this type?

With the hope of placing on the Court more of the business of a law court than that of a superlegislature, Professors Carrington and Cramton propose that Congress prescribe by statute the criteria under which the certiorari division is to grant review. But they do not attempt to say what those criteria should or could be, other than to suggest that priority might be given to inter-circuit conflicts. The standards for granting certiorari have long been spelled out by the Court itself in what is now its Rule 10. That rule sets out the “character of the reasons the Court considers” in deciding whether to grant re-

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<sup>20</sup> See generally Daniel J. Meador, *A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Courts of Appeals*, 56 U. CHI. L. REV. 603, 614 (1989) (describing variation in federal appellate dockets).



view.<sup>21</sup> Although the language of the rule is quite specific, it is generally recognized that the rule in practice offers little or no tightly-adhered-to guidance to the Court in passing on certiorari petitions. Indeed, Justice Byron White repeatedly noted that the Court was denying petitions that presented inter-circuit conflicts,<sup>22</sup> one of the situations specified in Rule 10 as justifying review. What more can Congress say? It would be interesting to have the authors draft a suggested statute. It may be that some wording could be developed that would more precisely constrict the certiorari division to the desired types of cases, but I am not optimistic. As pointed out earlier, the inability to define by legislation a meaningful obligatory jurisdiction led Congress to leave it all to the Justices. But a fresh effort back in that direction may be worth attempting.

The essence of the Carrington-Cramton proposal is the establishment of a mandatory docket for the Supreme Court, removing discretion from the Justices to choose the cases they will decide. But one aspect of their proposal is inconsistent with that objective. They would allow the Court to grant certiorari on a petition that had been denied by the certiorari division. In addition to undercutting the basic scheme, that provision would create internal administrative difficulties. If the Justices are left with this discretionary authority, does this mean that all petitions must be routed to them as well as to the certiorari division? If so, the plan would not relieve the nine Justices of the burden they now have of reviewing thousands of petitions annually, and it would ultimately leave them where they are now, without being confined to an obligatory agenda.

If some measure of discretion for the Justices is nevertheless deemed desirable, this difficulty could be reduced by providing, for example, that the Justices could grant a petition only where the division's decision to deny it had been accompanied by one or more dissents. Under that restriction, the Justices need see only those petitions on which the division's denial had not been unanimous, and they would have no access to the thousands that had been denied without dissent. This rule can be justified on the ground that a dissent in the certiorari division shows a reasonable difference of opinion as to whether the case deserves the Court's attention, thus leaving that question to the nine Justices.

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<sup>21</sup> SUP. CT. R. 10.

<sup>22</sup> For example, in the 1988, 1989, and 1990 Terms, Justice White dissented on that ground from the denial of certiorari in 237 cases. See Arthur D. Hellman, *Light on a Darkling Plain: Intercircuit Conflicts in the Perspective of Time and Experience*, 1998 SUP. CT. REV. 247, 251.

## IV

One might quibble over some other details in this arrangement. For example, a good argument can be made that the certiorari division should function through panels larger than the five-judge panels that Professors Carrington and Cramton propose. Seven circuit judges would bring to the case selection process a broader range of experience with federal appellate business. As mentioned earlier, dockets among the circuits vary considerably in their makeup. Also, seven judges would provide a greater range of geographical perspective than would be afforded by five. Then, too, on a matter as important as the setting of the Supreme Court's business, decisions of seven minds rather than five would carry more weight and likely have a heightened degree of acceptability.

Whatever the size of the panels, their membership should be continually shuffled so that the same group of judges is not routinely acting together. As to large intermediate appellate courts, say those with fifteen or more judges, I have argued that the goals of predictability and uniformity of decisions are served by having stabilized panels, each with a defined subject matter jurisdiction.<sup>23</sup> That applies to decisions on the merits at the intermediate level. For determining whether to grant or deny certiorari, however, there is value in having the input of the thirteen circuit judges in changing combinations, in order to get the varying perspectives they have to offer.

Another question concerns the length of term each circuit judge would serve. As Justice Brennan pointed out in responding to the Freund Committee report, facility and expertise in passing on certiorari petitions are gained with time on the job.<sup>24</sup> A "feel" for the flow of cases and the needs of the Supreme Court's docket are acquired with experience. At least two years may be necessary for this skill to be developed. This consideration suggests that each judge on the certiorari division should serve longer than the three years that Professors Carrington and Cramton suggest. Perhaps five years would be an appropriate length.

Carrington and Cramton do not address the question of how the thirteen circuit judges are to be selected, other than to say that one should come from each circuit. Chief judges might well be omitted on the ground that they already have a heavy administrative burden. The assignment in each circuit might rotate on the basis of seniority of service on the circuit's court of appeals, limited to those with at least ten years of service.

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<sup>23</sup> See Daniel J. Meador, *An Appellate Court Dilemma and a Solution Through Subject Matter Organization*, 16 U. Mich. J.L. Reform 471 (1983).

<sup>24</sup> See Brennan, *supra* note 13.

## V

These and other details can be worked out. The ultimate question put before the country by Professors Carrington and Cramton is this: would the proper role of the Supreme Court in the American legal order be better served if the Court were assigned a mandatory jurisdiction set by thirteen experienced circuit judges, rather than leaving the nine Justices to choose the cases and issues they would decide?

There is much to be said for restoring the Court to a mandatory jurisdiction. Removing the Justices' discretion to choose their cases would place the Court in the position of a traditional court of law, a judicial body obliged to resolve disputes brought before it by litigating parties. The beauty of the Carrington-Cramton proposal is that it would achieve this end without a statutorily prescribed mandatory jurisdiction, which would inevitably be an inexact straitjacket. That, coupled with a greatly enlarged number of non-constitutional cases, could diminish the public perception of the Court as a superlegislature and actually reduce the Court's role as such. This in turn could lessen the threat to judicial independence. The Justices could no longer be accused of reaching out to bring before themselves great socio-political issues on which they wished to impose their views.

It should be remembered that the concept of judicial independence took root in the eighteenth century and has been much valued ever since on the assumption that judges were neutral deciders of disputes, applying known or knowable principles of law. It came to be recognized that judges through the common law process do in a sense "make law," but in a limited way, as a by-product of resolving contested issues. As Justice Felix Frankfurter said, judges make law retail, while legislatures make it wholesale.<sup>25</sup> Once judges start making law wholesale the justification for their independence vanishes. The public then understandably wants them to be politically accountable, like legislators. That is an unfortunate development, as society needs, and a legal regime requires, a judicial body of independent judges acting as neutral deciders under law. If the Carrington-Cramton proposal can pull the Supreme Court back toward such a law court model it is to be applauded.

To the extent that they are right in thinking that the Court's current mode has a "trickle down" effect, this development could have a salutary impact on the courts of appeals. Influenced by the Supreme Court, those intermediate courts have tended to become "mini-su-

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<sup>25</sup> See Letter from Felix Frankfurter to Hugo Black, quoted in Joseph P. Lash, *A Brahmin of the Law: A Biographical Essay*, in *FROM THE DIARIES OF FELIX FRANKFURTER* 3, 67 (1975).

preme courts,” fascinated with pronouncing on large social and political matters while neglecting the mundane work of reviewing district court judgments for error. Professor Carrington over the years has been the most persistent and outspoken critic of that transformation, often seeming to be a “voice crying in the wilderness.”<sup>26</sup> State supreme courts have likewise evolved toward the superlegislative style, thus inviting partisan political scrutiny of the worst sort, making contests over judicial seats indistinguishable from elections of legislators.<sup>27</sup> To a considerable degree judicial independence is lost. The Supreme Court has contributed to the partisan rancor through its decision preventing states from attempting to moderate inappropriate, advance position taking by judicial candidates.<sup>28</sup> The popular election of judges is, of course, the major evil here. Perhaps it is too much to hope that reigning in the Supreme Court from its superlegislative style would indirectly reign in the state courts, but such a development just might have some beneficial influence.

My conclusions are these:

- At the least, the Carrington-Cramton proposal deserves a full airing before the judiciary committees of the Senate and House of Representatives. If a consensus emerges, a bill can be developed within those committees that addresses all the details necessary to set a certiorari division in place.
- The greatest good that could be expected from such a division within the Supreme Court would be an increase in its non-constitutional adjudications. Total elimination of the Court’s legislative-type output may be too much to hope, but any reduction of that role is to be welcomed.
- Little harm should come from giving this arrangement a try. Perhaps a “sunset” provision should be incorporated, authorizing the certiorari division to function for seven years. As that period neared its end, Congress could hold hearings and determine whether to continue it.

History tells us that any proposed alteration in judicial structure or jurisdiction faces a prolonged and rarely successful struggle. The

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<sup>26</sup> See, e.g., Paul D. Carrington, *The Function of the Civil Appeal: A Late-Century View*, 15 S. C. L. REV. 411 (1987); Paul D. Carrington, *The Obsolescence of the United States Courts of Appeals: Roscoe Pound’s Structural Solution*, 15 J.L. & POL. 515 (1999); Paul D. Carrington, *An Unknown Court: Appellate Caseload and the “Reckonability” of the Law of the Circuit*, in RESTRUCTURING JUSTICE: THE INNOVATIONS OF THE NINTH CIRCUIT AND THE FUTURE OF THE FEDERAL COURTS 206 (Arthur D. Hellman ed., 1990).

<sup>27</sup> Information on the extraordinary amount of money spent in partisan judicial elections can be found at the Justice at Stake Campaign Home Page, <http://www.justiceatstake.org>; National Institute on Money in State Politics Home Page, <http://www.followthemoney.org>; American Judicature Society Home Page, <http://www.ajs.org>.

<sup>28</sup> See *Republican Party of Minn. v. White*, 536 U.S. 765 (2002).

Evarts Act,<sup>29</sup> which established the courts of appeals, came about only after a quarter-century of wrangling. Of the numerous ideas concerning federal judicial structure advanced over the last forty years only two have been enacted: the split of the Fifth Circuit in 1981 to create the Eleventh Circuit<sup>30</sup> and the establishment in 1982 of the Federal Circuit.<sup>31</sup> The legal literature and congressional hearing records are littered with creative and constructive ideas that never went anywhere.

This, however, does not mean that the effort is not worthwhile, and Carrington and Cramton are to be congratulated for making it. If the idea is sound, after being tested in the crucible of debate, there is at least a chance that persistence will eventually pay off.

What is needed, and has been lacking for the last forty years, is strong congressional leadership. Support for any judicial reform, however meritorious, is typically thin and fragile. A minimum amount of opposition can usually block it. Thus its adoption will likely depend on having at least one influential member of Congress, such as Senator William Evarts in 1891, who takes the proposal as a major cause and presses it unrelentingly. Unfortunately, there is little political incentive for a member to take on such a cause; rarely is there public excitement behind such measures. The only motivation is a high-minded interest in a well-functioning judiciary. Evidence of such interest among members of Congress is not strong, but we should never give up hope. Then, too, the system needs, and we can be thankful for having, insightful academics such as Professors Carrington and Cramton to supply creative ideas for strengthening the independence of the third branch.

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<sup>29</sup> Evarts Act, ch. 517, 26 Stat. 826 (1891) (codified as amended at 28 U.S.C. § 43 (2006)).

<sup>30</sup> Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994 (codified as amended at 28 U.S.C. § 41 (2006)).

<sup>31</sup> Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (codified as amended in scattered sections of 28 U.S.C.).