

# Improving the Handling of Criminal Cases in the Federal Appellate System

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# IMPROVING THE HANDLING OF CRIMINAL CASES IN THE FEDERAL APPELLATE SYSTEM\*

*Clement F. Haynsworth, Jr.†*

The subject assigned to me by Dean Cramton is far broader than at first it may seem. No judicial system can function effectively in the processing of criminal cases if it is burdened with other matters that far exceed its capacities. We may discuss separately proposals dealing directly with the criminal processes, as Dean Cramton suggested, but our need of reformation is much broader.

Our federal courts of appeals are in critical condition.<sup>1</sup> In 1964, Professor Charles Alan Wright wrote an article in which he expressed great alarm over the growing case load in some of the courts of appeals.<sup>2</sup> His conclusion was that even the most productive, efficient federal court of appeals could not manage a case load exceeding 80 cases per year per judge. Several of the courts of appeals, including those of the Second, Fourth, and Fifth Circuits, had reached that level, or were close to it. In fiscal 1973, my court had a case load of 225 cases per year per judge, up from 200 cases in fiscal year 1972. Professor Wright was not wide of the mark in 1964, for he was thinking in terms of the traditional methods of processing appeals. The courts of appeals are digesting case loads soaring far beyond the maximum he envisioned, thus far by sacrificing some values which should be served if we could. These include a right to an oral hearing in each case and the right to an exposition of the court's conclusion. My court would be hopelessly behind if we orally heard every case or wrote adequate opinions in every case.<sup>3</sup> The immediate situation may not be unendurable, but further increases cannot be absorbed without the sacrifice of more important values—and that would soon become intolerable. If we

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<sup>1</sup> See H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 31 (1973).

<sup>2</sup> Wright, *The Overloaded Fifth Circuit: A Crisis in Judicial Administration*, 42 *TEXAS L. REV.* 949, 957 (1964).

<sup>3</sup> We undertake to explain what we do and why in cases that are not heard orally. After oral hearings in which the judges have shown their familiarity with the issues, we simply do not have time to write if writing is solely or primarily for the information of the parties and the lawyers in the case.

reach 300 cases per judgeship in two or three years—and it seems highly probable that we will unless drastic measures are taken—we may well witness a catastrophic breakdown of the entire system. For such reasons, the problems need to be attacked along a broad front so that while solving specific problems, we also limit the input of cases into the system to its capacity.

In addition to consideration of my own proposal, therefore, I will have occasion to mention the Chief Justice, Carrington, Frank, Freund, Friendly, Meador, and Rosenberg, all of whom have constructive proposals, many of which I heartily endorse. If we can move at once on all of these fronts, we can achieve a healthy judicial system that may function effectively in discharging its essential functions. A bit of tinkering here and there will not suffice.

My own modest proposal<sup>4</sup> is essentially abandonment of primary reliance upon collateral review of federal questions arising in criminal prosecutions and the substitution of an efficient system for prompt direct review. This would require the creation of a new national court of appeals to review convictions in the federal and state judicial systems. So that it would not be an entirely specialized court, I would also have it authorized to hear and decide cases referred to it for decision by the Supreme Court.

I propose no abandonment of the traditions of the Magna Charta or of the constitutional guarantee against suspension of the writ of habeas corpus in times when there is neither rebellion nor invasion.<sup>5</sup> I would preserve the federal writ of habeas corpus in a dimension far broader than that existing before the Supreme Court undertook to adapt it to new and, theretofore, unsuspected uses. That there may be no misunderstanding on this score, let me briefly sketch the steps by which we came, in 1963, to a system of collateral, rather than direct, review of federal questions in state prosecutions.

## I

### HABEAS CORPUS

The historic scope of the writ of *habeas corpus ad subjiciendum*, the "Great Writ" of the Magna Charta, was quite narrow. It was designed to remedy judicially unsanctioned imprisonments by the

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<sup>4</sup> See Haynsworth, *A New Court To Improve the Administration of Justice*, 59 A.B.A.J. 841 (1973).

<sup>5</sup> U.S. CONST. art. I, § 9.

King, the Privy Council, or other officers of the Crown. Later, it was used as an instrument for the procurement of bail for persons held on charges of bailable offenses and entitled to bail. In general, however, it was a sufficient answer to an application for the writ that the person was imprisoned under the authority of a court having jurisdiction.<sup>6</sup> It was available if the committing court was wholly without power to commit, as was the judge who imprisoned the jurors who acquitted William Penn.<sup>7</sup> In this country, by analogy, the writ was available to one who had committed no punishable offense because the statute he allegedly transgressed was unconstitutional,<sup>8</sup> and to one upon whom a second sentence was imposed because the court's power had been completely exhausted with the imposition of the first sentence.<sup>9</sup>

Until very recent years, this was substantially the dimension of the writ in the United States. Evidence of relaxation of earlier restrictions, until recently, is slight. It was held in 1923, for example, that a court might be ousted of its jurisdiction if a conviction was procured by the coercive conduct of a mob and that habeas corpus was available to release the victim of such an outrageous proceeding, notwithstanding the facial regularity of the court's order of commitment.<sup>10</sup>

This limited function of the writ as an instrument for review of constitutional issues arising in judicial proceedings remained the order of the day until 1953. In that year, a breach was opened by the decision in *Brown v. Allen*.<sup>11</sup> Focusing on the federal habeas corpus statute and collateral questions arising under it, the Supreme Court there approved a federal district court's consideration, on an application for habeas corpus, of constitutional claims

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<sup>6</sup> See generally 3 W. BLACKSTONE, COMMENTARIES \* 129-38.

<sup>7</sup> Bushell's Case, 124 Eng. Rep. 1006 (K.C. 1670).

<sup>8</sup> *Ex parte Siebold*, 100 U.S. 371 (1880).

<sup>9</sup> *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1874).

<sup>10</sup> *Moore v. Dempsey*, 261 U.S. 86 (1923). See also *Frank v. Mangum*, 237 U.S. 309 (1915). In *Frank*, a similar claim to federal habeas relief was rejected because the state court had afforded the prisoner an adequate opportunity to be heard on it. This jurisdictional concept was expanded in 1938 in *Johnson v. Zerbst*, 304 U.S. 458 (1938), where the Court held that complete denial of the sixth amendment right to counsel deprived a district court of "jurisdiction" to impose a prison sentence upon the uncounseled defendant. Thus, the claim could be raised in a habeas corpus proceeding.

<sup>11</sup> 344 U.S. 443 (1953). To some extent, *Brown* was foreshadowed by *Waley v. Johnston*, 316 U.S. 101 (1942). Decided in 1942 and involving a claim of outrageous coercion of a guilty plea, *Waley* held, not in jurisdictional terms, that the federal habeas corpus statute had enlarged the common law writ such that a prisoner could use the writ to assert a claim of constitutional deprivation if the claim was dependent upon facts outside the record and could not have been asserted in the direct proceedings.

of racial discrimination in jury selection and admission into evidence of coerced confessions during the state court proceedings. The old jurisdictional dichotomy—void or voidable—was not employed. But the door was not flung wide. Consideration of such issues was proper, provided the state court's resolution of, or failure to consider, the issue did not rest on an adequate and independent state ground. Thus, the merits of the claims of one of the several applicants in *Brown* were not reached because he had been one day late in perfecting his appeal to the state's supreme court and that court's declination to consider the merits rested on an adequate and independent state ground.<sup>12</sup> In the days when many criminal defendants were without the assistance of a lawyer, this limitation was substantial.

The modern era did not really dawn until 1963 and *Fay v. Noia*.<sup>13</sup> There, the Supreme Court undertook to sweep away all of the old limitations. A modified form of the requirement of exhaustion of state remedies was retained, but now a state prisoner need exhaust only such state remedies as were *then* open and available to him. Earlier defaults under state procedural requirements were no longer fatal unless the district court found such a default to have been both a deliberate and inexcusable by-pass of state remedies.

In *Fay v. Noia*, the Court also overruled *Darr v. Burford*,<sup>14</sup> and held that, henceforth, an application to the Supreme Court for certiorari would not be a requisite step in exhausting state remedies. The Court observed that "in the overwhelming number of cases" applications for certiorari were denied because they failed to meet the criteria for granting certiorari set forth in Rule 19.<sup>15</sup> The time required for "the examination and decision of the large volume" of such petitions "have unwarrantably taxed the resources of this Court."<sup>16</sup> Applications to the Supreme Court for certiorari from adverse state decisions were thought to impede, rather than further, the "goal of prompt and fair criminal justice"<sup>17</sup>—a goal better attained by the habeas route through the lower federal

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<sup>12</sup> 344 U.S. at 482-87.

<sup>13</sup> 372 U.S. 391 (1963).

<sup>14</sup> 339 U.S. 200 (1950) (absent special circumstances, state prisoner must apply to United States Supreme Court for certiorari from state court's denial of habeas corpus or other collateral relief as prerequisite to his bringing habeas corpus in federal district court).

<sup>15</sup> 372 U.S. at 437; see U.S. SUP. CT. R. 19.

<sup>16</sup> 372 U.S. at 437.

<sup>17</sup> *Id.*

courts. There, a state court record could be supplemented if it was deficient in any respect while the interests of the states were protected by the Supreme Court's ultimate power to review the judgment of the federal courts.

Surely, Mr. Justice Brennan and the majority were right in moving to relieve the Supreme Court of its impossibly burdensome responsibility for primary review of federal claims arising in connection with state prosecutions. The Court was deeply engaged in an expanding reexamination and reinterpretation of the Bill of Rights, extending the protections of those amendments through the fourteenth to persons accused of state crimes. The continuing process at once made federal review of federal questions that arose in state court prosecutions more imperative and thus the commitment of greater judicial resources to the process essential. Since the Supreme Court's resources were already being taxed, reserves to fill the breach had to be sought elsewhere. It may not have been entirely coincidental that *Gideon v. Wainwright*<sup>18</sup> was decided on the same day as *Fay v. Noia*.

*Fay v. Noia*, with the detailed guidelines so carefully laid down in *Townsend v. Sain*,<sup>19</sup> wrought a great change in the writ of habeas corpus. In the ten years since 1963, it has been further changed in an effort to adapt it to its new purpose. The Court has largely abandoned the old limitation that habeas corpus is available only to question the authority by which the petitioner is immediately held in custody,<sup>20</sup> and has also eliminated the deterrent effect of the possibility that greater punishment will be imposed on retrial by proscribing such retribution in resentencing.<sup>21</sup>

Still, the modified writ is ill-adapted to its new purpose. Few people today will find fault with the Supreme Court for doing what it did in 1963. Since it could not provide requisite federal review of federal questions arising in criminal prosecutions—and assuredly it could not—the Court very properly turned to the only other means available to it. With all the adaptations of the writ, and all the protections thrown around its use, however, experience over the

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<sup>18</sup> 372 U.S. 335 (1963).

<sup>19</sup> 372 U.S. 293 (1963) (enunciating precise rules governing habeas corpus and holding that federal district court must provide evidentiary hearing to state prisoner who petitions for habeas corpus and alleges deprivation of his constitutional rights, where record fails to disclose whether state courts had applied proper constitutional standards).

<sup>20</sup> See the development from *Jones v. Cunningham*, 371 U.S. 236 (1963), through *Peyton v. Rowe*, 391 U.S. 54 (1968), to *Hensley v. Municipal Ct.*, 411 U.S. 345 (1973).

<sup>21</sup> See *North Carolina v. Pearce*, 395 U.S. 711 (1969).

last ten years has proven it a singularly slow and wasteful device to correct deprivations of constitutional rights in the course of criminal prosecutions.

The deficiencies of the writ of habeas corpus as a vehicle for the review of federal questions in state court convictions were considered at some length in my article in the *American Bar Association Journal*.<sup>22</sup> I will not repeat here all that was said there, but a few brief references should suffice.

The most glaring defect stems from the requirement of the exhaustion of state remedies. A state prisoner with a federal claim must pursue the claim through the entire state court system—the trial court, the intermediate appellate court (if there is one) and the state supreme court. He may then seek a writ of certiorari to the Supreme Court, but under *Fay v. Noia* he need not. The Supreme Court has told him to go instead to the district court and that is the practical thing for him to do, even though his ultimate hope is access to the United States Supreme Court. He then must begin again a relitigation of his claim through the federal system—the trial court, the court of appeals, and, finally, an application for a writ of certiorari to the United States Supreme Court. If, in the process, it is found that the claim asserted in the federal court was not the claim asserted in and considered by the state courts, he is returned to the state court system to start all over again. Because the principles of *res judicata* are not fully applicable, however, he can try and try again. Many file successive petitions—five, ten, twenty, or more—and each petition requires consideration by both judicial systems to the extent that each raises a fresh claim. Meanwhile, time, measured in years, drags on. A state of finality is never reached, and the burden of litigation and relitigation is intolerable for the prisoner, for the courts, and for the public.

This situation is exacerbated because the prisoner is usually remanded to prison when the direct proceedings are ended, where he usually loses contact with his lawyer. Until he can state a postconviction claim which facially entitles him to relief, he is dependent upon the advice of jailhouse lawyers. They have a little learning in the law, but because they are not trained professionals, they engender false hopes that produce great frustrations. However guilty a prisoner may be of the substantive offense, denial of his false hopes leaves him with a sense that his constitutional rights have been ignored and that justice has not been done. This

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<sup>22</sup> See note 4 *supra*.

phenomenon becomes more deeply impressed upon me daily; it has been recognized in the recent report of the National Advisory Commission on Criminal Justice Standards and Goals<sup>23</sup> and also by Professors Rosenberg and Carrington.

This alienation of prisoners has a very unfortunate adverse impact upon their potential for rehabilitation. Even before frustration sets in, a prisoner with pending petitions or review proceedings has his hope in judicial release—not in parole. If the corrective and rehabilitative functions are to be served, it is of tremendous importance to reach a final judgment on all of the prisoner's legal and constitutional claims as promptly, fairly, and efficiently as is possible.

As a result of *Fay v. Noia*, the number of postconviction claims in which a prisoner challenged his conviction or his sentence in the federal district courts ballooned to 12,392 in fiscal 1970.<sup>24</sup> By fiscal 1973, they declined to 10,800, but they still constitute a very appreciable load upon the district courts.<sup>25</sup> In the courts of appeals in fiscal 1973, there were 2,141 such cases, over sixteen percent of the total case load in the courts of appeals.<sup>26</sup> Since each state prisoner case must be processed through all state-court levels, dependence upon postconviction procedures is as much a burden on state courts as it is on federal courts.

In cases where federal claims arise in connection with state court convictions, any mechanism for federal review which requires the lower federal courts to function in tandem with, rather than parallel to, the state courts is abrasive. The National Advisory Commission on Criminal Justice Standards and Goals takes the view that no federal trial judge should have the power to overturn a conviction which has been upheld through a state's system of appellate courts.<sup>27</sup> Its recommendation is that federal review of federal questions arising in state court convictions should be in the federal courts of appeals. Unless the scope of the federal writ of habeas corpus were greatly altered, however, this would impose an impossible burden on the courts of appeals.

*Fay v. Noia* was a "noble experiment," the phrase with which President Hoover referred to the eighteenth amendment. Hoover

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<sup>23</sup> NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT ON COURTS 113 (1973) [hereinafter cited as COURTS].

<sup>24</sup> See DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT II-27 (Table 20) (Preliminary, FY 1973).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at II-8 (Table 5).

<sup>27</sup> COURTS 128, 131.



recognized that noble experiment to be a failure. Today we all should recognize that the makeshift device which the Supreme Court fashioned as the only alternative available to it has also proven to be an abject failure. Now, with disappointment, we must understand that the hopes of *Fay v. Noia* are incapable of realization. Waste, inefficiency, delay, postponement, frustration, and endless repetition are all too inherent in the process to be eliminated.

## II

### A NATIONAL COURT OF APPEALS

If the Supreme Court had no other means of providing federal review for federal questions arising in state court convictions, the Congress does have the means. It may create a national court of appeals having jurisdiction to review, on writs of certiorari,<sup>28</sup> all federal questions arising in convictions in the state and federal systems. Because the system of corrections is so closely related to the judicial functions, I think the new court should have similar jurisdiction to review all cases adjudicating other rights of both federal and state prisoners, including such claims as the deprivation of access to the courts and of rights to reasonable correspondence, the arbitrary imposition of punitive measures or the deprivation of accrued rights and credits, and the denial of religious freedom and reasonable medical services. I think the court should be given jurisdiction to hear and determine cases unrelated to crimes and the rights of imprisoned persons which may be referred to it by the Supreme Court.

I include in the new court's jurisdiction federal cases involving federal convictions and federal prisoner claims because the court should serve a unifying function. It is imperative that the same federal constitutional principles and standards be applied with reasonable consistency in every state in the union and in every federal district and circuit. This can be accomplished only if the new court reviews decisions of the courts of appeals just as it reviews decisions of the highest courts of the states.

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<sup>28</sup> I have suggested the certiorari device because of its convenience in disposing of cases which do not merit review. It should be made plain, however, that the court would be expected to grant the writ in every case in which a substantial, unsettled federal question is presented. Its jurisdiction should be discretionary only in the sense that the court need not take insubstantial cases. It should not decline review because there is no conflict in the lower courts or for the kindred reasons which influence denial of review in the Supreme Court. Requiring leave to appeal would serve the purpose equally well.

The cases which I suppose the court would hear and determine on reference from the Supreme Court would not be cases involving large constitutional questions. The most likely category of such referenced cases would be those involving conflicts in statutory interpretation or decisional law which should be resolved for the sake of uniformity and predictability in the law. In that respect, the new court would serve to unify the law for the entire nation—a function for which the Supreme Court may have inadequate resources as long as there are many important constitutional questions pressing for determination.

In the American Bar Association Journal article, I discussed rather specifically some suggestions concerning the number of judges for the new court, a central staff, and the court's power to direct further proceedings in the lower courts, including the power to remand a case for supplementation of the record and further fact-finding.<sup>29</sup> With respect to the cases coming to the new court on petitions for certiorari, I also had specific suggestions about provisions for further review in the Supreme Court, provisions which I think are quite adequate to preserve the Supreme Court's overlordship, its supervision and control of its own docket, and its ultimate authority in the application and development of the law.<sup>30</sup>

With respect to the cases taken by the new court on reference from the Supreme Court, I would also permit subsequent application to the Supreme Court for writs of certiorari. By hypothesis, a referred case would probably be of little moment beyond the need to resolve conflicts between subordinate courts and to establish a uniform rule henceforth to be followed by all subordinate courts. However, if such a case were decided in the new court, it is unlikely that the Supreme Court would wish to reconsider it on its merits; but I would not wish to foreclose the possibility, for more may appear involved after decision by the new court than was apparent from the original petition for certiorari.

Once such a national court of appeals is established, I would limit the federal writ of habeas corpus and motions under 28 U.S.C. § 2255 to federal claims which were not and could not have been presented to the new court through earlier direct or collateral proceedings. A permissible claim, for example, would be that the

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<sup>29</sup> See Haynsworth, *supra* note 4, at 842-43. The proposal includes a specific suggestion that appropriate cases could be remanded to a United States district judge, who would act as a special master, for further hearings and fact-finding. The device would be available in any case where the adequacy or fairness of the fact-finding processes in the trial court was suspect.

<sup>30</sup> *Id.* at 843.

lawyer's representation in the trial and direct review proceedings was constitutionally inadequate. I would preserve the exhaustion-of-remedies requirement, however, so that a state prisoner with such a claim would be required to assert it first in the state courts. Having had an opportunity to apply to the national court of appeals for a writ of certiorari to the state court, he would be foreclosed from any subsequent petition in the lower federal courts. The only state prisoner claims that then could be maintained in the federal system would be those federal claims which could not be maintained in the state courts either because of an absence of adequate remedies or because of procedural defaults which the state court held to have foreclosed the claim.

This proposal's advantages seem to me to be as great as they are obvious. In place of our slow and bungling system of collateral review, there would be substituted a system of direct review, which would be expected to function much more promptly, effectively, and efficiently. Criminal convictions after direct review would be clothed with a substantial degree of finality. The quality of justice should be greatly enhanced and most of the deficiencies of the present system of collateral review would be avoided. The federal writ of habeas corpus would shrink from its present inflated dimension, but its new dimension would exceed its traditional one. Finally, there would be no problem with the constitutional prohibition against suspension of the writ.

With respect to cases involving the rights of prison inmates, the statute should require the prior exhaustion of all adequate administrative remedies and, with respect to state prisoners, the prior exhaustion of state judicial remedies. Today, state prisoners are given direct access to the federal courts under statutes enacted during the Reconstruction Period following the Civil War.<sup>31</sup> There is no reason for the continuance of such rights of direct access. State courts are fully competent to adjudicate these claims and should be involved in the process of prison reform that evolves from the successful prosecution of prisoner rights cases. As long as the state court judgments are reviewable in the national court of appeals, the federal questions in those cases remain subject to full and adequate federal review.

In addition to a great improvement in the promptness and efficiency with which justice would be administered, the proposal would also provide substantial relief for overcrowded courts at all levels. In the federal system, the district courts would be relieved of

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<sup>31</sup> R.S. 751-66 (1878), *as amended*, 28 U.S.C. § 2255 (1970).

substantially all state prisoner cases, which in fiscal year 1973 numbered 12,683.<sup>32</sup> It would also substantially reduce the number of petitions by federal prisoners under section 2255. In the courts of appeals, there would be similar relief. In fiscal year 1973, the postconviction and state prisoner rights cases numbered 2,619,<sup>33</sup> most of which would be removed from the dockets of the courts of appeals under my proposal. Even at the Supreme Court level, there would be a substantial reduction in the number of petitions for certiorari because in this area the Court would then have the decisions of only one national court of appeals to review rather than, as now, those of the highest courts of fifty states and eleven federal circuits.

Introduction of a substantial degree of finality in criminal convictions after direct review would also greatly reduce the case loads of all state courts, since repetitive and successive claims would largely be barred.

Thus, at the cost of the creation and operation of a court of nine judges with national jurisdiction, substantial economies could be effected in all other courts in the federal and state judicial systems, and substantial relief provided for them. Adoption of the proposal would directly improve the quality of justice in this area and, by reducing case loads, it would indirectly tend to improve the quality of justice in other areas.

### III

#### COMPATIBILITY WITH CERTAIN OTHER PROPOSALS

##### A. *National Advisory Commission*

After close observation of the English courts, Professor Daniel J. Meador of the University of Virginia wrote a remarkable little book, *Criminal Appeals: English Practice and American Reforms*. He served as Chairman of the Task Force on Courts of the National Advisory Commission on Criminal Justice Standards and Goals. The Commission has now incorporated many of his ideas in its recommendations found in Chapter 6 of its *Report on Courts* relating to review of trial court proceedings.<sup>34</sup>

The report of the National Advisory Commission contemplates a greatly expedited and expanded direct review procedure for the

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<sup>32</sup> See DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT II-27 (Table 20) (Preliminary, FY 1973).

<sup>33</sup> *Id.*

<sup>34</sup> COURTS I40-43.

initial reviewing court in the federal and state systems. Expedition would result from a requirement that the prosecutor immediately order a full transcript of all trial court proceedings in every case in which an appeal was likely. Expansion of the review proceeding would result, in part, from a complete review by a central staff of the transcript for possible questions which had not been raised by the defendant or counsel. Further expansion would come from a requirement that motions for new trials be lodged with the reviewing court and passed upon by it. Still further, the central staff would make a searching inquiry of the defendant, defense counsel, and the prosecutor in an attempt to discover any additional claim not apparent on the record. The defendant might claim, for instance, that his lawyer neglected to call five witnesses who could have established conclusively the defendant's alibi. The reviewing court would determine any claim thus revealed by staff inquiry and could call upon the trial court for any additional fact-finding deemed necessary.

After the first appellate court's comprehensive review of all issues apparent on the record or made apparent by subsequent motion or inquiry, subsequent review would be sharply curtailed under the Commission's recommendations. Subsequent review would be allowed in those instances where: (1) an appellate court finds that the public interest in the development of the law or in the maintenance of uniformity would be served by a further hearing, (2) the defendant claims newly discovered evidence raises substantial doubt about his guilt, or (3) the defendant claims a constitutional violation which, if true, would undermine the integrity of the trial or review proceeding, or impair the reliability of the fact-finding process.

In addition to these proposals relating to proceedings within a single judicial system, the Commission also addressed itself to federal review of federal claims arising in state court prosecutions. In its Standard 6.5, the Commission suggests that any federal review of state court convictions should be in the federal courts of appeals.<sup>35</sup> Seemingly, this procedure is intended to apply only to collateral attacks because in its Commentary following the Standard, the Commission states that (subject to the limitations outlined above) subsequent review of state convictions may occur "in the U.S. Supreme Court, or in any other Federal court designated by Congress for that purpose."<sup>36</sup>

The recommendations of the Commission insofar as they are

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<sup>35</sup> *Id.* at 128.

<sup>36</sup> *Id.* at 129.

directed to swift and comprehensive review—patterned substantially after the English model—are thoroughly commendable and also fully compatible with my proposal of a national court of appeals. I agree generally with the Commission's effort to cut off collateral proceedings following the comprehensive initial review it contemplates but I am disturbed about the limitations it would place upon federal review of federal claims arising in a state court prosecution. Two members of the Commission dissented, one of them specifically on the ground that he disapproved of the limitations on subsequent federal review of state court convictions.<sup>37</sup>

I infer from the reference to "any other Federal court designated by Congress" that the Commission contemplated the possibility that Congress might create a national court of appeals to serve that purpose. If a national court is created and given a discretionary jurisdiction, however, it ought not be required to make preliminary determinations and findings before it can exercise its discretionary jurisdiction. A grant of certiorari may imply that the court, or a substantial minority thereof thinks that the case presents issues substantially meeting the standards of the Commission's proposal. But neither the national court nor the Supreme Court ought to be required to explain its grant of certiorari or to justify it with preliminary determinations of matters which may be debatable.

As long as we are primarily dependent upon collateral proceedings for federal review of federal questions in state court proceedings (as we now are) I would deplore the recommendation which would limit such review to the federal courts of appeals. The courts of appeals have more than enough to do now, even when, as in many cases, they are tremendously assisted by full opinions prepared by district judges. If collateral review is subject to the expressed limitations—and apparently it is—then federal review of claims such as unlawful search and seizure seem unduly restrictive. I am firmly convinced, of course, of the necessity for federal review, at some point, of federal claims. It will be much better if federal review can be accomplished directly through a national court of appeals; but until that is provided, I would not favor restrictions upon such review in the lower federal courts.

#### B. *Professors Carrington and Rosenberg*

Professor Maurice Rosenberg of Columbia sent me a copy of a paper that he and Professor Paul D. Carrington of Michigan had prepared for tentative submission to the Advisory Council for

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<sup>37</sup> *Id.* at 319-30 (dissent by Mr. Stanley C. Van Ness).

Appellate Justice.<sup>38</sup> It is a thoughtful paper. They, as I, seek a better means for federal review of federal questions arising in state court convictions and also the introduction of a degree of finality to state court convictions. They recognize the detrimental effects of prolonged postconviction proceedings upon the prisoner as well as upon the courts and society. They express concern, however, that creation of a special court designed primarily to hear criminal appeals might be thought "to stamp criminal cases as requiring only second class treatment."<sup>39</sup>

Their tentative proposal is a merger of the present United States courts of appeals into one national court. Some of the judges would sit in regional panels, much as they now do, while others would serve on national panels, each national panel hearing and deciding designated classes of cases. One of those national panels would be authorized to hear and decide federal questions arising in state prosecutions, while other national panels of the merged court would be authorized to hear other classes of cases arising in both federal and state systems.

Professors Rosenberg and Carrington seek the same general end that I do, but it may not be surprising that I have a preference for my own idea about the means for getting there. Merging the courts of appeals with a system of rotation of individual circuit judges in and out of regional and national panels would create monumental administrative problems. In many respects, such national panels could serve a unifying function temporarily; but I have grave doubt of the precedential weight of their decisions, except in subordinate courts.

In a court such as mine, every nonsitting judge has an opportunity to criticize each proposed opinion and, on appropriate occasions, they unreluctantly avail themselves of that opportunity.<sup>40</sup>

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<sup>38</sup> An unpublished working paper to be completed and submitted to the Advisory Council for Appellate Justice entitled *A Preliminary Report on the Revision of the Federal Court Appellate System*, by Paul D. Carrington and Maurice Rosenberg. The substance of the ideas embodied in that paper is contained in Professor Rosenberg's Cornell lecture. See Rosenberg, *Planned Flexibility To Meet Changing Needs of the Federal Appellate System*, 59 CORNELL L. REV. 576 (1974).

<sup>39</sup> *Id.* at 587.

<sup>40</sup> In the Court of Appeals for the Fourth Circuit, decisions are not just panel decisions. When copies of a proposed opinion go to the other members of the panel, copies also go to the nonsitting members of the court. The nonsitting members are encouraged to speak up with constructive criticism and suggestions. If one or more of them think an important and possibly recurrent principle of law is involved, the whole court becomes actively involved. If a majority of the whole court disagrees with a majority of the panel, we have the case resubmitted to the court en banc. In the absence of such disagreement, the panel alone takes formal action. Nevertheless, the nonsitting judges have a sense of participation in the

Thus, every judge of the court readily accepts a prior decision of the court as binding, unless a majority of the whole court is prepared to depart from it. Each judge has an opportunity to be heard. Moreover, if reconsideration seems appropriate at a later time, the whole court can readily be involved in the process. If all of the courts of appeals were merged, such reconsideration would be impractical. Prior decisions of a national panel would probably be accorded no more than a becoming respect by successor panels, composed of judges who would have no sense of participation in the earlier decision. Indeed, a panel decision practically should not be given any greater effect. A panel can make a mistake. Furthermore, the law changes; it grows.<sup>41</sup> Subsequent panels must be free to correct earlier errors and to reflect a wholesome development of the law. Otherwise, some mechanism comparable to *en banc* review would be an absolute necessity, for the Supreme Court could not shoulder the burden of the close review required to handle situations of this kind.

As the courts of appeals are presently organized, by formal or informal *en banc* consideration, each may avoid this problem without stifling the law's growth. If merged, consideration by the whole court would seem impossible. However, if a national panel is free to disregard an earlier decision, the later holding may reflect no more than a normal disagreement among judges. That possibility would tend to encourage litigants and lawyers to pursue appeals despite prior adverse decisions.

I prefer a simpler solution to the problem we recognize—a solution that avoids involving other litigants in areas where there is no such problem and also avoids broad administrative rearrangements of the courts which may prove in practice to be unworkable.

I do not think my proposal can fairly be regarded as offering second class treatment to persons convicted of crimes. Although it would route their federal claims to a new court, the purpose of this change is improvement in the quality of justice they get as well as the promptness with which they get it. That should also be the effect. I regard my proposal as providing preferential treatment for the convicted; compared with other classes of litigants, they

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decision because those judges on or off the panel who disagree with the result have had their say. In consequence, when the same question comes up again, regardless of the membership of the panel, the panel readily recognizes the authority of the earlier case.

In some of the other courts of appeals, a nonsitting judge does not see most opinions until after they are announced. An *en banc* rehearing in such courts, however, can provide the same necessary continuity and unity.

<sup>41</sup> *Moffit v. Ross*, 483 F.2d. 650, 655 (4th Cir. 1973).



would have a proportionately larger opportunity for decisions on the merits of their federal claims by a court having nationwide jurisdiction, the decisions of which would be binding upon all lower tribunals.

It would be nice, of course, if we could have literal equality, routing all litigants with federal claims to the Supreme Court. All three of us, however, are agreed that the Supreme Court's resources are unequal to the task. Because of their numbers and the need for present dependence upon collateral proceedings for federal review of their claims, criminal defendants are now a disadvantaged class of litigants. A court specifically designed to give preferred, prompt, and adequate attention to their claims seems to me as much as one might ask. Professors Rosenberg and Carrington would achieve a semblance of literal equality in the treatment of litigants, but it may not be worth the price, if the price is a general reorganization of all of the courts of appeals and the involvement of all litigants in untried judicial systems.

### C. *Freund Commission*

The Federal Judicial Center Report of the Study Group on the Case Load of the Supreme Court (December 1972), commonly known as the Freund Commission Report,<sup>42</sup> contains much that readily commends itself. The statutory three-judge district court, with a right of direct appeal to the Supreme Court, has been an abomination for a long time. Such appeals tax the resources of the Supreme Court, and their cumbersome handling strains the energies of judges in the lower federal courts. The Freund proposal that they be abolished is widely applauded.

Senator Burdick has suggested preserving the statutory three-judge district court for legislative reapportionment and federal redistricting cases.<sup>43</sup> There may be some argument in support of his position with respect to those cases, but in general I heartily approve the Freund proposal that the compulsory appellate jurisdiction of the Supreme Court be abolished entirely.<sup>44</sup>

The Freund Commission proposal of a screening court is now only of academic interest. If it was not mortally wounded by the initial blasts of former Chief Justice Earl Warren,<sup>45</sup> former Justice

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<sup>42</sup> STUDY GROUP ON THE CASE LOAD OF THE SUPREME COURT, FEDERAL JUDICIAL CENTER, REPORT (1972).

<sup>43</sup> See S. 663, 93d Cong., 1st Sess. (1973); S. 271, 93d Cong., 1st Sess. (1973).

<sup>44</sup> See STUDY GROUP ON THE CASE LOAD OF THE SUPREME COURT, *supra* note 42, at 34, 47.

<sup>45</sup> See Burger & Warren, *Retired Chief Justice Warren Attacks, Chief Justice Burger Defends Freund Study Group's Composition and Proposal*, 59 A.B.A.J. 721, 724-30 (1973).

Arthur Goldberg,<sup>46</sup> and others, it recently received the *coup de grâce* from Mr. Justice Brennan.<sup>47</sup>

It is to be wished that the Study Group had looked beyond the Supreme Court's doorstep and sought means to reduce the input of controversies into the judicial system. The criticism of the proposed screening court, however, was based upon the premise that it would deprive the Supreme Court of control of its own docket. I propose no such thing.

To reduce the volume of useless petitions inundating the Supreme Court, I would deny an applicant for certiorari to the new national court of appeals the right to seek further review in the Supreme Court if the national court of appeals denied his petition without a dissenting voice. If the court of appeals disposed of a case on the merits or denied certiorari with one or more dissents, I would allow the applicant to seek further review in the Supreme Court. To that extent, this feature of my proposal means the new court would have a screening function. However, I would preserve the Supreme Court's control by giving it authority, on its own motion, to grant writs of certiorari to the national court of appeals or to any lower court in any case pending in the national court of appeals or denied review there. With a small central staff, the Supreme Court could monitor the docket of the national court of appeals and call up any case which it thought appropriate for consideration. While preserving the Supreme Court's power and its control over its own docket, this procedure would protect the justices from frivolous petitions. However, since this feature is not essential to my proposal, it should be abandoned if the Justices think this very narrow limitation objectionable.

#### D. *Judge Friendly*

I heartily commend to you Judge Henry J. Friendly's very thoughtful book.<sup>48</sup> Judge Friendly will be here later to speak for himself, but I particularly like his suggestions which would take several classes of cases out of the general federal courts. I think he demonstrates that those classes of cases can be handled as well, or better, elsewhere. I thoroughly share his conviction that such surgery is essential if the federal judicial system is to avoid breakdowns and function efficiently in the future.

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<sup>46</sup> See Goldberg, *One Supreme Court*, THE NEW REPUBLIC, Feb. 10, 1973, at 14-16; *The Case Against a National Court of Appeals*, Washington Post, Jan. 6, 1973, at A-14, col. 4.

<sup>47</sup> Brennan, *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473 (1973).

<sup>48</sup> See H. FRIENDLY, *supra* note 1. See also Haynsworth, Book Review, 87 HARV. L. REV. 1082 (1974).

E. *John P. Frank.*

In 1969, former Professor and now practicing lawyer John P. Frank wrote a book that has been too little noticed. It has a bold title: *American Law: The Case for Radical Reform*. What seemed radical to him in 1969 seems very moderate in 1973. The intervening years have simply confirmed his concern that judicial resources are not profitably allocated. They are not expended profitably when devoted to resolving technical questions that could be avoided without violation of essential fairness. Correctly, he points out that each "decision point" is costly to the litigants directly involved, to the courts, and to other litigants whose trials are delayed by judicial attention to other cases. He questions whether even the new rules governing choice of law are warranted. Our search for a "juster justice" in particular cases may so divert resources as to create delays and deny justice in other cases. A simplistic, inflexible rule may have greater virtue in a system threatened with overtaxation of its resources.

Chief Justice Burger has requested the Congress to consider the impact of new legislation on the courts.<sup>49</sup> Judge Friendly has questioned the advisability of placing the burdens of fact-finding on the federal courts when an administrative agency could do as well.<sup>50</sup>

I endorse no specific proposal here, but the Congress and the courts should be acutely aware of John Frank's point. We should not require successive hearings, judicial trials, and retrials without regard to the needs of fairness. Even when considerations of fairness in particular cases point in one direction, their force should be considered in the light of the institution's capacity to assume additional burdens without inflicting greater unfairness upon others.

#### IV

#### JUDICIAL SELECTION

Many people seem greatly concerned about the method of selection of the judges who will man such a national court of appeals as I propose. I think it should be a new article III court staffed by judges appointed by the President with the advice and

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<sup>49</sup> Burger, *The State of the Federal Judiciary—1972*, 58 A.B.A.J. 1049, 1050 (1972). The Chief Justice is providing splendid leadership in the movements to reform and improve our judicial systems.

<sup>50</sup> H. FRIENDLY, *supra* note 1, at 64.

consent of the Senate. I think the process has sufficient safeguards to avoid the polarization or politicization of such a court.

A possible solution to the start-up problem may be an initial assignment of judges by the Chief Justice for limited terms with presidential appointment and Senate confirmation of their successors. As an illustration, if one third of the judges were initially assigned to a term of three years, another third to a term of six years, and the final third to a term of nine years, with provision for filling vacancies by assignment but lodging the power to appoint successors after expiration of the term in the President after confirmation by the Senate, no President could appoint the whole court. Under such an arrangement, the likelihood that a majority of the judges would die or retire during the term of any future President would be minimized.

#### CONCLUSION

By different means, Professors Rosenberg, Carrington, and Meador, the National Advisory Commission on Criminal Justice Standards and Goals, and I are seeking methods for better adjudicating the claims of criminal defendants and also for substantially eliminating the practice of postconviction review. With the same kind of institutional concern, Judge Friendly proposes the withdrawal of several classes of cases from the jurisdiction of the general federal courts.

Each proposal differs in detail, though there is a large measure of compatibility between them. Except in their minor differences, one may embrace them all. It is not essential that everything be done at once, but it is urgent that we move on all of these fronts. We cannot afford the luxury of leaving any of these proposals on the fence for reflection some other day. No one of them, alone, will provide a perfect solution, but together they can work wonders. Little measures are not appropriate, for the continuing health of the federal judicial system is in grave and immediate danger.