MANDATORY APPELLATE JURISDICTION OF THE SUPREME COURT—ABOLITION OF CIVIL PRIORITIES—JURORS RIGHTS

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

NINETY-SEVENTH CONGRESS

SECOND ~~FIRST~~ SESSION

ON

H.R. 2406, H.R. 4395, and H.R. 4396

MANDATORY APPELLATE JURISDICTION OF THE SUPREME COURT—ABOLITION OF CIVIL PRIORITIES—JURORS RIGHTS

JUNE 22, 1982

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MANDATORY APPELLATE JURISDICTION OF THE SUPREME COURT—ABOLITION OF CIVIL PRIORITIES—JURORS RIGHTS

TUESDAY, JUNE 22, 1982

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES
AND THE ADMINISTRATION OF JUSTICE,
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to call, at 10:07 a.m., in room 2226, Rayburn House Office Building, Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier, Schroeder, Railsback, and Sawyer.

Staff present: David Beier, Thomas E. Mooney, associate counsel; and Audrey Marcus, clerk.

Mr. KASTENMEIER. The committee will come to order.

This morning the Subcommittee on Courts, Civil Liberties, and the Administration of Justice is holding a hearing on three bills that are of substantial interest to the Federal judiciary and members of the bar. Fortunately, these three bills are not fraught with the type of controversy that surrounds some of the other court-related legislation that is currently before the subcommittee.

It is my hope that if after hearing from our distinguished witnesses there is a consensus for supporting these bills, we can proceed to mark up in the very near future.

Before we begin the hearing this morning, let me take this moment to review the issues presented by these bills. The most significant bill before us today is H.R. 2406. This bill would alter the mandatory appellate jurisdiction of the Supreme Court. In many senses, this bill represents a logical culmination of reforms begun by the subcommittee in a previous Congress when we virtually eliminated the use of three-judge courts and thereby many direct mandatory appeals to the Supreme Court.

[Copies of H.R. 2406, H.R. 4395, and H.R. 4396 follow:]

97TH CONGRESS
1ST SESSION

H. R. 2406

To improve the administration of justice by providing greater discretion to the Supreme Court in selecting the cases it will review and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 10, 1981

Mr. KASTENMEIER introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To improve the administration of justice by providing greater discretion to the Supreme Court in selecting the cases it will review and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. Section 1252 of title 28, United States Code, is repealed.

SEC. 2. Section 1254 of title 28, United States Code, is amended by deleting subsection (2), by redesignating subsection (3) as subsection (2) and by deleting "appeal;" from the title.

SEC. 3. Section 1257 of title 28, United States Code, is amended to read as follows:

"§ 1257. State courts; certiorari

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

"For the purposes of this section, the term 'highest court of a State' includes the District of Columbia Court of Appeals.".

SEC. 4. Section 1258 of title 28, United States Code, is amended to read as follows:

"§ 1258. Supreme Court of Puerto Rico; certiorari

"Final judgments or decrees rendered by the Supreme Court of the Commonwealth of Puerto Rico may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of the Commonwealth

of Puerto Rico is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, or commission held, or authority exercised under, the United States.".

SEC. 5. The analysis at the beginning of chapter 81 of title 28, United States Code, is amended to read as follows:

"CHAPTER 81—SUPREME COURT

"Sec.
"1251. Original jurisdiction.
"1252. Repealed.
"1253. Direct appeals from decisions of three-judge courts.
"1254. Court of appeals; certiorari; certified questions.
"1255. Court of Claims; certiorari; certified questions.
"1256. Court of Customs and Patent Appeals; certiorari.
"1257. State courts; certiorari.
"1258. Supreme Court of Puerto Rico; certiorari.".

SEC. 6. Section 314 of the Federal Election Campaign Act of 1971, as added by section 208(a) of the Federal Election Campaign Act Amendments of 1974, as redesignated and amended (2 U.S.C. 437h), is amended:

(a) by deleting subsection (b); and

(b) by redesignating subsection (c) as subsection (b).

SEC. 7. Section 2 of the Act of May 18, 1928 (25 U.S.C. 652) is amended by deleting ", with the right of either party to appeal to the Supreme Court of the United States.".

SEC. 8. Subsection (d) of section 203 of the Trans-Alaska Pipeline Authorization Act (43 U.S.C. 1652(d)) is amended by deleting the last sentence and inserting in lieu thereof the following: Any review of the interlocutory or final judgment, decree or order of such district court may be had only upon direct review by the Supreme Court by writ of certiorari.

SEC. 9. This Act shall take effect ninety days after the date of enactment. However, it shall not affect cases then pending in the Supreme Court, nor shall it affect the right to review, or the mode of reviewing, the judgment or decree of a court when the judgment or decree sought to be reviewed was entered prior to the effective date of this Act.

97TH CONGRESS
1ST SESSION

H. R. 4395

To extend to all petit and grand jurors in the United States district courts eligibility for compensation for work injuries under title 5, United States Code, to provide for the taxing of attorney fees, as court costs, for a court appointed attorney in an action brought by a juror to protect his employment rights, and to authorize the service of jury summonses by ordinary mail.

IN THE HOUSE OF REPRESENTATIVES

AUGUST 4, 1981

Mr. KASTENMEIER introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To extend to all petit and grand jurors in the United States district courts eligibility for compensation for work injuries under title 5, United States Code, to provide for the taxing of attorney fees, as court costs, for a court appointed attorney in an action brought by a juror to protect his employment rights, and to authorize the service of jury summonses by ordinary mail.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

INJURY COMPENSATION FOR JURORS

SECTION 1. (a) Chapter 81 of title 5, United States Code, is amended by inserting immediately after section 8141 the following new section:

"§ 8141a. Federal petit and grand jurors

"(a) For purposes of this section, 'Federal petit or grand juror' means a person who is selected pursuant to chapter 121 of title 28 and summoned to serve as a petit or grand juror and who is entitled to the fees provided for attendance in section 1871 of title 28.

"(b) Subject to the provisions of this section, this subchapter applies to a Federal grand or petit juror, except that entitlement to disability compensation payments does not commence until the day after the date of termination of service as a juror.

"(c) In administering this subchapter with respect to a juror covered by this section—

"(1) a juror is deemed to receive monthly pay at the minimum rate for grade GS–2 of the General Schedule unless the actual pay of such juror as a Government employee while serving on court leave is higher, in which case monthly pay is determined in accordance with section 8114 of this title, and

"(2) 'performance of duty' as a juror includes that time when the juror is (A) in attendance at court pur-

suant to a summons, (B) in deliberation, (C) sequestered by order of a judge, or (D) traveling to and from the courthouse pursuant to a jury summons or sequestration order, or as otherwise necessitated by order of court such as for the taking of a view.".

(b) The chapter analysis of chapter 81 of title 5, United States Code, is amended by inserting immediately after the item relating to section 8141 the following new item:

"8141a. Federal petit and grand jurors.".

(b) Section 8101(1) of title 5, United States Code, is amended—

(1) by striking out subparagraph (F); and

(2) in clause (iv) by striking out "; and" and inserting in lieu thereof a period.

TAXATION OF JUROR ATTORNEY'S FEES

SEC. 2. Section 1875(d) of title 28, United States Code, is amended—

(1) by inserting "(1)" immediately after "(d)"; and

(2) by amending paragraph (2) to read as follows:

"(2) In any action or proceeding under this section, the court may award a prevailing employee who brings such action by retained counsel a reasonable attorney's fee as part of the costs. The court may tax a defendant employer, as costs payable to the court, the attorney fees and expenses incurred on behalf of a prevailing employee, in any case in

which such fees and expenses were paid pursuant to paragraph (1) of this subsection. The court may award a prevailing employer a reasonable attorney's fee as part of the costs only if the court finds that the action is frivolous, vexatious, or brought in bad faith.".

SERVICE OF SUMMONS FOR JURY SERVICE

SEC. 3. (a) The second paragraph of section 1866(b) of title 28, United States Code, is amended to read as follows:

"Each person drawn for jury service may be served personally, or by registered, certified, or first class mail addressed to such person at his usual residence or business address.".

(b) The fourth paragraph of section 1866(b) of title 28, United States Code, is amended to read as follows:

"If such service is made by mail, the summons may be served by the marshal, clerk, or jury commission, or their duly designated deputies, who shall make affidavit of service and shall attach thereto any receipt from the addressee for a registered or certified summons.".

97TH CONGRESS
1ST SESSION

H. R. 4396

To permit courts of the United States to establish the order of hearing for certain civil matters, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

AUGUST 4, 1981

Mr. KASTENMEIER (for himself and Mr. RAILSBACK) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To permit courts of the United States to establish the order of hearing for certain civil matters, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Federal Courts Civil Priorities Act".

SEC. 2. (a) Chapter 111 of title 28, United States Code, is amended by adding at the end thereof the following new section:

"§ 1657. Priority of civil actions

"Notwithstanding any law to the contrary, each court of the United States shall determine the order in which civil actions are heard and determined, except that the court shall expedite the consideration of any action brought under chapter 153 or section 1826 of this title, any action for temporary or permanent injunctive relief, or any other action if good cause therefor is shown.".

(b) The table of sections for chapter 111 of title 28, United States Code, is amended by adding at the end thereof the following new item:

"1657. Priority of civil actions.".

SEC. 3. (a) The following provisions of law are repealed:

(1) Section 309(a)(10) of the Federal Election Campaign Act of 1971 (2 U.S.C. 437g(a)(11)).

(2) Section 310(c) of the Federal Election Campaign Act of 1971 (2 U.S.C. 437h(c)).

(3) Section 552(a)(4)(D) of title 5, United States Code.

(4) Section 1 of the Act of February 11, 1903, commonly known as the Expediting Act (15 U.S.C. 28).

(5) Section 21(f)(3) of the Federal Trade Commission Improvements Act of 1980 (15 U.S.C. 57a–1(f)(3)).

(6) Section 12(e)(3) of the Coastal Zone Management Improvement Act of 1980 (16 U.S.C. 1463a(e)(3)).

(7) Section 3310(e) of the Internal Revenue Code of 1954.

(8) Section 6110(f)(5) of the Internal Revenue Code of 1954.

(9) Section 6363(d)(4) of the Internal Revenue Code of 1954.

(10) Section 2602 of title 28, United States Code.

(11) Section 10(i) of the National Labor Relations Act (29 U.S.C. 160(i)).

(12) Section 4003(e)(4) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1303(e)(4)).

(13) Section 304(e) of the Social Security Act (42 U.S.C. 504(e)).

(14) Section 814 of the Act of April 11, 1968 (42 U.S.C. 3614).

(15) Section 23(d) of the Outer Continental Shelf Lands Act (43 U.S.C. 1349(d)).

(b)(1) Section 6(a) of the Commodity Exchange Act (7 U.S.C. 8(a)) is amended by striking out "The proceedings in such cases in the court of appeals shall be made a preferred cause and shall be expedited in every way.".

(2)(A) Section 6(c)(4) of the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136d(c)(4)) is amended by striking out the second sentence.

(B) Section 16(b) of the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136n(b)) is amended by striking out the last sentence.

(3) Section 204(d) of the Packers and Stockyards Act, 1921 (7 U.S.C. 194(d)), is amended by striking out the second sentence.

(4) Section 366 of the Agricultural Adjustment Act of 1938 (7 U.S.C. 1366) is amended in the fourth sentence by striking out "At the earliest convenient time, the court, in term time or vacation," and inserting in lieu thereof "The court".

(5)(A) Section 410 of the Federal Seed Act (7 U.S.C. 1600) is amended by striking out "The proceedings in such cases in the court of appeals shall be made a preferred cause and shall be expedited in every way.".

(B) Section 411 of the Federal Seed Act (7 U.S.C. 1601) is amended by striking out "The proceedings in such cases shall be made a preferred cause and shall be expedited in every way.".

(6) Section 816(c)(4) of the Act of October 7, 1975, commonly known as the Department of Defense Appropri-

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ation Authorization Act of 1976 (10 U.S.C. 2304 note), is amended by striking out the last sentence.

(7) Section 5(d)(6)(A) of the Home Owners' Loan Act of 1933 (12 U.S.C. 1464(d)(6)(A)) is amended by striking out "Such proceedings shall be given precedence over other cases pending in such courts, and shall be in every way expedited.".

(8)(A) Section 7A(f)(2) of the Clayton Act (15 U.S.C. 18a(f)(2)) is amended to read as follows: "(2) certifies to the United States district court for the judicial district within which the respondent resides or carries on business, or in which the action is brought, that it or he believes that the public interest requires relief pendente lite pursuant to this subsection, then upon the filing of such motion and certification, the chief judge of such district court shall immediately notify the chief judge of the United States court of appeals for the circuit in which such district court is located, who shall designate a United States district judge to whom such action shall be assigned for all purposes.".

(B) Section 11(e) of the Clayton Act (15 U.S.C. 21(e)), is amended by striking out the first sentence.

(9) Section 5(e) of the Federal Trade Commission Act (15 U.S.C. 45(e)) is amended by striking out the first sentence.

(10)(A) Section 309(e) of the Small Business Investment Act of 1958 (15 U.S.C. 687a(e)) is amended by striking out the sixth sentence.

(B) Section 309(f) of the Small Business Investment Act of 1958 (15 U.S.C. 687a(f)) is amended by striking out the last sentence.

(C) Section 311(a) of the Small Business Investment Act of 1958 (15 U.S.C. 687c(a)) is amended by striking out the last sentence.

(11) Section 155(a) of the National Traffic and Motor Vehicle Safety Act of 1966 (15 U.S.C. 1415(a)) is amended by striking out "(1)" and by striking out paragraph (2).

(12) Section 503(b)(3)(E) of the Motor Vehicle Information and Cost Savings Act (15 U.S.C. 2003(b)(3)(E)) is amended by striking out clause (ii) and redesignating clauses (iii) and (iv) as clauses (ii) and (iii), respectively.

(13) Section 11 of the Act of September 28, 1976 (16 U.S.C. 1910), is amended by striking out the last sentence.

(14) Section 1108 of the Alaska National Interest Lands Conservation Act (16 U.S.C. 3168) is amended to read as follows:

"INJUNCTIVE RELIEF

"SEC. 1108. No court shall have jurisdiction to grant any injunctive relief lasting longer than ninety days against any action pursuant to this title except in conjunction with a

final judgment entered in a case involving an action pursuant to this title.".

(15)(A) Section 10(b) of the Central Idaho Wilderness Act of 1980 is amended by striking out paragraph (3).

(B) Section 10(c) of the Central Idaho Wilderness Act of 1980 is amended to read as follows:

"(c) Any review of any decision of the United States District Court for the District of Idaho shall be made by the Ninth Circuit Court of Appeals of the United States.".

(16)(A) Section 1964(b) of title 18, United States Code, is amended by striking out the second sentence.

(B) Section 1966 of title 18, United States Code, is amended by striking out the last sentence.

(17)(A) Section 408(i)(5) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 346a(i)(5)), is amended by striking out the last sentence.

(B) Section 409(g)(2) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 348(g)(2)) is amended by striking out the last sentence.

(18) Section 8(f) of the Foreign Agents Registration Act of 1938 (22 U.S.C. 618(f)) is amended by striking out the last sentence.

(19) Section 4 of the Act of December 22, 1974 (25 U.S.C. 640d–3), is amended by striking out "(a)" and by striking out subsection (b).

(20)(A) Section 9010(c) of the Internal Revenue Code of 1954 is amended by striking out the last sentence.

(B) Section 9011(b)(2) of the Internal Revenue Code of 1954 is amended by striking out the last sentence.

(21)(A) Section 2284(b)(2) of title 28, United States Code, is amended by striking out the last sentence.

(B) Section 2349(b) of title 28, United States Code, is amended by striking out the last two sentences.

(22) Section 10 of the Act of March 23, 1932, commonly known as the Norris-LaGuardia Act (29 U.S.C. 110), is amended by striking out "with the greatest possible expedition" and all that follows through the end of the sentence and inserting in lieu thereof "expeditiously".

(23) Section 11(a) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 660(a)) is amended by striking out the last sentence.

(24) Section 106(a)(1) of the Federal Coal Mine Health and Safety Act of 1969 (30 U.S.C. 816(a)(1)) is amended by striking out the last sentence.

(25) Section 1016 of the Impoundment Control Act of 1974 (31 U.S.C. 1406) is amended by striking out the second sentence.

(26) Section 3628 of title 39, United States Code, is amended by striking out the fourth sentence.

(27) Section 1450(i)(4) of the Public Health Service Act (42 U.S.C. 300j-9(i)(4)) is amended by striking out the last sentence.

(28)(A) Section 2004(e) of the Revised Statutes of the United States (42 U.S.C. 1971(e)) is amended—

(i) in the third paragraph, by striking out "An application for an order pursuant to this subsection shall be heard within ten days, and the execution of any order disposing of such application" and inserting in lieu thereof "The execution of an order disposing of an application pursuant to this subsection"; and

(ii) by striking out the first sentence of the eighth paragraph.

(B) Section 2004(g) of the Revised Statutes of the United States (42 U.S.C. 1971(g)) is amended—

(i) in the first paragraph, by striking out "to assign the case for hearing at the earliest practicable date," and by striking out ", and to cause the case to be in every way expedited"; and

(ii) by striking out the third paragraph.

(29)(A) Section 10(c) of the Voting Rights Act of 1965 (42 U.S.C. 1973h(c)) is amended by striking out "to assign the case for hearing at the earliest practicable date," and by striking out ", and to cause the case to be in every way expedited".

(B) Section 301(a)(2) of the Voting Rights Act of 1965 (42 U.S.C. 1973bb(a)(2)) is amended by striking out ", and to cause the case to be in every way expedited".

(30)(A) Section 206(b) of the Civil Rights Act of 1964 (42 U.S.C. 2000a-5(b)) is amended—

(i) in the first paragraph, by striking out "to assign the case for hearing at the earliest practicable date," and by striking out ", and to cause the case to be in every way expedited"; and

(ii) by striking out the last paragraph.

(B) Section 706(f)(2) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(f)(2)) is amended by striking out the last sentence.

(C) Section 706(f)(5) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(f)(5)) is amended to read as follows:

"(5) The judge designated to hear such case may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.".

(D) Section 707(b) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-6(b)) is amended—

(i) in the first paragraph, by striking out "to assign the case for hearing at the earliest practicable date," and by striking out ", and to cause the case to be in every way expedited"; and

(ii) by striking out the last paragraph.

(31) Section 2 of the Act of February 25, 1885 (43 U.S.C. 1062), is amended by striking out "; and any suit brought under the provisions of this section shall have precedence for hearing and trial over other cases on the civil docket of the court, and shall be tried and determined at the earliest practicable day".

(32) Section 203(d) of the Trans-Alaska Pipeline Authorization Act (43 U.S.C. 1652(d)) is amended by striking out the fourth sentence.

(33) Section 5(f) of the Railroad Unemployment Insurance Act (45 U.S.C. 355(f)), is amended by striking out ", and shall be given precedence in the adjudication thereof over all other civil cases not otherwise entitled by law to precedence".

(34) Section 402(g) of the Communications Act of 1934 (47 U.S.C. 402(g)) is amended—

(A) by striking out "At the earliest convenient time the" and inserting in lieu thereof "The"; and

(B) by striking out "10(e) of the Administrative Procedure Act" and inserting in lieu thereof "706 of title 5, United States Code".

(35) Section 12(a) of the Military Selective Service Act of 1967 (50 U.S.C. App. 462(a)) is amended by striking out the last sentence.

Mr. KASTENMEIER. The basic purpose of this bill is to provide the Supreme Court with greater discretion in selecting which cases they wish to decide. In many instances, under current law the Supreme Court is obligated to decide cases that do not have the same national signifiance as cases decided through the certiorari mechanism.

The advocates for this change in the Supreme Court's appellate jurisdiction include all of the current members of the Court. As a matter of fact, the Chair has in hand a letter dated June 17, 1982, which comes from the chambers of the Chief Justice of the United States, in which he and all other eight associate Justices sign a letter indicated, in summary, their support for H.R. 2406, together with an addendum relating to Supreme Court filings which supports their conclusion.

Without objection, this letter will be received and made a part of the record, together with the supporting material. I might add, this is unique. As chairman of this subcommittee over many years, I do not recall ever having received a letter from the Supreme Court of the United States, signed by all nine Justices. So I take special note of this special advocacy of this piece of legislation.

[The letter and materials follow:]

Supreme Court of the United States
Washington, D. C. 20543

JUN 18 1982

CHAMBERS OF
THE CHIEF JUSTICE

June 17, 1982

Dear Congressman Kastenmeier:

Re: H.R. 2406

In response to your invitation, we write to express our complete support for the proposals contained in H.R. 2406 substantially to eliminate the Supreme Court's mandatory jurisdiction. A letter to this effect was signed by all the members of the Court on June 22, 1978. Your invitation enables us again to renew our request for elimination of the Court's mandatory jurisdiction.

We endorse H.R. 2406 without reservation and urge the Congress its prompt enactment. Our reasons are similar to those presented to the Senate on June 20, 1978 by Solicitor General Wade McCree, Assistant Attorney General Daniel J. Meador, Professor Eugene Gressman and others. We also agree with the Freund Committee's recommendation urging the elimination of the Supreme Court's mandatory jurisdiction; that report was presented to your subcommittee in the summer of 1977 during the hearings held on the State of the Judiciary. At those hearings Professor Leo Levin and former Solicitor General Robert Bork also testified in favor of the elimination of the Court's mandatory jurisdiction.

The present mandatory jurisdiction provisions permit litigants to require cases to be decided by the Supreme Court of the United States without regard to the importance of the issue presented or their impact on the general public. Unfortunately, there is no correlation between the difficulty of the legal issues presented in a case and the importance of the issue to the general public. For this reason, the Court must often call for full briefing and oral argument in difficult issues which are of little significance. At present, the Court must devote a great deal of its limited time and resources on cases which do not, in Chief Justice Taft's words, "involve principles, the application of which are of wide public importance or governmental interest, and which should be authoritatively declared by the final court."

This is acutely important as we close a Term with the highest number of filings in history. The more time the Court must devote to cases of this type the less time it has to spend on the more important cases facing the nation. Because the volume of complex and difficult cases continues to grow, it is even more important that the Court not be burdened by having to deal with cases that are of significance only to the individual litigants but of no "wide public importance."

Attached in the appendix is a table showing the recent growth of filings at the Supreme Court. Also attached are statistical tables covering the October 1976 and 1980 Terms. These tables reveal that during the 1980 Term, thirty-six percent of the cases decided by the Court were cases arising out of mandatory jurisdiction. The percentage of mandatory jurisdiction cases has decreased since 1976, chiefly because of the action taken by Congress to confine the jurisdiction of three-judge federal district courts. Further decline in the percentage of mandatory jurisdiction cases is not expected however, since the curtailment of three-judge court cases has by now been reflected in the Court's caseload. The remaining burdens posed by the mandatory jurisdiction provisions still on the books are nevertheless substantial and continue to cause the Court to expend its limited resources on cases that are better left to other courts.

It is impossible for the Court to give plenary consideration to all the mandatory appeals it receives; to have done so, for example, during the 1980 Term would have required at least 9 additional weeks of oral argument or a seventy-five percent increase in the argument calendar. To handle the volume of appeals presently being received, the Court must dispose of many cases summarily, often without written opinion. Unfortunately, these summary decisions are decisions on the merits which are binding on state courts and other federal courts. See Mandel v. Bradley, 432 U.S. 172 (1977); Hicks v. Miranda, 422 U.S. 332 (1975). Because they are summary in nature these dispositions often also provide uncertain guidelines for the courts that are bound to follow them and, not surprisingly, such decisions sometimes create more confusion than they seek to resolve. The only solution to the problem, and one that is consistent with the intent of the Judiciary Act of 1925 to give the Supreme Court

discretion to select those cases it deems most important, is to eliminate or curtail the Court's mandatory jurisdiction.

Because the Court has to devote a great deal of time to deciding mandatory jurisdiction cases, it is imperative that mandatory jurisdiction of the Court be substantially eliminated. For these reasons we endorse H.R. 2406 and urge its immediate adoption.

Cordially & respectfully,

Warren E. Burger

William J. Brennan

Thurgood Marshall

Byron R. White

Lewis F. Powell

Harry A. Blackmun

John P. Stevens

William H. Rehnquist

Sandra D. O'Connor

SUPREME COURT FILINGS

October Term 1981	4,400 cases (estimated)*
October Term 1980	4,174 cases
October Term 1979	3,985 cases

*As of June 15, 1982 the actual figure was 4,209, which is five percent higher than last Term at the same time.

CASES DISPOSED OF IN OCTOBER 1976 AND 1980 TERMS

			O.T. 1976		O.T. 1980
1)	CASES BROUGHT AS APPEALS				
	Properly brought as appeals		211		126
	Improperly brought as appeals		94		91
	Dismissed Under Rule 60		6		1
		TOTAL	311		218
2)	CASES PROPERLY BROUGHT AS APPEALS				
	Decided With Opinion After Oral Argument		56		27
	Decided With Opinion Without Oral Argument		10		1
	Decided Without Opinion		145		102
	Affirmed	54		16	
	Reversed	0			
	Vacated & Remanded	26			
	Dismissed for Want of a Substantial Federal Question	65		86	
		TOTAL	211		130
3)	CASES DECIDED ON THE MERITS				
	Decided on Appeal		211		130
	Decided on Certiorari		234		229
		TOTAL	445		359*
Percentage Decided On Appeal			47.4%		36.2%
Percentage Decided on Certiorari			52.6%		63.8%

*Total does not include the one original case decided in October Term 1980

Mr. KASTENMEIER. The second bill before the subcommittee is H.R. 4396. This bill is in response to the growing problem of inconsistent priorities for civil cases. When this bill was introduced, the subcommittee staff located about 40 expediting provisions in current law. I am now told by staff there are at least 40 more expediting provisions in various titles of the United States Code. Some of these expediting provisions are the result of actions by this Congress.

As the American Bar Association and the Association of the Bar of the City of New York have both capably pointed out, this welter of provisions has a net effect of confusing lawyers and leaving no practical guidance to the courts.

While there may be room for some disagreement about the relative wisdom of certain of the expediting provisions, there is little dispute about the need to consolidate and rationalize these conflicting directions from Congress. It is my hope that at the very least we will be able to put all of the expediting provisions in the judicial title of the United States Code.

The second step we can take, and I believe we must take, is to require that any such future expediting provisions be referred to the respective judiciary committees for consideration. Without such a provision, any remedial action we take this Congress will be rendered virtually meaningless because in future Congresses other committees of this House will no doubt continue to insist on inserting expediting provisions in their bills.

There are two possible ways of achieving this result. One, we could amend the rules of the House to require a sequential referral to the Judiciary Committee of any such bill, or second, alternatively, we could require in statutory law that no bill with an expediting clause be voted on until it has been reviewed by the Judiciary Committee.

The third bill we have before us this morning is H.R. 4395 relating to jurors' rights. This bill, introduced by the Chair, requested by the Judicial Conference of the United States, contains three parts: First, corrects an error made in the Jury Systems Improvements Act by providing that court-appointed attorneys are eligible to receive attorneys' fees. Anomalously, under current law, only retained counsel can be awarded attorney's fees.

The second part of the bill permits the courts to use the regular mails to notify prospective jurors of jury service. The final part of the bill provides that jurors who are injured while on jury duty—I suppose it is possible—are eligible to apply for Federal workers compensation.

These three bills appear to be relatively noncontroversial. I would hope that members of our subcommittee would be ready to proceed with these measures in the very near future.

The Chair would like to greet this morning our first witness. It is a distinct pleasure for me to welcome to the subcommittee a distinguished jurist, Judge Elmo B. Hunter. Judge Hunter has appeared before the subcommittee on numerous occasions in the past several years. I know all of us have appreciated Judge Hunter's contributions in the work of the committee. We look forward to working with Judge Hunter on new judicial reform issues.

Judge Hunter, we have received a copy of your written statement and, without objection, it will be made a part of the record.

I also understand that you wish to submit additional materials as an addendum to your testimony, and without objection, the hearing record will remain open for 1 month to permit you to provide the committee with any additional materials.

So, Judge Hunter, we greet you again, and you may proceed as you wish.

Judge Hunter appears this morning, I might add, as Chairman of the Committee on Courts Administration of the Judicial Conference of the United States.

TESTIMONY OF HON. ELMO B. HUNTER, U.S. DISTRICT JUDGE FOR THE WESTERN DISTRICT OF MISSOURI, AND CHAIRMAN, COMMITTEE ON COURTS ADMINISTRATION OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, ACCOMPANIED BY WILLIAM WELLER, LEGISLATIVE AFFAIRS OFFICER OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS; AND MICHAEL REMINGTON, DEPUTY LEGISLATIVE AFFAIRS OFFICER

Judge HUNTER. Mr. Chairman, it is true that I have been before you and before this subcommittee many, many times. From that experience, I know first hand that your time and the time of this subcommittee is, indeed, very precious. So I will limit myself to 5 minutes apiece on these three bills that I have been invited to discuss.

First I would like to present the two gentlemen who are here with me, one on my right and the other on my left. On my right is Mr. William Weller, the Legislative Affairs Officer of the Administrative Office of the U.S. Courts, and on my left Mr. Mike Remington, the Deputy Legislative Affairs Officer of the Administrative Office.

Mr. KASTENMEIER. Actually, I don't think you needed to introduce them to this committee.

Judge HUNTER. I probably didn't, but I thought for the record I should show that they are here to support me and to add a good deal to this discussion.

I will take, in addition to the 15 minutes, only one other minute. I take that because I simply cannot let this opportunity pass without again expressing to you and to your colleagues on this subcommittee, and to your dedicated staff, I might also add, the extremely high regard that the judges, the Judicial Conference and I have for your extraordinary insight into and knowledge of the judiciary and its modern day and oftentimes complex problems. We are proud of your proven track record on this field, and we know that we are fortunate to have you and this subcommittee's aid as all of us together endeavor to bring to the citizens of our country an ever-higher quality of justice, as timely and as inexpensively as reasonably possible.

Mr. KASTENMEIER. On behalf of each member and all members of the subcommittee, I accept that very generous compliment.

Judge HUNTER. Mr. Chairman, I know you never invite accolades, but this one just had to be expressed because it is so well deserved.

Today I appear at your invitation to give the views of the Judicial Conference of the United States on these three bills that you have mentioned. You have already indicated that you understand that I do not purport to give the views of the U.S. Supreme Court, as no one can do that other than the Supreme Court itself. That Court has done it, as evidenced by the letter that you mentioned in your opening remarks. I hasten to add that the views that I express are in complete accord with that letter.

Since the statement which I earlier filed with your staff is quite detailed and hopefully sufficiently complete for the intended use, I will very briefly orally address each of the three bills now before this subcommittee.

I commence with H.R. 2406, a bill to grant the Supreme Court greater discretion in selecting the cases which it will review. This is to be accomplished by changing mandatory appeals to a discretionary or certiorari status. No jurisdiction that the U.S. Supreme Court possesses is eliminated. On the contrary, its jurisdiction remains intact. But it is to be exercised on a discretionary basis rather than on an obligatory or mandatory basis.

The question naturally arises as to why such a bill is needed. The answer, I think, is clear and is of such a nature as to make this bill relatively noncontroversial. The obligatory type of appeal which the Supreme Court now operates under serves to rob the Supreme Court of its historic purpose to decide the truly important cases of our Nation, for the Court loses much valuable time on cases that are not that high in importance to our country and to its citizens, and it makes it difficult, if not impossible, for the Court to reach and to decide cases that it ought to reach and decide in the interest of our country.

Second, the present system of the mandatory appeal impairs the Supreme Court's ability to select the right case at the right time for resolution of vital, recurring issues.

Third, it compels the Court, out of time considerations, to make summary dissolutions that may result in a lack of needed, definitive resolution in some of the cases.

In summary, the mandatory appeals process is simply not in the public interest, it is unnecessary, it is burdensome, and certainly it is counterproductive to the basic and constitutional purpose of our Nation's highest court.

Whatever justification, if any, which may have existed in earlier days for forcing the Court to decide the merits of all cases falling within certain arbitrary classifications, regardless of the importance to the Nation or its people of the particular case, simply no longer exists. What should be done, of course, is that the mandatory appellate jurisdiction should be eliminated by statute so that the Supreme Court can more efficiently and effectively administer its caseload in the interest of justice and in the interest of the Nation.

You mentioned in your opening statement that there is no particular opposition to this bill. Certainly there is none that I am aware of. The scholars, the law professors, the lawyers, all support the doing away with mandatory appeals and the substitution of the certiorari process. I simply call your attention to some of those who have done that:

First, the Supreme Court itself; second, the Judicial Conference of the United States and its court administration committee; third, the American Bar Association, whose representatives appear here today; fourth, the Senate Judiciary Committee itself, where on July 13, 1978, that committee, in effect, approved this bill.

Fifth—and those of you who attended the Williamsburg conference will recall it—all of those who spoke on this subject at that conference were in favor of this bill and its purposes, including the Attorney General of the United States. And if we go back some in history, we will find that the Hruska Commission, when it was studying the problem, came to the same bottom line that this bill comes to that we are discussing today.

So I think that it can be safely said, Mr. Chairman, that this is a bill that can and should be quickly taken up by the Congress and hopefully passed. Its need is great and no purpose is served by delay.

Turning to the second bill, H.R. 4396, that is a bill to permit the courts of the United States to establish the order of hearing certain civil cases. In other words, it is a bill which repeals most of the civil priorities for trying and deciding civil cases, and grants that authority to the courts.

There are a few, very minor exceptions, if they may be termed that, to that bill. Certainly it does retain priority for habeas corpus proceedings, or recalcitrant witness cases, and for those cases where applicable relief by way of injunctions is sought.

As you noted, these statutory priorities over the years have grown to where they have reached some 80 in number. They conflict, they overlap, they confuse, and they are simply not manageable. We have so many arbitrary priorities that the cases that should be reached just can't be reached if we apply those priorities. I say if we apply them, because frankly, the priorities are pretty well ignored throughout the judicial system. Ordinarily I would say that with apologies, because no one likes to tell that the judicial system doesn't follow some statutory requirement. But the truth of the matter is they simply cannot follow it. The confusion that exists is too great.

If you have a number of cases, all of which are given a first priority, which is truly first? If you add different language trying to describe what priority it should have and that language is not clear, how can you apply it in comparison with other language on other types of cases that is clear? It is simply a mess.

I have brought along with me the two books that I have had on the desk behind me in my office. Over the years the attorneys who have come in and have insisted that their case be advanced on the docket because of some statutory language purporting to give a priority, they just can't understand why they don't get that priority. I have simply handed them these two books over the years and said:

> Look, you are simply in a race with a lot of other people for priorities which are not clearly stated, and your first position really goes down to the bottom of the list because the others are more clearly stated and seem to carry a little more weight.

It is not a good answer. It doesn't satisfy the bar. It doesn't satisfy the judges. It is embarrassing, and it certainly is not in the interest of trying to have good case management in a busy court.

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Mr. Chairman, you have noticed in your opening statement that these priorities are spread throughout the United States Code, from title 2 to title 49, and that many of them were written into the particular statute by subcommittees other than this subcommittee and, I might say, to all appearances, written without any study or regard for the overall problem of priorities.

I think you have come to the right bottom line. All civil priorities should be placed in a single section in the judiciary title of the United States Code—that is title 28—under a proposed new section, 1657. Then the Judiciary Committees of the House and Senate should control and monitor that priority system, if there is to be one. In other words, I doubt that there is any particular need for a priority system. I think the judge on the firing line who knows his docket, knows well enough what the competing interests are, and what they might lead to. But if there is to be the priority system, certainly it should be under the guidance and control of the Judiciary Committees of the House and Senate, where they can be kept in orderly fashion.

This bill is supported by the Judicial Conference of the United States and by its court administration committee. It is supported by the American Bar Association, again whose representative is here today. And it is simply the logical progression that started in February of 1977 toward reaching this result. I commend it to you on behalf of the Judicial Conference and hope that you will enact H.R. 4396.

Turning to the last bill on which I am to comment, H.R. 4395, this is a bill to extend to all Federal jurors the coverage that presently exists under chapter 81 of title 5, United States Code, which is properly known as the Federal Employees Compensation Act. This bill amends that act so as to bring within the coverage of that act those Federal jurors who are not Federal employees.

I think it important to note that the bill does not make these Federal jurors Federal employees. It simply brings them within the coverage of the act itself.

It is in three parts. In part one, it grants coverage to jurors in attendance at court pursuant to summons; it grants coverage to those who are present during jury deliberations, during periods of sequestration, and those while they are in travel to and from the courthouse in connection with the mandated jury service.

Part two, which is section 1875(d)(2), empowers the court to tax as costs payable to the court the attorneys' fees and expenses incurred by the United States on behalf of a juror for whom the court has appointed counsel under the act.

Part three, 1866(b), authorizes service of summons to prospective jurors by ordinary first class mail, or by registered or certified mail, as is now allowed, all at the discretion of the particular court.

Federal employees, of course, come under this Federal Employees Compensation Act for money determined to some degree by their rate of pay. These new jurors who would come within the coverage of the act are considered as GS–2; that is, as earning approximately $30 a day, which just simply happens to be what they do earn by their daily Federal jury service.

I don't believe that anyone can justify having two classes of jurors—those who are lucky enough to be Federal employees and,

hence, who have this coverage of the Federal Employees Compensation Act, and those who are not Federal employees and who are injured as a part of their jury duties having no coverage under that act. It is simple equity. It is basic fairness to bring them all in on the same basis and, again, the Judicial Conference recommends that this statute, H.R. 4395, be enacted.

Mr. Chairman, that pretty well covers my very brief comments on these three bills. I appreciate very much the opportunity to appear here and to speak for the Judicial Conference of the United States on these matters. I have with me my two experts and we will happily stand whatever cross-examination you may wish to have.

[The statement of Hon. Judge Hunter follows:]

STATEMENT OF HON. ELMO B. HUNTER

Mr. Chairman, and members of the subcommittee, I am pleased to be before you yet again. I have belabored your patience with testimony so often now that I am almost beginning to feel as at home here as in my own courtroom. On behalf of the Conference, thank you for scheduling this hearing. I know we have much to do, so let me begin.

H.R. 2406

H.R. 2406 may be succinctly described as a bill to *convert* elements of existing Supreme Court jurisdiction which are "mandatory" or "obligatory" to a "discretionary" or "certiorari" status. Because the proposal is precisely drafted, it may appear upon first impression to reach such a small spectrum of "classes of cases" that its impact upon the Court's business would be relatively slight. In fact, this bill would be of great value to the Court, to other courts in the nation's federal judicial system, to state courts, the bar -- and, most of all, to the nation's comprehensive body of jurisprudence.

Fortunately, full recognition of this proposal's great value appears to be universal, and appears to have been universal since the introduction of predecessor bills in the Ninety-fifth Congress in 1977. At least since 1978 a broad consensus of support for this legislation has been obvious. It has been diverted from final passage in the past two Congresses *only* because it has been "linked" by amendments to controversial -- and extraneous -- issues. After addressing the substantive and policy aspects of the bill, I will, in explaining its background, return to that point. Before commenting further, however,

I feel that I must explain for the record what my testimony as a representative of the Judicial Conference constitutes -- and what it does not constitute.

Last May, Mr. Chairman, in testimony before this panel, in the series of excellent oversight hearings on the federal judiciary which you commenced in 1977, I explained "the role which the Judicial Conference of the United States performs on behalf of the third branch". I then noted Congress' deliberate recognition of the Supreme Court's unique Constitutional status -- which has thankfully been continuously defended and protected by Congress -- by explaining that the Conference's administrative and policy decisions, and the Administrative Office's performance in accordance with those decisions, do not encompass the Supreme Court. By statute (28 U.S.C. §331) the Conference's authority does not extend to the Supreme Court, and under no circumstances should Conference views on legislative proposals be regarded as equivalent to comments on behalf of the Court or its Justices. In the case of H.R. 2406, however, *both* the Conference *and* the Supreme Court have unanimously endorsed the purpose to be served by the bill -- and, indeed, the specific content of the bill. While I will explain those endorsements in more detail in following comments, at this point I merely wished to explain that I am not testifying today on behalf of the Court. In this instance, as in all others, the Court quite definitely speaks for itself.

Substantive Elements of the Bill

As now pending, Section 1 of the bill repeals 28 U.S.C. §1252. Section 1252 of Title 28 now provides "mandatory" or "obligatory" jurisdiction in the Supreme Court in cases in which a single district court judge invalidates an Act of Congress and the United States is a party in the case. Designed to expedite review of the decision by only one judge in such cases -- an obviously important objective -- the provision is not an exclusive means to achieving that end. An application for a stay and, under 28 U.S.C. §1254(1), application for "discretionary" or "certiorari" review by the Court prior to judgment in the court of appeals is a fully satisfactory alternative means to the same end.

Section 2 of the bill revises 28 U.S.C. §1254 to adjust Supreme Court jurisdiction over cases in the courts of appeals. Present subsection (2) of section 1254, which provides "mandatory" or "obligatory" appellate jurisdiction in cases in which a court of appeals has invalidated a state statute as repugnant to the Constitution, treaties or laws of the United States, is repealed. In the context of federal question jurisdiction such cases are, as a class, no different than any other courts of appeals cases. Deletion of subsection (2) of section 1254 will merely result in jurisdiction in such cases lying under subsection (1) of section 1254 -- that subsection which provides for discretionary or "certiorari" review by the Court.

Section 3 of the bill revises 28 U.S.C. §1257, which now provides for both (1) "obligatory" or "mandatory" jurisdiction in cases in which "the highest court of a State in which a decision could be had" invalidates

a statute or treaty of the United States or finds a state statute repugnant to the Constitution, a treaty, or law of the United States, and (2) certiorari jurisdiction in cases before such a court in which the validity of a state statute or federal treaty or law is questioned on federal grounds. As amended by Section 3 of the bill, revised section 1257 of Title 28 will place all presently encompassed cases under certiorari jurisdiction.

Section 4 of the bill revises 28 U.S.C. §1258, a provision which is applicable only to cases arising from the Supreme Court of Puerto Rico, conforming section 1258 to the revised provisions in section 1257 of Title 28 effected by Section 3 of the bill.

Section 5 of the bill is merely a technical and conforming amendment to the analysis at the beginning of Chapter 81 of Title 28 necessitated by changes in Chapter 81 effected by Sections 1-4 of the bill.

Sections 6, 7, and 8 of the bill are all "repealers" of provisions of law which are not incorporated in Title 28 but which nevertheless provide "mandatory" or "obligatory" jurisdiction. Section 6 repeals such a provision in the Federal Election Campaign Act, designed deliberately to provide expedited review of anticipated litigation, which in fact did materialize and was reviewed in *Buckley v. Valeo*, 424 U.S. 1 (1976). The provision is no longer needed. Section 7 repeals a 1928 provision for obligatory jurisdiction in certain cases involving California Indian lands. No appeals have ever arisen under that provision. Section 8 "converts" to certiorari jurisdiction a "mandatory" jurisdiction provision in the Trans-Alaska Pipeline Authorization Act.

Section 9 of the bill, principally designed to establish the effective date of the enacted legislation as the nintieth day after enactment, is carefully drafted to avoid any impairment of cases pending before the Court on the effective date or review of cases in which a judgment or decree was entered prior to that date.

Policy Factors Supporting the Bill

As I noted previously, H.R. 2406 can reasonably be regarded as nothing more than a "conversion" proposal -- a bill to convert existing mandatory or obligatory jurisdiction to discretionary or certiorari jurisdiction. As such, it is a proposal in full conformity with the evolutionary "modernization" of the federal judicial system, which realistically began in the second half of the Nineteenth Century and has accelerated in this century -- in pace with the nation's growth and rapidly developing demands upon all governmental institutions. In this century the federal courts have been compelled to change their methods of conducting judicial business continuously to meet the people's expectations. Last May this subcommittee examined the comprehensive impact that pattern of growth and rapid change has had upon the administrative elements of the federal judicial system. H.R. 2406 is merely another installment in a similar pattern of constructive reforms related to the adjudicatory elements of the system -- reforms which have dramatically aided the system's ability to manage its workload burdens.

A wealth of analytical and academic material exists examining the nuances of "obligatory" jurisdiction, its historical idiosyncrasies, and its occasional curious or mystifying consequences. As a simple trial

judge from Missouri, I will let that material speak for itself; I can add nothing to it, I fear, but confusion. For my purposes today, I am satisfied to accept what we have been learning to recognize since 1891 as a difference between mandatory or obligatory jurisdiction and discretionary or certiorari jurisdiction in the Supreme Court.

As with a great many other aspects of the federal judicial system's evolution, the Circuit Courts of Appeals Act of 1891 (Act of March 3, 1891, 26 Stat. 826) is a commencement point for the trend which has, I believe, inevitably resulted in H.R. 2406. That 1891 Act was, above all else, designed to permit the Supreme Court to work as the Founding Fathers intended it should, by reducing the *quantity* of *unnecessary* appeals before the Court. The 1891 Act introduced the concept of discretionary review by certiorari with the provision that final decisions by the courts of appeals in cases resting solely upon diversity of citizenship would be reviewable by the Court only by writ of certiorari -- only at the Court's discretion. For reasons I know you understand, Mr. Kastenmeier, I personally attach great significance to that moment in history. I am confident that a concluding chapter will be written concerning diversity jurisdiction soon.

In ensuing years, review by writ of certiorari was expanded by Congress to other types of cases, a realistic accommodation to the Court's ever-increasing quantity of work. With the Judiciary Act of 1925, Congress effectively "converted" the Court's jurisdiction in a majority of its cases to certiorari jurisdiction. It did so in direct response to the Court's strong recommendation in favor of that course of action.

In the past twelve years, just as other historical developments have accelerated, the conversion to certiorari jurisdiction -- and full recognition of the value of the conversion -- has accelerated. In 1970 Congress mandated review by the courts of appeals of all district court determinations in criminal cases and authorized Supreme Court review by certiorari. In 1974 similar action was taken regarding district court decisions in civil actions under antitrust laws and the Interstate Commerce Act. In 1976 Congress responded to the Court's burdens by vastly reducing the classes of cases cognizable only by three-judge district courts with direct appeal to the Supreme Court.

I personally believe the record speaks clearly and convincingly. Congress has recognized that the Court has limited resources and therefore must have greater discretionary control over its work. Since the Freund Committee advocated the "elimination" of obligatory jurisdiction in 1972, a Department of Justice Committee on Revision of the Federal Judicial System, the Hruska Commission on Revision of the Federal Appellate Court System, the American Bar Association, and the Supreme Court itself have endorsed extensive "conversion". For a decade now there have been no dissenting voices raised. I am not surprised. Problems associated with decisions in "mandatory cases" are legion; I will not attempt to address them today. The record established in the past decade is adequate testimony.

In the final analysis, we now know that certiorari jurisdiction meets our jurisprudential needs well; we know that obligatory jurisdiction is an administrative burden which seldom really meets a compelling need (and often generates confusion); and we know that the Court simply

cannot afford to devote resources to the resolution of cases which are not truly deserving of resolution on the merits and of national importance. The Judicial Conference is unanimously of the opinion that continued conversion of obligatory jurisdiction to discretionary jurisdiction has become, in fact, an historical imperative. As the Chief Justice noted in 1975, "all mandatory jurisdiction of the Supreme Court that can be should be eliminated by statute." H.R. 2406 will do that.

Legislative Background

The Judicial Conference's support for H.R. 2406 has, as does the incorporated legislative proposal, a five-year history. H.R. 2406 is a "successor bill" to a series of proposals. In January of 1977, the Court Administration Committee which I chair first responded to a Congressional request for evaluation when S. 83, 95th Cong., 1st Sess. was referred for comment. The committee unanimously approved the proposal and asked the Conference to formally refer the committee's favorable report to all of the Supreme Court Justices for their consideration. The Conference took that action on March 9, 1978. On May 18, 1978 a "clean bill", S. 3100, developed with the assistance of Assistant Attorney General Daniel Meador, was introduced. On June 22, 1978 all nine Justices advised the Senate by letter of their complete support for enactment of the bill: "We endorse S. 3100 without reservation and urge the Congress to enact it promptly." On July 13, 1978 the Senate Judiciary Committee favorably reported the bill, and included the Justices' letter in its report. See S. Rep. No. 95-985, 95th Cong., 2d Sess. 15 (1978).

Unfortunately, the threat of a controversial floor amendment precluded favorable action by the Senate before adjournment of the Ninety-fifth Congress.

On February 22, 1979 the same proposal embodied in S. 3100 in the Ninety-fifth Congress was introduced as S. 450 in the Ninety-sixth Congress. On March 7, 1979, cognizant of the Supreme Court Justices' unanimous expression of support, the Judicial Conference formally accepted the Court Administration Committee's recommendation that it endorse enactment of S. 450. On March 14, 1979 the Senate Judiciary Committee favorably reported S. 450. S. Rep. No. 96-35, 96th Cong., 1st Sess. (1979). On April 9, when called before the Senate, the bill became the vehicle for a controversial amendment which had delayed final approval of the Department of Education authorization bill. See *The Washington Post,* April 10, 1979, at A 1, col. 3. Many Members of both Houses thereafter concluded that, as amended, S. 450 could not be enacted. See 1979 *Congressional Quarterly* 688-89 and 1980 *Congressional Quarterly* 1966-67. In September of 1979, the Judicial Conference reaffirmed its full support for S. 450. Encumbered by a "school prayer" amendment, the bill became the subject of five days of extensive hearings before this panel. The Ninety-sixth Congress adjourned without resolution of the controversy into which S. 450 had been drawn.

Now, in the third sequential Congress, "successor bills" are again pending. In the Senate S. 1531, introduced on July 29, 1981 is pending before the Senate Judiciary Committee, and in the House H.R. 2406 lies before this panel today.

Mr. Chairman, this subcommittee's record of support and assistance to the federal judiciary under your personal leadership is without equal. I have, I suspect, embarrassed you in the past with enunciated recognition of this panel's contributions to the judiciary's improvement, and your key role in fashioning those contributions. I do not wish to embarrass you -- nor am I "currying favor". You and your colleagues deserve our thanks; you genuinely have it. I mention the record because I feel somewhat embarrassed about coming before you with yet another urgent request for assistance. Quite obviously, however, I must ask that this subcommittee again take the lead in helping us. The time has come without question to send H.R. 2406 to the President.

The record of support is unanimous for H.R. 2406. In March of 1981 in Williamsburg the issue was examined and not a single critical comment made. The list of study commission and academic supporters for the bill has already been mentioned; there are no conflicting opinions on record to my knowledge. The controversy associated with predecessor bills has never been directly related to the fundamental purpose to be served by H.R. 2406 -- *the statutory conferral of that discretionary authority in the Supreme Court which it must have if it is to more efficiently and effectively administer its caseload* -- and thereby more adequately serve its Constitutional purpose. I would hope that in this third Congress in a row, the bill will finally be considered on its own merits, free of the controversial issues which in this Congress are prolifically reflected in many other pending separate and distinct proposals. The relief which

H.R. 2406 will provide has long been needed. The Judicial Conference strongly recommends that Congress respond to that compelling need soon, and we appreciate whatever assistance this subcommittee is able to provide.

In closing, let me return briefly to my earlier observation that I do not speak today for the Court. I observed that the Court speaks for itself. It has done so regarding H.R. 2406 in a letter dated June 17, 1982 signed by all nine Justices. I would request inclusion of the letter in this hearing record.

H.R. 4396

I also am pleased to appear before you to express the Judicial Conference's support for H.R. 4396, a bill to permit courts of the United States to establish the order of hearing for certain civil matters. The bill accomplishes this objective basically by repealing most statutory provisions expediting civil cases in the Federal courts, both district and appellate.

Chairman Kastenmeier, you and your co-sponsor, Congressman Railsback, are to be thanked not only for introducing H.R. 4396 but also for scheduling its consideration as part of this morning's hearing.

Position of the Judicial Conference

The Judicial Conference of the United States considered the proposed legislation during its September 1981 meeting. Due to its import and clarity, a restatement of the entire text of the Conference's resolution is appropriate:

> "H.R. 4396, 97th Congress, introduced by Congressman Robert W. Kastenmeier, would repeal all statutory provisions granting a priority basis for the hearing of any class or category of civil case, (other than habeas corpus) in both the courts of appeals and district courts. The Congressman has noted that because of the large caseloads in the Federal courts, the number of priority cases has increased to the extent that many non-priority civil cases cannot be docketed for hearings at all, or must suffer inordinate delay. The American Bar Association has endorsed the legislation. The bill, if enacted, would leave to the courts themselves the determination of the priority of cases. Upon the recommendation of the Committee the Conference approved the bill."

Support for the Conference's resolution from within the Federal judicial branch is deep-rooted and virtually unanimous. Court administrators, be they clerks of court or circuit executives -- and tenured judges, be they district or circuit -- are all in agreement that the present system is unworkable.

In written testimony to this Subcommittee during its noteworthy oversight hearings on the State of the Judiciary and Access to Justice, Chief Justice Warren E. Burger discussed many issues. In particular, he observed that a large number of acts of Congress call for "expedited" handling of federal cases, concluding that "when so many cases are 'expedited' few cases are expedited *in law*, and few can be expedited in fact." During the State of the Judiciary hearings, my predecessor as Chairman of the Court Administration Committee (Judge Robert A. Ainsworth, Jr.), in response to a question by Congressman Railsback, echoed a similar concern: "The Congress has given us so many priorities that now those cases that remain just can't be reached." In addition,

Attorney General Griffin B. Bell (testifying on behalf of the Carter Administration), Professor Burt Neuborne (testifying for the American Civil Liberties Union), Benjamin Zelenko, Esq., and then-Judge Shirley M. Hufstedler (testifying for the American Bar Association) all concluded that finite judicial resources should be conserved by elimination of the present civil priority system.

Analysis of the Problem

With this array of support in mind, I am tempted to rest my case. However, I would like briefly to explore the problem before commenting upon whether H.R. 4396 is a reasonable and complete solution.

At present, there are more than twenty different kinds of civil case statutes that prescribe some kind of priority for their adjudication in the United States district courts. A similar number of expediting provisions are in the United States Code for the federal appellate courts. Several years ago, the Federal Judicial Center conducted a computer search of the United States Code, identifying and ultimately printing a listing of district and appellate statutory provisions. Although the Center reports are now in need of updating, it is appropriate to ask that they be reprinted in the record as an appendix. See "Priorities for the Handling of Litigation in the United States District Courts" (FJC No. 76-2, April 1976), and "Priorities for Handling Litigation in the United States Courts of Appeals" (FJC R-77-1, May 1977).

Due to sheer numbers alone, the priority system is clearly unmanageable. The priorities are spread throughout the United States Code, from Title 2 to Title 49. The priorities are rarely a work-product

of reasoned Congressional debate, but rather reflect random pronouncements of Congressional committees that certain types of cases should receive preferential treatment over others. A reading of the priority provisions reveals that the statutory language varies as to the degree of scheduling urgency a case must receive in relationship to other cases. In other words, no priorities are set among the priorities. Moreover, the priorities operate without cross-reference to any other expediting provisions, thereby creating conflicting priorities.

The confusion is perhaps most clearly illustrated by the priorities that mandate that certain cases be heard before *any* other cases on the docket. *See e.g.,* Federal Election Campaign Act, 2 U.S.C. §437g(a)(10); Federal Trade Commission Act, 15 U.S.C. §45(e).

The net result, as observed in an extremely well-prepared and documented Report of the Association of the Bar of the City of New York on "The Impact of Civil Expediting Provisions of the United States Courts of Appeals" (37 *Record* 19 [1982]), is that ". . . it becomes impossible to comply literally with the statutory requirements."

Parenthetically, let me candidly admit that I feel very uncomfortable testifying before a Congressional subcommittee that most federal judges are not obeying the letter of the law when it comes to applying the statutorily mandated priorities. It is not much consolation to me -- in my dual capacity both as a sitting Federal judge and as Chairman of the Court Administration Committee of the Judicial Conference -- to proffer the excuse that the present priority system is impossible to administer. This is true; the system is not being followed simply because it is not

followable. But is this an adequate defense? In a society that prides itself on its respect for the rule of law, there is something inherently sad about the admission that Federal judges are not -- and indeed cannot -- apply a system of legislatively enacted civil priorities. I am not sure that the "impossibility to administer" defense is satisfactory to the citizen-consumers of the federal court system, individuals who are asked to follow and respect the substantive rulings of the courts.

Interestingly enough, as you observed, Mr. Chairman, in your floor statement, when H.R. 4396 was introduced, many types of important cases do not receive priority status at all. Seed Act cases get preferential scheduling, in theory, over most patent, copyright, admiralty, securities, banking and civil rights cases.

The concern discussed above undoubtedly led to the introduction of H.R. 4396. It also led to the Resolution of the American Bar Association's House of Delegates (February 1977) approving the repeal of all statutory civil priorities, excluding habeas corpus matters. It likewise led to the Judicial Conference's general approval of H.R. 4396.

Solution

Is H.R. 4396 a reasonable solution to the existing problem? The Judicial Conference thinks so. It achieves -- by eliminating the crazy quilt pattern of existing priorities and by placing several others in a single provision in Title 28, United States Code -- the central reform needed here. Several drafting issues nonetheless arise.

First, what cases, if any, should receive statutory priority status? H.R. 4396 retains the existing statutory expediting provisions for habeas

corpus and recalcitrant witness cases (quasi-criminal matters) and equitable relief actions for temporary or permanent injunctive relief. As a starting point, the proposed legislation is eminently supportable. If, however, this subcommittee or the full Judiciary Committee, or indeed the Congress, feels that any other type of case should be accorded priority status and would like to amend H.R. 4396, the judiciary recognizes that this decision is properly one of policy for the legislative branch.

Several cautionary words of advice should be kept in mind. Initially, all civil priorities should be placed in a single section in the judiciary title of the United States Code (Title 28). In this regard, we agree with H.R. 4396's creation of a new 28 U.S.C. §1657 and further agree with the bill's initial phrase, "[n]otwithstanding any law to the contrary," which will prospectively nullify priority provisions that are inserted in other code sections. In addition, it would be helpful to the judicial branch if the Judiciary Committees of the House and Senate, either directly, or by sequential referrals, maintained reasoned and constant control over amendments to the newly created section 1657. A single statutory section coupled with vigilent oversight would result in a manageable priority system.

Second, by permitting the courts to establish their own priorities by local rule, the legislation does run the risk of breeding inconsistencies among districts and circuits, ultimately encouraging forum shopping. Due to the circuit council reform legislation that passed the Ninety-sixth Congress and now has been implemented, I am convinced that the councils

will satisfy their obligation of making all necessary and appropriate orders for the effective and expeditious administration of justice within their circuits. In other words, the councils should be able to maintain consistency among priorities, when needed, *within* the circuits.

If, however, national uniformity is desirable, and Congress does not want to amend section 1657, then a conforming amendment to 28 U.S.C. §331 (which authorizes the creation of the Judicial Conference of the United States) should be considered. The Conference presently lacks, except in the judicial discipline area, authority to review, reverse, or modify an order of a circuit council.

With these comments in mind, the Judicial Conference strongly supports the enactment of H.R. 4396.

H.R. 4395

H.R. 4395 would make several changes in existing law relating to federal jurors who serve on grand and petit juries in the United States district courts. This bill consists of three discrete sections, each of which has been fully endorsed by the Judicial Conference.

Federal Employees' Compensation Act Coverage

The purpose of section one of the bill is to extend to all federal jurors the coverage of chapter 81 of title 5, United States Code, popularly known as the Federal Employees' Compensation Act. Chapter 81 contains the statutory mechanism to compensate employees of the federal government for medical expenses and disability or death incident to personal injury sustained while engaged in the performance

of official duty. H.R. 4395 would amend chapter 81 to provide this same financial protection to citizens injured in the course of serving on a jury in federal court. The Judicial Conference originally urged such legislative action in March of 1974 and has renewed that endorsement on several subsequent occasions.

While the incidence of physical injury to jurors within the scope of their jury service has fortunately been quite rare, the position of the Judicial Conference in this matter is premised on the view that the United States has a basic obligation to reimburse its citizens who respond to the summons of a federal district court and are injured in the course of jury duty. Jurors render a high public service in effectuating the Constitutional guarantees of the Sixth and Seventh Amendments that there shall be the right to a jury trial in criminal and civil actions, as well as the Fifth Amendment right to indictment prior to prosecution on felony charges. As you know, federal jurors are not in any sense volunteers or seekers of such service. Instead, they are selected at random from voter lists by the terms of the Jury Selection and Service Act of 1968, as amended, and they appear in response to judicial summons at the risk of being found in criminal contempt for willful failure to comply. This Act further provides at 28 U.S.C. §1861,

> "It is . . . the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose."

Given the compulsory nature of jury duty and its high importance to our legal system, we submit that the government should in fairness compensate jurors for any personal injury incident to that service. At present, a juror who incurs physical injury has no recourse to obtain reimbursement for consequential expenses unless he or she can demonstrate negligent or wrongful conduct of a government agent as the proximate cause thereof and thus proceed against the United States under the Federal Tort Claims Act (28 U.S.C. §2671 *et seq.*). The requisite proof to meet this standard can be an impossible burden in those many instances where accidental injury is not readily attributable to any identifiable cause but occurs in circumstances where the federal government, and virtually any private employer, would readily and voluntarily compensate its employee injured in the same manner without requiring any prerequisite legal showing.

What sorts of injuries are federal jurors likely to incur in the course of their service, and how frequent is such injury? In responding to these questions, we find ourselves in a kind of "Catch 22" situation, in that the absence of any financial remedy for most physical injuries to jurors in the past has greatly impeded the reporting and recording of such incidents. In recent years, the Administrative Office of the U. S. Courts has been attempting to chronicle these episodes and has asked the clerks of the district courts to report instances of juror injury in their courts. The Administrative Office has supplied to your staff what documentation we have been able to obtain on this subject.

In brief, we have reports of perhaps 35 personal injuries to federal jurors over a period of several years. Most of these incidents appear to involve falls in the courtroom, jury room, and adjoining areas of the courthouse. There are also the inevitable instances of heart attacks and other sudden illnesses occurring during periods of jury service. In the latter situations, of course, the financial liability of the United States should (and would under this bill) be limited to providing emergency first aid measures and transportation to the nearest hospital, since the illness presumably results from a preexisting medical condition and would not be related to the performance of jury duty as a legal cause. Finally, it should be recognized that jurors must sometimes be sequestered on an around-the-clock basis during trial or, more commonly, during deliberations. In addition, it is essential in the course of certain trials to transport the jury to take a first-hand view of immovable physical evidence, such as an accident scene. Both of these occurrences may subject jurors to an enhanced risk of bodily injury in the event of a mishap.

The equitable considerations which we find to support this aspect of H.R. 4395 are buttressed by the fact that, under existing law, regular federal employees who happen to be serving on jury duty in the United States district courts continue to be covered by the Federal Employees' Compensation Act during the term of jury service in the same manner as they are protected in the scope of their ordinary employment. Such provision was made by amendment to the Compensation Act in 1974, adding 5 U.S.C. §8101(1)(F) (Act of September 7, 1974, Public Law No. 93-416, §1, 88 Stat. 1143).

Those citizens serving on a federal jury who happen to be private sector workers -- if they should be injured in the course of that service -- should, in fairness, be accorded the same financial protection as is possessed by the federal employee who may sit beside them in the jury box.

I should add, in reference to this 1974 amendment, that the Senate Labor and Public Welfare Committee, in its report on the bill which ultimately became Public Law No. 93-416, evidenced agreement with the position of the Judicial Conference that similar financial protection in the event of injury should be made available to all federal jurors. I should like to quote the following language from the Senate report which speaks to this point:

> "Furthermore, the Committee recognizes, and concurs with, the resolution of the Judicial Conference of the United States, adopted March 1974, which calls for the coverage of all persons serving as Federal jurors. The Committee would urge that such action be considered in conjunction with the matter of Federal juror compensation now being studied by Senate Judiciary Committee."
>
> S. Rep. No. 93-1081, 93rd Cong., 2d Sess., reprinted in [1974] *U. S. Code Cong. and Ad. News* 5341, 5347. *

I want to emphasize that section one of H.R. 4395 will not accord to jurors the status of federal employees for any other purpose than to bring them within the statutory scheme of chapter 81 of title 5 relating to compensation for injury. The Department of Labor, which is

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* The referenced study of juror compensation ultimately resulted in the enactment of the Jury System Improvements Act of 1978, Public Law No. 95-572, 92 Stat. 2453. Section 5 of this Act amended 28 U.S.C. §1871 to substantially increase the jury attendance fee from $20 to $30 per day and to provide more adequate reimbursement for travel and subsistence expenses necessarily incurred by jurors in going from their homes to the place of holding court.

charged with the administration of the Federal Employees' Compensation Act provisions, has in the past consistently rejected administrative claims for injury compensation by jurors who were not regularly employed by the federal government. This bill would alter that administrative construction by adding to title 5 a new section 8141a to provide expressly that this subchapter applies to a federal grand or petit juror. This new section also sets forth certain definitions critical to effecting this purpose. In particular, it would define the performance of duty by jurors to include (1) their attendance at court pursuant to summons, (2) periods of jury deliberation, (3) periods of sequestration by judicial order, and (4) their travel to and from the courthouse (including ordinary travel between their homes and the courts, as well as travel under sequestration order or other court order such as for the taking of a view).

Section 1(b) of this bill would strike from section 8101(1) the above-described subparagraph (F) with respect to federal employees serving as jurors. Special reference to federal employees would no longer be necessary if the protections of chapter 81 are to be extended to all federal jurors in the manner which this bill would accomplish.

Taxaction of Attorney's Fee

The second section of H.R. 4395 would make a technical amendment to 28 U.S.C. §1875(d) as enacted by section 6 of the Jury System Improvements Act of 1978. Section 1875 prohibits an employer from discharging, threatening to discharge, intimidating, or coercing any permanent employee as a result of the employee's federal jury service or the prospect of

being called for such service. This section also provides a legal remedy to a juror who has been so aggrieved by his employer, and subsection (d) thereof makes available a court-appointed attorney at the expense of the government to a juror demonstrating to the court such a claim having "probable merit."

Subsection (d)(2) of section 1975 authorizes the award of attorney's fees as part of the costs to an employee prevailing in such a lawsuit against his employer brought by retained counsel. However, the existing language of this subsection leaves a gap in the law as to the taxation of attorney's fees where the court appointed and the government paid counsel for the employee-juror. This bill would add to section 1875(d)(2) a sentence empowering the court to tax, as costs payable to the court, the attorney fees and expenses incurred by the United States on behalf of a juror for whom the court has appointed counsel. This authority to tax attorney's fees under these circumstances is appropriate in order to reimburse the United States for appropriated funds advanced on behalf of a juror to redress the misconduct of his or her employer in respect to interference with the performance of federal jury duty.

Service of Jury Summons

The third section of this bill is also in the nature of a technical amendment to the Jury Act at 28 U.S.C. §1866(b) to authorize the service of summonses to prospective jurors by ordinary first class mail, as well as by personal service and by registered or certified mail, at the discretion of the court. Section 1866(b) now requires service of jury summonses to be made personally or by registered or certified mail. In practice,

personal service is rarely employed, and the district courts rely almost exclusively upon service by mail in the case of these summonses.

The employment of registered or certified mail for this purpose has the advantage of memorializing the receipt of the summons by a juror, which is important in the event that voluntary compliance with the summons is not forthcoming and the court must issue a "show cause" order to the prospective juror or invoke the punitive provisions of 28 U.S.C. §1867(g) for noncompliance. Fortunately, the great preponderance of citizens summoned for jury service comply voluntarily and appear as instructed. Thus, a record of the receipt of the summons is not usually necessary. The existing requirement of certified or registered mail is disadvantageous to efficient court administration in that it necessitates added effort by clerks' offices to prepare summonses for service and keep track of their return. Further, the receipt of a certified or registered mail notice is alarming to many prospective jurors, some of whom may try to avoid delivery of the summons out of apprehension. Thus, the use of certified or registered mail might actually reduce the effectiveness of delivery of the jury summonses and the rate of compliance by prospective jurors.

H.R. 4395 does not interfere with the discretion of a district court to continue to utilize certified or registered mail to serve its jurors with summonses if local conditions or special circumstances concerning a particular juror suggest this procedure. It does afford the courts an additional alternative of employing regular mail for this

purpose when appropriate, thereby permitting a savings to the government of personnel manhours and postal costs -- and perhaps also actually improving the delivery rate of summonses for federal jury duty. In recent months two circuit councils have estimated potential cost-savings and reported their findings to the Administrative Office. I have attached their reports as appendices to this statement.

Mr. Chairman, thank you again for devoting this panel's time and attention to the three bills before you today -- and thank you for this panel's consistent support and constructive assistance on a continuing basis.

OFFICE OF THE CIRCUIT EXECUTIVE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

P.O. BOX 42068
SAN FRANCISCO, CALIFORNIA 94142

February 12, 1982

William James Weller
Legislative Affairs Officer
Administrative Office of the
United States Courts
Washington, D. C. 20544

Dear Bill:

At the January 26, 1982 meeting of the Circuit Council, the subject of the use of certified mail for summoning jurors was discussed. Pending in the House is H.R. 4395, which would permit the courts to use regular mails, the practice now in effect in most state jurisdictions.

The Council expressed its support for H.R. 4395 as a means of reducing costs of operating the jury system and improving jury utilization. Attached please find the projected fiscal impact statement on the district courts in the Ninth Circuit. The amount is small, but when combined with the other ten circuits it represents several hundred thousand dollars of savings.

We would appreciate your transmitting this recommendation to Congress. If you require more information please call us.

Sincerely,

Bill

William E. Davis
Circuit Executive

WED-tb
Enclosure
Copies to: Chief Judge Browning;
Chief Judges of District Courts

COST COMPARISON
ON USING CERTIFIED MAIL
VERSUS REGULAR MAIL
FOR JURY SUMMONS

District	Annual No. of Summons	Certified Mail ($1.55 per ltr.)	Regular Mail (20¢ per ltr.)
Alaska	1,550	$ 2,402.50	$ 310.00
Arizona	3,240	5,022.00	648.00
California Central	10,800	16,740.00	2,160.00
California Eastern	3,300	5,115.00	660.00
California Northern	7,000	10,850.00	1,400.00
California Southern	3,480	5,394.00	696.00
Guam	235	364.25	47.00
Hawaii	1,150	1,782.50	230.00
Idaho	550	852.50	110.00
Montana	90	139.50	18.00
Nevada	1,000	1,550.00	310.00
Oregon	2,600	4,030.00	520.00
Washington Eastern	1,325	2,053.75	265.00
Washington Western	1,500	2,325.00	300.00
		$58,621.00	$7,674.00

UNITED STATES COURTS

Judicial Council Of The Eighth Circuit
United States Court And Custom House
1114 Market Street
St. Louis, Missouri 63101-2068

MEMBERS
Hon. Donald P. Lay, Chief Judge
Hon. Gerald W. Heaney
Hon. Myron H. Bright
Hon. Donald R. Ross
Hon. Roy L. Stephenson
Hon. J. Smith Henley
Hon. Theodore McMillian
Hon. Richard S. Arnold
Hon. Albert G. Schatz
Hon. Edward L. Filippine
Hon. Harry H. MacLaughlin

April 5, 1982

Lester C. Goodchild
Circuit Executive

Mr. William James Weller
Legislative Affairs Officer
Administrative Office of the
United States Courts
Washington, D.C. 20544

Dear Mr. Weller:

Attached is a copy of this circuit's Administrative Order approving the use of regular mail for juror summons instead of certified or registered mail. The Council acted on recommendation of its Committee on the Operation of the Juror System, and after completion of a study concerning the potential yearly savings to the Courts in the Eighth Circuit if they could use regular mail. A copy of that study is enclosed.

It is my understanding that a measure is pending in Congress to permit the federal courts to use regular mail for juror summons. On behalf of the Council, I respectfully request that you transmit the Council's position to Congress.

If there is anything further that we can do to assist in this matter, please feel free to call me.

Sincerely,

Lester C. Goodchild
Circuit Executive

Encl.
LCG/emc

cc: Chief Judge Donald P. Lay
Members of the Circuit Council
Members of the Juror Committee

UNITED STATES COURTS

Judicial Council Of The Eighth Circuit
United States Court And Custom House
1114 Market Street
St. Louis, Missouri 63101-2068

MEMBERS
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Hon. Edward L. Filippine
Hon. Harry H. MacLaughlin

Lester C. Goodchild
Circuit Executive

CCAO - 101

CIRCUIT COUNCIL

ADMINISTRATIVE ORDER

This will certify that the Judicial Council of the Eighth Circuit supports the use by the federal courts of regular mail for a jury summons instead of registered mail.

L C Goodchild

Circuit Executive

April 5, 1982
St. Louis, Missouri

COST COMPARISON
ON USING CERTIFIED MAIL
VERSUS REGULAR MAIL
FOR JURY SUMMONS

District	Annual No. of Summons	Certified Mail ($1.55 per ltr.)	Regular Mail (20¢ per ltr.)
E. D. Arkansas	927	$ 1,436.85	$ 185.40
W. D. Arkansas	1,175	1,821.25	235.00
N. D. Iowa	1,165	1,805.75	233.00
S. D. Iowa	1,400	2,170.00	280.00
Minnesota	3,150	4,882.50	630.00
E. D. Missouri	1,500	2,325.00	300.00
W. D. Missouri	3,152	4,885.60	630.40
Nebraska	1,403	2,174.65	280.60
North Dakota	1,250	1,937.50	250.00
South Dakota	844	1,308.20	168.80
Total		$24,747.30	$3,193.20
		-3,193.20	
		$21,554.10	

Mr. KASTENMEIER. Thank you, Judge Hunter, for that review of the several pieces of legislation before the committee. It is very useful for this committee.

Let me ask just one or two questions, and then I would like to yield to my colleagues. My questions are designed to anticipate possible questions to be raised by others in the same respect.

On the first bill, H.R. 2406, mandatory jurisdiction, why might one not consider this a limitation to access to the Supreme Court of the United States by virtue of not having a right of mandatory review of certain appeals which heretofore, in fact, was required? If you make it discretionary, do you not, in fact, say in what appears at least superficially to be important classes of cases, cases in which a single district court judge invalidates an act of the Congress of the United States as a party and so forth, are we not, in accommodating the Supreme Court's caseload, denying certain otherwise desirable access to the Supreme Court?

Judge HUNTER. Mr. Chairman, I think you have to start at the bottom line on it. The Supreme Court, by virtue of this bill, is not going to do any less work. It is not going to cut out the number of cases or cut down on the number of cases that it will take up and hear. It is simply going to select out among all of the competing cases those which are truly the most important ones to our Nation that need resolution at that particular time.

It assures that the truly important cases will not be lost in the shuffle. In other words, it not only does not cut down on access to the Court, but it is somewhat of a guarantee of access for some cases, namely, those cases that on a competitive and comparative basis are the critical cases of the moment. I view that, as I say, not as a cutting down on jurisdiction but, rather, as a means of assuring that jurisdiction is so used as to get the truly most important cases before the Court.

It provides a luxury of access for those whose cases are of that high an importance. It gives away no jurisdiction whatsoever. It does not change jurisdiction in any way. Certainly it does not lessen it.

Mr. KASTENMEIER. Well, assuming you have a court, for various reasons, perhaps historically, perhaps the court is liberal or conservative, as the case may be, or otherwise, doesn't it give the Court the prerogative to not review cases on the basis of not wishing to confront certain controversies and accepting others, where in present law it requires at least some form of mandatory review?

Judge HUNTER. I think we are back to what you originally said; that is, the present categories of cases which must be taken on appeal are simply an effort, and perhaps even somewhat a superficial effort, to try to prejudge the importance of particular cases and the timing of them. By doing that, what you are really doing is limiting the opportunity of the type of case that you are speaking of to be reached for full opinion.

If you don't have that discretion in the Court itself, as a part of its docket management, the real effect is going to be that the Supreme Court is not going to confront itself with those critical cases that don't happen to fall within the rather artificial boundaries of cases that are designated as mandatory appeal type cases.

Mr. KASTENMEIER. Can I ask you this: To make an informed judgment on this matter, should this subcommittee understand fully the mechanism by which the Supreme Court of the United States decides whether or not the case is important, whether or not to grant certiorari, do you think that understanding is central to our being able to judge the merits of this particular piece of legislation?

Judge HUNTER. Mr. Chairman, I wish you had the Court itself to present that question to. I can only say, frankly, that I think there is that understanding—perhaps not through any published document of the Court itself—but certainly the scholars and others, who have studied the cases that they have taken up on cert and applied themselves to the question you asked, have pretty well been able to ferret out how the Court actually makes its selections.

But I don't know that there is any need for a final document doing it. I would agree with you, that it certainly would help this committee feel better about the whole situation if it possessed that knowledge. I certainly would agree to that.

Mr. KASTENMEIER. Thank you, Judge Hunter. I have taken longer than I wished.

Let me yield to the gentleman from Illinois, Mr. Railsback.

Mr. RAILSBACK. I will be very brief.

This does not purport to knock out all obligatory jurisdiction, does it? What about civil rights cases, appeals from Federal district three-judge panels?

Judge HUNTER. I think it keeps some there. It retains the three-judge district court of appeals. As Chairman Kastenmeier has said, you have cut out most of those three-judge courts, but there are still some that remain. Those appeals would still go to the U.S. Supreme Court, and there is a special railroad reorganization court which, frankly, I have no familiarity with, those appeals still go there.

I think those are about the only two exceptions. I look upon those as somewhat minor exceptions. We are always speaking comparatively, of course, because all of this litigation is important. It is just the old question of which is the most important.

Mr. RAILSBACK. I want to simply add that I share your concerns about the number of priority statutes that we have accumulated over the years, and I know the American Bar and I am sure the judicial conference as well has been concerned about that for a very long period of time.

I am not sure if there is opposition to knocking out those statutory priorities. Are you aware of opposition to doing that from some groups?

Judge HUNTER. I know of no group that supports these statutory priorities as a whole, no, sir.

Mr. RAILSBACK. They might be concerned about their own individual one.

Judge HUNTER. Oh, I think, if they have a pet at the time, they want to keep their pet in place, of course. But basically, the concept is approved by everyone I know.

They all realize that as a practical matter they are not getting priorities. There is no way. I used to try to apply that in good faith, and frankly, I treat it like there are no priorities and I try to take

the most important and most vital, the most pressing case of the moment, and move it.

Mr. RAILSBACK. I thought your comments were very interesting about that. Are other judges applying the same kind of——

Mr. KASTENMEIER. And admitting it openly?

Judge HUNTER. I don't want to get into a situation where I am conceding that maybe they don't follow the law, but I simply say they can't. It is too confusing and they do just exactly what I do—at least in my courts where I am that familiar.

Mr. RAILSBACK. Do any of the lawyers raise Cain with you for adopting that kind of an attitude, or have any of them tried to appeal?

Judge HUNTER. Only the novices. [Laughter.]

No, I have never known of any judge that has ever been the object of a mandamus proceeding who didn't follow the priority. I don't think our fellow courts would know whether there was a real priority or not in view of all this confusion.

Mr. RAILSBACK. OK. Thank you very much.

Judge HUNTER. You know, to get mandamus, you have to have a clear case. You have to have a clear duty that you owe. There is no clarity in this field.

Mr. RAILSBACK. Thank you very much, and I am glad to see you surrounded by all that "power" on your left and right.

Mr. KASTENMEIER. The gentlewoman from Colorado.

Mrs. SCHROEDER. Thank you, Mr. Chairman.

I have no questions. I would just comment that I am overwhelmed by the candor.

Mr. KASTENMEIER. The gentleman from Michigan.

Mr. SAWYER. I am glad to have you here again, Judge.

Just one question. Does the judicial conference or any other group have any idea of how much this workmen's compensation will involve in money? Do these things happen very often?

Judge HUNTER. Congressman, I don't think that there is any figure on that. They did try to make a little study to find out how many people had ever made this kind of a claim, or acted like they would like to make this type of claim. I think the number came up to something around 35. That number is not a firm number by any means, because I quickly added to it an incident that I had in my own court, where a lady juror in a short trial, 9 days, on about the fifth day stood up and collapsed and was hospitalized for a long time and actually died.

Obviously, her situation had nothing to do with her jury service, so she would get no compensation out of this act other than the expense of taking her to the nearest hospital as quickly as possible.

It is a very difficult figure to ascertain, but I would not think it would be large. It just doesn't happen very often and the numbers involved are not that great.

Mr. SAWYER. That was all I had, Mr. Chairman.

Mr. KASTENMEIER. That was a good question. I had the same question to ask, because surely this subcommittee will be asked what is the cost of this legislation, what do you anticipate, and what is the experience in terms of who might have to resort to workmen's compensation.

Judge HUNTER. You would have to speculate on what the average payout would be per case or per claim. That is almost impossible because we have no experience on it. You would have to approximate how many claims—again, we are back in that same position. But I think the judges would generally give you the same assurance that I do, that it would be comparatively inexpensive because it just doesn't happen that often, and certainly not in the numbers that you already cover in the bill as it presently exists. It wouldn't add that many to that bill's coverage.

Mr. KASTENMEIER. It is suggested that a larger model would be the State law experience, that we might possibly derive something from the experience of the States other than the Federal system on this, because it is a much larger statistical model.

Judge HUNTER. And you might gain some experience out of a workmen's compensation study or something of that sort. But it is a difficult thing in the first instance to arrive at a figure.

Mr. KASTENMEIER. On behalf of the committee, I want to thank you, Judge Hunter, for your appearance——

Mr. SAWYER. Mr. Chairman, just a——

Mr. KASTENMEIER. Yes, the gentleman from Michigan.

Mr. SAWYER. Just based on that last question, do any of the States cover their jurors under the workmen's comp?

Judge HUNTER. I am sorry, with apologies, I have not checked into that. I don't know of any that do, but let me consult with my experts for a moment, please.

Mr. WELLER. Congressman, we will have to try to find the answer for you and send it up later.

Mr. SAWYER. OK. That was all I had, Mr. Chairman.

Mr. KASTENMEIER. I am not as sanguine, perhaps, as Judge Hunter about what the popularity of getting rid of all the statutory priorities might be. I suspect we will find out. But I agree with the reservations expressed by the gentleman from Illinois.

However, I think this legislation, or that which tends in this direction, is desperately needed in terms of Federal judicial administration.

Mr. RAILSBACK. Would you yield, Mr. Chairman?

Mr. KASTENMEIER. Yes.

Mr. RAILSBACK. I share your feelings. I am certainly not against the legislation and I favor it, and I have favored it for a long time. I do think there might be some opposition.

Mr. KASTENMEIER. Again, on behalf of the committee, thank you, Judge Hunter.

Judge HUNTER. Thank you very much, Mr. Chairman.

Mr. KASTENMEIER. Next the Chair would like to call a panel of witnesses, consisting of two distinguished members of the bar, an old friend, Benjamin L. Zelenko, representing the American Bar Association, and also Mr. Michael Oberman, representing the Association of the Bar of the City of New York.

Gentlemen, you are most welcome to the committee and we look forward to hearing from you.

We have received copies of your prepared statements and, without objection, they will be made a part of the record. You may proceed as you see fit. Mr. Zelenko.

TESTIMONY OF BENJAMIN L. ZELENKO, AMERICAN BAR ASSOCIATION; AND MICHAEL S. OBERMAN, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

Mr. ZELENKO. Thank you, Mr. Chairman.

I want to add my personal remarks to those of Judge Hunter, that the committee and the Chair deserve a great deal of thanks from the bar, as well as the judiciary, for your attention to the matters that are often hard to find interest and attention in the Congress. They require study, they require patience, and this committee and its chairman deserve a great deal of thanks. As one representative of the organized bar, I want to express that gratitude this morning.

Two of the bills that are before you this morning were the subjects of reports of our committee of the American Bar Association and led to recommendations for approval which were adopted by the house of delegates. We recommended the approval of legislation that would eliminate the obligatory jurisdiction of the Supreme Court. That recommendation was overwhelmingly endorsed by the bar some years ago.

The abolition of civil priorities likewise was recommended by our committee, and I think we initiated that recommendation in 1976 that led to an approval by the bar in 1977. It has taken quite a while to get translated into legislation, Mr. Chairman, but the legislative translation of that recommendation which is before you, we totally applaud. We think it is an excellent piece of work and we are glad to be here to endorse it on behalf of the association this morning.

You have our statement and there is not much I wish to add to it. I would point out one or two items you may wish to consider.

In the course of Judge Hunter's remarks, he mentioned that the obligatory jurisdiction bill, H.R. 2406, still keeps certain appeals from the Regional Rail Reorganization Act subject to appeal. We see no reason for that. The recommendation of the bar was in general terms for the abolition of obligatory jurisdiction.

Our committee report, which we would be happy to make available to the staff, noted that there was no reason to keep obligatory jurisdiction for rail reorganization appeals, and we suggest that that matter be subject to certiorari as well. That would mean that the only cases subject to obligatory jurisdiction would be three-judge court cases, which clearly require appeal review by the court, and that is generally in the area of civil rights, the 1964 Civil Rights Act issue, Voting Rights Act appeals, and congressional reapportionment cases—which no more needs to be said about. [Laughter.] Those three areas would continue under obligatory jurisdiction.

We suggest that you also add to the list deleted, regional rail reorganization cases.

On the civil priority bill, to answer a question that Congressman Railsback raised, I suspect that one of the reasons, Mr. Chairman, this bill has taken so long in getting here has been the resistance within the Department of Justice to giving up some of its own priorities as a litigator in the Federal courts. That opposition apparently has now evaporated or they have come to grips with the need

for a bill that would rationalize the courts' ability to handle their dockets. Other than that, I don't think there is any generalized opposition to the abolition of civil priorities.

My final word would be that both of these bills are really access-to-justice bills, Mr. Chairman. By enabling the courts to control their calendars, it is our belief that there would be greater access, and that belief is based on the assumption that if we entrust substantive decisions to the courts, we ought to entrust the decisions to control their dockets to those who make those substantive decisions.

The only other suggestion we offer would be one concerning the procedures within the House itself. This committee may wish to consider the feasibility of reviewing legislation on an informal basis that other committees may report out that require expedition or priority treatment in the courts. How that would be done procedurally, Mr. Chairman, we would leave to the committee, but it could be done on an informal basis through the Parliamentarian or the Speaker's Office.

I believe that the committee has done that with respect to language on appellate review. The committee now examines the appellate review language in bills reported by other committees to standardize it. There have been questions in the past, as you know, as to which court would be the proper court in which to lodge an appeal. Language coming out of other committees often leads to confusion as to whether to file in the district court or the court of appeals. That was remedied by legislation some years ago.

Similarly, in this area, to the extent that other committees are recommending legislation with built-in priorities, your bill would at least centralize the priority issue in one section of the Code and may enable this committee to pass on the policy matter of priority retention.

I have no other comments, Mr. Chairman. I will be happy to answer any questions.

[The statement of Mr. Zelenko follows:]

STATEMENT OF

BENJAMIN L. ZELENKO

Mr. Chairman and Members of the Subcommittee:

My name is Benjamin L. Zelenko. I am a practicing attorney in Washington, D.C., and the immediate past chairman of the American Bar Association's Special Committee on Coordination of Federal Judicial Improvements.

I am pleased to be here today representing the ABA, to present our views on H.R.2406, legislation increasing the discretionary power of the United States Supreme Court over review of matters heretofore within the obligatory jurisdiction of the Court, and H.R.4396, legislation abolishing civil priorities in federal courts.

The ABA has not yet taken a position on H.R.4395, the Juror Employment Rights Act, although our House of Delegates will consider the issue this August. Nor have we taken a position on H.R.4763, the Judicial Survivor Annuities Act, although we have consistently supported adequate compensation for the federal judiciary, including adequate compensation for the survivors of judicial officials.

H.R.2406

Legislation such as H.R.2406, to abolish mandatory appellate jurisdiction of the Supreme Court, is needed to relieve the overwhelming, burgeoning caseload of the Court, which threatens to undermine the Court's effectiveness in the administration of justice.

In February, 1979, our House of Delegates adopted the following resolution supporting discretionary review of most

matters presently reviewable by appeal:

> "Be it resolved, that the American Bar Association approves and supports the adoption by the Congress of legislation to abolish obligatory Supreme Court review by appeal, as distinguished from discretionary review by certiorari, of all matters now reviewable by appeal, except for appeals from determinations by three-judge courts."

The reasons for supporting H.R.2466 are numerous. First, appeals in the federal system, including appeals to the Supreme Court, are not mandated by the Constitution. They are purely creatures of legislative choice. Heike v. United States, 217 U.S. 428 (1910). The Court under a legislative mandate is obliged to consider properly-perfected appeals upon their merits. This "obligation" was developed in the early days when ample time existed for hearings, deliberations and opinions upon the merits.

During the first century of the Supreme Court's existence, all cases came to the Court by appeal. However, since 1891, its obligatory jurisdiction has been steadily narrowed. It was tabulated that, during the 1980 term, there were 4,825 cases on the Court's discretionary (certiorari) docket and only 295 cases on its obligatory (appeal) docket, as well as 24 cases on its mandatory (Article III) original docket. The obligatory jurisdiction currently represents less than 5 1/2 percent of the Court's total volume. Nevertheless, while the percentage of appeals continues to decrease, a disproprotionate amount of the Court's time is required even to dispose of them,

or most of them, summarily without oral argument. This time should be devoted instead to the significant constitutional and other matters of nationwide import which are clogging the Court's calendar.

Second, the Court's use of summary dispositions on appeal has created an unclear picture as to their precedential value. Are they, as some lawyers and courts maintain, to be treated as precedents equally with opinions rendered on fully argued cases? Or are they not entitled to such weight? While this controversy could possibly be clarified by the Court on its own, the problem can best be corrected by reducing or altogether eliminating obligatory review by appeal.

Third, there can arise the problem of the appropriate procedure for seeking review in a given case. It is our view that it would be best to have a single unified procedure for all appeals. Occasionally, it is necessary to file both an appeal and a petition for certiorari to review the same order of a trial court because one cannot be sure which procedure is correct under the particular circumstances. This same dilemma, as to whether an appeal or certiorari is the correct procedure, arises before the United States Supreme Court, especially on review from state court decisions. In federal actions, some issues are reviewable by appeal and some by certiorari. This can happen in the same case which has more than a single issue! Even though 28 U.S.C. §2103 permits the Supreme Court to treat

an appeal as a petition for certiorari, the appeal papers must comply with certiorari requirements, and sanctions may be imposed for insufficiencies. It would be no surprise to find that the same duplication I have described has taken place from time to time before the United States Supreme Court. Such "protective" duplication should not be needed.

Fourth, if the summary disposition procedure on appeal were to be superseded by discretionary review through certiorari, there is a substantial likelihood that some cases which are presently treated as minor, and thus subject to summary jurisdiction, might, upon review in the Court's discretion, be found deserving of greater exploration. If so, they would then have a plenary hearing.

Finally, adoption of this legislation will not as a practical matter deprive any litigant of an appeal. There will still be appeals under federal law to the federal courts of appeals (or other federal appellate tribunals) and under state law to state appellate courts.

The Court should be able to control its own docket and in its discretion provide further review, by certiorari when appropriate, for such cases in which there has already been an appeal in another court. The public generally, as well as legal professionals, has learned to accept the proposition that our Supreme Court must pick and choose those cases it considers appropriate for the highest court in our land to review. No current public policy or public interest suggests that the present congressional

mandates for appellate review by the Court should be preserved, except in those few instances involving three-judge federal district courts, whose decisions may not be otherwise reviewable by appeal in any other appellate court.

We therefore encourage ongoing legislative efforts to eliminate obligatory jurisdiction in all instances when there has been appellate review below, whether in an appellate court of the United States or in a state appellate court. It is our view that legislation practically eliminating the last vestiges of the Court's obligatory jurisdiction will contribute substantially to meaningful access to justice in our federal court system.

Clearly, it is time that this overdue, noncontroversial judicial reform be enacted. No controversial, non-germane amendments, such as the school prayer amendment which killed this legislation in the last Congress, should be tolerated.

H.R.4396

I now turn to H.R.4396, a bill which would abolish civil priorities in federal courts. In February 1977, the ABA House of Delegates adopted the following resolutions:

> BE IT RESOLVED, That the American Bar Association endorses the repeal by the Congress of all statutory provisions which require that any class or category of civil cases, other than habeas corpus matters, be heard by the United States Courts of Appeals and the United States District Courts on a priority basis; and
>
> BE IT FURTHER RESOLVED, That the American Bar Association endorses the principle that the Circuit Council of each United States Courts of Appeals set calendar priorities for that Circuit.

This resolution reflects the concern of the ABA that the existing patchwork of conflicting civil priority statutes is adversely impacting the federal judicial system.

At present there are over 30 separate provisions spread throughout the United States Code (not including those dealing with writs of habeas corpus) requiring that particular kinds of civil cases be heard by the Courts of Appeals before other cases which may be on the courts' dockets. See Appendix A, attached. These cases include the following categories: federal election law, environmental law, anti-trust, labor relations, civil rights, health and safety, tax, administrative and regulatory laws, and unemployment.

These civil expediting statutes do not reflect a coherent scheme of priorities established by Congress. In reality, each succeeding law has been enacted with little regard for other expediting provisions. The result has been conflicting priorities and severe administrative problems in calendaring non-priority cases.

For example, the civil priority provisions of the Federal Election Campaign Act, in anti-trust appeal or in appeals of temporary infractions involving loan disputes are mutually contradictory. Each require that cases in those categories be heard before any other case, and thus presumably before one another.

The most important result of these statutes, however, is not that the order of priority is unclear. In some circuits -- the Fifth and Ninth Circuits, for example -- there are so many priority cases now being docketed that increasing numbers of non-priority cases may never be reached. Non-priority cases, as they near the top of the docket, are continually pushed back by a flood of new priority cases.

An argument that the system should be left as it is or left to the Congress is based upon three questionable premises. The first is that every case will be heard sometime, and that assignment of priorities merely rearranges the order of hearings. This is no longer true in all Circuits. The second premise is that the make-up of Court of Appeals caseloads is uniform nationally. This is not the case. Thus, while priority consideration of immigration cases might have little effect on other cases in the Eighth Circuit, it has a great effect in the Ninth Circuit. The third premise is that it is possible to say in advance that every case of category A (for example, cases under the Federal Trade Commission Act) is more important to society than any case of category B (non-priority civil cases, which include, for example, class actions charging racial discrimination by a large corporation). As judges and lawyers alike will recognize, such a generalization must be extraordinarily difficult to make in advance. Life is simply too varied for the drafter to anticipate.

The better, simpler and more workable solution to the priority question which H.R.4396 proposes and which the ABA endorses, is to allow each Circuit to set its own priorities.

First, this puts the solution closer to the problem. The judges of the Courts of Appeals know their own caseload better than anyone else is likely to. In some Circuits, priorities are irrelevant because any case may be heard in a reasonable time; in others, nationally assigned priorities of cases will squeeze out even the most important cases of all other kinds. Only the Court itself possesses the facts upon which to base a sound assessment of the importance of an individual case. A priori judgement must necessarily be based upon assumptions as to the facts, and sometimes the assumptions will be wrong.

Second, when the United States Courts are entrusted with the resolution of a problem, why should they not also be trusted to determine how rapidly the case must be heard? What is needed is the discretion to match priorities to the caseload of the Court. There is no reason to think that this cannot be done or will not be properly done by the Court itself.

In conclusion I hope the subcommittee, the full committee and House will promptly move H.R.2406 and H.R.4396 and that both will soon become law.

APPENDIX A

Statutes Establishing Priorities for Appeals in the Federal Courts

1. Federal Election Campaign Act. 2 U.S.C. §§437g(a)(11), 437h(c).
2. Freedom of Information Act. 5 U.S.C. §552(a)(4)(D).
3. Commodity Futures Trading Commission Act. 7 U.S.C. §8(a).
4. Federal Environmental Pesticide Control Act of 1972. 7 U.S.C. §§136d(c)(4), 136 n(b).
5. Packers and Stockyards Act of 1921. 7 U.S.C. §194(d).
6. Alaska Natural Gas Transportation Act of 1976. 15 U.S.C. §719h(c)(2).
7. Federal Seed Act. 7 U.S.C. §§1600, 1601.
8. Mine Health and Safety Act. 30 U.S.C. §816(a).
9. Clayton Antitrust Act. 15 U.S.C. §21(e). Robinson-Patman Price Discrimination Act. 15 U.S.C. §21a.
10. Federal Trade Commission Act. 15 U.S.C. §45(e).
11. Small Business Investment Act of 1958. 15 U.S.C. §687c(a).
12. Federal Food, Drug and Cosmetic Act. 21 U.S.C. §§346a(i)(5), 348(g).
13. Federal Unemployment Tax Act. 26 U.S.C. §3310(e).
14. Internal Revenue Code (federal collection of state taxes). 26 U.S.C. §6363(d)(4).
15. Mandamus, prohibition and extraordinary writs. 28 U.S.C. §1651.
16. Impoundment Control Act. 30 U.S.C. §1406.
17. Administrative Orders Review Act of 1966. 28 U.S.C. §2349.
18. Norris-LaGuardia Act. 29 U.S.C. §110.
19. National Labor Relations Act. 29 U.S.C. §160(m).
20. Occupational Safety and Health Act. 29 U.S.C. §660(a).

21. Postal Reorganization Act. 39 U.S.C. §3628.

22. Emergency Conservation Act of 1979. 42 U.S.C. 8514(b).

23. Social Security Appeals by states. 42 U.S.C. §502(c).

24. Fair Housing Act of 1968. 42 U.S.C. §3614.

25. Railroad Unemployment Insurance Act. 45 U.S.C. §355(f).

26. Communications Act of 1934, as amended 1952. 47 U.S.C. §402(g).

27. Railroad Transportation Policy Act of 1980. 45 U.S.C. §1018(b).

28. Internal Security Act of 1950. 50 U.S.C. §792(a) and 793.

29. Special Prosecutor Act. 28 U.S.C. §596(a)(3).

30. 28 U.S.C. §1364(c) (enforcement of Senate subpoenas).

There is also one resolution of the Judicial Conference of the United States, providing for special handling of protracted, difficult or widely publicized cases. Resolution of the Judicial Conference of the United States, October 29, 1971. In addition, the following Acts set priorities for criminal cases and habeas corpus matters:

(1) Criminal Appeals. Federal Rules of Appellate Procedure, Rule 45(b).

(2) Appeals from orders refusing or imposing conditions of release. 18 U.S.C. §3147(b).

(3) Appeals under 28 U.S.C. §2255 and Habeas Corpus. 28 U.S.C. §2254.

(4) Organized Crime Control Act (recalcitrant witnesses). 28 U.S.C. §1826.

(5) Selective Service Criminal Cases. 50 U.S.C. App. §462(a).

(6) Immigration and Naturalization Appeals (under Federal Rules of Criminal Procedure or by habeas corpus). 8 U.S.C. §§1105a(6), 1105a(b).

Mr. KASTENMEIER. Thank you.

Mr. Oberman.

Mr. OBERMAN. Thank you, Mr. Chairman. I appreciate this opportunity to appear here this morning on behalf of the Federal Legislation Committee of the Association of the Bar of the City of New York in favor of remedial legislation to give some order to the system of priorities for civil cases in the Federal courts.

I should note at the outset that our association has not taken any position with respect to the other measures pending before the committee today.

In contrast to the thrust of H.R. 4396 and to the ABA's 1977 report, our committee does not oppose a system of congressionally created priority provisions. We do, however, urge remedial legislation at this time because the present system of priorities is unmanageable, a product of ad hoc, we dare say haphazard, enactments. The present system exposes the coordinate branches of our Government functioning in a most uncoordinated fashion, shattering the civics book model of how a bill becomes a law and how a law, once enacted, is enforced. This system causes confusion at the level of the courts and advances no congressional purpose.

Any legislation that is adopted, we believe, should eliminate three features of the present structure. First, the provisions now appear throughout the United States Code, with no overall orchestration—it is simply a large number of directions to hear certain cases ahead of turn. Rather than being concentrated in the Judicial Code, provisions have, from time to time, been added during the drafting process to various substantive enactments. This has created a very basic practical problem. No one really knows even the number of priority provisions now in existence. Judge Hunter referred before to the Judicial Center publications which in the mid-seventies attempted to collect the priority provisions. They came up with a list at that time. Our committee, in the course of our research, came up with additional provisions, and I understand the Judicial Center recently has unearthed even more provisions. "Unearthed" probably is the best term here, for these provisions are often buried in technical language throughout the Judicial Code.

This almost random placement of priority provisions throughout the United States Code has resulted in a threshold problem for implementation. Most lawyers are probably unaware of the existence of these provisions throughout the code, unless their practice makes them specialists under a particular statute. Our research which we did for our report confirmed that lawyers infrequently cite the priority provisions. Among the circuits our research showed a few have attempted to design systems to identify the provisions and then to give effect to them. The lists compiled by the circuits, however, have been far from complete, and several of the circuits have made no attempt at all to implement the provisions.

Perhaps of even greater concern, the placement of the provisions reflects a substantive problem as well. Almost certainly there has been no consideration of the probable impact of each provision as it is enacted, either in terms of its own likely impact or as to its impact on other cases or on the courts. Because each new provision is added not to a single list but to a new part of the code, each ad-

dition is almost inevitably made without full awareness of what has come before.

A second and related problem of the present structure is that the language of the various provisions, once they are located, cannot be rationalized. The priorities send out mixed signals and are inconsistent. A number direct that cases heard under them must be put ahead of every other case. However, if more than one case is simultaneously pending, the literal statutory mandate cannot be observed. Even where the directive is less precise, the existing structure suffers from an absence of guidance as to what all the priorities mean and how they are to be fit, for example, in a judicial system which must advance criminal cases. If grouped in an integrated provision, priorities could be phrased in a way that would facilitate implementation.

Third, the present structure has created serious burdens in the courts. The priorities have strained already overburdened judicial resources and prejudiced nonpreferred litigants. At times when case backlog was pronounced in certain circuits, particularly the fifth circuit and the ninth circuit, the priorities impeded the courts' ability to reach nonpriority cases in any acceptable timeframe. At present, techniques of coping with rising caseload have permitted most of the circuits to remain relatively current, reducing the acute impact of priority provisions on nonpriority cases seen before. Indeed, as we stated in our report—and we did followup research during the past week to confirm that this is still the case—the provisions are not greatly postponing the progress of nonpriority cases in most circuits.

Still, the structure of priorities raises administrative burdens and interferes with the courts' management of their own dockets. As noted, it is first necessary to identify the provisions and then to create a way of locating cases which fall under these provisions. Staff resources have been diverted to this task in several circuits. Moreover, even when a court succeeds in finding priority cases, the existing system limits the ability of the court to balance workload among panels or to vary case types, which are valid calendaring objectives for a circuit.

We share the recommendations that the Chair expressed at the beginning of these hearings. To correct these features of the present structure, we believe that any priority provision should be included in a single section of the Judicial Code. All priority provisions now existing should be invalidated and the language of priority provisions should be rationalized if degrees of priority are actually intended.

We share the view expressed before this morning that Congress, either by rule or in the language of the new legislation, should assure that priority provisions, before being added, come before the Judiciary Committee of each House.

Further, to remove from the courts the principal burden of implementation of any existing priorities, we recommend that priority be accorded only if specifically requested by counsel. If a single Judicial Code section existed, appearance or docket forms could easily refer to the provision and allow counsel to state any applicable priority.

Now, our committee's proposal, somewhat unlike the presentations made before, does envision the retention of certain of the existing priorities or the addition of other congressionally enacted priorities. We concluded that at least some of the priorities might reflect valid congressional determinations that certain claims should be expedited in order to advance congressional objectives. Clearly, Congress, in creating rights, can find that the enforcement of some rights requires expedition, or that the legality or constitutionality of a new enactment should be quickly determined. Our committee contemplated that, in adopting remedial legislation, Congress might consider which, if any, of the existing provisions merited continuation. Similarly, we contemplated in the future certain priorities might be added to the Judicial Code.

We favored this approach rather than the wholesale elimination of all priorities for all times because we view a uniform system of rules as preferable to a system of local option. Standardized rules among the circuits discourages forum shopping. We, of course, recognize that exigencies will arise and each circuit should have a measure of discretion to deal with its own docket and with valid calendaring objectives. Still, we would prefer not to minimize the chance that litigants might go to one circuit for "fast track" litigation of one type of case but to another for similar expedited treatment for another type of case. In this connection, we note that the court's calendaring is already affected by what Congress does; at the most basic level the number of judges authorized for any district or circuit greatly affects the ability of that court to deal with caseload. The courts, of course, are subject to the Federal rules, which do pass through Congress for approval.

Beyond this difference in approach, our report noted two drafting suggestions for the present bill. First, we do not believe the statute should require expedition whenever an injunction is sought. It is too easy to have a claim for injunctive relief added to what is essentially a damage cause of action in order to obtain expedition. If an injunction application requires expedition, the courts can respond upon good cause shown.

Additionally, the bill does not sufficiently define what is meant by the direction to expedite, nor does it coordinate civil priorities with the expedition required in criminal matters. Either the text of the bill or the accompanying report should give greater examination and explanation to the intended result.

Mr. Chairman, among the many bills before this Congress, H.R. 4396 may not be the most pressing measure. Even those of us who embrace it must concede that it is a mere tinkering with the judicial system. And yet we urge that this or an alternative remedial bill should be enacted at this time. The problem of chaotic priority provisions has now been identified. It has been placed in full detail on the public record. We have learned that prior legislation has created an unruly structure which the courts cannot implement. New legislation should repair this structure.

[The attachment to Mr. Oberman's statement follows:]

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New York, New York 10036

The Impact of Civil Expediting Provisions on the United States Courts of Appeals

By THE COMMITTEE ON FEDERAL LEGISLATION*

INTRODUCTION: THE PROBLEM AND THE PROJECT

Spread throughout the United States Code are over thirty separate provisions which require that cases and appeals brought under them be given a priority by the federal courts of appeals. With no discernible coherence or pattern, these provisions appear in statutes involving diverse areas of federal law—from antitrust enforcement, to regulation of meat packing, to postal rate-making. Most often, the provisions relate to proceedings brought to enforce or review the actions or orders of cabinet departments or federal regulatory agencies.[1] Several apply to private civil suits, or to constitutional challenges to legislation.[2] Although they occasionally appear in separate, clearly labeled subsections, they are more often buried in lengthy recitations of procedures. Phrased in differing formulations, these civil expediting provisions impose on the individual courts a series of congressionally established directions that particular civil cases must be heard ahead of turn. As common as they have become, these provisions are rarely the product of clear and well-reasoned congressional policy, but are apparently spawned in the drafting process by random and unscrutinized beliefs that certain congressionally created judicial actions are simply more important than others.

The civil expediting provisions have been the source of occasional criticism, sometimes emanating from Congress itself.[3]

Indeed, after this Report was adopted by our Committee, a bill to abolish most of the priorities was introduced in the House of Representatives (H.R. 4396). We address H.R. 4396 in an addendum which follows this Report. The thrust of the criticism has been multifold. First, it has been stated that such provisions have often been enacted through unorthodox procedures in Congress: rather than being included in the Judicial Code, they have been added to various substantive enactments, without prior consultation with either the courts or the congressional committees which deal with prob-

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lems of judicial administration.[4] Second, perhaps as a result of the manner of their creation, these provisions have not formed a uniform, integrated scheme of priorities; on the contrary, read together, they create conflicting preferences and, consequently, problems of implementation.[5] Third, some critics have expressed concern that the existence of these provisions has greatly delayed the progress of non-priority cases on the calendars of the courts, and has limited the ability of some courts to respond to case management problems on the local level, where and when they arise.[6]

In 1977, a committee of the American Bar Association considered the effect of these provisions on the courts of appeals. Writing at a time when problems of case backlog were pronounced in many circuits—especially the Fifth and the Ninth—that committee concluded that the civil expediting provisions (other than in *habeas corpus* matters) should be repealed, leaving to each circuit court the task of establishing its own calendaring priorities.[7] That recommendation reflected a concern that non-priority cases would not merely be postponed but, in some circuits, would never be reached, and a belief that priorities are better left to the courts to decide locally, rather than having general standards developed in the abstract.

Several attempts were made later that year within the Justice Department's Office for Improvements in the Administration of Justice to develop reform legislation.[8] Like the ABA proposal, the Justice Department's drafts provided for the elimination of the provisions (except those relating to *habeas corpus*, collateral attacks on federally imposed sentences, and civil contempts under 28 U.S.C. § 1826). However, until this year, no bill was introduced, largely due to reluctance totally to repeal all the sections, especially in the absence of reliable information concerning the actual impact of these provisions.[9]

Nonetheless, the criticisms continued (leading ultimately to the introduction of H.R. 4396).[10] This Committee began a review of the expediting provisions in mid-1980, and set out to analyze the statutory scheme and to measure, at least in a qualitative fashion, the impact of the provisions on the courts of appeals and on the district courts. To aid our research, we sent a questionnaire to each Circuit Executive,[11] and obtained information from the Administrative Office of the United States Courts, the Federal Judicial Center and the Justice Department's Office for Improvements in the Administration of Justice.

We quickly learned that no statistics are regularly maintained by the circuits concerning the frequency of civil actions affected by the expediting statutes or of the relative processing time of such actions in comparison with non-priority civil litigations. To determine accurately, on a retrospective basis, the impact of the expediting provisions at any given point, or over time, would require a substantial expenditure of resources; briefs or pleadings would have to be examined to determine which cases fell under a statutory priority; the processing time of cases, priority and non-priority, would have to be reconstructed and recorded, eliminating other calendaring factors such as requests for extensions, disqualifications, and the like; and tables would have to be created. Even on a sampling basis, this would be a large undertaking. Prospectively, an alteration of docket sheets and appearance

forms could facilitate compilation of the requested data but, even if that process were commenced now, meaningful data would not be quickly available.[12]

The difficulties of compiling useful data are compounded at the district court level, where the individual assignment system generally prevails. In the coursé of our review, we did receive information concerning the district courts of the First, Second, Eighth and Tenth Circuits. It appears that no specific calendaring rule has been adopted in these courts to deal with civil priority provisions. None of these courts reported that the existence of these provisions causes undue delay in the progress of non-priority civil cases (in contrast to the Speedy Trial Act, 18 U.S.C. § 3161 *et seq*, affecting criminal cases). Beyond these generalizations, we did not attempt further to analyze the impact of the provisions at the district court level.

We have, however, developed meaningful information, as of Spring 1981, concerning the impact of the civil expediting provisions on the eleven circuit courts of appeals. We present below the details received in response to our questionnaire, as well as information obtained in follow-up discussions with administrative staff. We treat this information as background detail and incorporate it without specific attribution to particular interviews or correpondence.

In part I of the Report, we catalog the statutes themselves and summarize their contents. In Part II, we discuss the implications of this legislative scheme for the courts of appeals. We conclude, in Part III, that remedial legislation is warranted, but do not presently recommend the elimination of all expediting provisions. Rather, we favor the replacement of the current structure with a rationalized priority statute in the Judicial Code, which gives effect both to substantive policy concerns inherent in the priorities, as well as to the calendaring needs and administrative problems faced by each court. As noted, in the addendum we examine H.R. 4396.

I. *THE STATUTORY PROVISIONS*

We have identified thirty-eight provisions[13] in the United States Code which require varying degrees of priority treatment for civil matters in the courts of appeals. Among such provisions, which are all currently in effect,[14] the earliest were enacted in 1914,[15] the most recent in 1980.[16]

Most of the expediting provisions operate without reference to any other expediting provision, thus establishing conflicting priorities. This result is clearly illustrated by eight statutory provisions, each of which requires cases under that statute to be heard before *any* other cases on the court's docket[17] (except, in three instances, cases of the same nature).[18] For example, the Impoundment Control Act, which empowers the Comptroller General to commence civil actions to compel the President or a federal department to make available for expenditure budget authority granted by Congress, states:

> "The courts shall give precedence to civil actions brought under this section, and to appeals and writs from decisions in such actions, over all other civil actions, appeals, and writs." (31 U.S.C. § 1406).

And a section of the Norris-LaGuardia Act, governing appeals from tempo-

rary injunctions in labor disputes, provides:

> "Upon the filing of such record in the court of appeals, the appeal shall be heard and the temporary injunctive order affirmed, modified, or set aside with the greatest possible expedition, giving the proceedings precedence over all other matters except older matters of the same character." (29 U.S.C. § 110)

Thus, whenever appeals under both of these provisions (or any of the six similar mandates) appear for docketing simultaneously in the same circuit, it becomes impossible to comply literally with the statutory requirements.

The remaining thirty expediting sections require that priority be given to certain cases brought under the statutes in which they appear, but they do not expressly mandate priority over all other cases. Nonetheless, the sheer number of them creates a potential inconsistency; when many priority cases arise, not all can be equally expedited. And the heavier the caseload of priority actions, the greater is the impact on all other civil cases.

The language of these thirty provisions varies, although the substantive differences appear to be, overall, minor. If different treatment for these cases was intended, the language used has provided excessively subtle shadings. Thus, eight such provisions[19] specify that each case under it should be made a "preferred cause." Illustrative of this format is the Packers and Stockyard Act, 7 U.S.C. § 191 *et seq.*, which regulates the purchase of livestock and the manufacture, preparation, and marketing of meat and other livestock products, and which prohibits certain unfair practices. Under the Act, the Secretary of Agriculture is empowered to issue a cease-and-desist order if a violation of the Act is found after a hearing. In providing for an appeal from any such order, the Act states:

> "The proceedings in such cases in the courts of appeals shall be made a preferred cause and shall be expedited in every way." (7 U.S.C. § 194(d))

Four other statutes[20] dictate that the cases are to receive or are to be given a "preference" and "shall be heard and determined as expeditiously as possible." An example of that format is the Social Security Grants to States, 42 U.S.C. § 501, 504(e), which mandates such a "preference" for actions in the courts of appeals to review decisions of the Secretary of Labor to withhold federal funds used in administering state unemployment compensation laws. Under other provisions, the cases are to be "advanced on the docket" and "expedited."[21] Yet others specify that the cases are to be asssigned for hearing or heard at the "earliest practicable date"[22] or the "earliest convenient time."[23] While, as seen, most of the priority provisions contain the word "expedited" or a variant, along with language suggesting a priority, two provisions[24] require simply that "[p]etitions filed under this subsection be heard expeditiously."

The priority provisions, by their terms, look not only to expedited calendaring, but also appear to prescribe expedited *decisions* by the courts. At one extreme, three provisions prescribe specific time periods within which cases brought under the related statutes must be decided.[25] Thus, the Alaska Nat-

ural Gas Transportation Act of 1976, 15 U.S.C. § 719 *et. seq.*, created a mechanism for selecting and implementing a system to transport Alaskan natural gas and designated the D.C. Circuit Court of Appeals as the exclusive forum for reviewing the constitutionality of the Act or actions taken under the Act. But that Act also states:

> "Any such proceeding shall be assigned for hearing and completed at the earliest possible date, shall, to the greatest extent practicable, take precedence over all other matters pending on the docket of the court at that time, and shall be expedited in every way by such court and *such court shall render its decision relative to any claim within 90 days from the date such claim is brought* unless such court determines that a longer period of time is required to satisfy requirements of the United States Constitution." (15 U.S.C. § 719h (c)(2)(emphasis added.)[26]

A similar requirement appears in the National Labor Relations Act. The applicable provision[27] states that petitions filed under the Act to review orders of the National Labor Relations Board "shall be heard expeditiously, and if possible within 10 days after they have been docketed."

A number of other provisions specifically require that proceedings be determined, disposed of or adjudicated expeditiously.[28] For example, a provision of the Federal Election Campaign Act, which anticipates constitutional challenges to that law regulating campaign financing, decrees that:

> "It shall be the duty of the court of appeals and of the Supreme Court of the United States to advance on the docket and to expedite to the greatest extent the disposition of any matter certified under subsection (a)." (2 U.S.C. § 437h(c).)

In a different formulation, the Postal Reorganization Act, in connection with proceedings to review changes in postal rates and classifications, directs that "[t]he court shall make the matter a preferred cause and shall expedite judgment in every way 39 U.S.C. § 3628)." Even where the sections mandate only that the cases to which they relate be expedited "in every way," that presumably could include an expedited decision as well.

Viewed as a group, then, the expediting provisions all direct the courts to accelerate the progress of certain specified cases. They do not, however, provide any system or set of rules for giving effect to that mandate. Even where statutes contain extensive details concerning the commencement of, and hearings under, such provisions, few provide the mechanics, or even the precise intended effect, of the priority mandate. And with very few exceptions,[29] the statutes give no clue as to how priority cases are to be ordered among themselves. In short, Congress has left the problems of implementation to the individual courts.

Indeed, fifteen provisions[30] state directly that the courts will take the required steps to achieve priority. Only three of the expediting provisions expressly place upon the parties the initial burden to invoke priority.[31] The remaining provisions[32] are phrased passively (e.g., that priority "will be given"), but the burden of enforcement logically falls to the courts.

The courts, therefore, are left with considerable discretion; except for

those few provisions containing specific timetables for performance, the statutes impose only general directions. Several expressly confer upon the courts a measure of discretion in the process of giving life to priorities. For example, the frequently used provision for compelling disclosure of government records under the Freedom of Information Act states:

> "*Except as to cases the court considers of greater importance,* proceedings before the district court as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way" (5 U.S.C. § 552; emphasis added.)

The legislative history of the statutes containing such provisions typically provides no guidance for the exercise of this discretion. Usually, the history does not even indicate why the expediting provisions were included,[33] much less how the draftsmen intended that they be implemented. According to current staff members of the House and Senate Judiciary Committees, the legislation in which such provisions often appear typically does not come before their committees, and the expediting provisions receive little attention in the committees which do the major work on such bills.

Thus, the numerous and independently conceived expediting provisions have created a separate class of cases that must be heard ahead of other matters on the dockets of the courts of appeals. But with few exceptions, these provisions leave to the courts the responsibility to establish procedures for hearing cases in this preferred class.

II. *THE COURTS' RESPONSE*

A. *Implementation*

Faced with this myriad of unrationalized provisions, the circuits have followed differing paths of implementation. In doing so, they have operated, to an extent, in a vacuum. As noted, the statutes themselves give no directions for co-ordination or for resolution of the obvious inconsistencies which they collectively create. The Federal Rules of Appellate Procedure do little more than recognize the existence of such provisions:

> "The clerk shall prepare, under the direction of the court, a calendar of cases awaiting argument. In placing cases on the calendar for argument, he shall give preference to appeals in criminal cases and to appeals and other proceedings entitled to preference by law." (Fed. R. App. P. 45(b).)

Nor has the judicial system provided any suggested uniform rules for all circuits[34] or even a regularly updated compilation of the sections.[35] The provisions exist; it is for each separate circuit to find them and respond.

Several problems are inherent in the process of implementation. The provisions must be identified,[36] and then analyzed. Further, the competi-

tion among priorities must be addressed, even if not ultimately reconciled. And, most basic of all, a procedure must be designed for isolating at the time of filing those cases on which priority may be mandated. Only with these tasks accomplished is a circuit court in a position to expedite cases given a preference by law.

In considering the procedures adopted by the various circuits, the statutory preferences cannot be viewed in isolation. It must be borne in mind that in the process of calendaring civil appeals, judges and court administrators must also contend with numerous other factors and objectives which impact the ordering and progress of cases.[37] To begin with, under the Federal Rules of Appellate Procedure, criminal appeals take precedence over all civil cases.[38] Additionally, the operation of the disqualification statute[39] can affect the progress of a given case; in order to be assigned to a panel of eligible judges, a case might have to be moved forward or held back.[40]

Apart from these factors, which are imposed by federal rule or statute, the courts have also included in their case processing guidelines other considerations designed to enhance productivity and equitable distribution of work. For example, several circuits attempt to classify cases to insure that the appeals assigned to each panel are balanced in terms of subject matter and anticipated work load.[41] The implementation of the expediting provisions must thus be fit within this scheme of calendaring concerns.

Among the circuits the Fifth Circuit has promulgated the most detailed published rule in an effort both to identify the statutory provisions and to isolate cases falling under them. As a prelude, Local Rule 19 on Calendaring Priorities states:

> "The following categories of cases will be given preference in processing and disposition in accordance with the statutes shown. To assist the Clerk in implementing this rule, any party to a court appeal or review proceeding requiring priority status should notify the Clerk and cite the statutory support for the preference."[42]

The rule then cites some 25 categories of civil appeals from the district courts or agencies entitled to priority.[43] In practice, with this rule at hand, the Fifth Circuit clerk's office attempts to identify the priority cases, by comparing statues cited in the jurisdictional statements of briefs against the checklist of the local rule. However, the clerk also looks to counsel or the litigants to assist in the effectuation of the expediting scheme by calling attention to preferential appeals. Cases which are entitled to priority (and are not disposed of without argument under the court's summary calendar rule) are given expedited treatment on the argument calendar.

Similar, but less detailed, published rules exist in the Third, Ninth and District of Columbia Circuits to help identify cases requiring expedition. For example, Local Rule 7(c)(3) of the D.C. Circuit states:

> "In . . . cases wherein a statute requires expedition, counsel for appellant/petitioner shall so advise the Clerk of this Court by filing a written memorandum, citing the statute and the pertinent provisions thereof,

within 10 days from the filing of a notice of appeal or petition for review."

Thus, the D.C. Circuit's rule looks to counsel to claim a statutory preference; unlike the Fifth Circuit, the D.C. court does not attempt to ferret out each potential priority not called to its attention by counsel.[44]

The Ninth Circuit maintains a computerized calendaring system to help process its heavy caseload, which is specifically programmed to provide for the expediting provisions. It works as follows: point values are assigned to cases based on a variety of factors, including case type, statutory priority and length of pendency of appeal; as in the D.C. Circuit, expedited cases are to be identified by counsel. Thus, Local Rule 3(g) provides:

"Any party who believes his cause before this Court is entitled to priority in the hearing date by virtue of any statute or rule shall so inform the Clerk in writing prior to the filing of the first brief."

In operation, the Ninth Circuit's system assures that non-priority cases will not be indefinitely delayed by the docketing of new priority matters; at a point, the mix of weighted factors permits an "old" non-priority case to be heard before a "new" priority one. This is reflected in that court's operating rules:

"Generally, cases are selected for calendaring according to the order in which they were docketed, except that priority is given to direct criminal appeals and to civil appeals having statutory priority. [A compendium of statutory priorities is set forth in Priorities in Handling Litigation in the United States Courts of Appeals, issued by the Research Division of the Federal Judicial Center, May 1977 (reference: FJC-R-77-1).] Direct criminal appeals are given priority over all civil cases. There is no ordering among civil cases entitled to priority. Calendaring of nonpriority civil cases is not delayed without limit to accomodate priority cases; when a non-priority civil case has been pending for sixteen months it is added to the bottom of the list of priority civil cases waiting to be calendared."[45]

Although the Third Circuit also has a similar published rule,[46] the remaining circuits have no published rules dealing specifically with the statutory priorities. In the Seventh Circuit, an unpublished rule lists the various expediting provisions and states that cases under such provisions are to be given priority.[47] Similarly, in the Tenth Circuit, a screening process is followed internally to isolate the statutorily expedited appeals.

The other five circuits have apparently not developed any systematic procedures at all for identifying cases under the priority provisions (in some cases due to the currency of their dockets, as discussed below). To be sure, the rules of most courts provide for a litigant to move for expedition—whether the basis is a statutory preference or extenuating circumstances.[48] Nonetheless, the implementation of the statutory expediting provisions in those other circuits is less certain.

Even where procedures do exist to identify civil priority cases, conflicts

among competing, and inconsistently defined, priorities are not necessarily resolved. Thus, while the Fifth and Tenth Circuits have, to a limited extent, attempted at times to establish priorities among priorities, the general practice among the circuits is not to attempt any distinctions among expedited cases.[49] Rather, the usual proceedure is that civil priority cases are simply taken in order of readiness.[50] In many cases, the impact of that practice is clearly more theoretical than real: since several courts reported, for example, very few cases under the Packers and Stockyard Act[51] or the Federal Seed Act,[52] both of which contain expediting provisions, there is no practical necessity to distinguish between them and other expedited actions. Thus, the number of preferred actions actually in conflict in a given court at a given point in time may in fact be quite limited.

B. *Impact*

It is clear, as the starting point, that the extent of the impact of the expediting provisions in any circuit is directly tied to that circuit's case backlog. When cases are heard or determined shortly after briefing is complete,[53] priorities play a minor role. All cases, priority and non-priority alike, proceed to disposition on approximately the same schedule; all litigants, sooner rather than later, get their day in court. In the Second Circuit, for example, more cases were terminated than were filed in each of the seven successive years through 1980.[54] And in the year ended June 30, 1980, the median time from the last brief to hearing in civil cases was only eighteen days.[55] Thus, in the Second Circuit, statutory priority rules—apart from criminal, *habeas* and immigration matters—have little effect.

Seven of the circuits—the First, Second, Third, Fourth, Fifth, Seventh and Eighth—reported that, at present, they have little case backlog.[56] This, in itself, is a significant development. The caseload of the circuits has been rising dramatically over the years, forcing the courts to experiment with new procedures[57] and requiring the addition of new judges.[58] The combination of responses to rising caseload has apparently had its effect.

The progress in the Fifth Circuit is especially noteworthy; for several years, that circuit had a substantial back inventory of cases. During these years, the expediting provisions had a profound impact. For a time, the court was hearing nothing but priority cases. At present, however, in the Fifth Circuit, as well as in the six other circuits whose caseloads are current, the civil priority provisions generally have little impact; non-priority cases are being reached without undue delay. During the summer—when there are no sittings or only reduced sittings—and in the early fall, there is some backlog of cases. Still, the priority provisions are not seriously postponing the argument or submission of non-priority cases.

The expediting provisions continue to affect case progress in the Ninth Circuit. As of early 1981, civil priority cases were being reached four to six months after briefing was complete, while civil non-priority cases were being reached twelve to fifteen months after briefing. These median times have been reduced to an extent during the course of the year, but non-priority cases still lag at least some six months behind expedited matters. As noted above, the non-priority cases are not, however, left on endless hold;

the circuit's computerized docket program does allow older non-priority cases, at a point, to move onto the calendar, even if priority appeals are thereafter filed.

In the District of Columbia Circuit, there is also a significant backlog. The civil expediting provisions have a potentially significant impact there, for the court's docket—compared to other circuits—has a small criminal case component; the great bulk of cases are civil. Currently, the circuit is evaluating the expediting provisions, to develop new guidelines for implementation. Under the court's Local Rule 7(c)(3), quoted above, attorneys are called upon to notify the court of the existence of a statutory preference within ten days of the filing of the appeal. Such statements are rarely filed, except in Freedom of Information Act cases. If no priority has been claimed, the court does not analyze each case for the possible applicability of an expediting provision. As a result, the provisions do not now have great impact in that Circuit.

The Sixth and Tenth Circuits also face case backlog. In the Sixth, procedures are now being explored which might reduce the case inventory; if adopted and successful, such changes would advance both priority and non-priority cases. In the interim, there appears to be no on-going process for identifying and accelerating the statutorily preferred civil matters. In the Tenth Circuit, there are specific guidelines for assigning cases to each panel's docket which include, among other factors, the expediting provisions. Thus, at the moment, cases benefitted by an expediting provision will push back non-priority matters.

The foregoing discussion considered the expediting provisions as a group. It should also be noted that particular provisions have greater impact. For example, certain of the provisions apply to actions which are rarely filed, while others appear frequently. In the District of Columbia, as noted, Freedom of Information Act cases are a regular staple of the docket. Similarly, several circuits advised us that cases under the National Labor Relations Act are common. Moreover, certain of the provisions, by their terms, establish specific deadlines for decision. Thus, even if a circuit has no backlog, statutes that require hearing and determination within a fixed time frame, or otherwise particularize the procedure for review, can disrupt the progress of other cases.[59]

Our survey of the courts focussed primarily on the effect of the expediting provisions on the calendaring of other cases. However, as noted, the provisions also require, in most instances, expedited decisions. There are no data available which reveal the effect of the expediting provisions on time of decision. It is our view—unsupported by quantitative evidence—that, unless a statute fixes a specific time deadline for decision, the circumstances and complexities of a case, rather than its statutory preference, determine both the time required for deliberations and the manner of disposition (i.e., full opinion or memorandum).

The overall conclusion which necessarily follows from these findings is that, at the moment, the expediting provisions do not appear to be playing a major role in the calendaring of cases in the courts of appeals, or—most like-

ly—in decision-making. In the seven circuits which are nearly current, all cases—priority and non-priority—are moving forward, with possible discriminations based on statutory priority being apparent only in the summer and early fall, or only with respect to particular statutes containing specific time periods for hearing and decision. Of the four circuits with significant case backlog, two are following programs of implementation, but take into account other factors in addition to statutory expedition. The other two circuits are presently studying procedures for handling caseload, but do not currently have a system for implementation of the expediting provisions, leaving it instead to counsel to take the initiative.

Those who are concerned that non-priority cases are being unduly delayed by these expediting provisions may take comfort in our findings. But these findings also suggest that the courts have not been systematic in their application of the congressional mandates. Certainly there is reason to believe that, with respect to the eight provisions which direct that cases under them are to be heard before any other cases,[60] the courts have most likely been violating the statutory directives. Moreover, even though the other thirty statutes do not spell out the exact requirements of "preference"—leaving unclear the degree of case acceleration that is intended—it also appears that at least certain of the circuits are doing nothing to advance the intent of Congress. It is in this light that we now consider whether there is a need for remedial legislation and, if so, what kind.

III. THE COMMITTEE'S RECOMMENDATIONS

A. *The Need for Remedial Legislation*

The threshhold issue is whether any corrective legislation is required. The *status quo* has certain attractions. To an extent, the result advocated by the ABA committee in 1977 and contained in the Justice Department's draft legislation—that is, to abolish all the expediting provisions and allow the circuits to establish individually their own priorities—has been achieved *de facto*. In most circuits, dockets are being shaped by local calendaring rules, with the priority provisions having only modest impact. Even in the Ninth and Tenth Circuits, where the provisions are now most felt, their directives have been incorporated within the framework of each court's calendar system. Accordingly, one could argue that, even if the statutes are difficult to locate, confusing to rationalize, and cumbersome to apply, nonetheless—or, perhaps, consequently—there is, in fact, no need for change.

Moreover, the process of legislative reform might inspire interest groups anxious to expedite particular types of cases or to delay other types to attempt to shape a statute that, in the end, places greater burdens on the courts or on non-preferred litigants than does the present scheme. Similarly, those with a particular interest in existing priority actions might be moved to oppose reform for fear that elimination of that priority would carry a negative inference—that those causes are no longer favored and need not be expedited, whatever the circumstances. Indeed, some resistance of

this character arose when change was last seriously considered in 1977.

Nevertheless, this Committee believes that the arguments in favor of changing the present scheme are more powerful than these counterveiling considerations. First, the existing amalgam of expediting provisions is totally uncoordinated and irrational. Provisions literally dot the U.S. Code. It required a computerized research project by the Federal Judicial Center simply to compile a list of them[61]—and, even then, there is no assurance that a complete list has ever been drawn. Moreover, the formulations of particular statutes vary, and read together, they establish conflicting priorities.

Based on the dearth of legislative history, these provisions appear to have been added over the years without consideration of their need or likely impact (either alone or taken together with similar provisions). In particular, they were apparently added without consultation with the judicial system or with the Judiciary Committees of the Senate and House of Representatives, and without regard for other proper calendaring objectives of the courts. As a result, there is no integrated legislative scheme which may be easily followed. The provisions suffer the deficiency of all *ad hoc*, un-coordinated legislation: they are reconciled, as well as possible, only after the fact, rather than by advance planning.

The absence of a rationalized scheme as well as, in most cases, the lack of any statutory guidelines for implementing the mandated priorities, has made implementation by the courts difficult and erratic. Initially, the judicial system had to locate the various provisions and make sense of them. Even with a list of provisions at hand, it became necessary to develop procedures for determining which cases are entitled to statutory priorities. This process is burdensome. In those circuits which have attempted systematically to implement the provisions, significant time of staff attorneys or clerks has been required to screen cases for priority. Some circuits have come in practice to depend on counsel to identify the cases. However, unlike provisions conferring jurisdiction or providing venue for certain types of cases, the expediting provisions have a low profile, and tend to be overlooked. Without attempting to quantify this occurrence, it is certain that the intended priorities have more than occasionally been ignored.

Even if the administrative problems of implementation could be reduced (for example, by use of sophisticated computer programs and promulgation of a uniform local rule in each circuit), the expediting provisions would still compete with each other, as well as with such objectives as being able to respond to emergencies in other cases and insuring balanced caseloads among judges. Each circuit has adopted calendaring rules, designed to meet the many different caseload problems which confront them, of which statutory priorities are only one. The expediting provisions represent an externally-imposed factor which could properly be accommodated with the locally-adopted calendaring rules, if they were coherent and rational, and represented the informed judgment of Congress. In their present form, however, they simply impede the achievement of other objectives, at best, and at worst force the courts into ignoring them entirely in order to accommodate their full caseloads.

Nor should the current absence of severe case backlog in most circuits

suggest that the problem has been solved. Although the majority of the circuits are presently reaching cases soon after briefing is complete, in those that are not, the expediting provisions do have at least potential, if not current, impact. Additionally, the experience of the Fifth Circuit demonstrates that when a circuit attempts to deal with its backlog, the expediting provisions can have a very major effect on the treatment of non-priority cases. And, of course, there is no guarantee that the present total of 38 expediting provisions we have identified will not be increased by future Congresses.

In the final analysis, the existing unrationalized scheme is, we believe, inconsistent with the notion of a uniform federal judicial system. The legislature should take account—but here did not—of the impact of statutory privisions on the judicial system before they become law, and should not impose mandates on that system that is uncoordinated, inconsistent, difficult to implement in practice and, in some cases, literally impossible to carry out.[62]

B. *Approaches to Remedial Legislation*

A legislative remedy could take at least two alternative forms. First, the priorities now in existence could be totally eliminated, either expressly or impliedly leaving the creation of priorities, if any, to the local rule-making authority of the various circuits. This approach was favored by the ABA, and was reflected in the Justice Department's 1977 draft proposals.

While we believe this proposal merits consideration, we do not presently adopt it. We cannot say with assurance that none of the priorities are rationally grounded. Despite the lack of legislative history surrounding the provisions, we cannot conclude that all must be eliminated. In creating substantive federal rights, Congress has the power to facilitate their enforcement. Recognizing that, at times, the backlog of cases might prevent the quick progress of important causes of action created by statute, Congress may properly seek to assure the availability of a priority for such litigation. Similarly, it is appropriate for Congress to provide for accelerated testing of the constitutionality of certain new measures, to assure that the enactment can quickly become effective with no cloud on its legality. Without more quantitative data from the courts concerning the impact of the provisions, on both priority and non-priority cases, we do not believe an "all or nothing" approach to be warranted.

There is a further drawback in the ABA approach perceived by many members of our Committee. By placing responsibility on each circuit to establish local priorities, the potential uniformity of appellate procedure—which to some, appears already to have been weakened by local circumstances—would be further diminished. The calendar rules and composition of each circuit already create differences in the way a particular case might proceed in various courts, and surely the precedents and personnel of each court create distinct reputations among practicing lawyers. In the view of some, such differences encourage strategic forum-shopping. These differences might become even more exacerbated if certain kinds of cases began receiving priority treatment in some circuits, but not in others, thereby fur-

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ther undermining national uniformity in the federal judicial system.

We therefore favor and recommend a second approach to remedial legislation.[63] We urge the elimination of all the individual priority sections and their codification in a single expediting provision within the Judicial Code. Such a statute would repeal all priorities that have been created in all other Code sections, and re-enact them (or, at least, those which have continuing meaning and vitality) in one statute. Of equal importance, such a statute should provide that all future expediting enactments must be effected only by amendment to that section of the Judicial Code. Such a procedure ought to insure that, in the future, expediting provisions are considered by the Judiciary Committees in each House before enactment.[64]

A single statute would relieve much of the confusion and administrative burdens that have prevailed under the existing structure. The job of locating the priority provisions would, under this proposal, be accomplished, once and for all. And the job of identifying affected cases when they are filed could be greatly simplified: docketing sheets or appearance forms could reprint or incorporate the provision, allowing an easy and sure procedure for identifying priority cases. Finally, the varying statutory formulations[65] would be made uniform. This would force a clarification of the function and the mechanics of the priorities, and a resolution of the inconsistencies among them. The courts would be told specifically which expedited cases should be advanced ahead of *all* other cases, civil and criminal alike, and in what order; priorities among priorities would be established; and those cases entitled simply to the "preference" contemplated by Rule 45(b) of the Federal Rules of Appellate Procedure would be identified.

In the process of considering such a bill, Congress would do well to reconsider the existing priorities. Those which no longer appear to merit inclusion in new legislation could be eliminated; others, not presently included, could be added. This review preferably should proceed from an articulated set of neutral standards, in which the general characteristics of an action requiring special treatment have first been formulated. For example, Congress might determine to accord preference to all challenges to the constitutionality of statues less than, say, three years old, or to all actions directly affecting large classes of people, without regard to the substance of the statutes involved.[66] Only with such standards in place could be objective review of the present priorities be undertaken, and the number of priorities be kept—as they should—to a minimum, in order to reserve for the courts maximum flexibility.[67]

In addressing these questions, Congress could—and should—state, either in the bill or supporting reports, that the courts have the inherent power, in controlling their dockets, to expedite cases having no statutory preference, where circumstances warrant, and to adopt appropriate rules for case management. We believe that all legislatively imposed priorities should fit into such a scheme, and not supersede it.[68] Other calendaring objectives should be viewed as legitimate. Finally, Congress should relieve the courts of the primary burden of implementation: the new statute should expressly provide that the task of invoking priorities rests with the parties and their counsel.

* * *

We recognize that, given the plate of legislative issues, there may not be a hearty appetite for a modest reform of judicial administration, especially when the process of doing it right would require significant research and hearings, and might encounter pressures from various interest groups to retain specific expediting provisions. We therefore add that, until the time arrives, if it does, when corrective legislation is passed, the judicial system, on its own, should cure some of the problems of the present statutory scheme. For example, regular schedules of the expediting provisions should be circulated to the courts and made available to the Bar. Appearance forms should be amended to provide for attorneys to claim statutory priorities. And general guidelines for dealing with the priorities could be proposed by the Administrative Office of the United States Courts or the Federal Judicial Center for consideration and adoption by the circuits. The statutes leave sufficient discretion for significant reform by the courts themselves

CONCLUSION

Our review of the structure and implementation of the civil expediting provisions has revealed co-ordinate branches of the government functioning in a decidedly uncoordinated manner. Congress has enacted provisions affecting the courts, without prior consultation with the judiciary, without consideration of the probable—or actual—impact of such provisions, and without construction of an integrated priority scheme proceeding from articulated policy objectives. The courts have reacted inconsistently, with several circuits attempting to implement the preferences while other circuits are taking little note of the congressional mandates. What has emerged is hardly a uniform traffic system for the flow of cases through the courts with all signals properly synchronized. Instead, the rules of the road vary from place to place, and are inconsistently applied.

We therefore recommend the enactment of the remedial legislation described above, designed to rationalize the scheme of priorities, while giving latitude to the courts for the management of their dockets.

July 1981

ADDENDUM: H.R. 4396

Subsequent to our Committee's adoption of the foregoing Report, a bill was introduced in the House of Representatives by Congressmen Kastenmeier and Railsback, designed to eliminate virtually all of the civil expediting provisions applicable to either the district or appellate courts. The core language of the bill, titled the "Federal Courts Civil Priorities Act," H.R. 4396, is contained in a proposed new section of the Judicial Code:

> "Notwithstanding any law to the contrary, each court of the United States shall determine the order in which civil actions are heard and determined, except that the court shall expedite the consideration of any action brought under chapter 153 or section 1826 of this title,*

any action for temporary or permanent injunctive relief, or any other action if good cause therefore is shown."[69]

The bill goes on to amend some 50 statutory sections that presently confer priorities.

The proposed measure, if adopted, would achieve the central reform urged in our report: it would eliminate the confusing, and often inconsistent, patchwork of priorities now spread throughout the United States Code. In its place would be a single provision, properly placed in the judicial code, which would provide a more coherent direction to the courts.

The initial phrase, "[n]otwithstanding any law to the contrary," is apparently intended to insure prospectively that any priority provisions that are slipped into other code sections are of no effect. The bill itself repairs most of the problems previously created, by eliminating almost all of the presently existing provisions. The bill, however, does not rule out the possibility that some of these existing provisions will survive, or that others will be added. Implicit in the proposed scheme is the power of Congress to amend the new Judicial Code section to add specific priorities. Such an amendment would come before the Judiciary Committees of each House, either concurrently or subsequently with the substantive bill to which it is related, and would not result in priority provisions outside the Judicial Code.

While our Committee favors the adoption of reform legislation to modify the existing structure of priorities and, in particular, endorses the creation of a single priority provision in the Judicial Code, there are three aspects of H.R. 4396 that give us pause.

First, the bill—which in essence follows the approach of the ABA proposal discussed in our report—abolishes existing nationally-imposed priorities and leaves primary discretion to individual courts (acting through judicial councils in the circuits) to establish priorities at the local level. The federal courts must, of course, be able to respond to unique problems in their own dockets and to the exigencies of particular cases. Nonetheless, many members of our Committee are concerned that if each circuit is encouraged to undertake an effort to establish in advance priorities for certain categories of cases, different systems will soon emerge around the country, which in turn would encourage forum shopping. Thus, for example, a plaintiff seeking a "fast track" for a securities case might set out for one circuit, while a copyright plaintiff might set out for another.

Moreover, we are not, as yet, certain which, if any, of the existing priorities should be continued. Our report recommends a review of each existing provision, in the process of creating a single Code section. We believe that this review is best undertaken by Congress, not separately by each circuit. H.R. 4396 proceeds from the opposite direction, eliminating virtually all the provisions, but leaving open the possibility of selective retention or later addition. We hope that this different starting point will not reduce the thoroughness of the process of Congressional review.

Second, we question one of the priorities that is created by the present draft. While we favor the retention of priority for *habeas corpus* and recalcitrant witness cases (chapter 153 and section 1826 of title 28, respectively),

which always affect individual freedoms and understandably merit expedition, and while we favor the adoption of a uniform nationwide priority for "good cause shown" (a standard which may well be inherent in the power of each court to control its docket and already provided in the local rules of many courts), we take exception to the requirement of expedition whenever an injnunction is sought. This priority invites abuse: adding a request for a permanent injunction to a complaint would, in many situations, provide an easy way to achieve expedition. Further, the availability under the Federal Rules of Civil Procedure of a temporary restraining order and a preliminary injunction already gives adequate protection to the litigant who, ultimately, seeks a permanent injunction. The effect of delay can, by these means, be cushioned. It may well be that the claimant who seeks money damages alone is most damaged by delay, and most in need of expedition, because the combination of inflation and the disparity between the prime and legal rates of interest adds to his economic loss with each passing day.

Third, the bill does not sufficiently define what is meant by the direction to "expedite," nor does it coordinate civil priorities with the expedition required in criminal matters. Either the text of the bill or its accompanying legislative history should give greater explanation of the intended result.

September 1981

COMMITTEE ON FEDERAL LEGISLATION

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FOOTNOTES

[1] *See, e.g.*, National Labor Relations Act, 29 U.S.C. § 160(i); Occupational Safety and Health Act, 29 U.S.C. § 660(a).

[2] For example, one provision requires expedited review of the constitutionality of the federal political campaign laws, but not actions taken pursuant to such laws. 2 U.S.C. § 437h(c). Similarly, another facilitates a constitutional challenge of the special reorganization statutes applicable to the Rock Island Railroad and the Milwaukee Railroad. 45 U.S.C. § 1018. And Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3614, applies to suits brought to enforce the fair housing provisions against private defendants.

[3] *See, e.g., Cong. Quarterly*, Nov. 24, 1979, at 2679-80.

[4] *See id.*

[5] *Id.*

[6] ABA Special Committee on Coordination of Judicial Improvements, Report to the House of Delegates (Feb. 1977).

[7] *Id.* While the ABA committee's report addressed only the federal courts of appeals, the House of Delegates expanded the resolution to recommend in addition the repeal of all civil priorities (other than *habeas corpus* matters) directed at the district courts.

[8] *See Cong. Quarterly*, Nov. 24, 1979, at 2679-80.

[9] *Id.*

[10] *Id.*

[11] The text of the questionnaire sent to each Circuit Executive reads as follows:

"Dear_____:

"I am writing to you on behalf of the Federal Legislation Committee of the Association of the Bar of the City of New York. Our Committee is presently reviewing the impact of civil priority expediting provisions contained in various statutes on the progress of non-priority cases pending in the Federal District Courts and Courts of Appeals, with a view to determining whether legislative elimination, consolidation or modification of such provisions is warranted. I am attaching to this letter a schedule of certain of the expediting provisions which form the subject of our review.

"We believe that the impact of these expediting provisions merits careful study, and that our Committee is well equipped to prepare a useful report. Over the years, we have focused on a wide spectrum of legislative questions, have issued extensive analyses and have often been invited to testify on conclusions we reached. We have frequently been advised that, due to our Committee's impartiality and industriousness, our reports are well received in Congress. As a result, we generally enjoy the co-operation of Congressional Committees in the course of our work. In the present project, for example, we have the encouragement and co-operation of the House Subcommittee on Courts, Civil Liberties and Administration of Justice, as well as the Justice Department's Office for Improvements in the Administration of Justice. We are also working closely with Steven Flanders, the Circuit Executive of the Second Circuit, to whom our project is of particular interest.

"At this juncture, we are trying to learn the manner in which priority under these provisions is asserted, if, indeed, these provisions are being actively used at all. In this regard, we would very much appreciate it if you would provide us with the following information in whatever degree you are able to do so:

"1. In what ways, if any, do the requirements of these expediting provisions cause any delay in the adjudication of non-priority cases?

"2. Is there a calendaring rule or procedure (either published or informal) for the Court of Appeals, designed to implement any of the statutory expediting provisions? If so, what does the rule or procedure provide?

"3. Is there a calendaring rule or procedure followed by any of the District Judges designed to implement any of the statutory expediting procedures? If so, what do any such rules or procedures provide?

"4. Have any motions been made during the last three statistical years in the Circuit Court for priority pursuant to any of the statutory expediting provisions? If so, please state the number of motions and, if possible, indicate the provisions cited.

"5. Are you aware of any motions filed during the last statistical year in the

District Courts for priority pursuant to any of the statutory expediting provisions? If so, please state the number of motions and, if possible, indicate the provisions cited.

"We would also very much appreciate your advising us whether, to your knowledge, any of the Judges in your Circuit has publicly expressed an opinion concerning the utility or the impact of the expediting provisions. Moreover, we would appreciate your advising us of the names of any staff counsel or employees with whom we might speak for further information on this subject.

"We recognize that the information we request may not be readily available. Nonetheless, without this information, we cannot complete a meaningful study. We therefore will appreciate whatever assistance you, or a member of your staff, can provide. We will, of course, send you a copy of our report, which we hope to be able to complete within the next few months.

Very truly yours,
Michael S. Oberman"

We received written responses from nine circuits, and oral replies from the other two. We conducted follow-up telephone interviews with administrative personnel in six circuits. We also receive written answers to our questionnaire from the clerks of all district courts in two circuits.

Our committee expresses its appreciation to the many people who gave us their time and co-operation, and who made this report possible.

[12] The courts do maintain data concerning the median time from the filing of a record on appeal to final disposition for all cases as a group and also broken out separately for criminal, civil, administrative agency and bankruptcy appeals. *See, e.g.*, Administrative Office of the United States Courts, 1980 Annual Report of the Director, Table B4, at A-11 [hereinafter cited as 1980 Annual Report]. The civil category is not further subdivided among statutory types.

As discussed below, see text accompanying notes 53 to 58, *infra*, expediting provisions have the greatest potential effect in the presence of case backlog. Because factors such as judicial vacancies and time of year can affect the backlog at any moment, a statistical study of the effect of priorities would have to embrace a significant period of time, for example, two years, to reflect the impact of varying circumstances.

[13] Federal Election Campaign Act, 2 U.S.C. § 437g(a)(10) and 437h(c); Freedom of Information Act, 5 U.S.C. § 522(a)(4)(D); Commodity Futures Trading Commission Act, 7 U.S.C. § 8(a); Federal Environmental Pesticide Control Act of 1972, 7 U.S.C. §§ 136d(c)(4) and 136n(b); Packers and Stockyards Act, 7 U.S.C. § 194(d); Federal Seed Act, 7 U.S.C. §7%SM 1600 and 1601; Clayton Act, 15 U.S.C. § 21(e) and 21a; Federal Trade Commission Act. 15 U.S.C. § 45(e); Small Business Investment Act of 1958, 15 U.S.C. § 687a(e), 687a(f), and 687c(a); Alaska Natural Gas Transportation Act of 1976, 15 U.S.C. § 719h(c)(2); Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 346a(i)(5) and 348(g)(2); Federal Unemployment Tax Act, 26 U.S.C. § 3310(e); Internal Revenue Code, 26 U.S.C. § 6110(f)(5) and 6363(d)(4); Special Prosecutors Act, 28 U.S.C. § 596(a)(3); 28 U.S.C. § 1364 (c) (enforcement of Senate Subpoenas); 28 U.S.C. § 2349(b) (review of the orders of enumerated federal agencies); Norris-LaGuardia Act, 29 U.S.C. § 110; National Labor Relations Act, 29 U.S.C. § 160(i) and 160(m); Occupational Safety and Health Act, 29 U.S.C. § 660(a); Mine Health and Safety Act, 30 U.S.C. § 816(a); Impoundment Control Act, 31 U.S.C. § 1406; Postal Reorganization Act, 39 U.S.C. § 3628; Social Security Act, 42 u.S.C. § 504(e); Civil Rights Act of 1968, Title VIII, 42 U.S.C. § 3614 (Fair Housing); Emergency Energy Conservation Act of 1979, 42 U.S.C. § 8514(b); Railroad Unemployment Insurance Act, 45 U.S.C. § 355(f); Railroad Transportation Policy Act of 1980, 45 U.S.C. § 1018(b); Communications Act of 1934, 47 U.S.C. § 402(g); Internal Security Act of

1950, 50 U.S.C. §§ 792(a) and 793. *See also* Rules 21(b) and 21(c) of the Federal Rules of Appellate Procedure, implementing 28 U.S.C. § 1651 (Mandamus, Prohibition, and Extraordinary Writs).

[14] The Sugar Act of 1948, the Bankruptcy Act, and the Clean Air Act of 1955 each included priority provisions. The Sugar Act terminated in accordance with its terms on December 31, 1974. The applicable provisions of the Bankruptcy Act were not carried over into the New Bankruptcy Code, while the applicable provisions of the Clean Air Act were repealed when the Act was amended and recodified in 1977 (P.L. 95-95, Title I, §§ 107, 108, 117(a), 91 Stat. 691, 693, 712)

[15] Clayton Act, 15 U.S.C. §§ 21(e) and 21(a); Federal Trade Commission Act, 15 U.S.C. § 45(e).

[16] Railroad Transportation Policy Act of 1980, 45 U.S.C. § 1018(b).

[17] Federal Election Campaign Act, 2 U.S.C. § 437g(a)(10); Freedom of Information Act, 5 U.S.C. § 552(a)(4)(D); Clayton Act, 15 U.S.C. § 21(e) and 21a; Federal Trade Commision Act, 15 U.S.C. § 45(e); Norris-LaGuardia Act, 29 U.S.C. 110; National Labor Relations Act, 29 U.S.C. § 160(m); Impoundment Control Act, 31 U.S.C. 1406.

[18] Federal Election Campaign Act, 2 U.S.C. § 437g(a)(10); Norris-LaGuardia Act, 29 U.S.C. § 110; National Labor Relations Act. 29 U.S.C. § 160(m).

[19] Commodity Futures Trading Commission Act, 7 U.S.C. § 8(a); Packers and Stockyards Act. 7 U.S.C. § 194(d); Federal Seed Act, 7 U.S.C. §§ 1600 and 1601; Small Business Investment Act of 1958. 15 U.S.C. § 687a(e), 687(a)(f) and 687c(a); Postal Reorganization Act, 39 U.S.C. § 3628.

[20] Federal Unemployment Tax Act, 26 U.S.C. § 3310(e); Internal Revenue Code, 26 U.S.C. § 6363(d)(4); 28 U.S.C. § 2349(b); Social Security Act, 42 U.S.C. § 504(e).

[21] Federal Election Campaign Act, 2 U.S.C. § 437h(c); Federal Environmental Pesticide Control Act of 1972, 7 U.S.C. § 136d(c)(4) and 136n(b); Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 356a(i)(5) and 348(g)(2); Emergency Energy Conservation Act, 42 U.S.C. § 8514(b).

[22] 28 U.S.C. § 1364(c) (enforcement of Senate subpoenas and orders); 9011(b)(2); Civil Rights Act of 1968, Title VIII, 42 U.S.C. § 3614. *See* Internal Security Act of 1950, 50 U.S.C. §§ 792a and 793 ("earliest possible time").

[23] Communications Act of 1934, 47 U.S.C. § 402(g).

[24] Occupational Safety and Health Act, 29 U.S.C. § 660(a); Mine Health and Safety Act, 30 U.S.c. § 816(a).

[25] Alaska Natural Gas Transportation Act of 1976, 15 U.S.C. § 719h(c)(2); National Labor Relations Act, 29 U.S.C. § 160(i); Railroad Transportation Policy Act of 1980 45 U.S.C. § 1018(b).

[26] The language of this provision, with its references to the "possible" and "practicable," leaves the D.C. Circuit room to docket other cases before proceedings brought under such Act. However, unless the court were to find that constitutional considerations (presumably due process) required a longer period for the submission of briefs and oral argument, the court would seem to have little choice but to move such cases ahead of all others if it is to meet the 90-day time schedule.

[27] 29 U.S.C. § 160(i).

[28] Federal Environmental Pesticide Control Act of 1972, 7 U.S.C. § 136n(b); Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 346a(i)(5) and 348(g)(2); Federal Unemployment Tax Act, 26 U.S.C. § 3310(e); Internal Revenue Code, 26 U.S.C. § 6363(e)(4); Postal Reorganization Act, 39 U.S.C. 3628; Social Security Act, 42 U.S.C. 504(e); Railroad Unemployment Insurance Act, 45 U.S.C. § 355(f); Communication Act of 1934, 47 U.S.C. § 402(g).

[29] *See* note 18 *supra*.

[30] Federal Election Campaign Act, 2 U.S.C. § 437h(c); Federal Environmental Pes-

ticide Control Act of 1972, 7 U.S.C. 136n(b); Alaska Natural Gas Transportation Act of 1976, 15 U.S.C. § 719h(c)(2); Federal Food, Drug and Cosmetic Act, 21 U.S.C. §§ 346a(i)(5) and 348(g)(2); Internal Revenue Code, 26 U.S.C. §§ 6110(f)(5); Special Prosecutors Act, 28 U.S.C. § 596(a)(3); 28 U.S.C. § 1364(c) (enforcement of Senate Subpoenas and orders); Impoundment Control Act, 31 U.S.C. § 1406; Postal Reorganization Act, 39 U.S.C. § 3628; Civil Rights Act of 1968, Title VII, 42 U.S.C. § 3614; Emergency Energy Conservation Act, 42 U.S.C. § 8514(b); Railroad Unemployment Insurance Act, 45 U.S.C. § 355(f); Railroad Transportation Policy Act of 1980, 45 U.S.C. § 1018(b); Communications Act of 1934, 47 U.S.C. § 402(g).

[31] Federal Unemployment Tax Act, 26 U.S.C. § 3310(e) (review of decision to withhold certification from a state unemployment fund and thus deny to employers the right to credit contributions to such fund against their federal unemployment taxes); Internal Revenue Code, 26 U.S.C. § 6363(e)(4) (appeals from decision that a state individual income tax is not qualified to be collected by the federal government on behalf of the state); Social Security Act, 42 U.S.C. § 504(e) (review of decision to withhold from a state federal funds used to administer state unemployment compensation laws). The Federal Unemployment Tax Act, the Internal Revenue Code, and the Social Security Act each establish procedures for the review of federal certifications of certain state programs. In each instance, the applicable expediting provision states that such proceedings are "entitled" to, and, upon the request of the Secretary of the Treasury or of Labor, as the case may be, or the state, shall "receive a preference and shall be heard and determined as expeditiously as possible."

[32] Federal Election Campaign Act, 22 U.S.C. § 437g(a)(10); Freedom of Information Act, 5 U.S.C. §§ 552(a)(4)(D); Commodity Futures Trading Ccommission Act, 7 U.S.C. 8(a); Federal Environmental Pesticide Control Act, 7 U.S.C. § 136d(c)(4); Packers and Stockyards Act, 7 U.S.C. § 194(d); Federal Seed Act, 7 U.S.C. §§ 1600 and 1601; Clayton Act, 15 U.S.C. § 21(e) and 21a; Federal Trade Commission Act, 15 U.S.C. § 45(e); Small Business Investment Act, 15 U.S.C. § 687a(e), 687a(f) and 687c(a); 28 U.S.C. § 2349(b); Norris-LaGuardia Act, 29 U.S.C. § 110; National Labor Relations Act, 29 U.S.C. § 160(i) and 160(m); Occupational Safety and Health Act, 29 U.S.C. § 660(a); Mine Health and Safety act, 30 U.S.C. § 816(a); Internal Security Act of 1950, 50 U.S.C.§§ 792a and 793.

[33] One rare exception is the Federal Election Campaign Act, 2 U.S.C. § 437h(c), the legislative history of which was cited by the United States District Court in *Martin Tractor Company, et al. v. Federal Election Commission*, 460 F. Supp. 1017 (D.D.C. 1978) as follows:

> "Section 437h(a) had the purpose and effect of expediting judicial review of questions raised in Congress about the constitutionality of particular provisions of the Act so that these questions could be authoritatively resolved before the Presidential Election of 1976. See Remarks of Senator James Buckley, 119 Cong. Rec. S5707 (daily ed., April 10, 1974)."

[34] On occasion, the Federal Judicial Center, established in 1967 by the Federal Judicial Center Act, Pub. L. No. 90-219, 81 Stat. 664, 28 U.S.C. §§ 620-629 (1967), has promulgated suggested rules or procedures for the federal courts. For example, in 1973, the Center released a model rule for determining whether a decision of the circuit court should be designated for publication. Advisory Counsel for Appellate Justice, FJC Research Series No. 73-2, Standards for Publication of Judicial Opinions (1973). But the Center has produced no suggested procedures governing expedited proceedings.

[35] The Federal Judicial Center several years ago prepared annotated lists of the types of cases requiring priority handling by the federal district and appellate courts. This project was made feasible only by the availability of computerized legal research,

and it appears that no prior compilation had been asembled for the use of the courts. *See* Federal Judicial Center - Research Division, *Priorities for Handling Litigation in the United States Courts of Appeals*, FJC-R-77-1, May 1977 at 1; The Federal Judicial Center - Research Division, *Priorities for the Handling of Litigation in the United States District Courts*, FJC No. 76-2, April 1976. Moreover, these schedules have not been updated since their initial publication, nor have they been widely distributed outside the court system. Nonetheless, the distribution of these schedules may have facilitated some courts' implementation of the expediting provisions. For example, the Ninth Circuit's General Orders specifically refer to this compendium in setting forth an internal calendaring guideline for priorities. See text accompanying note 45, *infra*.

[36] *See id.*

[37] For a discussion of the calendaring practices of the Second Circuit, *see* New York State Bar Association Committee on Federal Courts, The Use of Designated Judges by the Second Circuit, N.Y.L.J., Mar. 21, 1980, at 4, col. 1 [hereinafter cited as NYSBA Report].

[38] *See* Fed. R. App. P. 45(b).

[39] 28 U.S.C. 455 (1976 & Supp. II 1978).

[40] *See* NYSBA Report, *supra* note 37, at 4, col. 3. General Orders of the Ninth Circuit,3.2(h).

[41] *See* NYSBA Report, *supra* note 37, at 4, col. 3. General Orders of the Ninth Circuit, August 14, 1979, at Ch. 3, sec. 3.3(b)3.3(b).

[42] United States Court of Appeals for the Fifth Circuit, Local Rules Supplementing the Federal Rules of Appellate Procedure and Plan for Expediting Criminal Appeals, As Amended to September 15, 1980.

[43] *Id.*, Local Rules 19.1, 19.2.

[44] The District of Columbia Circuit is, for its own courts, presently reviewing the impact of the expediting provisions and the best procedure for dealing with them.

[45] General Orders of the Ninth Circuit, August 14, 1979 edition, at Ch. 3, sec. (c).

[46] Rule 12(1) of the Third Circuit continues to state:

> "The clerk shall maintain, under the direction of the court, a calendar of all cases undisposed of on the docket. The cases shall be placed on the calendar in three groups, as follows: Group A, all criminal cases; Group B, all civil cases which are given preference by statute or rule; and Group C, all other cases. The cases shall be arranged in each group in the chronological order of their docketing." Despite this language, as noted below, the current docket of the court has limited the impact of priority provisions.

[47] 7th Cir. Int. R. 3.

[48] For example, Rule 5(b) of the Eighth Circuit's rules provide: "The court may, on its own motion, or for good cause shown on motion of either party, advance any case to be heard at any session, though the time permitted under the rules for filing briefs may not have expired at the date set for hearing."

[49] The Federal Judicial Center's study states:

> "The United States Code contains no general rule for ordering priority litigation; there are no priorities among the priorities established by the Code. Nevertheless, different degrees of urgency are expressed in the language of the various provisions, and categories can thus be developed. Further, the subjects or case types can be grouped into useful categories. A combination of these two methods is employed for the purposes of this document."

[50] To be heard, a case must be fully briefed. Requests for extensions, and other variations from the briefing schedule of the Federal Rules, affects the progress of priority and non-priority cases.

[51] 7 U.S.C. § 191, *et seq.* Sec. 194(d) provides: "The proceedings in such cases in the court of appeals shall be made a preferred cause and shall be expedited in every way."

[52] 7 U.S.C. § 1551. Secs. 1600 and 1601 contain the same language as 7 U.S.C. § 194(d). *supra*, note 51

[53] An increasing trend among the circuits is to summarily determine appeals without oral argument. *See generally*, Reynolds & Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Court of Appeals*, 78 Colum. L. Rev. 1167 (1978); Haworth, *Screening and Summary Procedures in the United States Court of Appeals*, 1973 Wash. U. L. Q. 257.

[54] *Circuit Court Caseload Rises; Calendar Clear*, N.Y.L.J., July 10, 1980 at 1, col. 4. In the most recent year, the Second Circuit operated with one vacancy for the entire statistical year, and another vacancy for one-fourth of the year; combined with a sharp increase in filings, this shortage of judge power created the first backlog—albeit quite minor—in many years. *See Circuit Court Reports Sharp Rise in Caseload*, N.Y.L.J. July 10, 1981 at 1, col. 4 (reporting that in the year ended June 30, 1981, the Second Circuit experienced an excess of filings over terminations for the first time in eight years).

[55] 1980 Annual Report, *supra* note 12.

[56] For the statistical year ending June 30, 1980, the median time for civil cases from filing last brief to hearing or submission ranged from .6 months in the Second Circuit to 15.7 months in the Sixth Circuit. In tabular form, the median time intervals for the circuits were as follows:

MEDIAN TIME INTERVALS IN CIVIL CASES TERMINATED AFTER HEARING OR SUBMISSION, JULY 1, 1979-JUNE 30, 1980

CIRCUIT	CASES	FROM FILING OF COMPLETE RECORD TO FINAL DISPOSITION INTERVAL (MONTHS)	FROM FILING OF COMPLETE RECORD TO FILING LAST BRIEF INTERVAL (MONTHS)	FROM FILING LAST BRIEF TO HEARING OR SUBMISSION INTERVAL (MONTHS)	FROM HEARING OR SUBMISSION TO FINAL DISPOSITION INTERVAL (MONTHS)	FROM FILING NOTICE OF APPEAL TO FILLING COMPLETE RECORD INTERVAL (MONTHS)	FROM FILING NOTICE OF APPEAL TO FINAL DISPOSITION INTERVAL (MONTHS)
Total	6,829	9.6	2.8	3.6	1.5	1.4	11.6
District of Columbia	245	12.5	4.8	4.6	1.8	1.3	14.0
First	254	5.7	2.3	.7	1.9	1.2	7.2
Second	651	4.5	2.3	.6	.5	1.2	5.8
Third	556	7.9	3.1	3.4	.3	1.3	9.6
Fourth	610	9.8	2.4	4.0	1.8	1.5	12.1
Fifth	1,545	11.0	2.9	3.8	2.0	1.4	13.2
Sixth	801	20.6	2.9	15.7	.5	1.8	23.0
Seventh	508	8.8	3.0	2.3	1.7	.8	10.2
Eighth	420	5.2	1.2	2.2	1.3	2.0	7.8
Ninth	676	24.4	4.4	14.6	2.4	2.2	26.9
Tenth	563	11.4	2.4	6.5	1.6	1.4	12.6

Source: 1980 Annual Report, *supra* note 12.

[57] *See generally*, Oberman, *Commentary—Coping with Rising Caseload:* A New Model of Appellate Review, 46 Brooklyn L. Rev. 841 (1980).

[58] Pub. L. No. 95-486 § 3, 92 Stat. 1632 (codified at 28 U.S.C. § 44(a)(1976)).

[59] For example, under section 701 of the Railroad Transportation Policy Act of 1980, 45 U.S.C. § 1018(b), appeals challenging the constitutionality of certain provisions must be heard *en banc* by the Seventh Circuit and decided within 60 days of the date of the last notice of appeal. In a letter to Senator Warren G. Magnuson, dated November 3, 1980, Collins T. Fitzpatrick, Circuit Executive of the Seventh Circuit, reported that the Court had two such cases. He wrote:

> "The requirements create several problems. The first problem is caused by the limitation of time. The court has been forced to severely shorten the briefing schedule in the two appeals so that there will be adequate time for the court to review the briefs, hear oral argument, decide the case, and write a decision. All of this must be accomplished within 60 days of the filing of the notice of appeal. (The court is fortunate that counsel advised the court of these statutory procedures, otherwise some of the 60 days might have run before the court was aware of the time limitation.) Criminal appeals and other important civil appeals must be set aside so these appeals can be decided.
>
> "Another problem is created by the requirement that the court hear the appeal *en banc*. Less time is available to counsel for preparing briefs as it is much harder to find a date on which the court is not already scheduled to sit and on which all eight judges are planning to be at the courthouse. In this instance it meant an earlier hearing date than would have been necessary. This scheduling problem is unique to *en banc* hearings and rehearings since it is rare that the court cannot assemble a panel of three judges for an emergency hearing.
>
> "A third problem is that there is a substantial amount of judicial resources used since each of the eight active judges must read the briefs, research the issues, liten to oral argument, and help decide the case. Each will utilize one or more law clerks to work on the case. This is a substantial investment of judicial resources over that of three judges and their law clerks. Each year only about five cases are reheard *en banc* by this court. In addition to deciding some cases without oral argument and performing other judicial duties, each Seventh Circuit judge now hears oral argument in about 200 appeals. If the court sat *en banc* rather than in panels of three, the Seventh Circuit would only decide 200 appeals. Instead, panels of three judges are utilized so that more cases can be argued and decided. If a majority of all the judges disagree with the decision of the panel, the case can be decided *en banc*. But as noted above, few cases require *en banc* consideration. . . .
>
> "My concern is not with the Transportation Policy Act of 1980 and the two appeals generated, but with the process by which it was adopted. I fear that the *en banc* language with a 60 day time limit may be included in other statutes. Such language may lessen the quality of justice. At the minimum it seriously disrupts the judicial process by requiring additional judicial appellate resources and by severely limiting the ability of the court to manage its own affairs.
>
> "Although, these two particular appeals will be handled without any major problems. It would be helpful if there was prior consultation with the judiciary on the effect such proposals have prior to their passage."

[60] *See* note 17, *supra*.

[61] *See* note 35, *supra*.

[62] *See* notes 17 and 18, *supra*, and accompanying text.

[63] A third possible approach would be for Congress—preferably the Judiciary Committees—to undertake an exhaustive reconsideration of each separate priority

provision on its merits, with a view to eliminating some and rationalizing the remainder, but otherwise leaving them alone. That approach was not seriously considered by our Committee.

[64] That could also be achieved if the Senate and the House of Representatives were to establish by rule a requirement that any bill containing an expediting provision be referred exclusively, or at least concurrently or successively, to its respective Judiciary Committee.

[65] *See* text at notes 13-32, *supra*.

[66] A minority of our Committee suggests that the single priority statute which we recommend contain *only* these neutral principles, stated in general terms, and should not attempt, in advance, to define the cases that will be expedited. This position falls roughly mid-way between the ABA proposal and ours.

[67] Including the priorities in a centralized statute is likely to increase their impact; there would be a greater awareness of the available preferences, and a greater likelihood they could be cited.

[68] The revised statute might incorporate the language used in the Freedom of Information Act expediting provision, 5 U.S.C. § 552: "Except as to cases the court considers of greater importance. . . ."

[69] Chapter 153 sets forth the procedures for *habeas corpus* petitions; section 1826 is the recalcitrant witness statute.

Mr. KASTENMEIER. Thank you, Mr. Oberman.

Would you briefly restate your position with respect to civil priorities in terms of which priorities you would retain, because you have indicated you are not for wholesale repeal of all these priorities but only some priorities.

Mr. OBERMAN. We have not gone one-by-one through the list of the priorities, which I gather now number 80, to see on the substantive level which merit retention. The basic thrust of our report, as opposed to the prior statements, is that we believe that if through proper review and consideration Congress determines that a particular measure warrants expedition, then that should be permitted and recognized as part of the system. I think that certainly applies on a forward-looking basis, if a procedure is accomplished so that bills would come before this committee before priorities are enacted.

We did not say that all of the present priorities should be eliminated, because we concluded that necessarily at least some of them must have reflected a valid congressional determination that some measures should be expedited, and without doing substantial research into the legislative history of each enactment, we did not want to say all of them were ill-conceived.

I do note we did attempt to see if there is any legislative history for the particular priorities and found none.

Mr. KASTENMEIER. Within your own association, do you find that those members who are aware of the issue, that there were some among those members that desired the association to take a position to retain priorities in certain classes of cases?

Mr. OBERMAN. Not on the specific level as to classes of cases.

There was a minority view expressed that the priority statute which we are discussing here today should contain a generalized guideline to the courts.

For example, if a challenge is made to the constitutionality of a statute enacted within the past 3 years, that challenge should be expedited so that people would know if the statute is a valid one.

But there was no particular recommendation to maintain any one of the existing priorities.

Mr. KASTENMEIER. Do you think, if any substantial number of the priorities are repealed, in terms of caseload or weighted caseload, what guidance should the Congress give the several circuits in terms of their own rules with respect to priorities, other than the first-filed-first-heard type of rule?

Mr. OBERMAN. Expedition breaks out, I think, into two elements, which comes through the present structure—first, expedition with respect to calendaring and, second, expedition with respect to determination. There are a number of statutes that not only say this case has to be put on the docket ahead of turn, but it has to be decided expeditiously and in a few cases within x number of days.

I would think the latter aspect should be shied away from. Once the case is before a judge or a panel of judges and the nature of the emergency or the nature of the merits is before that judge or those judges, the court should be permitted to make a determination based on what it views as a time limit in appropriate fashion.

With respect to hearing cases and then reaching a stage of determination, I think the guidance should be on the level of the court of appeals. Once the case is briefed, it should be put on the calendar as soon as possible, if it's a priority case.

Now, at the present time, part of the problem relates to the burden of identifying the cases. Lawyers don't know to ask for priority consideration and there is no centralized list to make the determination: only about four circuits are now making any effort at all to implement this scheme. Those that are divided between those that are current—where it makes no difference at all, and all cases are being put on the docket when they are fully briefed—and a few courts where it does make a difference, and you can be heard either in a matter of weeks or in some cases months.

Mr. KASTENMEIER. Do you agree with that observation?

Mr. ZELENKO. Mr. Chairman, I do agree.

I think it might be useful to mention that when we proposed a bill such as the bill before us today, our committee canvassed the individual circuit courts. All but one responded. All that responded were supportive of a bill that would abolish the priorities. And three circuits, the sixth, the seventh, and the District of Columbia, actually adopted a resolution to the Judicial Councils in 1977 endorsing the recommendation.

I think the discussion we have been listening to, and the Association of the Bar of the City of New York's report, which is a superb report, Mr. Chairman—I trust it will be part of the record of the hearing—shows that in the present context it is impossible to manage a priority system as Congress has created it over the years. And to delay the abolition of priorities pending a determination as to which cases go first, I think really forecloses the possibility of legislation in the short term.

There is no indication—first, let's say that the bill does preserve habeas and recalcitrant witness cases and gives that priority. Cases that involve the liberty of an individual are getting recognition as priority matters. You already have the Speedy Trial Act in the criminal area.

Now we are dealing with the civil side. It is almost beyond the capacity of anyone in this room to come up with a priority list. We each have our own priorities. The courts really should be interested with the management of their calendar, and in the exceptional case, where there are circumstances that warrant special treatment, there are provisions in the Federal rules today that entitle the clerk and the courts to deal with those matters. I don't think anything further at this time is necessary.

Mr. OBERMAN. May I add one thought to that?

Mr. KASTENMEIER. I would appreciate it.

Mr. OBERMAN. Lest our position be misunderstood, we are not saying that we would hold back remedial legislation for this case-by-case determination. We expressed as a policy notion the view that Congress, if it makes a determination that certain causes or types of relief warrant expedition, should so provide.

It could be that in step 1 a priority section is moved into the Judicial Code and a statement is made concerning the impact or the desirability of proceeding with a certain priority, but that no specific substantive enactments be included at this time.

Second, with respect to the guidance to the court, I would hope that if there is an accompanying report that describes whatever expedition is anticipated, that the calendaring objectives that the courts now apply be recognized as legitimate. The courts, for example, try to balance workload among panels, deal with the disqualification statute, try to vary case type. All of those make for an equitable distribution of work among judges, and I don't think that even if the habeas and the recalcitrant witness are the only priorities that are maintained, that they should necessarily be viewed as overriding all other kinds of considerations in the operations of the courts.

Mr. KASTENMEIER. I would like to yield to my colleague, but before I do, I think you can answer this very briefly.

Within your own associations, do you know of any lawyers who are concerned about repealing the mandatory appellate jurisdiction of the Supreme Court by virtue of the type of cases perhaps they handle, or for any other reasons?

Mr. OBERMAN. While we have not taken a formal position, I am aware of no such opposition.

Mr. ZELENKO. I am not either, Mr. Chairman.

I was looking to see when our report was adopted. It passed the midyear meeting in 1979. As you know, what held this bill up, which came out of this committee in the last Congress, was a nongermane amendment in the Senate. We think that nongermane amendment is intolerable——

Mr. KASTENMEIER. I had almost forgotten. [Laughter.]

Mr. ZELENKO. Having said that, I don't now what we can do about it. We place our trust in this committee.

But I don't recall, at the time this proposal was discussed, that any member of the association had reservations because of cases that they had presented to the Supreme Court that fell within the mandatory jurisdiction of the Court. There was no expression of reservation.

Mr. KASTENMEIER. That's interesting. Thank you.

I yield to the gentleman from Illinois.

Mr. RAILSBACK. Thank you, Mr. Chairman.

I want to thank both of you for what I think were very thoughtful statements. I would like to ask, does the Court, under existing rules, have sufficient latitude and do attorneys have the right and do they exercise the right to move for an expedited hearing under certain civil cases that they believe require an expedited hearing?

Mr. ZELENKO. The rules are different from circuit to circuit. I think the circuits that are trying to enforce the priority system ask the filing attorney to specify in his papers whether he believes his case has a priority, and if so, to state what that priority and what he obviously seeks to accomplish with it.

Mr. RAILSBACK. I am assuming now that there is no statutory priority, or in the future that we abolish these civil priorities. I guess what I am wondering is, if in a particular case the lawyer believes that by reason of a particular or peculiar circumstance he should be given expedited consideration, that the court, under the existing rules, aside from the statutory priorities, would have a right to give, as you mentioned, calendaring and determination. It occurs to me that the court clearly would have the discretion in the second case to decide a case in an expedited way. We know they have that right.

I guess what I am wondering is, if in the first case as to calendaring a court does have that latitude under existing rules and practice.

Mr. OBERMAN. Some of the courts have provided, by specific rule or provision, that for good cause shown a litigant may be advanced on the calendar. I think in any circuit, for the right circumstances, you can get the court's attention. The priorities that we are discussing can interfere if they are being scrupulously followed. When the caseload was high, as it was in the fifth and ninth circuits and the courts were trying with great dedication to enforce these priority provisions, for a while they were hearing only priority cases and without violating the statute they could not do what you are suggesting. But in normal times you can get moved along, but it is rare that that will happen.

Mr. ZELENKO. Your bill provides, the last phrase of the new section in title 28, it provides "or any other action if good cause therefore be shown." So you give the discretion to the court upon a showing——

Mr. RAILSBACK. You know, I was really asking about under the existing rules and law.

Let me ask you this: In your judgment, you and your colleagues would not take issue if the Judiciary Committee decided that it would be a wise policy decision to actually abolish all civil priorities?

Mr. OBERMAN. No, we would not.

Mr. RAILSBACK. In other words, my question is kind of a follow-up to the chairman's question, where he asked you to kind of enumerate those that you think should be given a priority. But I take it that, putting it a different way, that you don't know of any concern that might be expressed by your colleagues if we decide as a policy matter we don't want any civil priorities?

Mr. OBERMAN. No, sir. From our point of view, we were showing a philosophical deference to the power of Congress. If in its own de-

termination, it decides that certain matters or certain causes, or certain requests for relief need be expedited, then that can be accomplished.

Just like, for example, the Speedy Trial Act. It reflected the congressional determination that criminal cases should be moved along. If in the civil area some issue or, the review of the constitutionality of an act, for example, merits expedition and Congress so concludes, we have no objection to that being included in a rational scheme.

Mr. RAILSBACK. I want to just thank both of you and express my opinion that your bar association does do an excellent job and a very scholarly job in the presentations that you have been kind enough to appear before us. I think they have done a very scholarly job and we appreciate it.

Mr. OBERMAN. I thank you on behalf of my colleagues, and I would be glad to bring home that compliment.

Mr. KASTENMEIER. I would like to echo those sentiments.

I yield to the gentleman from Michigan.

Mr. SAWYER. I have just an observation, Mr. Chairman.

I practiced quite extensively in the Federal courts and I never even knew there was a system of priorities other than the TRO's and that kind of thing. I never heard lawyers, at least in our part of the country, ever even discussing it. Now, maybe in other parts of the country they do. But it came as news to me that there was this whole scheme of priorities.

Usually, if there is something about a case that had some special urgency about it, we would just contact the judge and the other lawyer and go over and try to talk the judge into giving us an early hearing. If we had a good reason, I don't think he ever doubted that he had the authority to do that. But I never knew there was any fixed priority.

Mr. ZELENKO. I ought to say this, Congressman, that when we proposed this to the ABA, our recommendation was the abolition of priorities in the courts of appeal. We were mainly concerned with the appellate side.

When Mr. Kastenmeier asked me earlier if I knew of any reservations expressed, I would say that at that time it was amended by the bar to include the district courts as well. So, if anything, the attitude of the organized bar, the ABA, has been to a complete abolition of civil priorities. It seems to be the best way to gain access.

Mr. KASTENMEIER. If the gentleman will yield on that point, that is why I raised the point with Mr. Oberman. I think it is almost impossible for us at this point in history to make a determination of one-third or half of these are entitled to it and the other half or two-thirds are not. We get into a terrible policy fight if we try to look at each substantively in terms of merit.

I would hope to avoid that, but maybe we cannot.

Mr. RAILSBACK. The simplest thing would be to start over if you have to, I would think, and start from scratch almost.

Mr. SAWYER. What also impressed me, the priority is kind of inherent in the particular fact situation as opposed to a classification of the case. I would think some, just by what is involved, are more urgent, even though it may be the same type of case as another

that wouldn't have the same fact situation. I would think it would be hard to separate them out by categories.

Mr. ZELENKO. Exactly.

Mr. KASTENMEIER. Of course, there are other ways of approaching the same question, including bringing judicial manpower and caseloads into balance, or, for example, getting rid of diversity jurisdiction and other burdens on the Federal system that—[Laughter.]

Mr. OBERMAN. I should have brought along an extra copy of our diversity report, Mr. Chairman. [Laughter.]

Mr. KASTENMEIER. The subcommittee is indebted to you both and to your organizations for the testimony that you have presented this morning. We will doubtless see more of you, if not with respect to these set of issues, other similar ones.

Thank you.

Mr. OBERMAN. Thank you very much.

Mr. ZELENKO. Thank you, Mr. Chairman.

Mr. KASTENMEIER. Our last witness today is Timothy J. Finn, Deputy Assistant Attorney General, Office of Legal Policy, U.S. Department of Justice.

Mr. Finn, we are happy to have you here today to present the views of the administration on these several bills. We have received your written statement and, without objection, it will become a part of the hearing record.

You may proceed as you wish. Perhaps it would be useful to summarize the points made in the discussion, however you desire to proceed.

TESTIMONY OF TIMOTHY J. FINN, DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL POLICY, U.S. DEPARTMENT OF JUSTICE

Mr. FINN. Thank you very much, Mr. Chairman. I will summarize my written statement which I have submitted for the record.

I am very pleased to appear before this subcommittee today to express the administration's strong support for the three bills under consideration this morning.

The first and perhaps most important of these, in our view, is H.R. 2406, which would generally convert the Supreme Court's mandatory appellate jurisdiction to jurisdiction for discretionary review by certiorari. The administration and the Department of Justice have repeatedly endorsed this reform. We believe it would effect a substantial improvement in the administration of justice in the Federal courts.

Mr. Chairman, I don't think I need to repeat at length the arguments in favor of this proposal which have been so excellently articulated earlier by Judge Hunter. As we have heard, the Supreme Court is currently required to devote a large portion of its time to deciding cases of no special importance because they qualify for review by appeal under existing statutes. There is widespread agreement that the categories specified in the appeal statutes do not draw a meaningful line between cases of general importance which deserve the Supreme Court's attention and routine cases which do not. The burden of mandatory appeals obviously limits

the ability of the Court to hear other certiorari cases whose consideration may be of greater importance.

I would also like to echo the concern expressed by Judge Hunter that the current system of mandatory appellate review is a source of confusion in the law. The Court is obligated by the size of its caseload to dispose of most appeals summarily. These summary dispositions are decisions on the merits to which the lower courts must give precedential effect. However, as the Justices themselves have noted, such summary dispositions often are uncertain guides to the courts bound to follow them and not infrequently create more confusion than clarity. The general elimination of review by appeal proposed by this bill would resolve this problem.

The current system also interferes with the Court's ability to pass on issues at a time and in a context most conducive to the sound development of Federal law. For example, the Court's ability to reach a sound decision with respect to a significant question may be enhanced by first allowing several lower courts to examine the issue and to render decisions on it. The broad rules of mandatory review tend to deprive the Court of control over the selection of cases for purposes of resolving such important questions.

For these reasons, the administration and the Department of Justice strongly support H.R. 2406 and urge its speedy enactment.

The second bill before us today is H.R. 4396, to generally eliminate civil priorities. The bill would substitute the requirement that cases be expedited if good cause therefore is shown.

We strongly agree with the purpose and the approach taken by this bill. Over the years, Congress has enacted a large number of priority provisions employing widely varying terms in a haphazard and uncoordinated manner. Most of these provisions are overly broad, according priority in many instances to cases which present no special need for expedition. They also provide the courts with no guidance in resolving conflicting priorities under different provisions, though the proliferation of priority provisions assures that such conflicts will frequently arise. We agree that the courts are, in general, in the best position to determine the need for expedition in particular cases to weigh the relative needs of various cases and to establish an order of hearing that treats litigants most fairly.

I would like to note two reservations concerning this proposal. First, we have not yet completed our own review of the large number of affected statutes, and we may be able to identify other priority provisions besides those two listed in your bill which are consistent with the basic purpose of the bill and are not overly broad and can be maintained without burdening the courts. We do recognize, however, that any exceptions should apply only to very limited and well-defined categories of cases for which expedition is almost always required. We believe that all but the most clearly justified priorities should be revoked and, frankly, we have some doubts that our own review will reveal any others besides those already named in the legislation that should not be revoked.

I would also like to note that we don't believe that it is necessary to provide, as the bill does, for expedition of any action for temporary or permanent injunctive relief. While it is clearly desirable to retain existing rules of expedition applicable to certain injunctions

under the Federal Rules of Civil Procedure, and to require that injunctive actions be expedited if good cause therefore is shown, as drafted, however, we believe the bill is overbroad. This broad priority for any injunctive action would be subject to manipulation, providing litigants with an incentive to include a claim for injunctive relief simply to obtain expedited consideration. Certainly not all cases in which an injunction can be plausibly claimed have a special need for expedited treatment.

In sum, we are in strong agreement with the approach of H.R. 4396. We believe that this is an important and very worthwhile bill and we would like to work further with the subcommittee in refining this proposal.

The third bill is H.R. 4395, which would make three amendments to the United States Code relating to jurors and jury service. First, it would extend workmen's compensation coverage to jurors. Jury duty is, of course, an important service to the Federal Government, and it is desirable to assure that it will not result in excessive financial burdens. Providing this additional protection against loss due to injury while on jury duty, however unlikely and infrequent such injury may be, in our view is a fair and, we think, inexpensive measure.

Second, the bill would allow attorneys' fees to be awarded against an employer charged with violating an employee's employment rights as a juror in cases in which the employee has a court-appointed attorney. The current law creates a cause of action in favor of an employee whose employment rights are violated and it also provides court appointment of counsel in such cases and authorizes award of attorneys' fees if the employee has retained counsel of his own. It is certainly incongruous that an attorney retained by the employee can have his fees reimbursed by the defendant employer, when in an identical case involving court-appointed counsel, the Government is left paying the fee. H.R. 4395 would eliminate this discrepancy.

Finally, this bill would allow service of jury summonses by regular first class mail, and this approach is desirable for obvious reasons of cost and efficiency. In sum, the reforms proposed in this bill seem, to us, sensible and fair, and we support them.

I greatly appreciate the opportunity to comment on all of these bills and would be glad to answer any questions the subcommittee might have at this time.

[The statement of Mr. Finn follows:]

STATEMENT

OF

TIMOTHY J. FINN

Mr. Chairman and Members of the Committee:

I am pleased to appear before the Subcommittee on Courts, Civil Liberties and the Administration of Justice to discuss the Administration's views on the following bills:

(1) H.R. 2406, relating to the mandatory appellate jurisdiction of the Supreme Court;
(2) H.R. 4396, relating to the abolition of civil priorities, and
(3) H.R. 4395, relating to jury service.

I. H.R. 2406 -- Supreme Court Jurisdiction

H.R. 2406 would generally convert the Supreme Court's mandatory appellate jurisdiction to jurisdiction for review by certiorari, except in connection with review of decisions by

three-judge district courts. [1/] The Administration has previously stated its strong support for this proposal in a letter transmitted to the Chairman of the Judiciary Committee [2/] and in testimony concerning the substantially identical Senate bill, S. 1531. [3/]

If enacted, this proposal would be part of a long, historical process of converting the appellate jurisdiction of the Supreme Court from being totally obligatory to being almost wholly discretionary. The first major effort by Congress to limit the burden of the obligatory functions of the Court was the

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1/ In addition to retaining appeals from three-judge district courts, the bill does not amend 45 U.S.C. § 743(d), which authorizes direct appeal to the Supreme Court of certain determinations of the special railroad reorganization court.

Three new mandatory appeal provisions have also been enacted since the drafting of the original version of the bill: 45 U.S.C. § 1105(b) (appeal of railroad reorganization court decisions enjoining or invalidating provisions of chapter relating to solvency of Conrail); 7 U.S.C. § 136w(a)(4)(E)(ii) (appeal of determinations concerning constitutionality of legislative veto provisions under Federal Insecticide, Fungicide and Rodenticide Act); 16 U.S.C. § 1463a(e)(2) (appeal of determinations concerning constitutionality of legislative veto provisions under Coastal Zone Management Act).

2/ Letter of Assistant Attorney General Robert A. McConnell Concerning H.R. 2406 to Honorable Peter W. Rodino, Jr., Chairman, House Comm. on the Judiciary (Dec. 4, 1981).

3/ Statement of Assistant Attorney General Jonathan Rose Concerning S. 1529, S. 1531 and S. 1532 Before the Subcomm. on Courts of the Senate Comm. on the Judiciary (Nov. 16, 1981).

Circuit Courts of Appeals Act of 1890. 4/ This legislation not only created a new level of courts, but also introduced the concept of discretionary review by certiorari. The burden on the Supreme Court was temporarily improved, but by 1925, long delays in the Court's docket led Chief Justice Taft to urge Congress to enact the Judiciary Act of 1925 5/, which greatly expanded certiorari jurisdiction. In the 1970's Congress further limited the Court's obligatory jurisdiction. 6/

The Department of Justice believes that the changes incorporated in this legislation are long overdue, and will bring about a substantial improvement in the administration of justice in the federal courts. Justice Frankfurter elucidated the reasons that make curtailment of the mandatory appellate jurisdiction of the Supreme Court desirable:

4/ 26 Stat. 826 (1891).

5/ 43 Stat. 936 (1925).

6/ Legislation adopted in the 1970's that reduced the Supreme Court's mandatory jurisdiction includes: revisions in 1970 to the Criminal Appeals Act, 18 U.S.C. § 3731 (eliminating direct appeals by the United States from certain types of district court criminal decisions); the Antitrust Procedures and Penalties Act, 88 Stat. 1706 (1974) (eliminating direct appeals in cases under the antitrust laws and the Interstate Commerce Act authorized by the Expediting Act of 1903); and the repeal of 28 U.S.C. §§ 2281 and 2282, which required the convocation of three-judge district courts to hear and determine injunctive challenges to the constitutional validity of State or Federal statutes, 90 Stat. 1119 (1976).

> To resolve conflicts among coordinate appellate tribunals and to determine matters of national concern are the essential functions of the Supreme Court. But such issues appear in myriad forms and no general classification of cases can hope to forecast the specific instances deserving the Court's ultimate judgment. . . . In marking the boundaries of the Court's jurisdiction its broad categories must be supplemented by ample discretion, permitting review by the Supreme Court in the individual case which reveals a claim fit for decision by the tribunal of last resort. 7/

Chief Justice Burger has endorsed these views in stating that, "all mandatory jurisdiction of the Supreme Court that can be, should be eliminated by statute." 8/ The Justices have written that they "have spoken out publicly on the issue . . . stating essentially the view that the Court's mandatory jurisdiction should be severely limited or eliminated altogether." 9/

The essential defect of the current system is that the Supreme Court is required to devote a large portion of its time to deciding cases of no special importance because they qualify for review by appeal under the current statutes. In the 1980

7/ Frankfurter and Landis, The Business of the Supreme Court 257-58 (1928).

8/ Remarks of Chief Justice Burger at American Law Institute meeting, May 20, 1975, cited in S. Rep. No. 985, 95th Cong., 2d Sess. 2 (1978).

9/ See Letter from the Justices to Senator DeConcini (June 22, 1978), reprinted in Appendix I, S. Rep. No. 35, 96th Cong., 1st Sess. 15-16 (1979); see also prefatory statements on behalf of the Court of Justice Stevens regarding First Federal Savings and Loan Ass'n of Boston v. Tax Comm'n of Massachusetts, 437 U.S. 255 (1978), and Moorman Manufacturing Co. v. Bair, 437 U.S. 267 (1978), reprinted in S. Rep. No. 35, 96th Cong., 1st Sess. 17 (1979).

term, for example, appeals accounted for about one-quarter of the cases set for oral argument and plenary consideration. Such cases frequently raise no question of general interest and would not warrant the grant of a writ of certiorari.

The current system of mandatory appellate review is also the source of unnecessary confusion in the law. The Court is required to review hundreds of such appeals on the merits, disposing of many in a summary fashion. As the Justices themselves have noted, such summary dispositions "often are uncertain guides to the courts bound to follow them and not infrequently create more confusion than clarity." 10/ The proposed legislation would eliminate the problem of determining the precedential effect of summary dispositions of obligatory cases.

More importantly, the current system should be changed because it interferes with the resolution of recurrent legal questions of public importance. Mandatory appellate review interferes with the Court's ability to pass on issues at a time and in a context most conducive to the sound development of federal law. The Court should not be required to afford review where, for example, the record in a case presenting an important legal question is unclear or the Court's ability to reach a sound decision with respect to a complex and significant issue may be

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10/ Letter from the Justices to Senator DeConcini, cited in note 9 supra.

enhanced by examination of subsequent decisions of several lower courts. 11/ Moreover, the categories defined by the existing appeal provisions encompass large numbers of cases which are not of sufficient importance to merit Supreme Court review. This point may be appreciated more fully in the context of the principal jurisdictional provisions that would be affected by H.R. 2406: 28 U.S.C. Sections 1257(1)-(2), 1254(2), and 1252.

Section 1257(1) authorizes review by appeal of a decision of the highest state court in which a decision could be had where a federal law is found invalid. Section 1257(2) provides similarly for review of decisions by the highest state court where the validity of "a statute of any state" is challenged on federal grounds and upheld.

The purpose of authorizing appeal in such cases is apparently to assure that the supremacy and uniformity of federal law will be upheld. However, there is no reason to believe that the Supreme Court would fail to carry out this responsibility if given discretion to decide which cases should be reviewed in order to vindicate federal interests. In addition, this provision implies that the state courts cannot be relied on to reach the proper result in such cases. As a federal courts study

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11/ See Colorado Springs Amusements, Ltd. v. Rizzo, 428 U.S. 913, 918 (1976) (Brennan, J., dissenting from denial of certiorari); Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 918 (1950) (opinion of Frankfurter, J., concerning denial of certiorari).

Committee chaired by former Solicitor General Robert H. Bork stated in 1977, "This residue of implicit distrust has no place in our federal system." 12/

Section 1257 does not restrict appeal to cases of general or unusual significance. The term "statute of any state," as used in Section 1257(2), is not confined to laws of statewide applicability, but includes municipal ordinances 13/ and all administrative rules and orders of a "legislative" character. 14/ Moreover, Dahnke-Walker Milling Co. v. Bondurant 15/ held that the challenge rejected by the state court need not be to the general validity of a state law. Appeal to the Supreme Court may be taken even if the application of the state law was barred on federal grounds only in the particular facts of an individual case. Hence, the availability of appeal may depend simply on an attorney's description of the outcome of a case as a rejection of a challenge to the validity of a state law as applied, rather than on any real difference

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12/ Department of Justice Committee on Revision of the Federal Judicial System, The Needs of the Federal Courts 13 (January 1977).

13/ See, e.g., Coates v. City of Cincinnati, 402 U.S. 611 (1971); Jamison v. Texas, 318 U.S. 413 (1943).

14/ See, e.g., Lathrop v. Donohue, 367 U.S. 820, 824-27 (1961).

15/ 257 U.S. 282 (1921).

between the case presented and those falling under the Supreme Court's certiorari jurisdiction described in Section 1257(3). 16/

Section 1254(2) authorizes appeal by a party relying on a state statute held by a federal court of appeals to be invalid on federal grounds. The category specified in this provision also does not define a class of cases which are always of special importance. As is the case for Section 1257, a "statute" under this provision includes municipal ordinances 17/ and administrative orders. 18/ It suffices if a state law is held to be invalid as applied under the facts of a particular case. 19/

Section 1252 provides for direct appeal to the Supreme Court of decisions of lower federal courts holding acts of Congress unconstitutional in proceedings in which the United States or its agencies, officers, or employees are parties. Ordinarily, lower federal court decisions invalidating acts of Congress present issues of great public importance warranting Supreme Court review. There is, however, no reason to believe that the Supreme Court would frequently refuse to grant a discretionary writ of certiorari in such a case. It should also be

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16/ See Hart & Wechsler, The Federal Courts and the Federal System 631-40 (2d ed. 1973).

17/ See City of New Orleans v. Dukes, 427 U.S. 297, 301 (1976).

18/ See Public Service Comm'n v. Batesville Telephone Co., 284 U.S. 6 (1931).

19/ See Dutton v. Evans, 400 U.S. 74, 76 n.6 (1970).

noted that in cases in which expedited consideration by the Supreme Court is required, it is possible for the litigants to apply to the Supreme Court for a writ of certiorari before final judgment in the court of appeals, as the government did in United States v. Nixon. 20/

We do not believe that alternative broad rules of mandatory review can be devised that will assure consideration of important cases in a principled and consistent way, and still avoid the problems arising under the current system. If the discretionary review contemplated by this bill proves in practice to be unsatisfactory in particular areas, Congress can restore more carefully defined areas of appellate review to the Supreme Court's jurisdiction.

The proposed measure will entail no additional government costs or expenditures and will permit the Supreme Court to utilize its current resources in a more rational manner. For the foregoing reasons, the Department of Justice supports H.R. 2406, and urges its speedy enactment.

II. H.R. 4396 -- A Bill to Eliminate Statutory Priorities for Civil Cases

H.R. 4396 eliminates over 50 different provisions scattered throughout the United States Code which require that

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20/ 418 U.S. 683 (1974).

particular classes of civil cases be given priority by the courts over other cases. In lieu of these provisions, the bill requires the courts to expedite the consideration of any action "if good cause therefor is shown." The bill also requires expedition of "any action for temporary or permanent injunctive relief" and explicitly retains the expedition requirement for habeas corpus actions and for appeals from orders confining recalcitrant grand jury witnesses under 28 U.S.C. § 1826.

This bill is an effective response to the problems of judicial administration that have been created by the proliferation of priority provisions throughout the United States Code. Congress has, through the years, enacted a large number of priority provisions in widely varying terms intended to govern actions under a bewildering array of federal statutes. Indeed, a recent survey prepared at the request of this Subcommittee by the Congressional Research Service of the Library of Congress shows that there are many priority provisions which are not even included in the long list contained in this bill. Taken together, these provisions constitute instructions to the courts that are often contradictory, frequently ineffective, and generally unnecessary.

These provisions have been enacted in a piecemeal fashion over the years with no attention to their cumulative impact on the courts and no effort to create an integrated, internally consistent set of instructions that can be effectively implemented by the courts. Thus, for instance, there are a

number of provisions which require the court to hear particular categories of cases before all others, but no indication of how conflicts between such categorical priorities are to be resolved. The sheer number of cases afforded some kind of priority assures frequent conflict among priorities, and can substantially limit the intended effect of a priority provision.

The various problems presented by civil priorities led the American Bar Association to adopt a resolution calling for the abolition of all civil priorities except habeas corpus. 21/ A particularly serious problem discussed at that time was the delay to non-priority actions caused by these provisions in courts experiencing substantial backlogs. In the late 1970's, for instance, the number of priority civil and criminal cases continually filed in the heavily backlogged Fifth Circuit were so great that for several years the court heard nothing but priority cases. This raised a real fear that non-priority cases might never be heard. Even today, in courts much less heavily backlogged, the priority cases can significantly delay the progress of non-priority cases. Thus, a report of the New York City Bar Association noted that non-priority cases in the Ninth Circuit in 1981 were, on the average, heard 6-8 months after priority cases. 22/

21/ See ABA Special Committee on Coordination of Judicial Improvements, Report of the House of Delegates (Feb. 1977).

22/ New York City Bar Association Committee on Federal Legislation, The Impact of Civil Expediting Provisions on the United States Courts of Appeals (1981).

Existing priority provisions are based on the premise that it is possible for Congress to predict in advance that expeditious resolution of one entire class of cases is more important than it is in other classes of cases. Such generalizations are, obviously, extraordinarily difficult. Most existing priority provisions define broad classes of cases in which expeditious treatment is sometimes especially important, but often is not. Though some priority provisions properly allow the court some discretion to distinguish among those cases which do or do not require expedited treatment, most priority provisions can be mechanically invoked. It is, obviously, unfair and a waste of resources to allow a case in which there is no special need for expedition -- but which falls in a broad "priority" class -- to take precedence over other cases in which the need is more compelling but no statutory priority applies. That is the frequent effect of the current law.

We believe that the approach taken by H.R. 4396 to this problem is fundamentally correct. We believe that all but the most clearly necessary and justifiable priority provisions should be revoked and replaced with a single standard which the courts can apply to all cases to determine the need for expedition. The courts are, in general, in the best position to determine the need for expedition in the circumstances of any particular case, to weigh the relative needs of various cases on their dockets, and to establish an order of hearing that treats all litigants most fairly. Litigants who can persuasively assert that there

is a special public or private interest in expeditious treatment of their case will be able to use the general expedition provision provided in H.R. 4396 to the same effect as existing priority provisions.

While we endorse the general design of this bill, I would, however, note that we have not yet been able to complete our own review of the large number of affected statutes to assure that there are no other specific exceptions which can be clearly justified in addition to those two that are identified in the bill. Though we are not prepared to offer any at this time, there may be some additional priorities provisions which are not inconsistent with the basic purpose of this bill, are not over-broad, and can be usefully maintained without burdening the courts. We recognize, however, that any exceptions to the general rule should apply only to very limited and well-defined categories of cases, for which expedition is almost invariably required.

We would also like to note one additional concern with this bill. As it is presently drafted, the bill would require the court to expedite "any action for temporary or permanent injunctive relief." It is clearly desirable to retain existing rules of expedition applicable to certain injunctions under the Federal Rules of Civil Procedure and to require that injunctive actions be expedited "if good cause therefor is shown." As drafted, however, we believe that the bill is over-broad. This

broad priority for any injunctive action would be subject to manipulation, providing litigants with an incentive to include a claim for injunctive relief simply to obtain expedited consideration. Certainly not all cases in which an injunction can be plausibly claimed have a special need for expedited treatment.

On balance, we believe, however, that H.R. 4396 represents an important and needed reform to the existing law of civil priorities. We look forward to working with the Subcommittee in refining this proposal.

III. H.R. 4395 -- Juror-Related Amendments

H.R. 4395 would amend the U.S. Code provisions relating to federal jury service by: (1) extending Federal Employees' Compensation Act coverage to jurors; (2) allowing the court to tax defendant employers for the fees of court-appointed attorneys of jurors who prevail in suits to protect their employment rights; and (3) authorizing service of jury summonses by regular first class mail. These proposals were submitted to Congress by the Administrative Office of the United States Courts on behalf of the Judicial Conference of the United States. 23/

23/ Letter of May 20, 1981, from William E. Foley to Honorable Thomas P. O'Neill.

The three changes proposed by the bill share the common purposes of encouraging jury service, making it fairer, and improving the efficiency of court administration. These purposes are obviously important, and the bill's provisions seem reasonable means to those ends. We have reviewed the rationale of the Judicial Conference in recommending passage of this bill, and find it persuasive. The Judicial Conference has, of course, particular expertise in this area and has made what appears to be a thorough study of the need for these changes.

A. Compensation for Injury to Jurors

Section One of the bill would extend federal employees workmen's compensation coverage to all federal petit and grand jurors. At present, coverage extends to jurors who are already federal employees. Jury duty is an important service to the federal government, and it is, of course, desirable to assure that it will not result in excessive financial burdens. Providing this protection against loss due to injury while on jury duty -- however unlikely and infrequent such injury may be -- is an inexpensive and fair measure. Moreover, it seems incongruous that the current law does not provide this protection to private citizens serving as jurors when the protection is accorded to federal employees serving as jurors (5 U.S.C. §8101(1)(A)) and to "individual[s] rendering personal service to the United States similar to the service of a civil officer or employee of the United States, without pay or for nominal pay" (5 U.S.C. §8101(1)(B)).

B. Taxation of Juror Attorney's Fees Against Employers

A federal cause of action presently exists in favor of an employee whose employment rights are infringed by his employer on account of the employee's jury service. (28 U.S.C. §1875) It is already provided that (1) such an employee may have a court-appointed attorney, to be paid out of government funds (28 U.S.C. §1875(d)); and (2) a court may award a prevailing employee who retains his own counsel reasonable attorney's fees against a defendant employer (28 U.S.C. §1875(d)(2)).

Section Two of H.R. 4395 would provide that the attorney fees for a prevailing employee with a court-appointed attorney may also be taxed against the defendant employer by the court. It is certainly incongruous for an attorney paid directly by a prevailing employee to have his fees reimbursed by the defendant employer, when in an identical case with a court-appointed attorney, the government would be left paying the fees.

C. Jury Summonses

Section Three of the bill would allow district courts the option of serving jury summonses by regular first class mail; under current law they are limited to personal service and registered or certified mail.

The efficiency and cost arguments advanced by the Judicial Conference in favor of this proposal are obvious and persuasive. Moreover, so long as it is clear that service by regular mail would only be a first-step means to achieve voluntary compliance, and that the more formal means of summons service would be employed before any sanctions are sought against non-complying recipients, no countervailing arguments occur to us.

In sum, the Department of Justice finds the proposals of H.R. 4395 to be sensible and beneficial. We support these reforms.

I greatly appreciate the opportunity to express our support for these important bills.

Mr. KASTENMEIER. Thank you, Mr. Finn. I want to compliment you on your statement. It was concise and, I think, very supportive and constructive.

Your suggestions for possible changes or amendments or other considerations in H.R. 4396 are well taken. We will certainly want to consult with the Department and with you on the several questions you have raised.

At this point I will yield to my friend, the gentleman from Michigan.

Mr. SAWYER. I have no questions, Mr. Chairman.

Mr. KASTENMEIER. I think I have no questions, either.

One area we did not take up today is judicial survivors annuity, which is of concern to a number of members of the judiciary. It was on our list to be taken up in the future.

I would hope, given the fact that there remains effectively not less than 6 months in this Congress, that we can expedite the review of the markup of these several bills and, therefore, I would hope that the Justice Department would be agreeable to promptly working with us in terms of any changes that might be needed to 4396 and that we could move forward.

Mr. FINN. We would like to help you in any way that we can, Mr. Chairman.

Mr. KASTENMEIER. That then concludes today's hearings and we appreciate your testimony, Mr. Finn.

The subcommittee will be sitting on two different matters this week. Tomorrow our hearings will be on the Federal penal system and alien internees, and on Thursday the question of off-air taping

for home use arising out of the *Universal* v. *Sony* case, at which time we will hear Government witnesses.

Therefore, until tomorrow morning at 10 o'clock, the subcommittee stands adjourned.

[Whereupon, at 11:35 a.m., the subcommittee was adjourned.]

Additional Material

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON, D.C. 20544

WILLIAM E. FOLEY
DIRECTOR

JOSEPH F. SPANIOL, JR.
DEPUTY DIRECTOR

May 20, 1981

MAY 22 1981

Honorable Thomas P. O'Neill
Speaker, United States House
of Representatives
Washington, D. C. 20515

Dear Mr. Speaker:

On behalf of the Judicial Conference of the United States, I am transmitting for the consideration of the Congress a draft bill to improve the conditions of federal jury administration and service in three major respects: (1) by extending statutory compensation for work injuries to all persons rendering federal jury service; (2) by making a technical amendment to 28 U.S.C. § 1875(d) to clarify the payment and taxation of attorneys' fees expended on behalf of jurors who are the object of discharge, intimidation, or coercion by employers arising from their jury service; and (3) by expanding the methods of serving jury summonses under 28 U.S.C. § 1866 to include regular first class mail, as well as personal service and registered or certified mail.

Compensation for Injury to Jurors

The first section of this draft bill would provide Federal Employees' Compensation Act coverage under chapter 81 of title 5, United States Code, to all persons serving as jurors in the United States district courts and bankruptcy courts. Such coverage would thus become applicable not only to federal employees serving as federal jurors, as at present, but as well for all other persons performing jury duty in federal courts in fulfillment of a basic obligation of citizenship.

Although coverage for federal employees who are serving as jurors was provided in the Act of September 7, 1974, Public Law No. 93-416, 88 Stat. 1143, adding 5 U.S.C. § 8101(1)(F), the extension of such benefits to private citizens who are injured while serving as federal jurors was not provided in that legislation. Nevertheless, the legislative history of this law in Senate Report No. 93-1081, 93rd Congress, 2d Sess., evidenced agreement at that time with a similar resolution of the Judicial Conference adopted in March, 1974 (see 1974 U. S. Code Cong. and Admin. News 5341, 5347) with respect to private citizens on federal jury duty.

Serious problems can arise when federal jurors who do not happen to be employed by the United States Government are injured or disabled while in the performance of jury service. On several occasions prior to and since the enactment of Public Law No. 93-416, the United States Department of Labor has rejected federal jurors' claims for injury compensation on the basis that jurors were not defined as "employees" of the federal government within the meaning of 5 U.S.C. § 8101(1). Since the enactment of Public Law No. 93-416, nothing has happened to indicate any change in this administrative interpretation relating to persons, not federally employed, who are serving as jurors in the courts of the United States. The purpose of this bill is to provide remedial legislation to specify that compensation benefits shall apply to all persons injured while serving as federal jurors.

Strong policy reasons exist for bringing all federal jurors within the coverage of the Federal Employees' Compensation Act. Jurors provide a valuable service to the government. While in actual service as a petit or grand juror, the citizen-juror should rationally be accorded the benefit of protection in case of a "job-related" mishap. What begins as the fulfillment of a high duty of citizenship through public service to the government could be turned into an economic catastrophe for the juror in the event of an accident or injury while serving. Presently a person injured while serving as a juror cannot recover compensation unless he can bring his case under the Federal Tort Claims Act by proving negligence on the part of the government or its agent, a difficult burden. Moreover, this inequity is compounded by the fact that a federal employee in the same circumstances would now be covered by these compensation acts. It would also contribute to the juror's peace of mind, especially in a protracted case or in a situation where he must be transported to make a site inspection, to know that this benefit is available. This aspect of the proposal might be especially reassuring to the head of a family or to the timorous juror sitting in a sensational criminal trial. While jurors are not frequently injured, we do have a number of such instances on record.

Section one of the enclosed draft bill would add new section 8142a to chapter 81 of title 5. Proposed section 8142a(a) and (b) define the protected juror to be one who is in actual attendance at court and specify when payments can commence. Proposed section 8142a(c)(1) defines the rate of pay that a federal juror is deemed to be receiving for purposes of the compensation scheme provided in chapter 81. This subsection also takes into account the situation of the federal

employee-juror and defines his compensation to be his normal, actual rate of pay while on court leave pursuant to 5 U.S.C. §§ 5537 and 6322. Section 8142a(c)(2) limits and defines when the juror is deemed to be in the performance of duty, ensuring that claims for compensation shall not be granted except for strictly duty-related mishaps. Federal jurors would not by virtue of this legislation become actual employees of the federal government. This amendment is not to be construed to characterize jurors as employees for any other purpose than their compensation for injuries resulting from jury service. Existing section 8116(c) of title 5 would make recovery under the Federal Employees Compensation Act the exclusive remedy of the juror against the United States for such injuries.

In view of the fact that the provisions of the Federal Employees Compensation Act presently extend via 5 U.S.C. § 8101(1)(B) to "an individual rendering personal service to the United States similar to the service of a civil officer or employee of the United States, without pay or for nominal pay," it appears appropriate as a matter of fairness to offer this same financial protection to persons summoned by the United States district courts and required to perform jury service as an obligation imposed upon them by the Jury Selection and Service Act of 1968, 28 U.S.C. § 1861. Such a provision was passed by the United States Senate in the 95th Congress on April 27, 1978, as Title III of S. 2074, but this portion of the bill was not acted upon by the House of Representatives.

Taxation of Juror Attorney's Fees

Section 2 of the draft bill which I am submitting would make a technical amendment to section 1875(d) of title 28, United States Code. Section 1875 was recently added to title 28 by the Jury System Improvements Act of 1978, § 6, Public Law No. 95-572, 92 Stat. 2456.

Section 6 of the Jury System Improvements Act of 1978, enacting 28 U.S.C. § 1875, was passed by the 95th Congress after having been strongly recommended by the Judicial Conference. Its purpose was to provide statutory assurance to federal jurors that they would not be dismissed from their employment as a result of being called for jury service and that they would be protected from harassment, intimidation, or other interference by their employers with their right to serve as jurors when called upon to do so.

It is now provided by 28 U.S.C. § 1875 that an employer who violates the basic duty imposed upon him by this section shall be subject to legal action for damages, injunctive relief, and a civil penalty. The United States district courts are afforded original jurisdiction over civil actions brought for this purpose. Subsection (d) of section 1875 now provides that a juror claiming a violation of this section by his employer may apply to the district court for the appointment of an attorney to represent him in the redress of such a grievance and that the court, upon finding probable merit in such claim, shall appoint counsel for this purpose. Subsection (d)(2) further provides that, where the juror has retained his own attorney to pursue legal action against an employer instead of seeking court-appointed counsel, the court may award such an employee who ultimately prevails in the action a reasonable attorney's fee as part of the costs. This subsection in its present form fails to make provision for the taxing of attorney's fees against an employer in a situation where the juror's lawyer has been appointed by the court and compensated from government funds, as authorized by section 1875(d) to the extent provided by 18 U.S.C. § 3006A.

Subsequent to their enactment, the Judicial Conference Committee on the Operation of the Jury System had occasion to review these statutory provisions on juror employment protection in order to advise the United States district courts on problems likely to be encountered in their implementation. On the basis of this review, it is the position of the Judicial Conference that the courts should be authorized to tax juror attorney's fees against employers where the juror is proceeding by appointed counsel paid from government funds, as well as where the juror has retained an attorney at his own expense. The prospect of being taxed an attorney's fee as part of the costs under this section would be a strong deterrent against employer misconduct and violation of his employees' rights. Such a sanction should logically be available whether the juror has retained his own attorney or has been granted a court-appointed counsel. Nevertheless the prevailing view has been that the courts do not have discretion to tax attorney's fees as part of an award of costs except where there has been a specific legislative authorization to do so. Alyeska Pipeline Service Co. v. Wilderness Society et al., 421 U.S. 240 (1975).

Where an attorney's fees are being taxed against an employer in a situation in which the attorney has been compensated from government funds rather than being paid by the juror himself, this bill provides that such fees shall be taxed as costs payable to the court rather than to be awarded to the

juror. This bill further makes a minor change in the numbering of the subsections in section 1875(d) by correctly designating the first paragraph thereof as subsection (d)(1). The number (1) was inadvertently omitted from this paragraph when the Jury System Improvements Act of 1978 was enacted.

Service of Summons for Jury Service

Section 3 of the draft bill being submitted would amend the second and fourth paragraphs of 28 U.S.C. § 1866(b) with respect to the manner of serving a summons upon prospective jurors, summoning them to court for jury service. This subsection presently requires that these jury summonses shall be served personally or by registered or certified mail. In practice, such summonses are now served nearly always by mail rather than by personal service.

The Judicial Conference Committee on the Operation of the Jury System has now recommended, and the Conference has agreed, that it would improve the efficiency of federal jury selection if section 1866(b) were amended to provide added flexibility through permitting the service of such summonses by regular, first class mail as well as by the methods of service presently authorized.

In arriving at this recommendation the Jury Committee received a survey of clerks to United States district courts which indicated their substantial support for this amendment. Many of the clerks and others familiar with the day-to-day demands of jury administration believe that service of jury summonses by ordinary mail would reduce mailing costs, would lessen the clerical burden of readying such summonses for service, and would improve the delivery rate of jury summonses by avoiding the reluctance of some persons to accept and sign for a registered or certified letter.

In recommending this legislation to add regular mail as a means of serving federal jury summonses, the Judicial Conference is not necessarily urging that all district courts should adopt this practice. The draft bill preserves the discretion of the courts to continue to require service of such summonses personally or by registered or certified mail, as at present. Those courts which face a substantial problem in achieving voluntary compliance with the summons by prospective jurors will undoubtedly wish to adhere to the present practice in order to have proof of the summons' delivery in the event

that its recipient must be ordered to show cause for failure to appear under 28 U.S.C. § 1866(g). Likewise, individual jurors who fail to respond to the initial summons could, under this bill, still be served personally or by registered mail with a follow-up summons as a prelude to any order to show cause for nonappearance.

Nevertheless it appears desirable to accord enhanced discretion to the district courts to select the manner of service of their jury summonses which appears most efficient in view of local practices and circumstances. The Judicial Conference accordingly recommends the enactment of section 3 of the enclosed draft bill.

It is the view of the Judicial Conference that the adoption of this bill is an important and needed step toward improving the efficiency of jury selection and the conditions of service imposed upon federal jurors. The Administrative Office of the U. S. Courts will be pleased to provide any further information necessary to the consideration of this draft bill, and representatives of the Judiciary and of this office will be available to testify before the committee to which the bill may be referred.

Sincerely,

William E. Foley
Director

Enclosure

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON, D.C. 20544

WILLIAM E. FOLEY
DIRECTOR

JOSEPH F. SPANIOL, JR.
DEPUTY DIRECTOR

CARL H. IMLAY
GENERAL COUNSEL

July 9, 1982

David Beier, Esq.
Counsel, Subcommittee on Courts, Civil Liberties
and the Administration of Justice
House Judiciary Committee
2137 Rayburn House Office Building
Washington, D. C. 20515

Dear Mr. Beier:

Mike Remington has asked me to send you copies of the attached materials regarding physical injury to federal jurors, which were originally transmitted to Chairman Kastenmeier in 1978 when your subcommittee previously considered legislation on this subject. I offer you these materials now in regard to H.R. 4395, section 1 of which would extend to all federal jurors the coverage of the Federal Employees' Compensation Act.

The 1978 covering letter to Chairman Kastenmeier enumerates and describes the various enclosures attached immediately thereto. Nevertheless we have in our files documentation of two additional incidents of juror injuries arising subsequent to our 1978 correspondence with Mr. Kastenmeier. These latter materials are attached as the final two enclosures in this package. The first consists of correspondence with Mrs. Marlene Porter regarding an incident that took place during her jury service in the United States District Court for the Eastern District of Pennsylvania in February, 1979. The second is a copy of a submission to the Department of Labor regarding an injury to Ms. Carol A. Mason, a juror in the Eastern District of Michigan in May, 1979. As explained in Judge Hunter's testimony before your subcommittee last month, the Labor Department has consistently rejected such claims from non-employee federal jurors under the existing law.

I hope that these materials may be of assistance in your subcommittee's consideration of H.R. 4395. If I can be of help in answering any further questions on this matter, please feel free to contact me at 633-6127. I hope to have the opportunity of meeting you in the near future.

Sincerely,

William R. Burchill, Jr.
Deputy General Counsel

Enclosures

May 25, 1978

Honorable Robert Kastenmaier
Chairman, Subcommittee on Courts, Civil Liberties
and the Administration of Justice
House Judiciary Committee
2137 Rayburn House Office Building
Washington, D. C. 20515

Dear Mr. Kastenmaier:

This is in response to your request, at the recent hearing of your subcommittee, for certain information respecting the incidence of injuries to jurors in the United States district courts. This question arises in view of the recent Senate passage of S. 2074, which would extend to federal jurors the protection of the Federal Employees Compensation Act. A similiar provision is contained in section 7 of H.R. 12389, also pending before your subcommittee at this time.

I should state at the outset that the Administrative Office of the U. S. Courts would not necessarily be informed of all or even most injuries incurred by jurors. I am certain that in many cases juror inquiries to court personnel in the particular court where they are serving regarding minor injuries are met with the response that there is presently no mechanism available for the United States to defray the medical expenses and other personal costs incurred by injured jurors unless the juror happens to be employed by the United States Government in his or her regular employment or unless the injury is such that official negligence can be shown, supporting recovery under the Federal Tort Claims Act.

Other such inquiries by jurors may be addressed directly to the Department of Labor, which administers the Federal Employees Compensation Act, and you may wish to contact that department to determine whether it would be in a position to categorize the number of inquiries received from injured jurors seeking to recover under the Act. Finally, in those situations where the injured

juror submits an administrative claim under the Federal Tort Claims Act (28 U.S.C. §2672), such claims will frequently be considered and disposed of by the General Services Administration, which has custody of most federal courthouses and is therefore the proper agency to act upon such claims for injuries resulting from the physical condition or maintenance of the premises outside of the immediate vicinity of the courtroom. The Administrative Office of the U. S. Courts receives and considers such administrative claims only in situations where negligence is alleged on the part of an officer or employee of the Judiciary or where the injury takes place within the immediate courtroom area under the direct control of the court.

I am pleased, nevertheless, to offer you what materials we have been able to locate in our files respecting incidents of juror injury. First, there is enclosed for general reference an exchange of correspondence between Mr. Herbert Doyle of the Department of Labor and me, which confirms the present position of the Department that federal jurors are not now considered eligible for Federal Employees Compensation Act coverage unless they also happen to be regular government employees. The second item is a memorandum of December 5, 1974, regarding a juror in the South Carolina district court who fell from the jury box and broke her arm as the jury was leaving the courtroom to deliberate. Third is a series of letters regarding an injury to a juror in the Los Angeles court, who was injured in a fall inside the courthouse in 1969. The fourth enclosure is a series of documents as to an Alabama federal juror who likewise fell from the jury box as the jury was leaving for a luncheon recess, lost her balance and struck her head against one of the counsel tables in the courtroom. In this 1976 incident, we authorized the payment from our appropriated funds of the immediate medical expenses incurred by the juror resulting from her fall in the amount of $10 for the physician's fee and $15 for emergency room treatment at a local hospital. Such disbursement was made by this office in recognition of the need for prompt medical treatment to avoid a delay in the trial and in view of the present unavailability of Federal Employees Compensation Act relief in situations of this kind, as explained in the attached letter from my Associate General Counsel, William R. Burchill, Jr. Finally, there is enclosed a letter of January 31, 1978, to Mrs. Ethel L. Taylor denying her administrative claim under the Federal Tort Claims Act for injuries sustained when she fell from the jury box during jury service in the Southern District of Texas.

For your further information I am enclosing a memorandum from Robert J. Pellicoro summarizing the results of a canvass of the clerks of all United States district courts which was recently undertaken by our Clerks Division at my request in order to develop additional information as to the incidence of juror injuries in response to your inquiry. These results indicate that several of the courts have experienced minor injuries to jurors incident to their service in addition to those described above. Most of these injuries seem to have resulted from falls. */ There have also been several instances of jurors suffering heart attacks during their service. In these situations our policy is to pay from the appropriated funds of the Judiciary the ambulance and immediate first aid expenses incident to the removal of the juror from the courthouse and the provision of emergency treatment. I should emphasize that under no circumstances do we construe our appropriated funds as being available to provide any further relief to jurors above and beyond the payment of medical expenses for treatment at the time of the immediate initial emergency and for transportation from courthouse to hospital. The extension of Federal Employees Compensation Act coverage would therefore be of great assistance to federal jurors in certain of these situations.

The above examples of injuries sustained by federal jurors in the scope of their jury service seem to point to the conclusion that the incidence of such injuries has been rare and their expense minor. There is every reason to believe that these conclusions will continue to apply in the future. This office has previously estimated for the Senate Judiciary Subcommittee on Improvements in Judicial Machinery that it would be reasonable to expect an absolute maximum of no more than 200 federal juror injuries per year for which compensation would be claimed under our proposed amendment to the Federal Employees Compensation Act, and that the average expense per occurrence for such juror injuries would be $100. See the letter of

---

*/ It should be noted that several of the injuries catalogued in this memorandum, notably the juror injured in the automobile accident en route to the courthouse and the juror who fell in a restaurant during lunch, present examples of incidents occurring essentially outside of the scope of actual jury service and for which coverage under the amendment which we are proposing to the Federal Employees Compensation Act is not envisioned.

Mr. Burchill at page 86 of the printed hearing before the Subcommittee on Improvements in Judicial Machinery of the Senate Judiciary Committee, 95th Cong., 1st Sess. (1977) on S. 2074 and related bills.

While the problem being addressed by this proposal is of small numerical and financial dimensions, nevertheless it is the position of the Judicial Conference of the United States that it is vital as a matter of equity for federal jurors to receive the same financial protection against injuries incident to their service which would be available to federal employees who are injured either on the job or while on court leave to perform jury duty. In this regard it should be noted that section 1861 of title 28, United States Code, imposes upon all citizens the obligation to serve as jurors in the courts of the United States when summoned for that purpose.

Additionally, the Federal Employees Compensation Act has been previously amended by the Act of September 7, 1974, Public Law No. 93-416, §1(a), 88 Stat. 1143, to include within its coverage those persons who are otherwise defined as employees for purposes of the Act and who are serving as grand or petit jurors in the courts of the United States. At the time of this amendment the Senate Labor and Public Welfare Committee in Senate Report No. 93-1081 evidenced agreement with the position of the Judicial Conference that this same protection should be afforded to all federal jurors. It was urged that this question be considered in conjunction with the overall matter of juror compensation which is now before your subcommittee.

We therefore urge the Congress to offer all federal jurors the same financial protection under the Federal Employees Compensation Act which is now available to federal employees serving as jurors. While there is every reason to believe that such protection will not be frequently invoked in the form of claims by jurors, this does not lessen the need for the government to assume its rightful responsibility to those summoned for jury duty by agreeing to bear the financial responsibility for injuries proximately resulting from the performance of such duty as an obligation of citizenship.

11-405 O - 83 - 10

Such protection is presently offered not only to jurors who happen to be federal employees, but also to certain volunteers rendering personal service to the United States similar to that of an officer or employee under circumstances where a statute authorizes the acceptance of such services. See 5 U.S.C. §8101(1)(B). Such volunteer workers as "gray ladies" in veterans hospitals have thus been construed to come within the scope of the Federal Employees Compensation Act. As a matter of logic, such coverage should certainly be extended to jurors, who must bear grave responsibilities and must sometimes experience onerous conditions of service.

I hope that the information here presented is sufficient in response to your questions. If the Administrative Office can be of any further assistance in respect to the consideration of this legislative proposal, please contact me or my Associate General Counsel, William R. Burchill, Jr., at 633-6127.

Sincerely,

Carl H. Imlay
General Counsel

Enclosures

cc: Michael Remington, Esq.
Subcommittee on Courts, Civil Liberties,
and the Administration of Justice
House Judiciary Committee

WRB:BOD
Foley
Daybooks
File: Injuries to Jurors

AGENDA ITEM NUMBER
I. C-4

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
Office of Workers' Compensation Programs
Washington, D.C. 20211

NOV 26 1975

File No.

Mr. Carl H. Imlay
General Counsel
Administrative Office of the
United States Courts
Supreme Court Building
Washington, D. C. 20544

Dear Mr. Imlay:

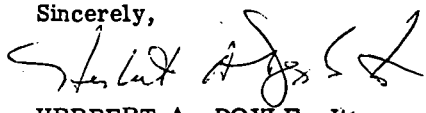
I am writing in reply to your letter of October 14, 1975, concerning the status of jurors in Federal courts as Federal employees within the meaning of the Federal Employees' Compensation Act (FECA).

Jurors are selected for jury duty in the Federal courts and are summoned to serve pursuant to statute. Their compensation for serving on the jury is likewise fixed by statute. The Government does not negotiate with a citizen for his services as a juror, nor does the citizen apply to the Government for such preferment. It is not by virtue of a contract that a juror performs jury duty, but by virtue of the requirements of the law. A juror selected in the manner prescribed by law is not "hired" to perform services on behalf of the Government. He is selected to perform a service as part of his duties as a citizen. Jury duty is an obligation of each qualified citizen and the juror's consent to serve is not essential. The juror's relationship to the Federal government does not stem from a contract of employment. Unlike employees, jurors are not subject to the direction and control of an employer, and what a juror determines in matters submitted for his attention is not subject to control from any source whatever.

The Employees' Compensation Appeals Board in O. W. Rawlings (24 ECAB 328) stated, "The unique responsibilities and position of a juror are such that they do not fall within the criteria that determine an employer-employee relationship for purposes of workmen's compensation. The reasoning is persuasive in those decisions discussed above which found that a juror's unique status precludes him from being regarded as an "employee" of the government while carrying out his jury duties."

A juror serving on a jury in a Federal court is not a civil employee of the United States within the meaning of the FECA. The 1974 Amendments to the FECA by Public Law 93-416 provided coverage to Federal employees who serve as Petit or Grand jurors. However, the status of jurors in Federal courts who are not otherwise employees of the United States remains unchanged.

Sincerely,



HERBERT A. DOYLE, JR.
Director, Office of Workers'
Compensation Programs

UNITED STATES GOVERNMENT

memorandum

DATE: May 17, 1978

REPLY TO ATTN OF: Robert J. Pellicoro

004715

SUBJECT: Your Request to Poll Clerks Re: the Incidence of Juror Injuries

TO: Carl H. Imlay

As a result of your telephone request of May 12, we contacted Wally Furstenau and asked that he set in motion his clerk representatives in each circuit to poll the district courts in their respective circuits with regard to the following:

1) Have you had any instances where jurors were injured while serving? and,

2) If so, were any claims filed against the Government?

The responses were as follows and they are listed by circuit.

FIRST CIRCUIT

Puerto Rico - Juror fell down flight of stairs, no claim was filed.

Massachusetts - Juror mugged, no claim was filed.

THIRD CIRCUIT

New Jersey - A juror had a tooth knocked out. A claim was submitted for full bridge work and was partially paid.

FOURTH CIRCUIT

Maryland - Three jurors injured. Claims paid by Judiciary in the amount of $423.17. An additional $89.50 was paid by the Marshal. There still exists a possibility of a claim re one of these jurors.

Virginia (W) - Two jurors injured. Judiciary paid claims of $103.88.

South Carolina - Two jurors injured. The Judiciary paid expenses of $235.80 and Medicare paid an additional $163.20. A juror claim of $2,000 was filed with the Administrative Office in 1976 on Form SF95.

FIFTH CIRCUIT

Georgia (N) - One juror who was a Federal employee was injured.

Alabama (N) - Four jurors were injured. Two jurors had heart attacks and the Judiciary paid ambulance costs.

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

OPTIONAL FORM NO. 10 (REV. 7-76) GSA FPMR (41 CFR) 101-11.6 5010-112

Texas (S) - One juror was injured.

SEVENTH CIRCUIT

Illinois (N) - Two jurors were injured. No claim was filed.

EIGHTH CIRCUIT

Iowa (S) - One juror was injured. The Judiciary paid hospitalization costs.

Missouri (W) - One bankruptcy court witness was injured. A suit is pending.

NINTH CIRCUIT

California (C) - Four jurors were injured. One filed a claim and nothing happened.

California (S) - One juror was injured.

TENTH CIRCUIT

Kansas - One juror injured in auto accident enroute. No claim was filed.

Oklahoma (E) - One juror suffered a fall. Claim pending against GSA.

Oklahoma (W) - One juror fell in a restaurant. We paid hospitalization on an AO 19. She is suing the restaurant.

Wyoming - Illness of juror. We paid emergency room costs.

We have not yet heard from the Second and Sixth Circuits and although some of the information is sketchy, I hope that it is of some assistance. Let me know if you will want any more detailed information.

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON, D.C. 20544

WILLIAM E. FOLEY
DIRECTOR

JOSEPH F. SPANIOL, JR.
DEPUTY DIRECTOR

WILLIAM JAMES WELLER
LEGISLATIVE AFFAIRS
OFFICER

July 20, 1982

Mr. David Beier, III
Counsel, Subcommittee on Courts, Civil Liberties,
and the Administration of Justice
House Judiciary Committee
2137 Rayburn House Office Building
Washington, D.C. 20515

Dear David:

As agreed during our telephone conversation yesterday, I am, to the extent possible, responding today to your request for two specific "cost estimate" figures.

First, you asked us to estimate costs related to enactment of section 1 of H.R. 4395 which would extend to Federal jurors coverage under the Federal Employees Compensation Act. In his prepared statement submitted to you for hearings on June 22, Judge Hunter reported that during the past several years we have received reports of no more than 35 injuries to Federal jurors. Judge Hunter also noted, however, the "catch 22" situation presently prevailing: Given the present lack of a means to financially compensate jurors for injuries, there is a strong possibility that many incidents of injury are not recorded. In May of 1978 the Administrative Office's General Counsel, cognizant of the "catch 22 problem", advised Mr. Kastenmeier by letter of our belief that there probably would not be more than 200 instances of juror injury in any one year. In that correspondence he noted that our limited experiences with reported injuries suggested that the average cost per injury would probably not exceed $100. Given the reality of inflation, we would now revise that dollar figure to $125. Thus, our current estimated maximum cost in any one year would be $25,000.

Second, you asked me to obtain estimated "cost savings" figures similar to those provided by the Eighth and Ninth Circuits as appendices to Judge Hunter's prepared statement. Although I have asked each circuit to file with my office estimated figures as soon as possible, as of today I have received estimated figures only from the Third and District of Columbia Circuits. The Third Circuit estimates that a savings of $38,000 per year would result from enactment of section 3 of the bill. The District of Columbia Circuit estimates a savings of $7,850.

Obviously, savings derived from enactment of section 3 should far exceed the cost of enactment of section 1 of H.R. 4395. As other circuits file their estimated savings figures, I will advise you of it.

Sincerely,

Bill

William James Weller
Legislative Affairs Officer

MR

AMERICAN BAR ASSOCIATION

SECRETARY
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300-308 W. Short Street
Lexington, KY 40507

ASSISTANT SECRETARY
F. Wm. McCalpin
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611 Olive Street
St. Louis, MO 63101

1155 EAST 60TH ST., CHICAGO, ILLINOIS 60637 TELEPHONE (312) 947-4016

March 28, 1979

Honorable Peter W. Rodino, Jr.
Chairman, Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

RE: Supreme Court Review

Dear Mr. Chairman:

At the meeting of the House of Delegates of the American Bar Association held February 12-13, 1979 the following resolution was adopted upon recommendation of the Special Committee on Coordination of Federal Judicial Improvements:

> BE IT RESOLVED, That the American Bar Association approves and supports the adoption by the Congress of legislation to abolish obiligatory Supreme Court review by appeal, as distinguished from discretionary review by certiorari, of all matters now reviewable by appeal, except for appeals from determinations by three-judge courts.

This resolution is being transmitted for your information and whatever action you may deem appropriate.

Please do not hesitate to let us know if you need any further information, have any questions or whether we can be of any assistance.

Sincerely yours,

Herbert D. Sledd

HDS/jf

cc: Benjamin L. Zelenko, Esquire
Chairman, Special Committee on
Coordination of Federal Judicial Improvements

4-3-79

AMERICAN BAR ASSOCIATION

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WRITER'S DIRECT TELEPHONE NUMBER (312) 947-4019

August 31, 1982

Honorable Robert W. Kastenmeier
Chairman, Subcommittee on Courts, Civil
Liberties and the Administration
of Justice
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

RE: Federal Juror Improvements

Dear Mr. Chairman:

At the meeting of the House of Delegates of the American Bar Association held August 10-11, 1982 the attached resolution was adopted upon recommendation of the Special Committee on Coordination of Federal Judicial Improvements. The action taken thus becomes the official policy of the Association in this matter.

This resolution is transmitted for your information and whatever action you may deem appropriate. Please do not hesitate to let us know if you need any further information, have any questions or if we can be of any assistance.

Sincerely yours,

F. Wm. McCalpin

FWM/BAH/kab
Enclosure
0716L/3142R/3143R

cc: Edward I. Cutler, Esquire
Chairman, Special Committee on Coordination
of Federal Judicial Improvements
Robert MacCrate, Esquire

REPORT 102

BE IT RESOLVED, That the American Bar Association supports enactment of legislation such as H.R. 4395, 97th Congress:

(1) To provide for the taxing of attorneys' fees as court costs, for a court-appointed attorney in an action brought by a juror to protect his employment rights;

(2) To extend statutory compensation for work injuries to all persons rendering federal jury service; and

(3) To authorize the service of jury summonses by ordinary mail.

3179R/4

Congressional Research Service
The Library of Congress

Washington, D.C. 20540

June 17, 1982

TO : Hon. Robert Kastenmeier
Chairman, Subcommittee on Courts, Civil Liberties
and the Administration of Justice
Attn: David Beier

FROM : American Law Division

SUBJECT : "Priorities in Deciding Cases before United States Courts"

The above captioned report has been prepared in light of your recent request. If we can be of further service, please feel free to call on us.

Leland E. Beck
Legislative Attorney

Congressional Research Service
The Library of Congress

Washington, D.C. 20540

PRIORITIES IN DECIDING CASES BEFORE UNITED STATES COURTS

Leland E. Beck
Legislative Attorney
American Law Division
June 17, 1982

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PRIORITIES IN DECIDING CASES BEFORE UNITED STATES COURTS

In the course of legislating for various programs and to correct various problems, Congress has required that particular types of cases arising under such laws be heard by United States courts more expeditiously than others.[1/] The rationale for these provisions has often been that classes of cases arising under sundry acts of Congress require expedited review to establish standards and interpretation. For the most part, however, these priorities have been established without formal consideration of the entire docket of the federal court system. Accordingly, with over eighty such provisions identified as currently extant, the priorities of handling cases by the courts has become an uneven patchwork raising questions of the validity of the expressed rationale. This report reviews the types of "expediting" provisions, the courts to which they apply, the manner in which they require administration and are, in fact, administered, and the effect these provisions have on the civil justice system.

The report is divided into specific reviews of (I) Criminal Case Priority (II) Priorities in District Court Civil Litigation, (III) Priorities in Court of Appeals Civil Litigation, (IV) Conflicts in the Theory and Practice of Priority Administration, and (V) Legislative Responses and Possibilities. Parts (II) and (III) are analogous to the Appendix, Parts 1 and 2, delineating the various expediting provisions.

1/ Authority for the legislative requirement of expedition in the handling of particular classes of cases flows from the authority to establish inferior federal courts, Const. of the United States, Art. III, § 1; Art. I, § 8, ¶ 9, and the authority to make regulations for the appellate jurisdiction of the Supreme Court, Const. of the United States, Art. III, § 2, ¶ 2.

As used in this report, "expediting provision" or "priority" refer to any provision of law which requires that a court hear and/or determine a particular case or class of cases before other cases, or to any provision of law which places a preference among cases on a court's docket. In many instances, these expediting or priority provisions do not include specifications of administrative or judicial actions to be taken, but may be considered hortatory. Expediting provisions do not include provisions which place a time limit or an expiration date on the effectiveness of particular types of orders even though the effect is to require further judicial action within a particular time frame in order to continue the validity of the order. E.g. F.R. Civ. P., Rule 65(b).

Concern for the number and effect of expediting provisions began in the mid-1970's.[2/] The Federal Judicial Center began to compile expediting provisions,[3/] and the Office for Improvements in the Administration of Justice at the Department of Justice drafted a bill to repeal many such provisions, but the bill was never sent to Congress.[4/] Recently, the Committee on Federal Legislation of the Association of the Bar of the City of New York presented a report limited to expedition in the courts of appeals.[5/] In the course of preparing this report,

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2/ ABA Special Committee on Coordination of Judicial Improvements, Report to the House of Delegates (February, 1977).

3/ Federal Judicial Center, Priorities for the Handling of Litigation in United States District Courts (FJC No. 76-2, 1976); Federal Judicial Center, Priorities for Handling Litigation in the United States Courts of Appeals (FJC-R-77-1, 1977).

4/ This draft bill has been widely circulated and includes the first attempt at developing technical and conforming amendments to repeal extant expediting provisions.

5/ Committee on Federal Legislation, "Impact of Civil Expediting Provisions on the United States Court of Appeals", 37 Record Assoc. B.C.N.Y. 19 (1982).

we have consolidated the provisions suggested by these materials and further expanded the collection of expediting provisions. 6/

6/ See, Appendix, infra. As with all compilations of statutory provisions, we do not suggest that the provisions enumerated in this report exhaust the field. Rather, while we have attempted to compile as complete a listing of all extant provisions which require expedition or priority as possible, the delay in printing, codification and indexing of new statutes, combined with the incompleteness and editing of the United States Code codified titles, United States Statutes at Large provisions for uncodified titles enacted subsequent to the Revised Statutes of 1875, the Revised Statutes of 1875, and the United Statutes at Large enacted prior to 1875 which were not repealed by the Revised Statutes of 1875, caution against sny reliance on this or any other compilation for completeness. As will become apparent, the diversity of linguistic style in expediting provisions further counsels caution because there may be additional undiscovered variations in the law. Accordingly, we must advise that any attempt to legislatively reconsider the expedition or priority ststutes which is intended to have an effect on all extant law should include a boilerplate implicit repealer similar to "Any provision of law to the contrary notwithstanding . . .."

I. Criminal Case Priority

The Speedy Trial Act of 1974, 18 U.S.C. §§ 3161 et. seq. (1976, as amended), requires that federal criminal procedure be conducted within specific time frames. No more than thirty days are allowed to lapse between arrest or service of a summons and the filing of an indictment or information in connection with such charges. § 3161(b). The defendant must be arraigned within ten days of (a) filing of the indictment or information, (b) service and public disclosure of the indictment or information or (c) an appearance before a judicial officer at which the defendant is ordered held to answer the charges, whichever is later. § 3161(c). Where a plea of not guilty is entered, trial must commence within sixty days. Id. Trial is generally considered to have begun with the commencement of voir dire examination for this purpose. The specificity of these provisions, together with the remedy for failure to comply with the time limitations — dismissal, with or without prejudice, § 3162 — clearly impose a priority of criminal cases as a class over the civil docket. 7/

In addition, § 12(a) of the Military Selective Service Act, provides that criminal cases arising from the administration of the Selective Service System shall receive a particular preference:

> Precedence shall be given by courts to the trial of cases arising under this title, and such cases shall be advanced on the docket for immediate hearing and an appeal from the decision or decree of any United States district court or United States

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7/ The right to a speedy trial is also recognized as a constitutional standard. Const. of the U. S., Amend. VI. Barker v. Wingo, 407 U.S. 514 (1972); Strunk v. United States, 412 U.S. 434 (1973). Cf. F. R. Crim. P., Rule 50(b) (eff. July 1, 1972, abrogated by amendment eff. August 1, 1976).

> court of appeals shall take precedence over all other cases pending before the court to which the case has been referred.

Act of June 24, 1948, ch. 625, Title I, § 12, 62 Stat. 622, as amended, Pub. L. 89-152, 79 Stat. 586, August 30, 1965, Military Selective Service Act of 1967, Pub. L. 90-40, § 1(11), 81 Stat. 105, June 30, 1967, Pub. L. 92-129, Title I, § 101(a)(31), 85 Stat. 352, September 28, 1971, Pub. L. 97-86, Title IX, § 916(b), 95 Stat. 1129, December 1, 1981, found at 50 U.S.C. App. 462(a) (1976), This particular provision antedates all formal consideration of the problem of requiring and providing for a speedy trial on criminal charges, but was not not repealed at the time the Speedy Trial Act of 1974 was passed. Further, the reference to "this title" encompasses potential civil actions as well, but we construe this criminal statute narrowly.

In addition, as a general matter, criminal cases, as a class, are given priority over civil cases in the intermediate appellate process. See, generally, General Rules of the United States Court of Appeals for the District of Columbia Circuit, Appendix: Plan for the Prompt Disposition of Criminal Cases (eff: August 1, 1979).

The general priority of criminal over civil case throughout the federal courts system is thus clear. Beyond this general distinction, however, the administration of the court dockets becomes substantially clouded.

II. Priorities in District Court Civil Litigation

The normal course of litigation in the federal court system commences with trial in the United States District Court having jurisdiction over the subject matter of the litigation and the persons of the parties, as well as venue over the case.[8/] The District Courts are given authority to order the priorities of cases for trial, subject to statutory requirements, by F.R. Civ. P., Rule 40:

> The district courts shall provide by rule for the placing of actions upon the trial calendar (1) without request of the parties or (2) upon request of a party and notice to the other parties or (3) in such other manner as the courts deem expedient. Precedence shall be given to actions entitled thereto by any statute of the United States.

The provision for local rules on this point has had varying degress of success. We expect that few courts have taken advantage of the rule and developed formal standards. For example, the United States District Court for the District of Columbia operates, as most district courts, on an individual judge calendar basis. Each judge is assigned cases and is responsible for their disposition. If an expedition is plead and necessary, the judge may adjust his own calendar or, if a backlog has occurred on his calendar, may entertain a motion to transfer the matter to another judge. Under a master calendar system, such adjustments are even less difficult, because the focus is on the case rather than on the

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8/ The United States Court of Claims Commissioners, as to be reorganized as the United States Claims Court on October 1, 1982, the Court of International Trade and the United States Tax Court are trial courts equivalent to the District Courts to which the civil rules generally apply. 28 U.S.C. § 171 et seq., as amended, Federal Courts Improvement Act of 1982, Pub. L. 97-164, §§ 105, 133, 167, 96 Stat. 26, 39, 50, April 2, 1982 (eff. October 1, 1982); 28 U.S.C. § 251; I.R.C. of 1954, § 7441, 26 U.S.C. § 7441. See, Appendix A, Part 3, infra.

judge and individual motions will often be heard by different judges. Under a master calendar plan, specific motions divisions of the court, on a rotating basis, will handle all pretrial questions until a judge to conduct trial is appointed.

Two types of case generally arise, the original suit, replete with discovery and pretrial procedure, and the administrative review suit, limited to a statutory standard of review of an administrative record, often akin to a motion for summary judgment: there being no material issues of fact to be resolved, and disposition may be had on the basis of interpretation of law.[9/] In those cases in which that statutory standard of review is trial de novo, the process will include the full panoply of discovery and pretrial procedure.

Trial de novo, procedurally, is often dependent upon the speed with which counsel for the parties can come to terms on the amount of pretrial discovery. See, F. R. Civil P., Rules 26, 28 - 37. In many cases, however, district judges order, during a pretrial conference, that discovery be concluded within a specific period of time in order to move the case along. F. R. Civil P., Rule 16. Priority or expedition statutes favor this method of proceeding to varying degrees.

9/ In a limited number of cases, the scope of review is more limited to the questions of law which are presented by the record of facts adduced by the administrative body. In such a case, there is far greater potential for accommodating the requirement of expedition because there is no need to adduce additional facts, rather, the court must only review the decision of the administrative body and the memoranda and points of authority raised by counsel. In reviewing an administrative procedure to determine whether an administrative body has abused its discretion, the district court will need to do more than review the record before it, but less than necessary on a trial where no such record exists. Nearly all such cases will be reviewed by an appellate court, rather than a district court, but there remains a distinct possibility for this type of limited review in the district courts.

At the opposite end of the spectrum, however, there are occasions in which there is little for the district court to do in the disposition of issues case which is not ministerial. For example, provisions of the Federal Election Campaign Act, as amended, require that an aggrieved individual file a complaint with the United States District Court, but any question of constitutionality will thereafter be immediately certified to the Court of Appeals. Federal Election Campaign Act of 1971, P.L. 92-225, title III, § 315, as added Pub. L. 93-443, title II, § 208(a), 88 Stat. 1285, October 15, 1974, as renumbered and amended, Pub. L. 94-283, title I, §§ 105, 115(e), 90 Stat. 481, 196, May 11, 1976, found at 2 U.S.C. § 437h(a). This type of provision may be generally regarded as a mandatory interlocutory appeal, cf. 28 U.S.C. § 1292(b), although the remainder of the case is not stayed by the appellate process.

Within these general boundaries, the district courts apply a number of different statutory expedition provisions. For the most part the language of these provisions is hortatory, not requiring any specific action. However, specific statutes provide for a determination within a specific span of time, for example: ". . . such court shall render its final decision relative to any challenge within one hundred and twenty days from the date such challenge is brought . . .." Alaska National Interest Lands Conservation Act, Pub. L. 96-487, Title XI, § 1108(b), 94 Stat. 2464, December 2, 1980, found at 16 U.S.C. § 3168. See also, Pub. L. 96-312, § 10(b)(3), 94 Stat. 953, July 23, 1980 (not compiled in code). It will be the rare case in which a court can prod counsel to conclude discovery, hold trial and complete deliberation in such a short period of time. Nonetheless, it is possible that, given the strictness with which the language is written and given a literal interpretation, a writ of mandamus will lie to compel a decision, subject always to the Constitutional

requirements of due process and, if appropriate, a trial by jury. No such case, however, has been found.

Less compelling, due to the lack of requirement of a determination within a specific time, are those provisions which require a hearing within a specific time, such as, "An application for an order pursuant to this subsection shall be heard within ten days . . .." R.S. § 2004(e), as added Pub. L. 86-449, Title VI, § 601, 74 Stat. 90, May 6, 1960, found at 42 U.S.C. § 1971(e). Here the important distinction is between the requirement to proceed to judgment in the former and the requirement to at least hold a hearing in the latter. The requirement that a hearing be held within ten days does not indicate that the district court must, or even suggest that the court will, reach a decision within a specific period of time.

Far less imperative and quite common is the requirement that: "Any such proceeding shall be assigned for hearing at the earliest practicable date and shall be expedited by such court", or, altering the second clause, "shall be expedited in every way". See, Appendix, Part 1, item 17. The court is vested with discretion in these instances to determine the meaning of "earliest practicable date" and "expedited in every way". This example is far down the list on a loosely constructed typology, well below the instances using terminology such as "possible".

In addition there are provisions which apply to cases in both the United Statea District Courts and "appeals therefrom" to the Courts of Appeals, such as cases under the Freedom of Information Act which "take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way", "[e]xcept as to cases the court considers of greater importance". 5 U.S.C. § 552(a)(4)(D).

This type of priority is not directed specifically to the court, but runs with the case throughout the judicial system, implicating both the district court and appellate court dockets, as well as the Supreme Court docket.

The ultimate determinus of the facility of expediting provisions on the District Court dockets would be the difference in the median time from joinder of issue between priority and non-priority cases. While it is possible that the Administrative Office of United States Courts could collect such information in the future, the available compiled data do not appear make the necessary legal distinction.[10/]

At bottom, the first critical point of analysis is clearly illustrated by the loose typology in the Appendix: there is no clear order of priority among the expediting provisions. There are a few clear examples of provisions which rank certain classes of cases ahead of others, but beyond those clear instances, systemic evaluation of the law becomes very speculative. The variety of linguistic styles, together with their recurrence (often denominated by the subject matter of the legislation), indicates that particular provisions drafted in the past have been reiterated in subsequent legislation by the committee having jurisdiction over that subject matter, without regard to the full panoply of provisions extant at the time. This lack of systematized approach to priorities in civil litigation is further illustrated by the lack of consideration of the civil priorities generally and development of compilations of provisions prior to 1977.[11/]

10/ See, Annual Report of the Director of the Administrative Office of United States Courts, Tables C-5 - C-5b (Preliminary Edition, 1981).

11/ See, supra, notes 2 - 6, and accompanying text.

IV. Priorities in Courts of Appeals Civil Litigation

Expedition privisions in the twelve regional United States Courts of Appeals[12/] are generally limited to review of a predetermined record from an administrative agency or appeals from expedited proceedings or certified questions. As such, expeditious disposition of the questions of law before the three-judge panel, generally, or the court en banc, in specific cases, is a more easily accomodated process. However, given the number of statutes and the number of cases which arise under each, administration of review of the statutes poses a more substantial problem.

The only nationwide guidance for the implementation of expediting provisions is found in Rule 45(b) of the Federal Rules of Appellate Procedure:

> The clerk shall prepare, under the direction of the court, a calendar of cases awaiting argument. In placing cases on the calendar for argument, he shall give preference to appeals in criminal cases and to appeals and other proceedings entitled to preference by law.

In accord with these provisions, the courts of appeals may prescribe supplementary rules. In light of the large number of expediting provisions which apply directly and solely to the United States Court of Appeals for the District of Columbia Circuit in addition to those expediting provisions which are applicable to all the courts of appeals, the most formidable impact from local rules will

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12/ When organized, on October 1, 1982, the United States Court of Appeals for the Federal Circuit will be required to apply any expediting statutes. See, Federal Courts Improvement Act of 1982, Pub. L. 97-164, § 127(a). 96 Stat. 39, April 2, 1982 (adding 28 U.S.C. § 1296, Precedence of cases in the United States Court of Appeals for the Federal Circuit). But see, id., § 140, 96 Stat. 44, (repealing, inter alia, 28 U.S.C § 2602 (Court of Customs and Patent Appeals: Precedence of American manufacturer, producer or wholesaler cases)).

be generated by that court's general rules.

As in the district courts, counsel must plead statutory entitlement to expedition.[13/] Rule 7(c) of the General Rules of the United States Court of Appeals for the District of Columbia Circuit prioritizes criminal appeals (accord, F.R.A.P., Rule 45(b)) and recalcitrant witness appeals (see, 28 U.S.C. § 1826). Rule 7(c)(3) provides:

> In all other cases wherein a statute requires expedition, counsel for appellant/petitioner shall so advise the Clerk of this Court by filing a written memorandum citing the statute and the pertinent portions thereof, within 10 days from the filing of a notice of appeal/petition for review.

The Clerk is thus notified of a potential need for an expedited briefing schedule. After all briefs are submitted, cases are placed on an argument calendar with the assignment of judges and cases to panels at random.[14/] If an expedited case is ready for argument, that case will be placed in the pool of cases to be assigned in the next calendaring. This process, however, obviously removes a slot from the calendar for a case which would otherwise be the youngest case on that calendar.

Many of the problems which arise in implementation of priorities in the district courts are present in the expedition of cases in the courts of appeals.

13/ But see, United States Court of Appeals for the Fifth Circuit, Local Rules Supplementing the Federal Rules of Appellate Procedure and Plan for Expediting Criminal Appeals, Rule 19 (as amended, September 15, 1980).

14/ The creation of panel calendars is facilitated in several circuits, including the District of Columbia Circuit, by a staff review of the issues and subject matter of the case to assign a weighting factor. These factors are compiled in order to balance the workload among panels. Accordingly, the panel workload is not constructed in a random manner, but the assignment of judges to the panels will be random. This process is, however, subject to the application of 28 U.S.C. § 455, requiring recusal of a judge who has an interest or other disqualifying factor from the consideration of a case.

The most restrictive of the expediting provisions impacts directly on the docket of the United States Court of Appeals for the Disrtict of Columbia Circuit, providing for review of orders granting or denying exemptions from certain average fuel economy calculations of passenger automobiles:

> Any such proceeding shall be assigned for a hearing and completed at the earliest possible date and shall be expedited in every possible way by such court. The court shall render its decision in any such proceeding within 60 days after the date of filing the petition for review unless the court determines that a longer period of time is necessary to satisfy the requirements of the Constitution of the United States.

Motor Vehicle Information and Cost Savings Act, Pub. L. 92-513, Title V. § 503, October 20, 1972, as added, Energy Policy and Conservation Act, Pub. L. 94-163, Title III, Part A, § 301, 89 Stat. 906, December 22, 1975, as amended, Chrysler Corporation Loan Guarantee Act of 1979, Pub. L. 96-185, § 18, 93 Stat. 1336, January 7, 1980, Automobile Fuel Efficiency Act of 1980, Pub. L. 96-425, § 4, 94 Stat. 1822-1823, October 10, 1980, found at 15 U.S.C. § 2003(b)(3(E)(ii) (Supp. IV, 1980). There are several slight variations on this style of expedition provision which seem only slightly less imperative. See, Appendix A, Part 2, items 2 & 3.

Of less imperative nature are provisions, generically known as "Buckley-type review", which require the expeditious handling of challenges to the constitutionality of particular statutory provisions:

> It shall be the duty of the court of appeals and of the Supreme Court of the United States to advance on the docket and expedite to the greatest possible extent the disposition of any matter certified . . ..

The origin of this prototype can be found in the Federal Election Campaign Act of 1971, Pub. L. 92-225, Title III, § 310, as added, Federal Election Campaign Act Amendments of 1974, Pub. L. 93-443, Title II, § 208(a), 88 Stat. 1285,

October 15, 1974, as amended and redesignated, Federal Election Campaign Act Amendments of 1976, Pub. L. 94-283, Title I, §§ 105, 115(e), 90 Stat. 481, 496, May 11, 1976, as amended and redesignated, Federal Election Campaign Act Amendments of 1979, Pub. L. 96-187, Title I, §§ 105(4), 112, (c), 93 Stat. 1354, 1366, January 8, 1980, found at 2 U.S.C. § 437h(c) (Supp. IV, 1980), and draws its name from the Supreme Court decision, rendered under the procedures outlined therein, in Buckley v. Valeo, 424 U.S. 1 (1976). This procedure has been replicated in several different contexts. See, infra, Appendix, Part 1, item 8. See, also, California Medical Association v. Federal Elections Commission, 641 F.2d 619, 634 - 639 (9th Cir. 1980)(Wallace, J., concurring and dissenting), aff'd 453 U.S. 182 (1981). These provisions fall somewhere in the middle of the typology of expediting provisions.

At the very end of the expediting provisions which impact on the courts of appeals, by design, is the provision for review of claims determinations by the Railroad Retirement Board:

> Upon the filing of such petition the court shall have exclusive jurisdiction of the proceeding and of the question determined therein, and shall give precedence in the adjudication thereof over all other civil cases not otherwise entitled by law to precedence.

Act of June 25, 1928, ch. 680, § 5(f), 52 Stat. 1099, as amended, Act of October 10, 1940, ch. 842, §§ 19, 20, 54 Stat. 1098, Act of July 31, 1946, ch. 709, Division III, §§ 314, 60 Stat. 738, Pub. L. 85-791, § 23, 72 Stat. 948, August 28, 1958, Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, Title XI, Subtitle D, § 1128(a), 95 Stat. 641, August 13, 1981. This provision is unique in that it not only establishes a place in the priority of cases to be heard, but, in relation to other priority cases, establishes that cases brought under this provision will be last.

This complex of linguistic styles has the potential to present direct interprovisional conflicts. While this is not so evident as in the provisions which impact upon district court dockets due to the more deferential nature of the language in most instances, the focus of many provisions solely upon the United States Court of Appeals for the District of Columbia tends to aggravate any potential conflict.

The approach taken by the D. C. Circuit, however, may reflect something of a middle ground between the responsibility for identifying expedited cases being assumed by the court, as in the Fifth Circuit,[15/] the listing of provisions and requirement of notice, such as in the Eleventh Circuit,[16/] to the studied disregard of specific language differences and a limitation on the recognition of expedition when the backlog of the court has reached a certain age, as in the Ninth Circuit.[17/] Each approach necessarily reflects problems of docket backlog; circuits which do not have a backlog will reach all or nearly all cases for hearing at the same speed, i.e. priority and non-priority cases will always be current, as appears to be the case in the First or Second Circuit.[18/]

15/ Supra, note 14, and accompanying text.

16/ United States Court of Appeals for the Eleventh Circuit, Interim Rules Supplementing the Federal Rules of Appellate Procedure, Rule 7(b), 22(f), Appendix 1.

17/ See, General Orders of the Ninth Circuit, quoted in "Impact of Civil Expediting Provisions . . ., supra, 37 Record Assoc. B.C.N.Y. at 26. It should also be noted that the Ninth Circuit has a fully computerized docketing system and has pioneered the use of issue identification indexing and weighting in the calendaring process. These developments would suggest that the Ninth Circuit would be better prepared to generate statistical analysis of the impact of the expediting provisions than the other circuits or the Administrative Office.

18/ See, Annual Report of the Director of the Administrative Office of United States Courts, Table B4 (Preliminary Edition, 1981).

IV. Conflicts in the Theory and Practice of Priority Administration

In theory, the courts to which expedition provisions apply ought to proceed with the briefing, argument and disposition of these selected cases more rapidly than with the normal caseload. In fact, only limited steps can be taken to do so, in part because of the conflicting needs of counsel and the parties, the quality of the records on review, and, in some cases, the very number of cases which require expedition to the exclusion of the remainder of the docket.

The expedition provisions reviewed in this paper are, in all but a few specific instances, hortatory. The provisions place a duty on the respective courts to proceed expeditiously, but neither command what that expedition is to be, nor how Congress expects it to be administered. Neither do the civil expedition provisions provide any penalty for failure to expedite cases in any way.

In practice, the individual judge in the district courts (the vast majority of courts being on individual calendars) must decide whatever expedition will be afforded, and only then on a pleading by counsel for expedited proceeding. This is complicated further by individual conflicts of counsel's practice which require continuances. For the purpose of expediting review at the district court level, the master calendar system (with its motions bench and trial bench separated before different judges) would be a preferable approach, but this would undermine the degree of accountability for the general handling of the court's docket by the bench which was sought in implementing the individual calendar system. Thus, whatever expedition can be accomplished in the district courts will be the result of accommodation between judge and counsel. Exhortations

by Congress to dispose of particular classes of cases expeditiously would appear to have no greater effect than pleas by counsel where counsel can demonstrate that the client's interests in the litigation will be harmed by progressing at the normal pace of the judicial process.

In practice, in the courts of appeals, there is a greater possibility for expeditious handling of particular classes of cases. The general backlog of cases which have been fully briefed and stand ready to be argued before a panel of the court will generally be displaced by an appeal in which counsel has properly plead an expedition statute. Thus, after briefing, a case may be heard during the next calendar period without unduly disturbing the progress of a large number of cases. It would appear to be a rare possibility, but a possibility none the less, that an entire argument calendar could be made up from cases requiring expedition, to the detriment of all other cases on the argument docket. In a single court, such as the United States Court of Appeals for the District of Columbia Circuit, where many statutes repose judicial review, the possibility of multiple expedition provisions and numerous cases seriously affecting the ability of the court to hear its regular caseload becomes evident. Statistics on this effect, however, have not heretofore been developed.

We have already alluded to the first question of theory and practice, that the provisions are many, conflicting, and do not appear to have any rational structure. We have already suggested the limitations imposed upon the capacity of the courts to meet time specific requirements due to scheduling factors beyond the court's control, including counsel's other court appearances, etc. Additionally, in those instances where expediting provisions require that a case be given precedence "over all other" or "over other" cases on the docket,

the result is best described by the banking term "LIFO" - Last In, First Out. That is to say, a case under such an expedition provision will remain the first priority case only so long as no new case under a similar provision is filed. It is no less difficult to imagine conflicting views of the weight to be given the various expediting provisions on a crowded docket.

In focusing on the conflicts between theory and practice, due regard must be given to the actual timing of cases. For example, in Buckley-type expedited review process implemented in California Medical Association v. Federal Election Commission, supra, appellants filed suit for a declaratory judgment in early May, 1979. Pursuant to the statute, the District Court for the Northern District of California certified four questions of constitutionality to the Ninth Circuit Court of Appeals on May 17, 1979. On May 23, 1980, a divided Court of Appeals, sitting en banc pursuant to the statute, see, F.R.A.P., Rule 35, United States Court of Appeals for the Ninth Circuit, Rule 25, rendered its decision. 641 F.2d 619. An appeal was taken to the United States Supreme Court; on October 6, 1980, the Court postponed the question of jurisdiction to a hearing on the merits. 449 U.S. 817. After full briefing and oral argument (January 19, 1981), the Court determined that it possessed jurisdiction and affirmed the decision of the Court of Appeals on June 26, 1981. 453 U.S. 182. Thus, from filing to final disposition of the constitutional issues required slightly in excess of two years. On the other hand, Dames and Moore v. Regan, 453 U.S. 654 (1981), required slightly less than six months to be dispatched, through the process of a writ of certiorari before judgment, once it was determined that vital interests demanded swift disposition. In perhaps the ultimate of such cases, the Pentagon Papers Case, New York Times v. United States, 403 U.S. 713

(1971), required slightly over two weeks from the filing of the first complaint to the ultimate disposition of the case. Thus, where it is deemed appropriate, initially by counsel, and ultimately in the discretion of the courts, substantial expedition can be granted to a case.

In these ultimate expedition examples, of course, there has been substantial concern evidenced for the completeness of the record on which the Court has based its decision. See, e.g., New York Times v. United States, supra, at 748 - 749 (Burger, C.J., dissenting). The same argument might be posed in the case of expeditious district court treatment of divergent pleadings of fact. In one of the major, but only preliminary, dispositions based on an expedited, ex parte hearing, a temporary restraining order will be granted only if the party requesting the injunction bears the burden of pursuading the court of the significance of the threat of irreparable harm to the plaintiff if the injunction is not granted, the balance of this harm as opposed to the injury which the injunction would inflict on the party enjoined, the probability that the proponent will succeed on the merits, and that the public interest is served by the injunction. See, Wright and Miller, Federal Practice and Procedure, § 2948, et seq. (1973, Supp. 1982). The effect of this process, however, is not expedition of the merits, but rather a temporary order preserving the status quo, which may be followed by other temporary orders requiring an escalating burden of persuasion until trial is ultimately held. See, F.R. Civ. P., Rule 65(b). In the court of appeals, this argument is less persuasive; the record is presumably complete when filed by the administrative agency or district court as to the facts litigated therein, and only the briefing and argument of points of law are required.

In operation, the dockets of the United States courts may be divided into

four functional categories: (1) questions pendente lite, such as questions of privilege and recalcitrant witnesses, 28 U.S.C. 1826, or interlocutory appeals, 28 U.S.C. § 1292(b), where a rapid disposition of the question at hand will significantly contribute to the disposition of the merits of the case, (2) criminal cases and habeas corpus petitions, where the ultimate remedy is relief from custody, (3) priority cases as dictated by Congress and (4) non-priority cases. There is, clearly, substantial overlap in even a functional or rationalized typology of cases requiring expedition. However, within category (3), priority cases as directed by Congress, there appears to be no formal rationalization of the process for determining whether and to what degree statutory priority is appropriate. As a result, there is substantial doubt whether the courts can effectively administer more than a few such provisions, and greater doubt that the courts can administer any of a large number of expedition provisions.

V. Legislative Responses and Possibilities

Currently proposed H.R. 4396 would codify the courts' power to determine priorities, specify two particular priorities in civil cases, expressly repeal many, but not all, of the provisions for civil expedited review, and implicitly repeal all other civil priorites. Section 2(a) would codify 28 U.S.C. § 1657:

> Notwithstanding any law to the contrary, each court of the United States shall determine the order in which civil actions are heard and determined, except that the court shall expedite the consideration of any action brought under chapter 153 or section 1826 of this title, any action for temporary or permanent injunctive relief, or any other action if good cause therefore is shown.

H. R. 4396 specifically leaves intact provision for the expedition of habeas corpus and recalcitrant witness cases, as well as the requirements of the F. R. Civ. P., Rule 65 for requests for injunctive relief. In light of past practice we note the following rationales for these exceptions.

First, the writ of habeas corpus, while considered civil in process, is more criminal in nature. That is, the writ is generally applicable only to questions of confinement in criminal cases to review the legality of confinement. Accordingly, the retention of this priority comports with the general priority of criminal cases over civil cases. While it is true that the writ of habeas corpus may be utilized to challenge the lawfulness of civil confinement -- e.g. commitment for psychiatric care where confinement is due to a finding of a jury in a criminal proceeding that the defendant is not guilty by reason of insanity -- drawing a distinction between the type of confinement poses a substantial problem in and of itself.

Second, the question of recalcitrant witnesses is a question of process

itself, where the witness is detained for failure to answer questions which the trial court has determined do not violate any privilege granted by law. While it may be generally said that the witness holds the keys to his jail cell "in his mouth", the exercise of a right, particularly the right against self-incrimination under the Fifth Amendment, would require a more formidable process on appeal. Providing this exception comports with current practice in the courts to hold appellate panels almost immediately when a witness is confined and an appeal taken.

Third, the provision for expedition in the determination of temporary restraining orders, preliminary and permanent injunctions also comports with the present practices of the federal courts. In many districts there is a judge "on call" to hear just such motions. The use of injunctions in all areas of civil litigation generally will bring all classes of cases in which it is currently in use, but this is severely limited to those cases in which such extraordinary interim or final relief is appropriate, and further subject to the requirements of showing irreparable harm, likelihood of success on the merits, favorable equities, and the public interest to secure interim injunctive relief. The granting of injunctive relief under F.R. Civ. P., Rule 65, would require expedition in order to be effective, whether the exhortations of the Rule that procedure be expedited were judicially or legislatively suggested.

Finally, the last clause, although it may be redundant to the operative text, recognizes the power of the federal courts to expedite on motion of counsel as in Dames and Moore, California Medical Association, New York Times, supra, and other cases.

An alternative to this substantive clause and the repeal of all other expediting provisions explicitly or implicitly would be to rationalize the

scheme of expediting provisions by reconsideration individually and recodification into a single section. Where there is definite appeal in expediting certain classes of cases or claims (particularly constitutional claims), the fact remains that this would expedite both the meritorious and frivolous cases without allowing for the expedition of cases involving vital interests outside the class of statutorily expedited cases.

Ultimately the question underlying the bill is whether Congress or the courts should determine the speed at which cases are decided. Here the question has two distinct premises: Congress has historically determined which cases are to be expedited by refering to a class, inherent from the legislative discrimnations drawn by the statute, and the courts have historically determined which cases are to be expedited by refering to the facts and issues of a particular case, with the aid of counsel.

We have already suggested the need for an implicit repealer if the purpose of the bill is to repeal all civil priorities save those specifically mentioned. There are also recent changes in the code which may be further amended to reflect the broad sweep of the provisions of H.R. 4396. E.g., Federal Courts Improvement Act of 1982, Pub. L. 97-164, § 127(a), 96 Stat. 37, 39, April 2, 1982, adding 28 U.S.C. § 1296 (eff. October 1, 1982) (providing for expedition rules by in the United States Court of Appeals for the Federal Circuit).

There are also other roots to H.R. 4396, particularly the perceived need for a systematic handling of federal courts legislation. In the course of collecting and analyzing the various provisions of law, it has become evident that these provisions not only have a diverse linguistic style, but come from diverse sources. In short, most of these provisions have been added by committees of the House and Senate other than the Committees on the Judiciary. The

development of many of these provisions further indicates that reference was not made to the Committees on the Judiciary to review the provisions prior to passage in accord with House Rule X, cl 1(m)(1), and Senate Rule 25.1(1)(10), 97th Congress, and their precursors. See, also, House Rule X, cl. 5. Cf. Senate Rule XVII.

Finally, we should note a common misunderstanding of the effect of the implicit repealer.[19/] The implicit repealer applies only to laws currently extant, not laws which may be passed in the future. It is axiomatic that Congress can not tie the hands of future Congresses and that, even with a specific disclaimer of future statutory action requiring expedition of particular classes of cases, a conflict between the disclaimer and a subsequently passed expedition provision would be resolved by the courts in favor of the latter enacted statute, in the same way as the implicit repealer operates. Accordingly, the most that can be accomplished by prospective legislation would be to require that future provisions for judicial review including expedition provisions be serially referred to the Committee on the Judiciary by imposing such a duty on the appropriate officer.

If we can be of further service, please feel free to call on us.

Leland E. Beck
Legislative Attorney

19/ See, "Impact of Civil Expediting Provisions . . .", supra, 37 Record Assoc. B.C.N.Y. at 34.

APPENDIX: STYLES OF EXPEDITING PROVISIONS

This appendix is divided into three parts: (1) provisions affecting the district courts, (2) provisions affecting the Courts of Appeals, and (3) provisions affecting specialized courts. Provisions requiring expedition by the Supreme Court (possibly eight) are omitted because they are all combined with other expedition provisions or are included under a generic expedition. Where a statute provides for the composition of a special panel -- e.g. the designation of three judges to sit as a special court -- the court has been classified as a district court, whether the panel designated is composed of all trial judges or a mixture of trial and appellate judges. Only if the panel designated was to consist wholly of appellate judges performing a non-evidentiary appellate review function will the panel be classed as a court of appeals. There are instances in which a particular provision will appear twice in the compilation/due to its multiple affect or general discription of the court involved. In several cases it has been necessary to follow cross-references through several sections of the public law in order to determine the proper court affected; in some cases, there is dispute over where a case would be filed invoking the expedition provision. Furthermore, there are definite instances in which the proper court is subject to interpretation.

The linguistic styles within each category of court affected are organized by a loosely defined declining order of specificity. In several cases, generic linguistic styles have been combined due to alteration only in the order of clauses or a lack of any effective distinction between them. The organization

is subject to argumentation and is only suggestive of a possible ordering of cases by a court if posed with simultaneous filing of one case of each linguistic style or generic compilation.

The complex interplay of provisions is illustrated by 26 U.S.C. § 6110(f)(5). This provision requires the Tax Court to make decision with respect to petitions regarding disclosure of tax information "at the earliest practicable date" and further requires the court of appeals to "expedite any review of such decision in every way possible." Section 6110(f)(4) also provides for review of such petitions by the United States District Courts under procedures governed by the Freedom of Information Act's judicial review provisions, 5 U.S.C. § 552(a)(4), including subsection (D), which provides,

> Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

Procedure in the courts of appeals are thus governed by two standards at the same time: "expedite . . . in every way possible" and "take precedence on the docket over all cases and shall be assigned . . . for arguement at the earliest practicable date and expedited in every way."

1. Provisions Affecting United States District Courts

(1) "Within 180 days after the filing of a petiiton under . . ., the special court shall decide, after a hearing, whether the proposed supplemental transactions, contained in such petition, considered in their entirety, are in the public interest and consistent with the purposes of this Act and the goals of the final system plan and are fair and equitable. . . . Within 90 days after the filing of such petition, the special court shall decide, after a hearing whether the proposal as modified by the certification is in the public interest and consistent with the purposes of this Act and the goals of the final system plan and is fair and equitable, and shall enter such further orders as are consistent with its determination."
-45 U.S.C. § 745

(2) "Any proceeding before a federal court in which an administrative action, including compliance with . . . pursuant to . . . shall be assigned for hearing and completed at the earliest possible date, and shall be expedited in every way by such court, and such court shall render its final decision relative to any challenge within one hundred and twenty days from the date such challenge is brought unless such court determines that a longer period of time is required to satisfy the requirements of the United States Constitution."
-16 U.S.C. § 3168(b)
-P.L. 96-312, § 10(b)(3), 94 Stat. 953, July 23, 1980 [variation: 180 days].

(3) "An application for an order pursuant to . . . shall be heard within ten days"
-42 U.S.C. § 1971(e)

(4) "Any proceedings as authorized in . . . shall be assigned for hearing at the earliest possible date, shall take precedence over all other matters pending on the docket of the District Court at that time, and shall be expedited in every way."
-25 U.S.C. § 640d-3(b)
-16 U.S.C. § 3119
-43 U.S.C. § 1652(d)

(5) " . . . any suit brought under the provisions of . . . shall have precedence for hearing and trial over other cases on the civil docket of the court, and shall be tried and determined at the earliest practicable day."
-43 U.S.C. § 1062.

(6) "At the earliest convenient time, the court, in term time or vacation, shall hear and determine the case upon the original record of . . .."

-7 U.S.C. § 1366

(7) "Such proceedings shall be given precedentce over other cases pending in such courts, and shall be in every way expedited."

-12 U.S.C. § 1464(d)(6)(A)

(8) "Any action brought under this subsection shall be advanced on the docket of the court in which filed, and put ahead of all other actions (other than other actions brought under this subsection or . . .).

-2 U.S.C. § 437g(a)(10)

(9) "The courts shall give precedence to civil actions brought under this section, and to appeals and writs from decisions in such actions, over all other civil actions, appeals, and writs."

-31 U.S.C. § 1406

(10) ". . . the motion for a preliminary injunction shall be set down for hearing by the district judge so designated at the earliest practicable time, shall take precedence over all matters except older matters of the same character and [criminal trials], and shall be in every way expedited."

-15 U.S.C. § 18a(f)(B)

(11) "Except as to cases the court considers of greater importance, a proceeding brought . . . and appeals, take precedence on the docket over all cases and shall be assigned for hearing and decided at the earliest practicable date."

-26 U.S.C. § 7609(h)(2)

(12) ". . . the court shall proceed as soon as practicable to the hearing and determination thereof."

-18 U.S.C. § 1964(b)

(13) "Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by . . ., and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way."

-5 U.S.C. § 552(a)(4)(D)

(14) "Except as to cauases which the [three-judge] court considers to be of greater urgency, proceedings before any district court under . . . shall take precedence over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way."

-10 U.S.C. § 2304 note

(15) "Whenever any such petition is accompanied by a certificate of the Attorney General to the effect that the proceeding so instituted is one of exceptional public importance, such proceeding shall be set for hearing at the earliest possible time and all proceedings therein before . . . any court shall be expedited to the greatest practicable extent."
-50 U.S.C. § 792(a)

(16) "Any such proceeding shall be assigned for hearing at the earliest possible date and shall be expedited by such court."
-42 U.S.C. § 6508
-43 U.S.C. § 2010(c)

(17) "Any such proceeding shall be assigned for hearing at the earliest practicable date and shall be expedited by such court," or "shall be expedited in every way" or similar variations.
-15 U.S.C. § 28
-18 U.S.C. § 1966
-26 U.S.C. § 9010(c)
-26 U.S.C. § 9011(b)(2)
-28 U.S.C. § 1364[5](c)
-29 U.S.C. § 1303(e)(4)
-42 U.S.C. § 1971(g) [¶1]
-42 U.S.C. § 1971(g) [¶3]
-42 U.S.C. § 1973h(c)
-42 U.S.C. § 2000a-5(b) [¶1]
-42 U.S.C. § 2000a-5(b) [¶3]
-42 U.S.C. § 2000e-5(f)(2)
-42 U.S.C. § 2000e-5(f)(5)
-42 U.S.C. § 2000e-6(b) [¶1]
-42 U.S.C. § 2000e-6(b) [¶3]
-42 U.S.C. § 3614.

(18) "The hearings shall be given precedence and held at the earliest practicable day"
-28 U.S.C. § 2284(b)(2)

(19) "The proceedings in such a case shall be made a preferred cause and shall be expedited in every way"
-15 U.S.C. § 687c(a)
-22 U.S.C. § 618(f)

(20) "It shall be the duty of the judges designated to hear the case to assign the case for hearing and determination thereof, and to cause the case to be in every way expedited."
-42 U.S.C. § 1973bb(a)(2)

(21) "The court shall expedite the disposition of any civil action to which this section applies."
-15 U.S.C. § 1415(a)(2)

(22) "The court shall give expedited consideration to any such action."
-7 U.S.C. § 136h(d)(3)

(23) "Civil actions filed under . . . shall be heard and decided expeditiously."
-15 U.S.C. § 2623(d)
-42 U.S.C. § 300j-9(i)(4).

(24) "The court shall expedite its consideration of any claim brought pursuant to . . .."
-16 U.S.C. § 1910.

(25) "Wherever possible the local rules of the district court and the rules promulgated by the conference shall endeavor to make such appeals [to the district court] expeditious and inexpensive."
-28 U.S.C. § 636(c)(4).

(26) "The court shall order speedy hearing in any such case and shall advance it on the calendar."
-38 U.S.C. § 2022.

2. Provisions Affecting the Courts of Appeals

(1) "Any such proceeding shall be assigned for a hearing and completed at the earliest possible date and shall be expedited in every possible way by such court. The court shall render its decision in any such proceeding within 60 days after the date of filing the petition for review unless the court determines that a longer period of time is necessary to satisfy the requirements of the Constitution of the United States."
-15 U.S.C. § 2003(b)(3)(E)(ii).

(2) ". . . the court of appeals shall determine such appeals in a consolidated proceeding, sitting en banc, and shall render a final decision no later than 60 days after the date the last such appeal is filed."
-45 U.S.C. § 1018(b).

(3) "Any such proceeding shall be assigned for hearing and completed at the earliest possible date, shall, to the greatest extent practicable, take precedence over all other matters pending on the docket of the court at that time, and shall be expedited in every way by such court and such court shall render its decision relative to any claim within 90 days from the date such claim is brought unless such court determines that a longer period of time is required to satisfy requirements of the United States Constitution.
-15 U.S.C. § 719h(c)(2)

(4) "Upon the filing of such record in the court of appeals, the appeal shall be heard and the temporary injunctive order affirmed, modified, or set aside with the greatest possible expedition, giving the proceedings precedence over all other matters except older matters of the same character."
-29 U.S.C. § 110.

(5) "The courts shall give precedence to civil actions brought under . . ., and to appeals and writs from decisions in such actions over all other civil actions, appeals, and writs."
-31 U.S.C. § 1406

(6) "Except as to cases the court considers of greater importance, proceedings before the district court, as authorized . . ., and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way."
-5 U.S.C. § 552(a)(4)(D).

(7) "Any review . . . shall be assigned for hearing and completed at the earliest possible date, and shall be expedited in every possible way."

-P.L. 96-312, § 10(c), 94 Stat. 954, July 23, 1980.

(8) "It shall be the duty of the court of appeals and of the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter certified under . . .."

-2 U.S.C. § 437h(c).
-7 U.S.C. § 136w(A)(4)(E)(iii).
-15 U.S.C. § 57a-1(f)(3).
-16 U.S.C. § 1463a(e)(3).

(9) "It shall be the duty of the court of appeals to advance on the docket and to expedite to the greatest possible extent the disposition of any matter certified under . . .."

-42 U.S.C. § 8514(b)

(10) "The court[s] shall advance on the docket and expedite the disposition of all causes filed therein pursuant to . . .", or ". . . shall be advanced on the docket of the courts of appeals."

-7 U.S.C. § 136n(b)
-7 U.S.C. § 136d(c)(4)
-21 U.S.C. § 346a(i)(5)
-21 U.S.C. § 348(g)(2)

(11) "At the earliest convenient time the court shall hear and determine the appeal . . .."

-47 U.S.C. § 402(g).

(12) "The court shall make the matter a preferred cause and shall expedite judgment in every way."

-39 U.S.C. § 3628.

(13) "Such proceedings in the courts of appeals shall be given precedence over other cases pending therein, and shall be expedited in every way."

-15 U.S.C. § 21(e).
-15 U.S.C. § 45(e).

(14) ". . . shall expedite any review of such decision in every way possible."

-26 U.S.C. § 6110(f)(5)

(15) "The division of the court shall cause such an action to be in every way expedited."

-28 U.S.C. § 596(a)(3)

(16) ". . . the court shall assign the action or proceeding for hearing at the earliest practicable date and cause the action or proceeding in every way to be expedited. Any appeal or petition for review from any order or judgment in such action or proceeding shall be expedited in the same manner."
-28 U.S.C. § 1364 [Senate Actions]

(17) "Any judicial proceedings under this section shall be entitled to, and, upon request of the Secretary or the State, shall receive a preference and shall be heard and determined as expeditiously as possible."
-26 U.S.C. § 3310(e).
-26 U.S.C. § 6363(d)(4).
-42 U.S.C. § 504(e).

(18) "Except as to causes of action which the court considers of greater importance, any action under this section shall take precedence on the docket over all other causes of action and shall be set for hearing at the earliest practical date and expedited in every way."
-15 U.S.C. § 78k-1(c)(4)(B)
-43 U.S.C. § 1349(d)

(19) "Petitions filed under this . . . shall be heard expeditiously, and if possible within ten days after they have been docketed."
-29 U.S.C. § 160(i)

(20) "Whenever any such petition is accompanied by a certificate of the Attorney General to the effect that the proceeding so instituted is one of exceptional public importance, such proceeding shall be set for hearing at the earliest possible time and all proceedings therein before . . . any court shall be expedited to the greatest practicable extent."
-50 U.S.C. § 792(a) [note]

(21) "The hearing on an application for an interlocutory injunction shall be given preference and expedited and shall be heard at the earliest practicable date after the expiration of the notice of hearing on the application. On the final hearing of any proceeding to review any order under this chapter, the same requirements as to precedence and expedition apply."
-28 U.S.C. § 1349(b)

(22) "The proceedings in such cases . . . shall be made a preferred cause and shall be expedited in every way."
-7 U.S.C. § 8(a)
-7 U.S.C. § 194(d)
-7 U.S.C. § 1600
-7 U.S.C. § 1601
-15 U.S.C. § 687a(e)
-15 U.S.C. § 687a(f)
-15 U.S.C. § 687c(a)

(23) "Petitions filed under this . . . shall be heard expeditiously"
-30 U.S.C. § 816(a)(1).
-29 U.S.C. § 660(a).

(24) "Upon the filing of such petition the court shall have exclusive jurisdiction of the proceeding and of the question determined therein, and shall give precedence in the adjudication thereof over all other civil cases not otherwise entitled by law to precedence."
-45 U.S.C. § 355(f).

3. Provisions Affecting Other Courts

United States Court of International Trade, 28 U.S.C. § 2647:

"§ 2647. Precedence of cases

The following civil actions in the Court of International Trade shall be given precedence, in the following order, over other civil actions pending before the court, and shall be assigned for hearing at the earliest practicable date and expedited in every way:

(1) First, a civil action involving the exclusion of perishable merchandise or the redelivery of such merchandise.

(2) Second, a civil action for the review of a determination under section 516A(a)(1)(B)(i) or (ii) of the Tariff Act of 1930.

(3) Third, a civil action commenced under section 515 of the Tariff Act of 1930 involving the exclusion or redelivery of merchandise.

(4) Fourth, a civil action commenced under section 516 or 516A of the Tariff Act of 1930, other than a civil action described in paragraph (2) of this section."

Court of Customs and Patent Appeals, 28 U.S.C. § 2602 (repealed eff. October 1, 1982) Federal Courts Improvement Act of 1982, Pub. L. 97-164, § 140, 96 Stat. 44, April 2, 1982):

"§ 2602. Precedence of American manufacturer, producer or wholesaler cases

(a) Every proceeding in the Court of Customs and Patent Appeals arising under section 516 of the Tariff Act of 1930, as amended, shall be given precedence over other cases on the docket of such court, except as provided for in paragraph (b) of this section, and shall be assigned for hearing at the earliest practicable date and expedited in every way.

(b) Appeals from findings by the Secretary of Commerce provided for in headnote 6 of schedule 8, part 4, of the Tariff Schedule of the United States (19 U.S.C. § 1202) shall receive a preference over all other matters."

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Court of Appeals for the Federal Circuit, Federal Courts Improvement Act of 1980, Pub. L. 97-164, § 127(a), 96 Stat. 39, April 2, 1982, eff. October 1, 1982, as 28 U.S.C. § 1296:

"§ 1296. Precedence of cases in the United States Court of Appeals for the Federal Circuit

"Civil actions in the United States Court of Appeals for the Federal Circuit shall be given precednece, in accordance with the law applicable to such actions, in such order as the court may by rule establish."

Tax Court of the United States, 26 U.S.C. § 6110(f)(5):

"(5) Expedition of determination. The Tax Court shall make a decision with respect to any petition described in paragraph (3) at the earliest practicable date and the Court of Appeals shall expedite any review of such decision in every way possible."

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PRELIMINARY DRAFT Subject to Revision

June 18, 1982

TO : Hon. Robert Kastenmeier
Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice
Attn: David Beier

FROM : American Law Division

SUBJECT : "Mandatory Appellate Jurisdiction of the Supreme Court of the United States"

In light of your recent request, we have revised and updated the above captioned report. We have reorganized the report on a more functional basis, including an annotated table of contents for your convenience, and added the following statutes which have come to our attention since the report was originally prepared:

(1) Federal Insecticide, Fungicide and Rodenticide Act Amendments (page 8);

(2) Coastal Zone Management Improvement Act (page 9); and

(3) Northeast Rail Service Act (page 11).

We have also included additional commentary on the origins of the three-judge district courts (page 15), review of ICC orders (page 15), and trends in Congressional activity (page 24). Part V has been expanded to review more of the policy considerations surrounding amendment to the Supreme Court's appellate jurisdiction. If we can be of further service, please feel free to call on us.

Leland E. Beck
Legislative Attorney



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Washington, D.C. 20540

MANDATORY APPELLATE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

Leland E. Beck
Legislative Attorney
American Law Division
November 10, 1981

Revised June 18, 1982

EXECUTIVE SUMMARY

This report reviews the statutes under which the Supreme Court of the United States *must* review certain classes of cases by way of appeal, as contrasted with that class of cases in which the Court has discretion on whether each case is of sufficient merit to warrant review by the Court by way of certiorari. There are over twenty statutes providing for appeals to the Supreme Court, ranging from the general provision for direct review of decisions that an Act of Congress is unconstitutional when the United States is a party to the specific provision for an expedited and complex review of the question of whether the "legislative veto" is constitutional as found in several statutes. Included in this process are a large number of specific statutes which rely on a three-judge district court, which must include at least one circuit court judge, for the initial determination of cases with a direct appeal to the Supreme Court. These provisions include not only questions of constitutionality, but questions of the implementation and enforcement of atatutes. In addition, there are several statutes which appear to be dormant, i.e. there are no cases which would be brought at this time.

In the last decade, Congress has restricted the use of direct appeals and the non-discretionary appeals process in cases in which the constitutionality of State statutes are raised. At the same time, Congress has increased the number and variety of statutes which utilize direct appeals and non-discretionary appellate process in cases in which the constitutionality or enforcement of federal law is raised.

The Court has recently amended its rules to reduce the procedural differences between appeals and petitions for certiorari. The timing of such procedures has also been altered to reduce the differences based on the origin of the case, whether from State or federal court. In the process of initially reviewing all cases, all appeals are placed on the Court's "discussion list", in contrast with petitions for certiorari, which are placed on the discussion list only if a Justice requests.

The Court appears to apply much the same standards to appeals in determining whether the case should be set down for full briefing and oral argument as it does when considering whether to grant petitions for certiorari and set those cases for full briefing and oral argument. The Court has also suggested that its disposition of cases which are summarily affirmed, reversed, or vacated and remanded, without full briefing, argument and formal opinions, have precedential value limited to the particular parties and issues of the case. Thus, substantial questions have arisen with regard to whether more than formal distinctions exist between certiorari and appeal.

The caseload created by appeals now numbers only about two hundred dispositions per Term, but the content of the docket requires substantially more time

than this number indicates. Litigants and counsel also appear to be mistaken about when appeals may be properly brought in a large percentage of cases, reflected by the dismissal of appeals for want of jurisdiction or more complex orders of the same nature.

In response to the rising caseload of the Court and the complexity of the appeals process, Congress has begun to reconsider whether and to what extent the right of appeal should be retained. H.R. 2406 and S. 1531, 97th Cong., 1st Sess., have been introduced to give the Court greater discretion in determining what cases to hear. The bills would remove substantial grants of the right to appeal and substitute the petition for certiorari. Several major grants of a right to appeal have been retained by inaction in the bills. These bills, therefore, do not seek to eliminate the right to appeal and substitute the petition for certiorari in all cases, but only to reduce the incidence of appeals.

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MANDATORY APPELLATE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The jurisdiction of the Supreme Court of the United States arises in many forms during legal and political debates. The purpose of this report is to review the jurisdiction of the Court in the sense of the degree of statutory control the Court has over its various docketa and the appeals docket in particular.[1/] In terms of degree of control, jurisdiction may be divided into mandatory or obligatory on one hand and discretionary on the other. This Report reviews, seriatim, (1) the mandatory appellate jurisdiction of the Court, (2) the procedure under which the mandatory jurisdiction may be invoked; (3) the practice of the Court; (4) the caseload under the mandatory jurisdiction, and (5) the contemporary proposals to alter or abolish the mandatory jurisdiction. The focus of this report on the details of juraidiction, procedure and caseload is designed to provide a detailed basis for Congressional consideration of the proposals to alter or abolish mandatory jurisdiction.

1/ See, generally, R. Stern and E. Gressman, Supreme Court Practice (Washington: Bureau of National Affairs, 5th ed. 1978); R. Wolfson and P. Kurland, Robertson and Kirkham's Jurisdiction of the Supreme Court of the United States (New York: Matthew Bender & Co., 1951); H. Tayler, Jurisdiction and Procedure of the Supreme Court of the United States (Rochester Lawyers' Co-Operative Publishing Co., 1905); W. Phillips, Phillips' Statutory Jurisdiction and Practice of the Supreme Court of the United States (New York: Banks and Brothers, 5th ed. 1887).

CRS-2

I. Mandatory Appellate Jurisdiction

The statutory jurisdiction of the United States Supreme Court can be divided into two major structural types: mandatory or obligatory, and discretionary.[2/] The mandatory or obligatory jurisdiction, the primary subject of this report, is a specific direction by Congress to the Court that, on the filing of an appeal and docketing of the case, the Supreme Court shall hear and determine the case or controversy. The discretionary jurisdiction of the Court is a direction by Congress that the Court may decide whether the issues raised are sufficiently meritorious to require the Court's review.

There are over twenty specific statutory requirements of mandatory or obligatory jurisdiction. Mandatory jurisdiction has historically focused on the question of the constitutionality of federal and state laws, but specific statutes provide for mandatory jurisdiction over certain classes of cases and the interpretation of certain laws. Certiorari jurisdiction which is discretionary, generally covers the broad range of federal Constitutional, statutory or treaty interpretation. As will be noted, in many cases of general mandatory jurisdiction, certiorari jurisdiction is provided as an alternative process.

2/ A historic theory of the jurisdiction of the Supreme Court is that no statutory jurisdiction is required: that, in essense, Article III of the Constitution sufficed to grant jurisdiction to the Court created by Congress and denominated the Supreme Court:

> The judicial Power of the United States shall be vested in one supreme court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . . .
> The judicial Power shall extend to all Cases, in Law and Equity, Arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; -- to

a. Inferior federal court decisions in civil actions to which the United States is a party and in which an Act of Congress is held unconstitutional may be brought directly to the Supreme Court for decision under 28 U.S.C. 1252 (1976):

> Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands and any court of record of Puerto Rico, holding an Act of Congress unconstitutional in any civil action, suit or proceeding to which the United States or

---

2/ [continued]:

> all Cases affecting Ambassadors, other public Ministers and Consuls; —to all Cases of admiralty and maritime Jurisdiction, —to Controversies to which the United States shall be a Party; —to Controversies between two or more States; —between a State and citizens of another State; —between Citizens of different States; —between Citizens of the same State claiming lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
>
> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate jurisdiction, both as to law and fact, with such Exceptions, and under such Regulations as the Congress shall make.

See, 3 J. Story, Commentaries on the Constitution of the United States 546 - 626 (Boston: Little, Brown & Co., 833). Compare, Marbury v. Madison, 1 Cranch (5 U.S.) 137 (1803) (original jurisdiction in Constitution) with Durousseau v. United States, 6 Cranch (10 U.S.) 307 (1810) (appellate jurisdiction statutory). See, Martin v. Hunter's Lessee, 1 Wheat (14 U.S.) 304, 374 (1816). The current discussion, however, need not focus on the origins of the jurisdiction of the Court, for the question of "mandatory jurisdiction", contrasted with "discretionary jurisdiction", is one of the manner in which jurisdiction is exercised. We assume, but state no opinion on, the power of Congress to make the distinction between mandatory and discretionary jurisdiction, as it has done since the founding of the Republic, under the authority to make "regulations" for the Court. See, generally, F. Frankfurter and J. Landis, The Business of the Supreme Court 3 - 54 (Boston: Little, Brown & Co., 1928).

any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.

A party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court. All appeals or cross appeals taken to other courts prior to such notice shall be treated as taken directly to the Supreme Court.

Three prerequisites must be met to invoke the appellate jurisdiction of the Court under § 1252: (1) the case must be civil in nature, although this requirement comprehends all cases, including habeas corpus proceedings, which are not criminal, (2) the case must be one in which the United States, either directly, or through an officer or employee, is the real party in interest,[3/] and (3) the judgment must be against the constitutionality of an Act of Congress.[4/] We should note that any party may take an appeal to the Supreme Court under § 1252; although it would be rare, a successful party in the lower court is entitled to petition for an affirmance of the decision.[5/] It is also important to note that where an appeal is taken under

---

3/ The United States, referred to generically to encompass all of the parties under the statute, does not need to be one of the original parties to the action. The United States must be notified and may intervene whenever the constitutionality of an Act of Congress is called into question. 28 U.S.C. § 2403 (1976). International Ladies' Garment Workers' Union v. Donnelly Garment Co., 304 U.S. 243 (1938).

4/ A decision that an Act of Congress is unconstitutional as applied in a given situation suffices to invoke jurisdiction under § 1252. Fleming v. Rhodes, 331 U.S. 100 (1947). However, a decision that an administrative agency has improperly interpreted a statute or applied the statute in an unconstitutional manner will not suffice for the invocation of jurisdiction under § 1252. United States v. Christian Echoes Ministry, 404 U.S. 561 (1971).

5/ Given that the United States is a party, and the decision is against the constitutionality of an Act of Congress, the appropriate remedy would be injunction relief against the United States and the nationwide application of that injunction would be presumable. Therefore the need for affirmance by the Court would merely remove the possibility of further litigation of other facts before other federal courts under the same Act. However, we cannot state that

§ 1252, the entire case is removed to the Supreme Court, including all subsidiary questions of statutory interpretation and procedure, whether ancillary to the question in issue or otherwise.[6/]

Invocation of jurisdiction by direct appeal from a district court to the Supreme Court under § 1252 has been rare, at best.[7/] For the most part, an order striking down an Act of Congress in which the United States is a party will be an order directly appealable to the Court of Appeals whether final, 28 U.S.C. § 1291 (1976), or interlocutory, 28 U.S.C. § 1292 (1976), and further be subject to a petition to the Supreme Court for a writ of certiorari before judgment if such expedition is truly necessary, 28 U.S.C. § 2101 (1976). Direct appeals from the Courts of Appeals have also been rare until recently.[8/]

5/ [continued]:

this is uniformly the case. See, e.g., INS v. Chadha, 634 F.2d 408 (9th Cir. 1980), jur. postponed and consolidated, --- U.S. --- (No. 80-1832, October 5, 1981) (contrasted with the consolidated cases in which main parties appealed and the intervenors petitioned for certiorari). Conceptually, the requirement of an aggrieved party in adversity to the decision below is constitutional. The limits of the statutory "any party" provisions do not appear to have been constitutionally challenged and must be taken at face value.

6/ So long as the basis for decision in the inferior court was the unconstitutionality of an Act of Congress, all questions in the case can be brought before the Court, "no matter what the contentions of the parties might be as to what its proper basis should have been." United States v. Raines, 362 U.S. 17, 20 (1960). Indeed, the Court has taken a broad view of the requirements of the statute: "this Court's jurisdiction under §1252 in no way depends on whether the district court had jurisdiction." McLucas v. DeChamplain, 421 U.S. 21, 31 - 32 (1975); United States v. American Friends Service Committee, 419 U.S. 7, 12 n. 7 (1974); Flemming v. Nestor, 363 U.S. 603 (1960); United States v. Raines, supra, at 27 n. 7.

7/ See, also, Report of the Study Group on the Case Load of the Supreme Court 33 (Washington: Federal Judicial Center, 1972), reprinted at 57 F.R.D. 573, 602 (1972) ("Freund Report"). See, infra, at 47, 49 - 50.

8/ Parker v. Levy, 417 U.S. 733 (1974), appears to have been the first.

b. Buckley-type review is a specific process of judicial review of questions of constitutionality of Acts of Congress which has become relatively popular in recent years. In litigation to which a Buckley review mechanism applies, questions of statutory interpretation and application are reviewed by the district courts in the normal way, but the mechanism requires that the District Court immediately certify all questions of constitutionality to the Court of Appeals, and that the Court of Appeals expedite hearing en banc. An appeal may be taken to the Supreme Court from the judgment of the Court of Appeals within twenty (20) days of the judgment. This procedure is generally referred to as "Buckley"-type review after the first case, Buckley v. Valeo, 424 U.S. 1 (1976), invoking the original provision, the Federal Elections Campaign Act of 1971, infra.

Unlike the normal course of litigation, the sole function of the district court is to certify to the court of appeals that an issue of constitutionality of an applicable statute has been joined. This function is all but ministerial when the issue is the constitutionality of an applicable statute per se. If the issue is one of the constitutionality of an applicable statute as applied, the district court would necessarily determine the facts before reaching the question of constitutionality of the statute as therein applied. Accordingly, the district court would make all the necessary fact-finding decisions and certify the issue of constitutionality on the record to the court of appeals for decision.

The court of appeals is required to sit en banc, rather than in the normal panels of three, but the term "en banc" is not defined and now has different meanings in different circuits. In the First Circuit, with only four judges,

the en banc procedure simply requires all four to sit and determine the case. In the Ninth Circuit, however, "en banc" now means only the chief or ranking judge and ten randomly drawn judges of the court. United States Court of Appeals for the Ninth Circuit, Local Rule 25 (as amended through October 1, 1981). These eleven judges do not constitute a majority of the authorized bench of twenty-three judges. 28 U.S.C. § 44 (1976, Supp. IV 1980).

Additionally, the provision generally requires that the appeal to the Supreme Court from the decision of the en banc court of appeals be filed within twenty days, a substantially shorter period than generally available. It is not clear whether this provision requires filing the notice of appeal in the court below or docketing the appeal in the Court, or both, within the 20 days.[9/] With this general review in mind, we turn to the specific statutes.

1. The Federal Elections Campaign Act of 1971, as amended, provides that suits to test the Constitutionality of the Act may be brought by any individual eligible to vote in a Presidential election and provides specific procedures for the exercise of judicial review. Pub.L. 92-225, § 314, as added P.L. 93-443, § 208(a), 88 Stat. 1285, October 15, 1974, as renumbered § 310, found at 2 U.S.C. § 437h(c).

This provision differs markedly from the general provisions for appeals. First, Congress has provided what may be best characterized as "voter standing"[10/]

12/ See, infra, pages 27 - 31.

10/ Statutory grants of standing will vitiate the prudential rules of standing imposed by the courts, but any plaintiff invoking the statutory clause must still meet the requirements of the Constitution, Article III, standing. Duke Power v. Carolina Environmental Study Group, 438 U.S. 59 (1978); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977); Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976); Warth v. Seldin, 422 U.S. 490 (1975).

in the district court, along with standing for the Federal Elections Commission and the political organizations involved. Second, the provision is substantially more restrictive as to who may file the appeal because it does not contain a specific authorization that "any party" may file the appeal, as is found in § 1252, supra, or § 1253, infra. Rather, the lack of such authority would revert procedure to the general requirement that only the aggrieved, or losing, party may file the appeal.[11/]

2. Section 21 of the Federal Trade Commission Improvements Act of 1980 provides for Congressional review of Federal Trade Commission final rules. Pub.L. 96-252, § 21, 94 Stat. 393, May 28, 1980, found at 15 U.S.C. § 57a-1 (1976, Supp. IV 1980). Subsection 21(f), provides for Buckley-type judicial review of the constitutionality of the legislative veto provision, including an appeal to the Supreme Court. One substantial difference between the FECA provision and the FTC Improvements Act is that the latter does not appear to confer any statutory standing; rather the FTC Improvements Act relies on traditional aggrieved parties language.

3. Section 25(a)(4)(E)(ii) of the the Federal Insecticide, Fungicide and Rodenticide Act, as added Pub. L. 96-539, § 4, 94 Stat. 3194, 5, 6, December 17, 1980, provides for a Buckley-type judicial review of the constitutionality of legislative veto provision covering regulations under the Act. In this provision the aggrieved parties type of limitation is also evident, as is the limitation to specific review of the legislative veto, indicating a relatively narrow sweep in effect.

11/ See, generally, Buckley v. Valeo, 424 U.S. 1 (1976).

4. Section 12 of the Coastal Zone Management Improvement Act of 1980, Pub.L. 96-464, 94 Stat. 2060, October 17, 1980, found at 16 U.S.C. § 1463a (1976, Supp. IV 1980), provides for Congressional veto of regulations promulgated under the Coastal Zone Management Act of 1972. Section 12(e) provides for Buckley-type review, including certification, review en banc by the court of appeals and, under § 12(e)(2), an appeal to the Supreme Court.

Buckley review initially was designed to cover all questions of constitutionality under the FECA, but more recently has been used as boilerplate to provide an expedited review of the question of the constitutionality of the legislative veto. The relative recency of the provision, together with the narrow and highly visible scope of the substantive review, indicate that cases may be expected to be heard under the procedure, until this substantive question is otherwise settled.[12/]

c. For a substantial period of time the direct appeal provision in § 1252 appeared to be a surplusage of authority since Congress had also mandated that suits to enjoin the operation of an Act of Congress or a State statute on the grounds of unconstitutionality be heard before three-judge district courts, in accord with 28 U.S.C. § 2284 (1976). Under the procedures outlined in § 2284, when a party requests an injunction to restrain the operation of a statute from a single judge in the district court, the judge is to certify to the chief judge of the circuit that two additional judges are required

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12/ See, Chadha v. INS, supra, note 5; Consumer Energy Council v. FERC, --- F.2d ---- (D.C. Cir. No. 80-2184, January 29, 1982), appeal filed sub nom. Process Gas Consumers Group, v. Consumer Energy Council (No. 81-2008, filed April 29, 1982), Interstate Natural Gas Association v. Consumer Energy Council, (No. 81-2020, filed May 1, 1982).

to compose the three judge court and the chief judge of the circuit appoints the two additional judges, one of whom must be a circuit judge, will be appointed. These decisions, as are all three-judge district court decisions, are directly appealable to the Supreme Court under 28 U.S.C. § 1253 (1976):

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

The division of jurisdiction on this basis caused substantial confusion in the district courts, and the general three-judge district court injunction statute was repealed in 1976.[13/] The specific extant statutes require some explanation.

1. Actions brought before the United States District Courts to implement the Presidential Campaign Fund Act, I.R.C. § 9011, as added P.L. 92-178, § 801, 85 Stat. 570, December 10, 1971, as amended, P.L. 93-443, § 404(C)(19) - (21), 88 Stat. 1293, October, 15, 1974, as amended, may be appealed directly to the Court. As in the provision for the right of direct, mandatory appeal under the FECA, supra, voter standing is provided in the district court and no specific allowance is made for an appeal by any party. However, the district court is required to proceed under the three-judge district court provisions, 28 U.S.C. § 2284 (1976), and jurisdiction over the appeal therefrom may also be governed by 28 U.S.C. § 1253 (1976), as well as I.R.C. § 9011. The governing distinction will be whether the suit is one for injunction based on unconstitutionality; if

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13/ Pub. L. 94-381, § 1, 90 Stat. 1119, August 12, 1976, repealing 28 U.S.C. § 2282 (1976).

so, any party may appeal; if not, only the aggrieved, or losing, party may appeal.[14/]

2. The determination of constitutionality of the so-called Regional Rail Reorganization Act of 1973 by a special three-judge district court specified in the Act is reviewable on direct appeal to the Supreme Court "in the same manner that an injunctive order may be appealed under section 1253 . . .." Pub.L. 93-236, § 209(e), 87 Stat. 999, January 2, 1974 as amended, found at 45 U.S.C. § 719(e)(3) (1976, Supp. III 1979). While the reorganization was considered a temporary process, although involving a permanent body, the potential for litigation arising within the ambit of the special court, and consequently the potential for litigation raising the constitutionality of the Act, is continuous.[14/] This special court is not truly a three-judge district court because it is organized separately from § 2284 procedures.

3. Congress has recently added to the duties of this special three-judge court in the Northeast Rail Service Act of 1981, Subtitle E of Title XI of the Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, § 1152, 96 Stat. 676, August 13, 1981. Subsection (b) provides that orders enjoining enforcement or declaring the unconstitutionality or invalidity of the subtitle may be appealed directly to the Supreme Court. This provision adds substantially to the scope of what would otherwise appear to be § 1253 jurisdiction.

4. Three provisions of the Civil Rights Act of 1964 contain specific

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13/ The procedures under the FECA are complex, as these jurisdictional and procedural requirements illustrate. The fundamental point of reference between these two provisions is that they are, at best, inconsistent.

14/ See, generally, Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974).

provisions for direct appeals to the Supreme Court from determinations of three-judge district courts. R.S. § 2004, as amended, prohibits discrimination in voting on the basis of race, color or previous condition of servitude. In 1964, current subsection (g) was added requiring that actions brought to enforce the section by the United States in which the Attorney General has requested a finding of a practice of discrimination be heard by a three-judge district court in accordance with 28 U.S.C. § 2284 (1976), and provides that an appeal shall lie directly to the Supreme Court. R.S. § 2004(h), as added, P.L. 88-352, § 101, 78 Stat. 241, July 2, 1964, as renumbered, P.L. 89-110, § 15, 79 Stat. 445, August 6, 1965, found at 42 U.S.C. § 1971 (1976).

Section 201 of the Civil Rights Act of 1964 entitles all persons to the full and equal enjoyment of public accommodations, and § 202 entitles all persons to be free from discrimination in that enjoyment. Section 203 prohibits interference with that enjoyment. Section 206 authorizes the Attorney General, on reasonable cause, to file a suit for injunctive or other relief. Section 206 provides that the Attorney General may request that a three-judge district court be convened to hear the case if he determines that the suit is of general public importance and an appeal from the final judgment of the three-judge district court specifically lies to the Supreme Court. P.L. 88-352, § 206(b), 78 Stat. 245, July 2, 1964, found at 42 U.S.C. § 2000a-5(b) (1976).

Section 707, after the enumeration of employment discrimination practices which are prohibited in §§ 703 and 704, authorizes the Attorney General [now the Equal Employment Opportunities Commission] to file suits for injunctive or other relief to enforce the equal employment opportunities provisions. If the Attorney General certifies to the district court that the case is of general

public interest, a three-judge district court is to be convened. Section 707(b) provides that an appeal to the Supreme Court shall lie from the decision of the three-judge court. P.L. 88-352, § 707(b), 78 Stat. 261, July 2, 1964, found at 42 U.S.C. § 2000e-6(b) (1976).

5. Several voting rights provisions require trial disposition before a three-judge district court but have separate provisions for appeal to the Supreme Court. Section 4(a) of the Voting Rights Act of 1965, as amended, provides that suits brought by States or political subdivisions thereof to challenge the determinations of the Attorney General with regard to the previous use of election tests shall be heard by Three-Judge District Courts under 28 U.S.C. § 2284 (1976). The subsection separately requires that appeals from such courts lie directly to the Supreme Court. P.L. 90-110, § 4(a), 79 Stat. 438, August 6, 1965, as amended, P.L. 91-285, § 2, 84 Stat. 314, 315, June 22, 1970, P.L. 94-73, §§ 101, 201, 202, 203, 206, 89 Stat. 400 - 402, August 6, 1975, found at 42 U.S.C. § 1973b(a) (1976).

Section 5 of the Voting Rights Act provides that declaratory judgment suits brought by a State or political subdivision to determine whether a particular voter qualification, prerequisite, standard, practice or procedure abridges the right to vote, as an alternative to submission to the Attorney General, shall be heard by a three-judge district court in accordance with 28 U.S.C. § 2284 (1976) and specifically provides that an appeal lies to the Supreme Court. P.L. 89-110, § 5, 79 Stat. 439, August 6, 1965, as amended, P.L. 91-285, §§ 2, 5, 84 Stat. 314, 315, June 22, 1970, P.L. 94-73, §§ 204, 206, 405, 89 Stat. 402, 404, August 6, 1975, found at 42 U.S.C. § 1973c(a) (1976).

Section 301 of the Voting Rights Act of 1965, as added by § 6 of the Voting

Rights Act Amendments of 1970, as amended, requires the Attorney General to institute such actions as appropriate against the States or political subdivisions to enforce the Twenty-Sixth Amendment to the United States Constitution, prohibiting the denial of the right to vote on the basis of age. The provision requires a three-judge district court to be empaneled in accordance with 28 U.S.C. § 2284 (1976) and specifically provides for an appeal to lie directly to the Supreme Court. Pub.L. 89-110, § 310, August 6, 1965, as added, Pub.L. 91-285, § 6, 84 Stat. 318, June 22, 1970, as amended, Pub.L. 94-73, § 407, 89 Stat. 405, August 6, 1975, found at 42 U.S.C. § 1973bb(a)(2) (1976).

Section 10 of the Voting Rights Act, as amended, directs the Attorney General to institute actions for injunctive or declaratory relief from the collection of any poll taxes by a State or political subdivision from any eligible voter. Subsection (c) requires that a three-judge district court be empaneled in accordance with 28 U.S.C. § 2284 (1976) and specifically provides for an appeal to lie directly to the Supreme Court. Pub.L. 89-110, § 10(c), 79 Stat. 442, August 6, 1965, found at 42 U.S.C. § 1973h(c).

Section 204 of the Voting Rights Act, as amended, authorizes the Attorney General to file suit in the appropriate district court to enjoin any State or political subdivision from enacting or seeking to administer any test or device as a prerequisite for voting or undertaking any action to deny the right to vote in violation of the Act. The provision requires that these suits be heard before a three-judge district court in accord with 28 U.S.C. § 2284 (1976) and specifically provides for an appeal to be taken to the Supreme Court. Pub.L. 89-110, § 204, as added, Pub.L. 91-285, § 6, 84 Stat. 317, June 22, 1970, as amended, Pub.L. 94-73, §§ 302, 303, 406, 89 Stat. 403, 405, August 6, 1975, found at 42 U.S.C. § 1973aa-2 (1976).

6. We should also specifically mention the origin of three-judge district court cases under 28 U.S.C. §§ 2281, 2282 (1970), repealed Pub. L. 94-381, § 1, 90 Stat. 1119, August 12, 1976, to which we have previously alluded, which created the premise for § 1253 jurisdiction. The original act was passed in response to the Court's decision in Ex parte Young,[16/] upholding a contempt conviction of a state official for enforcing a state law in violation of a federal injunction issued by a single judge. Section 2281 provided that temporary or permanent injunctions to restrain the enforcement, operation or execution of a State law on the grounds that the law was unconstitutional should not be granted except by a three-judge court. Section 2282 provided that temporary or permanent injunctions to restrain the enforcement, operation or execution of any Act of Congress on the grounds that the act was unconstitutional should not be granted except by a three judge court. Although the statutes have been repealed, there remain several cases which continue under a savings provision.

7. Lastly, the Congress repealed a long-standing provision that required that temporary or permanent injunctions to restrain the enforcement, operation or execution of orders of the Interstate Commerce Commission be heard by a three-judge district court. 28 U.S.C. § 2325 (1970), repealed Pub. L. 93-584, § 7, 88 Stat. 1918, January 2, 1975. The significance of this repeal lies in the narrowness of application to ICC orders; this was probably the only administrative body which had such a review mechanism.

d. Where a United States Court of Appeals holds a State statute unconstitutional or preempted, the party relying on the state statute may take an appeal to the Supreme Court. 28 U.S.C. § 1254 (2) (1976). This relatively narrow set of circumstances is further constricted by the statutory preclusion of a writ of certiorari. Section 1254 reads, in pertinent part:

16/ 209 U.S. 128 (1908).

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

. . .

"(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

. . ."

The statute has both broad and narrow features in interpretation. In the broad sense, the statute clearly indicates that a holding that a State statute has merely been preempted by federal law is sufficient to invoke § 1254(2) jurisdiction.[17/] Similarly, the "State statute" comprises not only State legislative enactments of general applicability, but special State legislative acts of local applicability, local, county, or municipal ordinances and State administrative regulations, an interpretation which is more comparable to the State action doctrine than to specific statutory interpretation.[18/] On the other hand, the "State statute" must be relied upon for the decision of the court of appeals to be appealable to the Supreme Court, and the decision must be free of an independent and adequate state law ground.[19/] At the same time, the

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17/ See, Minnesota v. Northern States Power Co., 405 U.S. 1035 (1972), affirming 447 F.2d 1143 (8th Cir. 1971).

18/ See, Williams v. Bruffy, 6 Otto (96 U.S.) 176, 183 (1877); King Manufacturing Co., v. Augusta, 277 U.S. 100, 104 - 105 (1928) (State constitutional and statutory provisions); Chicago v. Atchison, Topeka and Santa Fe R.R. Co., 357 U.S. 77, 82 (1958); Doran v. Salem Inn, Inc., 422 U.S. 922, 927 n. 2 (1975); City of New Orleans v. Dukes, 427 U.S. 297, 301 (1975) (municipal and local ordinances); cf., United States v. Howard, 352 U.S. 212 (1957) (administrative bodies); Dusch v. Davis, 387 U.S. 112 (1967) (State law of local application).

19/ If the decision is based on a state law ground, the use of 1254(2) is improper. Public Service Commission v. Batesville Telephone Co. 284 U.S. 6 (1931). The interpretation of the statute as to the scope of the law covered parallels the general requirements in cases on appeal from State courts of last resort, 28 U.S.C. § 1257 (1976) (discussed in part, infra, at 17 - 20), that there be no independent and adequate State ground on which to rest the judgment.

term "State" does not include Puerto Rico.[20] This leaves a substantial anomaly: holdings by the United States Court of Appeals for the First Circuit that a "statute" of Puerto Rico is repugnant to the Constitution or preempted by federal law may only be reviewed by writ of certiorari under 28 U.S.C. § 1254(1) (1976). A similar result would appear warranted with regard to the decisions of the United States Court of Appeals for the District of Columbia Circuit that a District of Columbia "statute" was unconstitutional, although the instant case has not arisen.[21]

(e.) The next major provision for the right of appeal to the Supreme Court is the most common and yet, most complex. Appeals from the final courts of review of the various States may be taken to the Supreme Court under circumstances provided in 28 U.S.C. § 1257 (1976);

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

20/ Fornaris v. Ridge Tool Co., 400 U.S. 41, 42 n. 1 (1970); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 675 - 677 n. 11 (1974). See, supra, note 18. Otherwise, Puerto Rico is treated in a manner similar to a State. Compare, e.g. 28 U.S.C. §§ 1257 (appeal and certiorari from State courts of last resort) and 1258 (appeal and certiorari from Supreme Court of Puerto Rico), discussed, infra, at 21.

21/ Cf., infra, note 30.

> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.
>
> For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals."

The primary elements of this statute do not require discussion beyond the context of the general policies engendered. The "highest court of a State" is often referred to incorrectly as a "state court of last resort" since the highest court in many state systems has discretionary review; therefore, where the court of last resort has issued a denial of review, the case will be subject to appeal.[22/] Finality is also a prerequisite, as in all cases brought before the Court, but the process of determination of finality is more difficult given the variety of State court systems and procedures which must be analyzed.[23/] Thus, where a State trial court decision is final because it is not reviewable by a higher court of the State, the judgment will be reviewable under § 1257.

22/ See, e.g., Cohens v. Virginia, 6 Wheat. (14 U.S.) 264, 375 - 376 (1819). This is a more or less common occurence depending on the structure of a particular state court system and authority of the highest court.

23/ The question of finality in cases arising from State court systems can not be effectively analyzed without due concern for the variation of State judicial systems and the powers of State courts of last resort and inferior courts which may have, by statute or practice, gained the status of final resort. For example, Pennsylvania divides its Supreme Court into panels which are generally final. The New York Court of Appeals has discretion to review, and therefore many cases will come from the Supreme Court of New York, Appellate Division, to the United States Supreme Court. Further, the appellate structures in Ohio and Illinois are such that appeals would appear to lie from county courts to the United States Supreme Court if all other jurisdictional requirements are met.

The litigation from the State courts must include a "substantial federal question", a term which will recur in several other contexts. In State courts the federal issue must be raised in accord with the State rules of procedure and subject to State limitations, so long as an adequate opportunity to raise the issue is provided. Any failure to properly frame or present a substantial federal issue is avoided if the State court decision being appealed expressly considers and decides the issue.[24/] The substantial federal question denominated in § 1257 (1) is whether the validity of a federal statute is drawn into question based on its repugnance to the Constitution, and the decision below is that the statute is unconstitutional. The substantial federal question denominated in § 1257 (2) is whether the validity of a State statute is drawn into question based on its repugnance to the Constitution or preemption by federal law, and the decision below is that the statute is constitutional and not preempted. The complexity of these questions is not here entirely germane.[25/]

Additionally, as in appeals from the court of appeals under § 1254(2) and in review of petitions for certiorari from State courts under § 1257(3), the self-imposed doctrine that the decision below be free of an independent

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24/ See, e.g., Saltonstall v. Saltonstall, 276 U.S. 260, 267 (1928) ("We may disregard the ambiguity of the trustees' contention below that the statutes were 'unconstitutional,' in so far as the state court understood that the federal Constitution was the basis for the objection and in its opinion sustained the statutes under that instrument.").

25/ The Court's substantive decision of whether a substantial federal question has been raised is based upon pleadings of varying quality and shall reappear in terms of the procedure on appeal, the practice of the Court and the statistical implication of the mandatory docket, infra. What suffices as a properly plead substantial federal question, however, is more of a lower court litigative question, observed more in the failure of counsel than in elucidation by the Court.

and adequate non-federal ground must be established.[26] The question is two fold: (i) whether the decision is based on an independent non-federal or State ground, and (ii) whether that ground is adequate to support the judgment below. Analysis of these two questions has been historically confusing.

The Court will determine the precise ground on which the judgment below rests -- whether federal or State -- in each instance.[27] If the State court has expressly relied on both federal and non-federal or State grounds, the Court must inquire whether the non-federal or State ground is both independent and adequate, for if the non-federal or State ground meets both tests, the Court has no jurisdiction.[28] At the other extreme, if both a federal and State ground are properly raised in the record of the court below, and the foundation of the decision below is ambiguous, the Court will generally assume that the decision below is based upon any independent and adequate non-federal or State ground which can be found; this is a practice presumption that the petitioning party bears the burden of both proceeding and persuading the Court that the decision below is clearly based on federal grounds. Clearly, numerous middle grounds can be identified for argument in jurisdictional statements.[29]

26/ One of the unanswered questions after 190 years of Supreme Court practice is whether the requirement that an independent and adequate non-federal or State ground not exist for the decision below is, in fact, constitutionally based. As the Court has consistently adhered to the view that it will not decide cases in which there is an independent and adequate non-federal or State ground, the question is likely to remain unanswered. See, Herb v. Pitcairn, 324 U.S. 117 (1945) (on certiorari).

27/ Black v. Cutter Laboratories, 351 U.S. 292, 297 - 298 (1956).

28/ See, e.g., Fox Film Corp. v. Muller, 296 U.S. 207 (1935).

29/ The middle grounds are considered, but not necessarily ranked, in R. Stern and E. Gressman, Supreme Court Practice, supra, note 1, at 230 - 245.

Finally, the limited nature of the questions which come under this mandatory jurisdiction must be reiterated. The question of constitutionality of a State statute must be clearly drawn into question and the decision must be in favor of its constitutionality. Similarly, the State court must hold a State statute to have not been preempted by federal law, a complex question of the operation of Article VI of the Constitution and the interpretation of federal law. The limited number of instances in which a State court has held a federal statute unconstitutional tends to naturally be limited by the choice of forums by litigants.30/

f. We have already alluded to the last operative provision for a direct right of appeal to the Supreme Court to be discussed here. 28 U.S.C. § 1258 (1976) is a parallel to § 1257 and specifically applies to the Supreme Court of Puerto Rico. Section 1258 (1) and (2) provide specific mandatory jurisdiction in appeals from the Supreme Court of Puerto Rico as can be brought from State Supreme Courts or the District of Columbia Court of Appeals under § 1257.

g. Certain California Indian claims filed in the Court of Claims are reviewable by appeal to the Supreme Court. Act of May 18, 1928, c. 624, § 2, 45 Stat. 602, found at 25 U.S.C. § 652 (1976). Insofar as we have been able to determine, no such claims have survived the statutes of limitations included in §4 of the specified Act.

h. The constitutionality of the Trans-Alaska pipeline construction

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30/ Although the District of Columbia Court of Appeals is specifically included in the definition of "highest court of a State", a law applicable only to the District of Columbia passed by Congress or its delegated authority is not a "statute of the United States" for purposes of § 1257(1). Palmore v. United States, 411 U.S. 389 (1973); Key v. Doyle, 434 U.S. 59 (1977).

authorization and limitations of judicial review could be tested by direct appeal of a district court judgment. P.L. 93-153, § 203(d), 87 Stat. 584, November 16, 1973, found at 43 U.S.C. § 1652(d) (1976). As the express statute of limitations within the provision specified a bar to filing sixty days after the date of enactment, this provision now appears dormant.

i. The Criminal Appeals Act underwent substantial revision in 1971 and the historical parity between civil and criminal cases where the right to a direct appeal when the constitutionality of an Act of Congress was called into question was removed. Prior to the 1971 amendments, an appeal could be taken directly to the Supreme Court from a decision or judgment setting aside or dismissing an indictment or information based on the invalidity of the statute charged. 28 U.S.C. § 3731 (1964, superseded ed.). This provision has the same effect as 28 U.S.C. § 1252 (1964, 1976) in civil cases. The Criminal Appeals Act, however, also contained a substantial number of other rights of appeal to the Supreme Court, all of which were removed in 1971, relegating all criminal appeals of right to the courts of appeals. This provision is mentioned here specifically because of the prior parity between civil and criminal cases in which the constitutionality of an Act of Congress was challenged and the decision was against the constitutionality of the Act.

j. The so-called Expediting Act, a misnomer among the plethora of such provisions, required specific direct appeals prior to the 1974 Amendments. Act of February 11, 1903, c. 544, § 2, 32 Stat. 823, as amended, Act of March 3, 1911, c. 231, § 291, 36 Stat. 1167; Act of June 9, 1944, c. 239, 58 Stat. 272; Act of June 25, 1948, c. 646, § 17, 62 Stat. 989; Pub. L. 93-528, § 5, 88 Stat. 1709, December 21, 1974, found at 15 U.S.C. § 29 (1976). After the

1974 Amendments, the provision can no longer be considered mandatory.[31]

31/ The extant so-called Expediting Act requires, in pertinent part:

> "(a) Except as otherwise expressly provided by this section, in every civil action brought in any district court of the United States under the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", approved July 2, 1890, or any other Acts having like purpose that have been or hereafter may be enacted, in which the United States is the complainant and equitable relief is sought, any appeal from a final judgment entered in any such action shall be taken to the court of appeals pursuant to [28 U.S.C. §§ 1291, 2107 (1976)]. Any appeal from an interlocutory order entered in any such case shall be taken to the court of appeals pursuant to [28 U.S.C. §§ 1292(a)(1), 2107 (1976)] but not otherwise. Any judgment entered by the court of appeals in any such action shall be subject to review by the Supreme Court upon a writ of certiorari as provided in [28 U.S.C. § 1254(1) (1976)].
>
> "(b) An appeal from a final judgment pursuant to subsection (a) of this section shall lie directly to the Supreme Court if, upon application of a party filed within fifteen days of the filing of a notice of appeal, the district judge who adjudicated the case enters an order stating that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice. Such order shall be filed within thirty days of the filing of a notice of appeal. When such an order is filed, the appeal and any cross appeal shall be docketed in the time and manner prescribed by the rules of the Supreme Court. The Supreme Court shall thereupon either (1) dispose of the appeal and the cross appeal in the same manner as any other direct appeal authorized by law, or (2) in its discretion, deny the direct appeal and remand the case to the court of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal and any cross appeal therein had been docketed in the first instance pursuant to subsection (a) of this section."

The reference to the so-called Sherman Antitrust Act is relatively clear in the statute, Act of July 2, 1890, c. 647, §§ 1 - 7, 26 Stat. 209, as amended Act of August 17, 1937, c. 690, T. VIII, 50 Stat. 693, Act of July 7, 1955, c. 281, 69 Stat. 282, found at 15 U.S.C. §§ 1 - 7 (1976). The general description of the class of statutes to which this provision applies relegates the application of the provision in most cases to the determination of the Court. Accordingly, with the exception of the Sherman Act we must suggest that this elaborate procedure of mandatory review amounts to no more than elliptical statutized procedure for the granting of certiorari before judgment. The choice of the availability of appeal has two elements: (1) the district judge who tried the case

We know of no experience under the discretionary framework of the 1974 Amendments. This previously mandatory jurisdiction is now inapplicable; it is mentioned here because of the historical significance and a continuing lack of understanding about the provision.

This catalogue of provisions for mandatory jurisdiction over appeals from various inferior federal courts, State courts rendering final judgments, and other particular courts should not be viewed as exhaustive. Several features suggest the evanescence of provisions, such as the Trans-Alaska Pipeline Act, supra, the complexity of others, such as §§ 1252 and 1257(1) and (2), and the ongoing changes which Congress makes in requiring the Court to hear particular cases under particular circumstances, such as Buckley review and the three-judge district courts, supra. In light of the lack of codification or consolidation of many mandatory jurisdiction provisions and the discordant linguistic patterns utilized in the statutes, we are constrained from asserting that this catalogue is complete. For these same reasons, the Court relies on the affirmative pleadings of the parties -- the filing of a notice of appeal in the inferior court and the docketing of an appeal in the Supreme Court -- for the demand that a case being brought be heard as an appeal.

31/ [continued]:

must determine that the case is of general importance and issue the certificate, and (2) the Supreme Court must determine to hear the case. Clearly, the district court judge must be persuaded to issue the certificate, but there would appear to be a de minimus procedural presumption that once the certificate has been filed with the Supreme Court and the record called up, the Court should hear and determine the appeal rather than remand it to the Court of Appeals. To construe the statute otherwise would strip it of all vitality. We have included the provision in this review of statutory mandatory jurisdiction only because of the general, but rather inaccurate, perception of the so-called Expediting Act as a mandatory review provision.

Several trends are apparent from the development of this catalogue. First, Congress has changed the scope of the class of cases which may be appealed to the Supreme Court. During the 1970's, Congress has repealed statutes granting the right to appeal to the Supreme Court from injunctions restraining the enforcement of both federal and state laws where the injunction is based on a declaration that the statute in question is unconstitutional, injunctions restraining the enforcement of ICC orders, the Criminal Appeals Act, and the so-called Expediting Act. At the same time, Congress has provided for a right to appeal additional civil and voting rights cases and particular questions of the constitutionality of particular Acts of Congress or specific provisions, notably the legislative veto provisions.

Second, the most formidable class of cases which Congress has relegated to the complete federal judicial process is that class of cases in which an injunction restraining the enforcement of state laws on the basis of unconstitutionality. The paralell class of cases in which injunctive relief is sought to restrain the enforcement of federal laws on the basis of unconstitutionality is substantially smaller. While federal and state governments may both intervene in actions challenging the constitutionality of laws under their respective jurisdictions in accord with 28 U.S.C. § 2403 (1976), the effects of intervention are markedly different. Once the United States is a party and the question of constitutionality has been resolved against the constitutionality of the statute, the United States, or any party, may invoke the right to appeal under § 1252. There is no paralell provision for States to directly appeal to the Supreme Court, rather they must appeal to the court of appeals under 28 U.S.C. § 1291 (1976), and may appeal therefrom or file a petition for a writ of certiorari

thereto under § 1254 (2) or (1), supra, respectively. Accordingly, reveiw of Acts of Congress have been placed at a substantial advantage over statutes of a State in terms of the process of acquiring a final judgment from the Supreme Court as to their constitutionality.

Third, Congress has added provisions specifically tuned to acquire a final judgment as to the constitutionality of certain federal statutes through the Buckley type of review process and other specific means. These statutes have been narrowly drawn to provide review of either a particular provision (e.g., the legislative veto) or the specific enactment. In short, Congress has removed cases of state law constitutionality from the realm of direct and obligatory review and replace those cases with specific review of the constitutionality of particular federal statutes or provisions.

The development of these provisions has been patterned, at least in part, but the full context of obligatory or mandatory jurisdiction and the types of cases so favored has only recently been the subject of formidable review by the Congress.[32/] The varying quality of the statutes and the cases which will arise thereunder brings into focus the question of the Court's practices and the effects of the statutes.

32/ See, infra, at 52 - 53.

II. Supreme Court Procedure on Appeal

The procedure for taking an appeal is substantially different from the filing of a petition for a writ of certiorari. We outline the procedure for taking an appeal to the Supreme Court in order to define the process in jurisdictional terms.

The notice of appeal from a judgment of a United States court that an Act of Congress is unconstitutional under §§ 1252 or 1253 must be taken within 30 days of the date of the judgment below. 28 U.S.C. § 2101(a) (1976); Rules of the Supreme Court of the United States, Rule 11.2 (November 21, 1980) (hereinafter "Rule"). The notice of appeal must be filed with the Clerk of the federal court from whose judgment the appeal is taken. Rule 10.3 The case must then be docketed in the Supreme Court within 60 days of the date of the notice of appeal to the court below. 28 U.S.C. 2101(a) (1976); Rule 12.1.

The notice of appeal from an interlocutory judgment of a United States District Court in other cases must be filed with that court within 30 days of the date of judgment; notice of appeal from a final judgment of the District Court must be filed with that court within 60 days of the date of judgment. In particular instances (the constitutionality of the Federal Elections Campaign Act of 1971, the implementation of the Presidential Campaign Fund Act, and the constitutionality of the legislative veto provision of the Federal Trade Commission Improvements Act of 1980, supra), the notice of appeal must be filed with the district court, and/or the case docketed, within 20 days. In any event, the case must be docketed in the Supreme Court within 90 days of the date of the

judgment from which the appeal is taken. Rule 12.1.

All other civil appeals must be taken and docketed within 90 days of the date of the judgment being appealed. 28 U.S.C. § 2101(c) (1976); Rule 12.1.

Determining the time for filing appeals in criminal cases from state courts has been delegated to the Court by Congress and the Court has conformed the time to the remainder of civil appeals: 90 days to file the appeal and docket the case. 28 U.S.C. § 2101(d) (1976); Rules 11.1, 12.1.

The time for filing the notice of appeal in the court below may not be extended. Rule 11.4. Further, "[t]he Clerk [of the United States Supreme Court] will refuse to receive any jurisdictional statement in a case in which the notice of appeal has obviously not been timely filed." Rule 12.1. Any Justice of the Court may extend the time for filing a petition for a writ of certiorari, 28 U.S.C. § 2101(c) (1976), or, for good cause, docketing the case, Rule 12.2, for up to 60 days. The allowance of additional time in filing petitions or docketing the case, together with the proscriptions of extending the time of filing a notice of appeal or accepting jurisdictional statements where the notice of appeal was untimely, clearly indicate that the timing of the filing of the notice of appeal is jurisdictional in nature.

Where an appeal is timely filed, the Court's initial review of the jurisdictional statement will be for the purpose of determining jurisdiction. Where an appeal has been improvidently filed and certiorari will otherwise lie, the savings provision of § 2103, mentioned above, provides the Court with a mechanism for avoiding dismissal for want of jurisdiction. If, however, as in criminal cases from State courts, the appeal is timely filed more than 60 days after the date of the judgment below, viz, the date on which a petition for certiorari in

such a case becomes untimely, § 2103 will not provide an alternative means of review. This anamoly is due to the recent conformance of all time requirements for petitions for writs of certiorari in criminal cases at 60 days. Rule 20.1. Previously, the writ was available for only 30 days to review a criminal judgment of a federal court and 90 days to review a criminal judgment of a state court.

The docketing of the case is accomplished by the filing of the jurisdictional statement, together with an appearance of counsel, certificate of process on all other parties and the payment of the docketing fees. Rule 12.3.

Where an appeal has been filed and docketed, and a cross-appeal may be brought, the cross-appeal must be docketed within 30 days of the receipt of the jurisdictional statement. Rule 12.4. Jurisdiction over a cross-appeal is relatively limited: it applies only to cases in which the cross-appeal could be filed originally, not where the entire case is brought up by the original appeal or where the original appeal is dependent on the declaration of unconstitutionality of an Act of Congress or State statute, or where the appeal is dependent upon the declaration of State law preemption by federal law. Here again, the savings feature of § 2103 may be utilized to redenominate a cross-appeal as a petition for a writ of certiorari, whenever certiorari would be appropriate, or a petition for writ of certiorari before judgment where certiorari might there be inappropriate.

The record on appeal is required to be filed in the Supreme Court within 60 days after the notice of appeal is filed in cases appealed under §§ 1252 or 1253. 28 U.S.C. § 2101(a) (1976). Otherwise, the record need not be filed with the Court prior to Court action on the jurisdictional statement unless deemed essential to a proper understanding of the case. Rule 13.1.

The filing of the notice of appeal in the lower court and the docketing of the case in the Supreme Court merely sets in motion the process of Court consideration. An appeal may be dismissed by the appellant in the court below prior to docketing of the appeal. Rule 14.1. Upon agreement of the parties, and satisfaction of any fees owing and costs, at any stage of the proceedings, the Clerk may enter an order of dismissal. Rule 53.

In proceeding further with a live case or controversy, the appellee may file a motion to dismiss, a motion to affirm, or, where appropriate, a motion in alternative form, within 30 days of receipt of the jurisdictional statement, subject to enlargement. Rule 16.1. Rule 16.1 illuminates the variables which are contemplated within the motion to dismiss or affirm:

> (a) The Court will receive a motion to dismiss an appeal on the ground that the appeal is not within this Court's jurisdiction, or because not taken in conformity with statute or with these Rules.
>
> (b) The Court will receive a motion to dismiss an appeal from a state court on the ground that it does not present a substantial federal question; or that the federal question sought to be reviewed was not timely or properly raised or was not expresaly passed on; or that the judgment rests on an adequate non-federal basis.
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> (c) The Court will receive a motion to affirm the judgment sought to be reviewed on appeal from a federal court on the ground that it is manifest that the questions on which the decision of cause depends are so unsubstantial as not to need further argument.
>
> (d) The Court will receive a motion to dismiss or affirm on any ground the appellee wishes to present as a reason why the Court should not set the case for argument.

The process of appeal may be considered essentially complete upon the filing of the response to the jurisdictional statement, for at that time, both appellant and appellee have filed with the Court not only the questions of jurisdictional

authority, but at least a synopsis of the merits of the cause, although this is a matter of practice, not law. Through the motion to dismiss or affirm, the Court is presented with the countervailing arguments which enable it to make basic decisions on the case. It is to the manner in which the pleadings present the jurisdiction and merits, and how the Court considers its mandatory docket that we now turn.

III. The Practice of the Court

Upon receipt of the motion to dismiss or affirm, or a waiver of the right to file a motion to dismiss or affirm, the Clerk of the Court distributes the jurisdictional statement and the motion to dismiss or affirm to the Justices. Rule 16.4 While a reply to the motion to dismiss or affirm may be filed by the appellant, the Court will not delay consideration of the jurisdictional statement or the motion to dismiss or affirm pending such a ruling. Rule 16.5. Where the appellee has filed a crossappeal or a crosspetition, the distribution of the jurisdictional statement, the motion to dismiss or affirm and the jurisdictional statement on the cross appeal will be delayed until the motion to dismiss or affirm to the jurisdictional statement on the cross-appeal is received. Rule 16.4.

Rule 16 indicates the next action which the Court will take based on the jurisdictional statement and the motion to dismiss or affirm:

> .7 After consideration of the papers distributed pursuant to this Rule, the Court will enter an appropriate order. The order may be a summary disposition on the merits. If the order notes probable jurisdiction or postpones consideration of jurisdiction to the hearing on the merits, the Clerk forthwith shall notify the court below and counsel of record of the noting or postponement. The case then will stand for briefing and oral argument. . . ..
>
> .8 If consideration of jurisdiction is postponed, counsel, at the outset of their briefs and oral argument, shall address the question of jurisdiction.

Rule 16.7 speaks specifically of the procedure which the Court will follow. The Rules do not indicate the practice of the Court that appeals are routinely included on the list of cases to be discussed at the Court's Conference, whereas

petitions for certiorari are included only at the behest of any Justice. Rule 16.7 specifically states that the Court may dispose of the case on the merits at this juncture. Thus, while all necessary papers may have been filed in a large number of cases, distributed to the Justices and reviewed by each of the Justices, all appeals and those petitions for certiorari placed on the "Discuss List" by a Justice will be reviewed in the Conference. However, before reaching the implications of that process, we first consider the question of what factors animate the Court's decision under the Rule.

The Court has avoided official comment on the process of determining the appropriate disposition of appeals in all but a few instances, and these are not particularly illustrative. For the most part, the Court's internal practice of handling the mandatory jurisdiction comes from a careful study of the entirety of the docket, rather than opinions filed in the disposition of cases.

No specific process or means of determination by the Court are required by statute in any case before the Court, save the hortatory requirements of expedition in several statutes. The most cogent statement from the bench illuminates the internal procedure for deciding on the means of disposition of an appeal, that is, whether to dispose of the appeal on the pleadings or after fuller briefing and oral argument. In Eaton v. Price,[33/] the Court was badly divided over the application of a previous holding, itself the product of the narrowest of majorities, 5 to 4. Justice Brennan's candid statement of the determination which the Court makes on the jurisdictional statement and the motion to dismiss or affirm bears substantial repetition:

33/ 360 U.S. 246 (1959).

> The Court's practice, when considering a jurisdictional statement whereby a litigant attempts to invoke the Court's jurisdiction on appeal, is quite similar to its well-known one on applications for writs of certiorari. That is, if four Justices or more are of the opinion that the questions presented by the appeal should be fully briefed and argued orally, an order noting probable jurisdiction or postponing further consideration of the jurisdictional questions to a hearing on the merits is entered. Even though this action is taken on the votes of only a minority of four of the Justices, the Court then approaches plenary consideration of the case anew as a Court; votes previously cast in Conference that the judgment of the court appealed from be summarily affirmed, or that the appeal be dismissed for want of a substantial federal question do not conclude the Justices casting them, and every member of the Court brings to the ultimate disposition of the case his judgment based on the full briefs and the oral arguments. Because of this, disagreeing Justices do not ordinarily make a public notation, when an order setting an appeal for argument is entered, that they would have summarily affirmed the judgment below, or have dismissed the appeal from it for want of a substantial federal question. 34/

A response filed by the Justices believing the appeal was controlled by the prior decision speaks only to that prior decision and the perceived effect of setting Eaton for oral argument as a reconsideration of the prior decision. From this singular statement, it seems clear today that the Rule of Four controls setting a case for plenary briefing and oral argument.[35/] The Rule of

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34/ 360 U.S. at 246 - 247.

35/ The Rule of Four being a "minority rule" there is the possibility that a majority of the Court may take the more formidable step of disposing of the case on the pleadings. However, at least in considering a dismissal of certiorari as improvidently granted, the Rule of Four would be meaningless if a majority of five could proceed to the summary disposition. Therefore, the internal practice of the Court includes a courtesy that the Rule of Four will not be overruled unless one of the Justices who voted to set the case for argument thereafter recedes and would dismiss certiorari. See, Burrell v. McCray, 426 U.S. 471 (1976) (Stevens, J., concurring; Brennan, J., dissenting); The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180, 183 (1959); Rice v. Sioux City Cemetary, 349 U.S. 70, 73 (1955); Ferguson v. Moore-McCormack Lines, 352 U.S. 521, 559 - 562 (1957) (Harlan, J., concurring and dissenting); United States v. Shannon, 342 U.S. 288, 294, 298 (1952) (Douglas, J., dissenting).

Four merely sets the stage for how the Court will reach a conclusion on the case, even though the failure of four Justices to agree to full briefing and oral argument does not dispose of the matter. The process of reaching the decision on whether to set a case for oral argument includes the consideration of many variables.

The threshold question is whether the pleadings properly assert mandatory appellate jurisdiction. If the papers improperly assert mandatory jurisdiction the Court will review the question of whether the papers may properly be treated as a petition for a writ of certiorari in accord with 28 U.S.C. § 2103 (1976). If the primary and dependent questions are answered in the negative, the appeal will be "dismissed for want of jurisdiction". If the primary question is answered in the negative and the dependent question is answered in the affirmative, the Court will then consider whether to grant certiorari.[36/]

The foremost question of the substantiality of the federal issues, assuming the prerequisites of a final judgment, a lack of an independent and adequate non-federal or State ground, and proper presentation, has not been formally addressed by the Court. The limitation on briefing and oral argument to those cases in which a substantial federal question is present can be traced as far back as the early 1900's.[37/]

36/ In light of the discussion which follows, the answer to the question of whether to grant certiorari is also usually negative. Accordingly, the complex order is frequently rendered: "The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied." Granting of certiorari after dismissal of an appeal is not unknown. See, e.g., Palmore v. United States, supra, note 30 (appeal dismissed, certiorari granted in part).

37/ E.g., Jacobson v. Massachusetts, 197 U.S. 11 (1904).

Perhaps the most cited off the bench comment on the mandatory jurisdiction of the Court comes from Chief Justice Warren during the proceedings of the American Law Institute in 1954:

> It is only accurate to a degree to say that our jurisdiction in cases on appeal is obligatory as distinguished from discretionary on certiorari. As regards appeals from state courts our jurisdiction is limited to those cases which present substantial federal questions. In the absence of what we consider substantiality in light of prior decisions, the appeal will be dismissed without opportunity for oral argument. 38/

This quotation, however, has led to confusion on the subject since it seems to place the question of "substantiality" before the formal question of jurisdiction. The thought processes of the Justices, unless they provide some formal opinion on the subject, are likely to remain unknown. As Professor Mishkin has reiterated:

> In ruling on substantiality on an appeal, the Court cannot avoid an appraisal of the merits. 'Votes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case.' Ohio ex rel. Eaton v. Price, [supra]. The discretionary element involved, at least in theory, goes only to the question of the need for or utility of further argument. And ruling on that point would be disciplined by the consideration that dismissal or affirmance denies a full hearing in a case where Congress had not made review discretionary and represents adjudication, not refusal to adjudicate. 39/

The distinction between the jurisdiction of the Court and the degree to which the Court will require briefing on the issues presented is thus one subject to substantial debate, but limited by the historic development of the written

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38/ Address of Chief Justice Earl Warren, American Law Institute (May 19, 1954), quoted in Wiener, "The Supreme Court's New Rules" 68 Harv. L. Rev. 20, 51 (1954).

39/ P. Bator, P. Mishkin, D. Shapiro, and H. Wechsler, Hart and Wechsler's The Federal Courts and the Federal System (Mineola: Foundation Press, 1973) at 649.

brief and the decline in the use of oral argument generally. This development has led to the substantial practice by counsel, although not mandated or even suggested by the Rules, of making two arguments in the jurisdictional statement and the motion to dismiss or affirm: (i) the jurisdiction of the Court and the substantiality of the federal questions presented (Rule 15.1(e) - (g)), and (ii) the merits of the claim.

Justice, then Professor, Frankfurter once noted the general existence of discretion in the mandatory appellate docket:

> "Plainly, the criterion of substantiality is neither rigid nor narrow. The play of discretion is inevitable, and wherever discretion is operative in the work of the Court the pressure of the docket is bound to sway its exercise. To the extent that there are reasonable differences of opinion as to the solidity of a question presented for decision or the conclusiveness of prior rulings, the administration of [Rule 16] operates to subject the obligatory jurisdiction of the Court to discretionary considerations not unlike those governing certiorari." 40/

The invocation of the factors which will lead to the granting of certiorari in determining whether full briefing and oral argument will be granted represents perhaps the only substantive indication of what the Court looks for in determining the process for the appeal. The factors which the Court will consider in this light periodically change with the Rules, but current Rule 17.1 provides:

> "A review on writ of certiorari is not a matter of right but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

40/ F. Frankfurter and J. Landis, "The Business of the Supreme Court at October Term, 1929" 44 Harv. L. Rev. 1, 12 - 14 (1930).

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

To an extent these factors are redundant with the decision made by Congress in determining that particular classes of cases or claims should be adjudicated by the Supreme Court as a matter or right, rather than by leave of the Court; the saving difference is the application of these standards to particular cases, pleadings and facts as contrasted with the Congressional determination on the basis of policy. General (statutory) importance contrasts with particular (case) importance, often in terms of the scope of rights adjudged, effect of the decision on not only parties but the general public, and even the monetary value of the judgment where that value is unusually high. Conflicts among the judgments of courts which will become final unless review is granted is a particularly important factor, given that only the Supreme Court can provide a nationwide judicial uniformity to federal law, with the exception of injunctions against the federal government, and given the number of inferior courts which must be

supervised.[41/] It seems clear that the Court is particularly mindful of the conflicts and importance factors in the process of determining the extent of briefing and oral argument required to reach a decision.

If we make the assumption of the two-tiered decision making process, it follows, both from the assumption and the conventional wisdom on the provision of an appeal of right, that the summary disposition of appeals are all on the merits. That is to say, summary affirmances, summary dismissals, remands, and dismissals for want of a substantial federal question are conclusive adjudications of the merits of the case. The assumption and the conventional wisdom have both received substantial reconsideration.[42/] The problem, in part, is the lack of formal opinion of the Court in cases of summary disposition, depriving the lower courts of any effective guides as to the meaning of the summary disposition. Similarly the lack of explanation of the summary disposition does not provide the bar with guidance as to what cases and what arguments can more profitably be expected. At bottom, the lack of full briefing and oral argument of the case, mitigated by the dual purpose jurisdictional statement and motion to affirm or dismiss, raises a question in the minds of academics, judges and members of the bar as to how clear the Court was on the issues presented and the precedent pro and con. Without a more fundamentally complete

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41/ I.e., the reorganization of the Fifth Circuit Court of Appeals into the Fifth and Eleventh Circuit Courts of Appeal. Fifth Circuit Court of Appeals Reorganization Act of 1980, P.L. 96-452, 94 Stat. 1994, October 14, 1980. See, also, Federal Courts Improvement Act, Pub.L. 97-164, 96 Stat. 26, April 2, 1982 (consolidating the Court of Claims and the Court of Customs and Patent Appeals into the Court of Appeals for the Federal Circuit).

42/ See, J. Simpson, "Turning Over the Reins: The Abolition of the Mandatory Appellate Jurisdiction of the Supreme Court" 6 Hastings Con. L. Q. 297, 320 - 328 (1978) and material cited therein.

process of adjudication than provided in summary dispositions, there is a substantial aversion to perceiving a decision as "on the merits" and fully dispositive of the issues presented.

Quite to the contrary, the presentation of the motion to affirm or dismiss provides an ample opportunity for the Court to rely on the pleadings and utilize the motion to the end of disposition of the case.

The Court clearly indicated in Hicks v. Miranda that summary affirmances of inferior federal court decisions and dismissals for want of a substantial federal question of the final judgments appealed from State courts were adjudications on the merits which bind the inferior federal courts, but this requirement is limited to the particular parties and facts adjudicated below as pointed out in Mandel v. Bradley.[43/] As Chief Justice Burger noted in concurrence with the Court in Fusari v. Steinberg, "When we summarily affirm, without opinion, . . . we affirm the judgment but not necessarily the reasoning by which it was reached. An unexplicated summary affirmance settles the issue for the parties, and is not to be read as a renunciation by this Court of doctrines previously announced in our opinions after full argument."[44/] In effect, the Court consistently asserts that the summary affirmance is a meritorious disposition which must be respected, but, given that there is no rationale for the disposition, the precedential value is limited to the cases which fall "four square" in line with the summary affirmance. As Robert Stern and Eugene Gressman have noted:

43/ 422 U.S. 332, 342 - 348 (1975); 432 U.S. 173, 176 - 177 (1977).

44/ 419 U.S. 379, 391 - 392 (1975) (footnote omitted).

> When the Court feels that the decision below is correct and that no substantial question on the merits has been raised, it will affirm an appeal from a federal court, but will dismiss an appeal from a state court 'for want of a substantial federal question.' Only history would seem to justify this distinction; it would appear more sensible to affirm appeals from both state and federal courts when the reason for the summary disposition is that the decision below is correct. But if the bar fully understands that 'dismissed for want of a substantial federal question' in a state court appeal is the equivalent of affirmance on the merits insofar as the federal questions under . . .§ 1257(1) and (2) are concerned, and is not limited to determination of whether there is such a federal question, the difference in nomenclature does no harm. 45/

Historical differences in both the jurisdictional statutes and the Rules concerning appeals from State and federal courts have all but disappeared, but the Court itself appears to consider the distinction to carry a difference, if only historical. 46/ Whatever the value of the distinction, the Court has made clear that, within the limited sphere of facts and law directly on point, summary affirmances and dismissals for want of a substantial federal question have binding precedential effect.

Summary vacation and remand are on the merits due to the alteration of the parties' postures with regard to the litigated claim. Limited precedential value is here assumed due to the lack of opinion and rationale to guide the courts, but not necessarily a repudiation of the entire reasoning of the court below.

45/ R. Stern and E. Gressman, Supreme Court Practice, supra, note 1, at 377 - 378.

46/ E.g., Morris v. Mathers, --- U.S. ---, 50 U.S.L.W. 3300 (No. 81-240, October 19, 1981). ("The order dismissing the appeal for want of a substantial federal question is hereby vacated. The judgment of the United States Court of Appeals for the Fourth Circuit is affirmed.").

All other orders have only limited, procedural effect on the case at bar. A dismissal for want of jurisdiction, where certiorari otherwise would not lie, or the bifurcated order dismissing the appeal for want of jurisdiction and denying certiorari, are generally considered to have no precedential value at all. although in certain instances denials of certiorari may leave further avenues of litigation open and certain arguments can be made from patterns of certiorari denials.

In sum, the Court considers all appeals in conference. The factors which the Court considers in determining whether to set the appeal for full briefing and oral argument, the conventional wisdom holds, are quite similar to those which the Court considers in determining to take a case on writ of certiorari. Affirmances of inferior federal court decisions and dismissals of appeals from judgments of state courts for "want of a substantial federal question" have limited precedential effect. Other dismissals of appeals have no effect substantively save that which the Court may specifically attach to the order.

IV. The Caseload and Mandatory Jurisdction

During the 1980 Term, the Court acted on and disposed of a total of 4,360 cases: 2,326 fees paid matters, 2,027 in forma pauperis matters and 7 original matters.[47/] Of these 4,360 cases, 264 cases became available for argument, of which 154 were argued and decided. In short, of the cases disposed of by the Court, less than 4% were fully briefed and argued before a decision was reached.

The distinction between disposition of appeals and writs of certiorari is not statistically recorded by the Court. This distinction is made in the Term end review of the Solicitor General and is replicated in Table 1 on the following page.[48/] Over the course of the last five years, with due regard for the repeal

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47/ The Clerk of the Court prepares a statistical recapitulation of cases handled by the Court after each week of session of the Court and at the end of each Term. The 1980 Term convened on October 6, 1980 and was adjourned on October 5, 1981, the commencement of the 1981 Term. The statistical recapitulation for the 1980 Term, without distinction between the mandatory or discretionary jurisdiction, but rather whether the fees of the Court were paid or waived, is the basis for these statistics. Reprinted at 50 U.S.L.W. 3044 (August 11, 1981).

Generally, it is necessary to discuss either cases which were docketed during a Term and subsequently disposed, or cases which were disposed during a given Term. The process of the Court and the general limitations imposed by the time consumed in preparing a case for initial consideration by the Court after docketing, and the time required to bring a case forward through briefing, oral argument and decision on the merits, carry many cases from one Term to the next. At the commencement of the 1980 term, 970 cases were carried over from the 1979 Term. At adjournment of the 1980 Term, 786 cases were carried over to the 1981 Term. Because of the carry over factor, and the delay in disposition, the statistics in this Report are based on cases disposed of by the Court during the 1980 Term. This allows the statistics to be as complete as possible, as well as being as current as possible.

48/ Infra, Table 1, note *.

Table 1

SUPREME COURT CASELOAD
BY TYPE OF JURISDICTION
OF DISPOSITION

	October Term 1980		October Term 1979		October Term 1978		October Term 1977		October Term 1976	
1. Appeals*	178	4 %	170	4 %	187	5 %	195	5 %	260	7 %
2. Certiorari	4097	94 %	3648	93 %	3763	93 %	3664	93 %	3790	92 %
3. Miscellaneous Docket - Original Writs	71	2 %	71	2 %	64	2 %	77	2 %	53	1 %
4. Original	12	-	13	-	16	-	8	-	6	-
5. Certifications	2	-	0	-	0	-	0	-	0	-
6. TOTAL	4360		3902		4030		3944		4109	

* October Term - 1980 statistics provided by the Office of the Solicitor General, United States Department of Justice. October Term - 1979 through October Term - 1976 statistics: U.S. Attorney General, The Annual Report of the Attorney General of the United States 1980 (Washington: U.S.G.P.O. 1981) at 7. The number of appeals shown for the 1980 Term in this table and Table 2 differ because of differing definitions of accounting for several classes of complex orders.

of the general three-judge district court provisions,[49] the percentage of cases disposed of by the Court as appeals has remained relatively constant as compared to the dispositions on certiorari and the total docket. For the 1980 Term, the Court disposed of 178 appeals,[50] representing 4.08% of the entire docket dispositions. We should note, however, the Solicitor General counts dismissals of appeals with consideration of the papers as petitions for certiorari in accord with § 2103, and denying certiorari in the same case as a disposition on writ of certiorari. We would suggest that § 2103 is a procedural requirement which affords the Court the opportunity to avoid dismissal of improperly plead cases and does not create a separate disposition. Accordingly, we feel that the certiorari denied statistic is slightly inflated. However, in those rare cases in which an appeal is improperly taken and therefore dismissed, and the Court subsequently grants certiorari,[51] the statistical accounting would require a separate reflection of that event. This does not appear to have happened during the Term according to our own reading of the Supreme Court's Journal. With this dispute noted, we believe the true reflection of the number of appeals disposed of by the Court, after the removal of duplicate or complex dispositions, would be 4.15% of the docket dispositions.

The disposition of appeals, within the universe of the mandatory or obligatory docket itself, provides more insight into how the Court treats the

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49/ Supra, notes 9, 16, and accompanying text. See, also, the Freund Report, supra, note 7.

50/ The decision for inclusion or exclusion from this number is subject to some debate; our figures differ at 195 summary dispositions, whether on jurisdiction or the merits. We have attempted to keep the tables internally consistent.

51/ Supra, Palmore v. United States, supra, note 30.

mandatory jurisdiction than a comparison of dispositions based on the mandatory and discretionary dockets. The statistics for this internal analysis have been developed by reviewing the Journal of the Supreme Court for the entire 1980 Term, the same method utilized by the Solicitor General in developing statistics on disposition by the type of jurisdiction and governmental participation before the Court. Table 2, on the following page, illustrates the types and numbers of dispositions.

Appeals from State courts under § 1257 (1) or, more likely, (2) clearly predominate the mandatory appellate docket (68.72%).[52/] Of State court judgments appealed to the Supreme Court, only 3 (2.04%) were summarily vacated and remanded to the State courts issuing the judgment, and in each case the vacation and remand was in light of a recent decision of the Court.[53/] On the other hand, the Court took jurisdiction and dismissed the appeals for want of a substantial federal question in 80 cases (53.69%).[54/] Taking as a given the limited sphere of precedential value, the rate of "affirmance" remains remarkably higher than is generally the case.[55/]

Sixteen appeals (10.74% of appeals from State courts) were dismissed for want of jurisdiction in situations in which the issuance of a writ of certiorari

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52/ We found no summary dispositions of appeals from the Supreme Court of Puerto Rico under § 1258.

53/ Nos. 79-1862, 80-6280 and 80-1797.

54/ As we have noted, this is, in essence, an affirmation of the judgment of the State court, but not necessarily the rationale underlying that judgment.

55/ The Court generally reverses approximately 65% of the cases it orders fully briefed and argued.

CRS-47

Table 2.

SUMMARY OF SUPREME COURT DISPOSITIONS OF APPEALS
WITHOUT FULL OPINIONS ON THE MERITS
OCTOBER TERM - 1980

[Appeals Disposed: (n) = 195] [----------] [Appeals-Disposed:] [Off Merits (n') = 99 (1,2,6)] [Summarily (n") = 96 (3,4,5)]	All State Courts	United States Courts of Appeal	United States District Courts
1. Appeal Dismissed for Want of Juriadiction	16*	1	9
2. Appeal Dismissed for Want of Jurisdiction; Treating the Papers filed as a Petition for a Writ of Certiorari; Certiorari Denied	47	21	2
3. Appeal Dismissed for Want of a Substantial Federal Question	80	**	**
4. Judgment of Lower Court Summarily Affirmed	**	4	4
5. Judgment of Lower Court Summarily Vacated and Remanded	3	3	2
6. Appeal Dismissed After Oral Argument	3°	0	0

* Includes two appeals dismissed on the basis of Independent and Adequate State Grounds to Support the Judgment, and four appeals dismissed for failure to Properly Present a Federal Question. These are jurisdictional in nature and do not go to the merits.

** See, supra, at 40 - 41.

° Includes two appeals dismissed for failure to Properly Present a Federal Question and one appeal dismissed for Lack of a Final Judgment. These are jurisdictional in nature and do not go to the merits.

would have been improper, vitiating any consideration of § 2103.[56/] In 47 appeals (31.54% of appeals from State courts) the Court completed the complex task of determining that it did not have jurisdiction over the appeal under § 1257, dismissed the appeal, considered the papers whereby the appeal was taken as a petition for certiorari in accord with the strictures of § 2103, and denied certiorari.[57/] Finally, three appeals (2.01% of appeals from State courts) required the plenary review of the Court before it could be determined that the appeal should be dismissed for want of jurisdiction; that is to say, the Court having taken jurisdiction to determine jurisdiction, later determined that the appeal was improperly before it.[58/] Where further consideration, and the full exposition of the facts and issues of law in the briefs and at oral argument, illuminate the lack of a final judgment where the jurisdictional statement implies finality or the failure of counsel to properly present the federal question in the lower court, as in these cases, the Court will issue a per curiam judgment of dismissal. Such a state of a record below is not common, but, at the same time, incompleteness on closer examination where facial completeness appears is not surprising given the wide variance in State court organization and procedure.

We should also note that the Court disposed of 11 appeals from State courts

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56/ See, note * of Table 2.

57/ We do not suggest that this is as onerous as it may sound. All appeals are placed on the Court's discussion list for the first Conference after the motion to dismiss or affirm, or a waiver is filed, or becomes untimely. The Court, based on the timing, appears to differentiate the aspects of the process, but the consideration and disposition could well, and may, be completed in a single Conference.

58/ See, note ° of Table 2.

after full consideration and on the merits of the appeal. In so far as we can determine, in 41.25% of all appeals from State courts decided or disposed of by the Court during the 1980 Term, appellant erred in understanding the Court's mandatory appellate jurisdiction and bringing the appeal.[59/]

Most appeals brought from the United States Courts of Appeals which are dismissed for want of jurisdiction, whether outright or with consideration of certiorari under § 2103, appear to arise under § 1254(2). Similarly, all summary affirmances and vacation and remands to the Courts of Appeals were initially filed under § 1254(2). The technical aspects of § 1254(2) jurisdiction pose considerable interpretive problems: if the six dispositions of appeals from the Courts of Appeals on the merits after full briefing and argument are included to complete the universe of appeals disposed of by the Court from the Courts of Appeals, appellant appears to have erred as to the jurisdiction of the Court in 62.86% of the disposed appeals.

Summary disposition of appeals from United States District Courts are much more specific and include several which were clearly frivolous.[60/] Of the nine

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59/ To say that "counsel" erred would be somewhat misleading in these cases. One appellant, proceeding in forma pauperis and pro se, had eight appeals dismissed during the 1980 Term: two appeals from State courts dismissed for want of jurisdiction together with consideration of the papers under § 2103, one appeal from a United States Court of Appeals dismissed for want of jurisdiction, and five appeals from a United States Court of Appeals for want of jurisdiction together with consideration of the papers under § 2103. Instances of clearly frivolous appeals such as these taint any statistical analysis of the appellate docket.

60/ For example, one appellant, proceeding in forma pauperis and pro se, had four appeals from United States District Courts dismissed for want of jurisdiction. We note parenthetically that the named appellees in these four cases were a United States District Judge, the Chairman of the Committee on the Judiciary of the United States House of Representatives, a former President of the United States and the Chief Justice of the United States. See, supra, note 59.

appeals dismissed for want of jurisdiction, four were filed under § 1253 from three-judge district courts under now repealed §§ 2281 or 2282 (injunction against enforcement of unconstitutional state or federal statute, respectively), and one was filed in alternative pleading under § 314 of the Federal Election Campaign Act of 1971, supra, and § 1253. The two appeals which were dismissed for want of jurisdiction, where certiorari would lie in accord with § 2103 and was denied, were filed under § 1252.

Of cases disposed of summarily on the merits, the Court affirmed two appeals under Section 5 of the Voting Rights Act, supra, and two other appeals brought under § 1253. Both appeals resulting in summary vacation and reversal were brought under § 1252 from final judgments declaring an Act of Congress unconstitutional. By contrast, ten appeals brought under § 1252 or 1253, or the specific provisions of other statutes, were disposed of by the Court after full briefing and oral argument, on the merits.[61/] Again, in a substantial number of dispositions of appeals from district courts (40.74%), in this instance where the Court does not have the benefit of intermediate appellate review, appellant appears to have misjudged the extent of the Court's jurisdiction.

61/ These include, for example, United States Railroad Retirement Board v. Fritz, 449 U.S. 166 (1980) (constitutionality of Railroad Retirement Act of 1974; § 1252); United States v. Will, 449 U.S. 200 (1980) (2 cases: constitutionality of pay provisions of appropriations act as applied to judges; § 1252); Hodel v. Virginia Surface Mining and Reclamation Association, 452 U.S. 264 (1981) (constitutionality of Surface Mining Control and Reclamation Act of 1977; § 1252); Hodel v. Indiana, 452 U.S. 314 (1981) (id.); Rostker v. Goldberg, 453 U.S. 57 (1981) (constitutionality of exclusion of women under Military Selective Service Act; §§ 1253, 2282).

The caseload of the Supreme Court and the manner in which the Court deals with the mandatory appellate docket indicate that the Court considers the questions of constitutionality of Acts of Congress and State statutes more seriously than other cases, once the determination has been made that jurisdiction exists to hear the appeal. Suits from the federal courts are more likely to receive plenary review than suits from State courts. The inherent nationwide effect of injunctions against enforcement of federal statutes, prevalent in federal court litigation, appears to receive the most serious consideration of all. In a number of instances, the plenary review of particular appeals is followed by the summary disposition of related or similar appeals from other courts.[62/] At the other end of the spectrum, particular types of cases in which the appellant has misjudged the jurisdiction of the Court also abound.

62/ See, e.g., Hodel v. Virginia Surface Strip Mining and Reclamation Association, supra, at 275 n. 16 (acknowledging three cases pending on appeal, judgments in all of which were later summarily affirmed or vacated and remanded).

V. Proposals for Change

Revision or abolition of the Supreme Court's mandatory appellate jurisdiction has been a subject for debate since the founding of the Republic. Indeed, the initial distinctions between appeals and writs of error posed substantial problems for lawyers before the bar of the court even then.[63/] The provision for consideration of appeals improvidently taken as petitions for writs of certiorari, currently § 2103, was added to the Court's procedure in 1925.[64/] Since that time the distinctions between appeals from State courts and inferior federal courts have slowly been eroded by Congress and the Court's rules. For the present purposes, it is only necessary to review the proposals of the last few years.

During the 95th Congress, S. 3100 and H.R. 12979, were introduced to repeal various provisions authorizing appeals to the Supreme Court. Hearings were held on S. 3100, and the bill was amended and reported to the floor.[65/] Neither the Senate or the House took any further actions on the measure.

During the 96th Congress, S. 450 and H.R. 2700 were introduced for the purpose of eliminating certain appeals. No further hearings were held on the

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63/ See, Act of September 24, 1789, c. 20, 1 Stat. 73; Wiscart v. D'Auchy, 3 Dall. (3 U.S.) 321, 328 (1796).

64/ Judicial Code of 1911, § 227(c), as added, Act of February 13, 1925, c. 229, 43 Stat. 936, 937, 938.

65/ Hearings before the Senate Judiciary Committee Subcommittee on Judicial Machinery, Supreme Court Jurisdiction Act of 1978, 95th Cong., 2d Sess. June 20, 1978.

proposal and S. 450 was reported.[66] The bill was called up on April 9, 1979, and after an amendment to remove jurisdiction over cases involving prayer in public schools, the bill was passed.[67] The House Judiciary Committee took no action on the bill, as referred, and a petition to discharge the Committee from further consideration failed to call the matter to the floor.

In the 97th Congress, H.R. 2406 and S. 1531 has been introduced "to improve the administration of justice by providing greater discretion to the Supreme Court in selecting the cases it will review and for other purposes," and hearings were held on the Senate bill.[68] H.R. 2406 and S. 1531 are identical in all material aspects; they differ only in form and citation of one technical or conforming amendment.

Section 1 of H.R. 2406 and S. 1531 would repeal § 1252, eliminating appeals to review final judgments of courts of the United States declaring an Act of Congress unconstitutional. If this provision became law, review of decisions by district courts would revert to the general class of review by the courts of appeals under 28 U.S.C. § 1291 (1976).

Section 2 of each bill would amend § 1254 by deleting ¶ (2) and conforming the remainder of the section by renumbering and retitling; the bills differ only in form. If this provision becomes law, review of decisions by the courts of appeals that a State statute is repugnant to the Constitution or preempted by federal law, at the instance of the party relying on that statute, would be available only by writ of certiorari or certification under current ¶¶ (1) and (3).

66/ S. Rept. 96-35, 96th Cong., 1st Sess. (March 14, 1979).

67/ 125 Cong. Rec. S4138 - S4165 (April 9, 1979, daily ed.).

68/ Hearing before the Senate Judiciary Committee Subcommittee on Courts, Court Reform Legislation, 97th Cong., 1st Sess., November 16, 1981.

Section 3 of each bill would rewrite § 1257 to provide that a writ of certiorari will lie in all cases in which an appeal or writ of certiorari currently lies. The amendment would not alter any of the underlying jurisdictional definitions.

Section 4 of each bill would amend § 1258 to allow a writ of certiorari to lie in any case in which certiorari would lie from a State court. The right to appeal from the Supreme Court of Puerto Rico be eliminated by the amendment and the amendment would continue the conformance in light of the amendments to § 1257.[69/]

Section 5 of each bill would conform the chapter heading for Chapter 81 of Title 28, United States Code, to conform with the amendments noted above.

Section 6 of each bill eliminates the right to appeal from judgments of the United States Courts of Appeal on the constitutionality of provisions Federal Election Campaign Act of 1971, supra, part 1, ¶ (c), by repealing § 310(b) of the Act.[70/] This subsection includes specific provisions for "bringing" the appeal process within 20 days; these requirements would also be eliminated and the provisions of § 2101(c) and the Rules of the Court would become effective over such cases.

Section 7 of the bill would eliminate the right to appeal certain California Indian lands claims, if any survive, discussed, supra, part 1, ¶ g.

69/ In light of the paralell between §§ 1257 and 1258 an additional question may be raised as to whether a further amendment to § 1257 to include the courts of Puerto Rico with the courts of the District of Columbia, and the elimination of § 1258, would simplify the code without changing the law.

70/ The difference depends on whether the bill was written before of after the section was most recently renumbered.

Section 8 of the bill would substitute a petition for a writ of certiorari for the right to appeal over questions challenging the constitutionality of the Trans-Alaska Pipeline Authorization Act, discussed, supra, part I, ¶ h. The provision for a writ of certiorari directed to the District Court, rather than the current, more complex, procedure of filing an appeal with the appropriate court of appeals and petitioning the Court for a writ of certiorari before judgment appears to be unique both in its procedure and its exclusivity. We should note, also, that the 60-day statute of limitations in the provision cuts off suits to test the constitutionality of the Act per se, contrasted with challenges to the constitutionality of the Act as applied, and the elimination of that limitation may revive the possibility of commencement of litigation challenging the constitutionality of the Act per se.

Section 9 of the bill stipulates the effective date to follow the date of enactment by 90 days. Further the section provides that the provisions of the bill shall not affect any case pending before the Supreme Court.

The bill does not propose to eliminate all of the obligatory or mandatory appellate jurisdiction of the Court. The bill leaves intact provisions under the Federal Trade Commission Improvements Act of 1980, the Federal Insecticide, Fungicide and Rodenticide Act, the Coastal Zone Management Improvement Act, the Presidential Campaign Fund Act, the Regional Rail Reorganization Act, the Northeast Rail Service Act, the Civil Rights Acts and the Voting Rights Act. This conclusion is further supported by the retention intact of 28 U.S.C. §§ 2101 - 2104, 2107 (1976), providing procedure and time limitations for the right to appeal generally. If the bill were intended to obliterate the right of appeal to the Supreme Court, and thereby relegate the process of review to

certiorari and certification, and given the general caveat on completeness of cataloging all direct appeal provisions, it would be necessary to amend and repass the chapter with a traditional implicit repealer prefacing each section, or a specific statutory disclaimer of the right to appeal.

As has been noted in the particular setting of cases during the 1980 Term of Court, several appeals could have arisen under specific provisions left intact under the bill. From the review made of summary dispositions and judgments after full briefings and oral argument, however, only two appeals clearly brought under the Voting Rights Act of 1965, and summarily affirmed, would have been properly appealable under the provisions of the bill.

The bills appears to consider the relative importance of the administration of certain Acts and the conclusiveness of the constitutionality of others while the general allowance of appeals in all situations in which the constitutionality of an Act of Congress or the constitutionality or preemption of a State statute are concerned has been rejected. It is clear that the bill will grant the Court greater leeway in determining its caseload, much as the review of the obligatory or mandatory appellate docket appears to receive more concerted attention by the Court than the discretionary docket.

In reviewing the complex series of appellate processes, substantial questions have arisen with regard to the efficacy of both the Buckley review process and the three-judge district courts. First, the Buckley review procedure requires certification of any question of constitutionality of a statute to the court of appeals in any case to which the provision applies. If the attack on the statute is that the statute is unconstitutional per se, there will be few if any facts for the court do adduce; but if the attack on the

statute is that the statute is unconstitutional as applied, the district court must determine the basis of the application of the statute in the instant case. In cases of attacks on the statute per se, district court consideration may be reduced in the ordinary case to a question of cross-motions for summary judgment (there being no material fact in issue), a question equally, if not better, suited for review by an appellate panel. In cases in which the attack on the statute is as applied, certification of the question at the time the issue is joined will be futile because of a lack of a factual record. It is entirely unclear whether any administrative record developed prior to the filing of the case in the district court must be considered by that court, or the court of appeals on review of the certified question of constitutionality. Cf. 28 U.S.C. § 2112 (1976). Accordingly, these cases will be heard without the factual background on which they ultimately will be determined. Accordingly, certification of a question of the constitutionality of a statute as applied will not be profitably accomplished.

In the same vein, the requirement of an en banc proceeding in the courts of appeals does not recognize the differences in the size and structure of the courts.[71/] The historical justification of requiring three-judge district courts in a variety of settings was that the trial function should be accomplished in a more exact and respectable judicial process than might be commanded by a single judge and reduce the rate of reversal by enlisting the thinking of other jurists at the trial stage. For the same reason, and to allow greater expedition, no intermediate appellate review was required, particularly since one of the

71/ Supra, at 6 - 7.

judges of the three-judge court was an circuit judge. Beyond that rationale, the differing size and structure of the circuit courts raises a question of whether the Buckley procedure accomplishes more.

Finally, Buckley review procedure is unclear on the point of how expeditious the docketing of a case must be in the Supreme Court. The language used in the various Buckley review procedure statutes simply does not distinguish between the filing of the notice of appeal in the court of appeals and the docketing of the case in the Supreme Court. Whether this appeal, in light of the treatment which the Court has historically given the appeals docket, should be altered to comport with the certiorari process is a policy question of note, while the current proposals decline to make that change.

Three-judge courts, on the other hand, have blended the appellate and trial process relatively well in acquiring expeditious and well-reasoned determinations in the first instance. Whether the appeal afforded to decisions of a three-judge district court is meritorious in furthering the Supreme Court's examination of such decisions is, however, and for the same reasons as the rest of the appeals docket, debatable. Whether this appeal should be altered to utilize the writ of certiorari is a question which the contemporary proposals implicitely answer in the nagative.

Conclusions

This paper has reviewed the law and practice of the Supreme Court's mandatory appellate jurisdiction. There are in excess of a twenty provisions currently in force which require the Court to hear and determine particular cases brought by appeal. In addition to the general class of cases in which a State or federal statute is held to be unconstitutional by a federal court, or a State statute is upheld against a claim of unconstitutionality by a State court, there are particular provisions for injunctions against the enforceability of certain federal statutes, and other particular provisions for an appeal no matter what the determination of the lower court vis-a-vis the constitutionality of the statute. These special provisons include the Federal Election Campaign Act, the Presidential Campaign Fund Act, the Civil Rights Act of 1964, the Voting Rights Act of 1965, the Regional Rail Reorganization Act and the Federal Trade Commission Improvements Act of 1980. In at least one instance, a broad range of cases may be brought by appeal to the Supreme Court on the interpretation of a statute alone.

In considering appeals, the Court must first determine the jurisdictional correctness of the filing. Where the filing of an appeal is improvident, the Court must determine whether certiorari would lie, and, if so, determine whether to grant certiorari. If certiorari would not lie, the Court will dismiss the appeal for want of jurisdiction.

If the Court has jurisdiction, a determination must be made on the extent of briefing and oral argument necessary to decide the issues. If oral argument is deemed necessary, probable jurisdiction will be noted. If further briefing

is deemed necessary to determine the Court's jurisdiction, the question of jurisdiction will be postponed until argument.

If the Court determines that no further briefing is necessary to determine the merits, an order will be entered either (i) affirming the judgment of an inferior federal court or dismissing the appeal for want of a substantial federal question where the judgment is from a State court, or (ii) vacating the judgment and remanding the case to the court below for further proceedings. These summary dispositions -- while on the merits -- have little precedential effect beyond the parties and the litigated issues between them. Only where a subsequent case is "four square" with the summary adjudication will the summary adjudication be of precedential value.

The Court's docket in recent years has reflected changes in the mandatory jurisdiction. A marked decline in the number of appeals is evident after repeal of the general provisions for seeking injunctive relief on the basis of unconstitutionality from three-judge district courts. Cases from State courts predominate the mandatory docket, but there is high rate of dismissal for want of jurisdiction, or meritorious dismissal for want of a substantial federal question. Appeals from the federal court of appeals have correspondingly high rates of summary action. Appeals from district courts appear to have the greatest likelihood of receiving plenary review, in part due to the specific statutory authorizations and the Congressional determination of general importance, and despite the fact that trial records are often sparse. The "error" rates which may be generated from these three types of appeals are quite high, although skewed by inartful pleadings of several particularly contentious litigants.

In short, the mandatory jurisdiction is complex at best. The cases which

are brought to the Court include the most significant issues of the day, such as Rostker v. Goldberg,[72/] the constitutionality of the all-male draft. However, the mandatory jurisdiction is also subject to abuse, as is perhaps best illustrated by the twelve appeals brought by two litigants, all of which were dismissed for want of jurisdiction, either outright or in tandem with certiorari denied. Finally, litigants do not appear to fully understand the complexity of the Court's appeals practice, best illustrated by the high rates of dismissal for non-meritorious reasons.

Contemporary proposals have not sought to completely obliterate the mandatory jurisdiction of the Court, but rather to redefine that jurisdiction in far more narrow circumstances, such as civil or political rights and specific instances where Congress feels an early disposition by a final arbiter is prudent, such as the legislative veto provisions of the Federal Trade Commission Improvements Act. As with previous adjustments to the Court's mandatory jurisdiction, this rebalancing is a continuing process.

Leland E. Beck
Legislative Attorney
American Law Division
November 10, 1981
Revised June 18, 1982

72/ Supra, note 61.

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Washington, D.C. 20540

July 19, 1982

TO : Hon. Robert Kastenmeier
Chairman, Subcommittee on Courts, Civil Liberties
and the Administration of Justice

FROM : American Law Division

SUBJECT : Amendments to H.R. 4396.

In light of our report on priorities in federal court civil case docketing and the hearings before the Subcommittee on June 24th, you have requested a reiteration of the additional technical and conforming amendments suggested for H.R. 4396, 97th Cong., 1st Sess. There are twenty additional priorities provisions suggested, in generic form, as subsections of § 3(a) of the proposed clean bill, as follows:

(4)(B): § 20(d)(3) of the Federal Insecticide, Fungicide and Rodenticide Act (7 U.S.C. § 136h(d)(3));

(4)(D): § 25(a)(4)(E)(iii) of the same act (7 U.S.C. § 136w(a)(4)(E)(iii));

(15): § 10(c)(2) of the Natural Gas Transportation Act (15 U.S.C. § 719h(c)(2));

(18): § 23(d) of the Toxic Substances Control Act (15 U.S.C. § 2622(d));

(22)(A): § 807(b) of the Alaska National Interest Lands Conservation Act (16 U.S.C. § 3168);

(27)(D): § 7609 of the Internal Revenue Code of 1954 (administrative summonses);

(28)(A): 28 U.S.C. § 596(a)(3) (suits to challenge removal of special prosecutor);

(28)(B): 28 U.S.C. § 636(c)(4) (district court rules on magistrates);

(28)(C): 28 U.S.C. § 1296 (rule on priorities in the Court of Appeals for the Federal Circuit) [*];

(28)(D): 28 U.S.C. § 1364(c) (actions brought by the United States Senate) [**];

(28)(G): 28 U.S.C. § 2647 (priorities in United States Court of International Trade);

(35): 38 U.S.C. § 2022 (postal rate orders);

(43): undenominated material under the headings of "Energy and Minerals" and "Geological Surveys" subheading "Exploration of National Petroleum Reserve" (43 U.S.C. § 6508);

(44): § 214(b) of the Emergency Energy Conservation Act of 1979 (42 U.S.C. § 8514(b));

(47): § 511(c) of the Public Utilities Regulatory Policy Act of 1978 (43 U.S.C. §2011(c));

(50): § 305(d)(2) of the Regional Rail Reorganization Act of 1973 (45 U.S.C. § 745(d)(2)) (two amendments);

(51): § 124(b) of the Rock Island Transition and Employee Assistance Act (45 U.S.C. § 1018(b));

(53): § 13A(a) of the Subversive Activities Control Act of 1950 (50 U.S.C. § 792a note)

(55): § 4(b) of the Act of July 2, 1948 (50 U.S.C. App. § 1984(b)) (Japanese-American claims).

Further, we note that the proposed clean bill has deleted the amendments to former 28 U.S.C. §§ 2602, 2633 as obsolete. Many of these provisions are new or have unique phraseology and have escaped notice until recently.

In addition we should note that § 11A of the Securities Exchange Act of 1934, as added, Pub. L. 94-29, § 7, 89 Stat. 111 (1975), found at 15 U.S.C. §

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* Becomes effective October 1, 1982.

** There are three unrelated items officially codified under this section number by Congress.

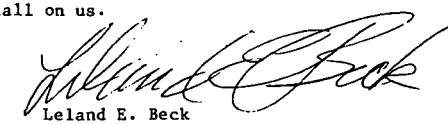
78k-1(c)(4)(B), provides for expedited review of Securities and Exchange Commission rules regarding the national securities marketing system. This provision has not been previously identified to include an expediting provision.

Additionally, we have noted that § 2(b)(6) of the Voting Rights Act Amendment of 1982 has substituted the following language in § 4 of the Voting Rights Act:

> (6) If, after two years from the date of the filing of a declaratory judgment under this subsection, no date has been set for a hearing on such action, and that delay has not been the result of an avoidable delay on the part of counsel for any party, the chief judge of the United States District Court for the District of Columbia may request the Judicial Council for the Circuit of the District of Columbia to provide the necessary judicial resources to expedite any action filed under this section. If such resources are unavailable within the circuit, the chief judge shall file a certificate of necessity in accordance with section 292(d) of title 28 of the United States Code.

Voting Rights Act Amendment of 1982, Pub. L. 97-205, § 2(b)(6), 96 Stat. ---, to be codified at 42 U.S.C. § 1973b(a)(6), found at 129 Cong. Rec. H3840 (daily ed. June 22, 1982). The provision eludes precise characterization as an expediting requirement or a separate judicial duty which only suggests the assignment of additional judicial personnel.

Accordingly, we now suggest that there are 88, or possibly 89, civil expediting provisions included in Congressional enactments. If we can be of further service, please feel free to call on us.



Leland E. Beck
Legislative Attorney

UNITED STATES DISTRICT COURT

DISTRICT OF NEW MEXICO
OFFICE OF THE CLERK

JESSE CASAUS
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July 16, 1982

Honorable Robert W. Kastenmeier
2232 Rayburn House Office Bldg.
Washington, D.C. 20515

Dear Congressman Kastenmeier:

Section 1866 (b) of Title 28 of the United States Code requires that persons drawn for jury service may be served personally or by registered or certified mail addressed to such persons at their usual residence or business address.

Studies by the Federal Judicial Center, the National Center for State Courts and Clerks of U. S. District Courts reflect that service of juror summons by first class mail would result in considerable mail and clerical savings to the government. The Center of Jury Studies has reported that all state courts, except for South Carolina, have adopted delivery of juror summons by first class mail and that:

a. The net response from prospective jurors is as high, if not higher than with other methods of service of summons;

b. Non-deliverables are returned more quickly and reduced in number (certified mail is held for three weeks; undeliverable first class mail is returned at once);

c. The use of first class mail is considerably less expensive. (A jury summons sent certified mail with return receipt requested costs $1.35 per summons in postage; a summons by first class mail would cost 37 cents. Since approximately 250,000 juror summons are sent by the Federal Courts per year, the savings could be significant.)

The Committee on Jury Standards, Judicial Administration Division of the American Bar Association in its Preliminary Draft Standards Relating to Juror Use and Management, recommends the use of first-class mail for notifying individuals that they are being considered for jury duty.

The Federal Court Clerks Association, Incorporated, at its recent annual conference on July 1, 1982, in Philadelphia, passed a resolution endorsing the use of first-class mail for summonsing prospective jurors in lieu of the presently required registered or certified mail. A copy of the FCCA resolution is attached.

The U. S. District Court Clerks Committee on Jury Operations respectfully recommends that Congress favorably consider House Resolution 4395 which would amend 28 U.S.C. 1866(b) to permit the use of first class mail for such summons.

Yours truly,

JESSE CASAUS, Chairman
Clerks Committee on Jury Operations

JC:tm

Attachment

FEDERAL COURT CLERKS ASSOCIATION, INC.

RESOLUTION

WHEREAS, Section 1866(b) of Title 28 of the United States Code requires that persons drawn for jury service be summoned by clerks of court or jury commissioners by registered or certified mail, and,

WHEREAS, studies conducted by Clerks of District Courts, Federal Judicial Center and the National Center for State Courts reveal that the use of first-class mail instead of registered or certified mail would result in considerably less mail expense, more rapid response by prospective jurors, less delay in return of undelivered summonses and significant clerical cost savings,

BE IT RESOLVED that the membership of the Federal Court Clerks Association, Incorporated, endorses the use of first-class mail for summonsing of prospective jurors in lieu of the presently required registered or certified mail as being more effective and economical and respectfully recommends to the Congress of the United States that it favorably consider House Resolution 4395 which would statutorily permit the use of first-class mail for such summonses.

ADOPTED this 1st day of July, 1982, at Philadelphia.

ATTEST: Lucille L'Miller
Secretary

H.R. 4300

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MINNESOTA

CHAMBERS OF
MILES W. LORD
CHIEF JUDGE

U. S. COURTHOUSE
MINNEAPOLIS, MN 55401

June 24, 1982

Representative Peter Rodino
House Judiciary Committee
U. S. House of Representatives
Washington, D.C. 20515

Dear Representative Rodino:

I am writing to strongly urge that the coverage of the Federal Employee Compensation Act be expanded to include those serving as Federal jurors. 5 U.S.C. §1801. I was recently trying a case in Duluth and, on a trip to view the accident site, one of the jurors fell and was injured. In the coverage provisions of the F.E.C.A., such individuals are specifically excluded although coverage has been extended to include those jurors who are also regular federal employees.

Where civic-minded individuals contribute their time and effort to fulfill the important tasks of a Federal juror, losing valuable time from their usual work activities, I feel it imperative that they receive protection for possible injuries incurred during their service. I note in reviewing the legislative history of the Act that such coverage was expressly supported by the Senate Committee on Labor & Public Welfare (S.R. No. 93-1081, 1974). See Pub. L. No. 93-416, 1974, U. S. Code Cong. & Ad. News, 5347. Their recommendation reflects careful analysis of potential problems of non-coverage and should therefore be accorded due consideration by the House Judiciary Committee in its review of the Act.

Thank you.

Very truly yours,

Miles W. Lord
Chief Judge U. S. District Court

clg

DEC 23 1981 #556

United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, D.C. 20510

STROM THURMOND, S.C., CHAIRMAN
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RICHARD W. VELDE, CHIEF COUNSEL AND STAFF DIRECTOR

December 18, 1981

The Honorable Robert W. Kastenmeier
U.S. House of Representatives
Chairman, Subcommittee on Courts, Civil
Liberties and the Administration of Justice
2232 Rayburn House Office Building
Washington, D.C. 20515

Dear Congressman:

Thank you for your letter concerning H.R. 4369. I am pleased to hear that you and Congressman Railsback have taken action by introducing this important piece of legislation addressing the problem of the multitude of priorities that the courts must weigh in moving civil litigation through their courts.

My staff has contacted the Courts Subcommittee Counsel to discuss your legislation. Considering the wide ranging interest expressed by the judicial and legal communities in resolving the kinds of problems addressed by your legislation, I believe that the subject should be addressed by the Senate. I look forward to working with you on this problem.

Sincerely yours,

BOB DOLE
United States Senate

BD:kml

cc: The Honorable Tom Railsback

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

DEC 04 1981

Honorable Peter W. Rodino, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This is in response to your request for the views of the Department of Justice on H.R. 2406, a bill relating to the jurisdiction of the Supreme Court. The general effect of this legislation would be to convert the mandatory appellate jurisdiction of the Supreme Court to jurisdiction for review by certiorari, except in connection with review of decisions by three-judge district courts.1/

This legislation originated in the 95th Congress as S. 3100.2/ It was reintroduced in the 96th Congress as H.R. 2700 and S. 450. S. 450 was passed by the Senate in April of 1979.3/

1/In addition to retaining appeals from three-judge district courts, the bill does not eliminate one extremely narrow area of appellate jurisdiction -- 45 U.S.C. § 743(d) authorizes direct appeal to the Supreme Court of certain determinations of the special railroad reorganization court.

2/A bill to the same effect, S. 83, had been introduced earlier by Senator Bumpers.

3/The report accompanying S. 3100 is S. Rep. No. 985, 95th Cong., 2d Sess. (1978). The report accompanying S. 450 is S. Rep. No. 35, 96th Cong., 1st Sess. (1979). There is little difference between the two reports. Hearings on S. 3100 were held in the Senate. See Supreme Court Jurisdiction Act of 1978: Hearings on S. 3100 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess. (1978) [hereafter cited as "Senate Hearings"].

S. 3100 was endorsed in a letter signed by all the Justices of the Supreme Court [hereafter cited as "Letter of the Justices"]. The letter is reprinted in S. Rep. No. 985, 95th Cong., 2d Sess., at 15-16 (1978), and in S. Rep. No. 35, 96th Cong., 1st Sess., at 15-16 (1979).

We believe that the changes effected by this legislation are long overdue, and will bring about a substantial improvement in the administration of justice in the federal courts. The essential defect of the current system is that the Supreme Court is required to devote a large portion of its time to deciding on the merits cases of no special importance because they happen to fall within the categories which qualify for review by appeal under the current statutes. There is no necessary correlation between the difficulty of the legal questions in a case and its public importance. When the Justices are uncertain concerning the appropriate disposition of a case presented on appeal, they are obliged to devote the time and energy to it required for reaching a decision on the merits--including, in many cases, full briefing and oral argument--though all may agree that it raises no question of general interest and would not have warranted the granting of a writ of certiorari.4/

The present system also interferes with the ability of the Court to select appropriate cases for the decision of recurrent legal questions of public importance. A particular case may raise an important issue, but the record in it may be unclear. The Court's ability to reach a sound decision with respect to a complex and significant issue may be facilitated by first letting several lower courts explore the ramifications of the problem.5/ By forcing the Court to decide the merits of dispositive issues whenever they may arise in a case presented for review by appeal, the current system interferes with the Court's ability to pass on issues at a time and in a context most conducive to the sound development of federal law.

Commentators and commissions that have studied the jurisdiction of the Supreme Court have generally agreed that the categories defined by the existing appeal provisions are essentially arbitrary. Innumerable cases of the greatest significance have been brought under the certiorari jurisdiction of the Supreme Court.6/ Conversely, the statutory categories qualifying for appeal encompass broad classes of cases of no

4/See Letter of the Justices, supra note 3; S. Rep. No. 985, 95th Cong., 2d Sess. 17 (1978)(prefatory remark of Justice Stevens in relation to First Federal Savings and Loan Ass'n of Boston v. Tax Comm'n of Massachusetts, 437 U.S. 255 (1978), and Moorman Manufacturing Co. v. Bair, 437 U.S. 267 (1978)); S. Rep. No. 35, 96th Cong., 1st Sess. 17 (1979)(same).

5/See Colorado Springs Amusements, Ltd. v. Rizzo, 428 U.S. 913, 918 (Brennan, J., dissenting from denial of certiorari); Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 918 (1950) (opinion of Frankfurter, J., respecting denial of certiorari).

6/See, e.g., United States v. Nixon, 418 U.S. 683 (1974); Regents of the University of California v. Bakke, 438 U.S. 265 (1978); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Shelley v. Kraemer, 334 U.S. 1 (1948).

special importance. This point may be appreciated more fully in the context of a detailed consideration of the principal jurisdictional provisions that would be affected by H.R. 2406--28 U.S.C. § 1257(1)-(2), 28 U.S.C. § 1254(2), and 28 U.S.C. § 1252:

28 U.S.C. § 1257(1)-(2). 28 U.S.C. § 1257(1) authorizes review by appeal of a decision of the highest state court in which a decision could be had where the validity of a federal law is drawn in question and the decision is against its validity. 28 U.S.C. § 1257(2) provides similarly for review of state court decisions where the validity of "a statute of any state" is drawn in question on federal grounds and the decision is in favor of its validity.

The purpose of authorizing appeal in such cases is apparently to assure that the supremacy and uniformity of federal law will be upheld by requiring Supreme Court review where federal laws are invalidated or federal challenges to state laws are rejected. However, there is no reason at all to believe that the Supreme Court would be derelict in carrying out this responsibility if given discretion to decide in which cases review is warranted to vindicate federal interests.

As a practical matter, the categories defined by § 1257 do not restrict appeal to cases of general import or unusual significance. The term "statute of any state," as used in § 1257(2), is not confined to laws of statewide applicability, but includes municipal ordinances[7] and all administrative rules and orders of a "legislative" character.[8] In light of the doctrine of Dahnke-Walker Milling Co. v. Bondurant,[9] qualification for appeal under this provision does not require that a challenge be rejected to the general validity of a state law. It is sufficient if a claim was rejected that the application of the state law under the facts of the particular case was barred on federal grounds. Hence, the ability of a litigant to obtain review on appeal depends to a very large degree on his attorney's ability to describe the outcome of the case as a rejection of a challenge to the validity of a state law as applied, rather than on any substantive difference between his case and state cases falling under the certiorari jurisdiction of the Supreme Court described in § 1257(3).[10]

28 U.S.C. § 1254(2). 28 U.S.C. § 1254(2) authorizes appeal by a party relying on a state statute held to be invalid on federal grounds by a federal court of appeals. The category specified in this provision also does not define a class of cases

7/See, e.g., Coates v. City of Cincinnati, 402 U.S. 611 (1971); Jamison v. Texas, 318 U.S. 413 (1943).
8/See Lathrop v. Donohue, 367 U.S. 820, 824-27 (1961).
9/257 U.S. 282 (1921).
10/See Hart & Wechsler, The Federal Courts and the Federal System 631-40 (2d ed. 1973).

of unique importance either to the individual states or to the nation. As in § 1257, the notion of a "statute" in this provision applies to municipal ordinances[11] and administrative orders,[12] and it suffices if a state law is held to be invalid as applied.[13]

28 U.S.C. § 1252. 28 U.S.C. § 1252 provides for direct appeal to the Supreme Court of decisions of lower federal courts holding acts of Congress unconstitutional in proceedings in which the United States or its agencies, officers, or employees are parties. Ordinarily, lower federal court decisions invalidating acts of Congress present issues of great public importance warranting Supreme Court review. We doubt, however, that the Supreme Court would frequently refuse to grant a discretionary writ of certiorari in such a case. In addition, in cases in which expedited consideration by the Supreme Court is required, it is possible for the litigants to apply to the Supreme Court for a writ of certiorari before final judgment in the court of appeals, as the government recently did in Dames & Moore v. Regan, No. 80-2078 (July 2, 1981).[14] Hence, elimination of "direct appeals" under 28 U.S.C. § 1252 need not prove an obstacle to expeditious review in cases of exceptional importance.

In sum, the existing grounds of Supreme Court appellate jurisdiction are essentially arbitrary or unnecessary. We also do not believe that alternative broad rules of mandatory review could be devised that would assure consideration of important cases in a principled and consistent way, but would avoid the types of problems that have arisen under the current system.[15] If the general regime of discretionary review contemplated by H.R. 2406 proves unsatisfactory in particular areas after its enactment, there will be ample time then to consider restoring carefully controlled bases of appellate review to the Supreme Court's jurisdiction.

We do not anticipate that the proposed changes will present any drawbacks from the perspective of the operations of the Department of Justice. For many years Supreme Court practice has

11/See City of New Orleans v. Dukes, 427 U.S. 297, 301 (1976).
12/See Public Service Comm'n of Indiana v. Batesville Telephone Co., 284 U.S. 6 (1931) (assuming that order of state Public Service Commission invalidated by court of appeals is a "statute," but dismissing appeal on other grounds); Stern & Gressman, Supreme Court Practice 64 (5th ed. 1978).
13/See Dutton v. Evans, 400 U.S. 74, 76 n. 6 (1970); Stern & Gressman, Supreme Court Practice 65 (5th ed. 1978).
14/The same procedure was employed in the Nixon tapes case, United States v. Nixon, 418 U.S. 683 (1974).
15/See Senate Hearings, supra note 3, at 33-34 (prepared statement of Prof. Arthur Hellman).

tended to minimize differences between application for appeals as of right and review by certiorari. Parties (including the government) wishing to invoke the Supreme Court's appellate jurisdiction have been required, as a practical matter, to draw up jurisdictional statements similar in character to petitions for certiorari. Hence, the statutory reform that is proposed should not substantially change our practice before the Supreme Court.

Finally, it may be noted that the proposed measures will entail no costs or expenditures. Their effect will only be to allow the Supreme Court to utilize the resources it presently possesses in a more rational manner.

For the foregoing reasons, the Department of Justice supports H.R. 2406, and urges its speedy enactment.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

(Signed) Robert A. McConnell

Robert A. McConnell
Assistant Attorney General

4Aa

SPECIAL COURT
REGIONAL RAIL REORGANIZATION ACT OF 1973

HENRY J. FRIENDLY
PRESIDING JUDGE
2302 U. S. COURTHOUSE
FOLEY SQUARE
NEW YORK N. Y. 10007

JOHN MINOR WISDOM
JUDGE
200 U. S. COURTHOUSE
600 CAMP STREET
NEW ORLEANS, LA. 70130

ROSZEL C. THOMSEN
JUDGE
720 U. S. COURTHOUSE
101 W. LOMBARD STREET
BALTIMORE, MD. 21201

JAMES F. DAVEY
CLERK
1820-A U. S. COURTHOUSE
WASHINGTON, D. C. 20001

RICHARD E. ERIKSEN
EXECUTIVE ATTORNEY
2403 U. S. COURTHOUSE
WASHINGTON, D. C. 20001

JUL 15 1982

July 12, 1982

Honorable Robert W. Kastenmeier
Chairman, Subcommittee on Courts, Civil
Liberties and the Administration of Justice
2232 Rayburn House Office Building
Washington, D.C. 20515

Dear Congressman Kastenmeier:

I have been asked by Mr. David W. Beier of your subcommittee staff to comment regarding a bill you introduced (H.R. 2406) to convert the mandatory appellate jurisdiction of the Supreme Court to discretionary review by certiorari. As developed below, certain decisions of the Special Court established under the Regional Rail Reorganization Act of 1973 ("Rail Act") are reviewable by direct appeal to the Supreme Court. H.R. 2406 as it presently reads does not affect these provisions.

For some years, the Special Court has been comprised of Judge John Minor Wisdom, Judge Roszel C. Thomsen and myself. We have exercised the jurisdiction described in §§209, 303, 305, and 306 of the Rail Act, 45 U.S.C. §§719, 743, 745, and 746. In May of this year the Judicial Panel on Multidistrict Litigation assigned Judges Oliver Gasch, William B. Bryant and Charles R. Weiner as three additional judges to the Special Court to exercise the jurisdiction found in §1152 of NRSA, 45 U.S.C. §1105. The court is now divided into two separate panels of three judges each. The General Panel continues to exercise the jurisdiction established by the Rail Act while the §1152 Panel exercises jurisdiction over cases arising under NRSA.

Actions of the Special Court are reviewable only by the Supreme Court. The provisions for review of final orders on most matters within the Court's jurisdiction are found in two separate statutory provisions, §209(e)(3) of the Rail Act, 45 U.S.C. 719(e)(3) and §1152(b) of the Northeast Rail Service Act of 1981 ("NRSA"), 45 U.S.C. 1105(b). Both of these subsections provide for review of a final order or judgment of the Special Court by certiorari except that review is by direct appeal where the court enjoins the enforcement of or determines that the Rail Act or NRSA, or any provision thereof, is unconstitutional. These provisions are generally in accord with the provisions of 28 U.S.C. §1252 except that they are not limited to proceedings in which the United States, its officers, agencies or employees are parties. Since the United States almost always becomes party to such a proceeding as a result of action under 28 U.S.C. §2403, the difference is not material. As your committee is proposing to repeal 28 U.S.C. §1252, I assume that the exceptions in §209(e)(3) and §1152(b) of the Rail Act should likewise be repealed in the interest of consistency, although the Special Court has not yet found an act of Congress unconstitutional.

A third statutory provision, §303(d) of the Rail Act, 45 U.S.C. §743(d), provides that a finding or determination of the Special Court regarding the valuation of rail properties conveyed pursuant to §303 may be appealed directly to the Supreme Court. The second sentence of that subsection further provides that:

> The Supreme Court shall dismiss any such appeal within 7 days after the entry of such an appeal if it determines that such an appeal would not be in the interest of an expeditious conclusion of the proceedings and shall grant the highest priority to the determination of any such appeals which it determines not to dismiss.

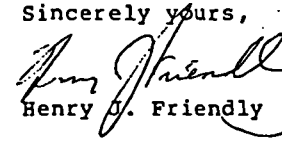
There are many difficulties with this provision. One is that it is not limited to final judgments. Counsel have been fearful, unnecessarily in our view but understandably in light of the stakes, that failure to appeal an interlocutory order might preclude its later review on appeal from the final judgment. Hence in some instances they have taken appeals from interlocutory orders but have asked at the same time that the appeal be dismissed. A greater difficulty is the provision requiring the Supreme Court to act within 7 days if it thinks that an appeal would not be in the interest of an expeditious conclusion of the proceedings. I understand that the Chief Justice has

established procedures in the office of the Clerk of the Supreme Court to spot such appeals as soon as they are entered. Still we have been concerned that 7 days might elapse, especially during the Court's summer recess, before a quorum of the Court could be assembled. Accordingly we have sometimes postponed the effective date of decisions that could have been rendered in July or August until September or October.

We see no reason why review under §303(d) should not be by certiorari. These are essentially eminent domain proceedings; judgments of the courts of appeals in such proceedings are subject to Supreme Court review only by certiorari. To be sure, in such cases there has already been one review as of right, to wit, of the district judge by a three judge panel of a court of appeals. But here the initial determination has been made by three judges. If review is solely by certiorari it will be unnecessary to grapple with the interlocutory order problem, which can be left to the Supreme Court's discretion. In point of fact we are nearing the end of the valuation process with all but two of the transferor railroads now having settled as a result of the proceedings the Special Court has conducted. While this might suggest leaving things as they are, we believe that §303(d) of the Rail Act, 45 U.S.C. 743(d) should be amended to read as follows:

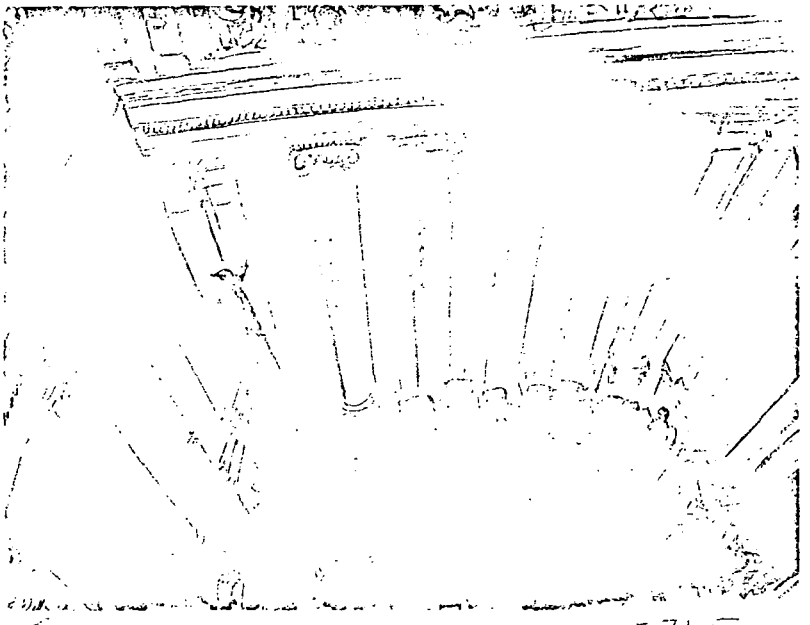
> (d) Review. -- A finding or determination entered by the Special Court pursuant to subsection (c) of this section or section 306 of this title shall be reviewable only upon petition for writ of certiorari to the Supreme Court of the United States. Such review is exclusive and any petition shall be filed not more than 20 days after entry of finding or determination.

Sincerely yours,



Henry J. Friendly

cc: Hon. John Minor Wisdom
Hon. Roszel C. Thomsen
Hon. Oliver Gasch
Hon. William B. Bryant
Hon. Charles R. Weiner



JK 1571 E

Requiem for the Supreme Courts' Obligatory Jurisdiction

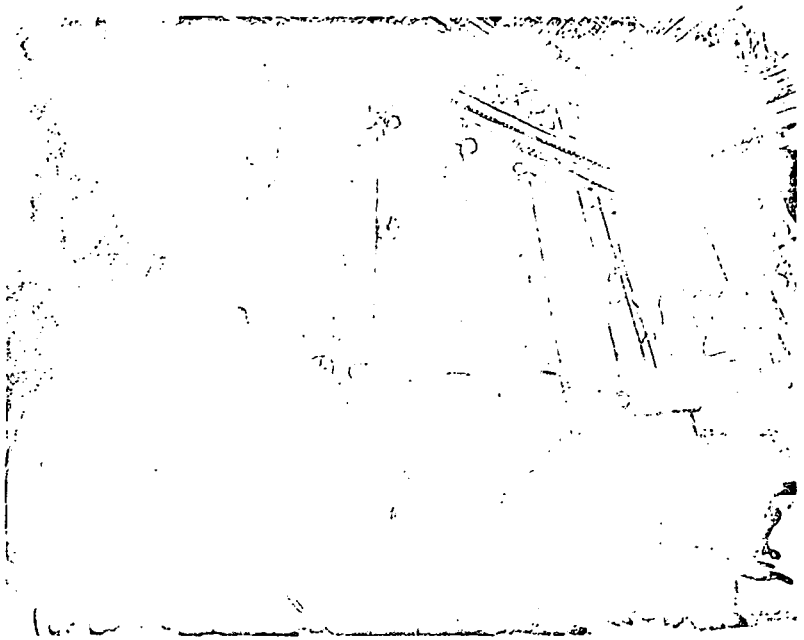
All review will be discretionary by the route of certiorari if current proposals are enacted by Congress.

Illustration by Betty Watts © 1979

By Eugene Gressman

THE APPELLATE jurisdiction of the Supreme Court of the United States appears to be at the brink of losing virtually all its obligatory or mandatory characteristics. Given the delays and quirks of the legislative process, Congress in the relatively near future seems likely to cloak the Court's jurisdiction almost entirely in discretionary garb. Save for a few isolated appeals from the remaining handful of three-judge federal district courts, the Court's nonoriginal jurisdiction will soon be all certiorari.

The current 96th Congress has begun the process of enacting S. 450, the Supreme Court Jurisdiction Act of 1979. S.450 is identical in content with S. 3100, which was introduced but not enacted in the 95th Congress. S. 450, with a rather unfortunate amendment,



passed the Senate on April 9, 1979, and is now pending in its original form before the House of Representatives as H.R. 2700.

In its pertinent aspects, S. 450 would make the following types of cases reviewable by the Supreme Court only by writ of certiorari rather than by way of a direct appeal:

1. Cases that can now be appealed to the Court from the highest state courts under 28 U.S.C. § 1257(1) and (2). Those are cases in which the state court has either (1) invalidated a federal statute or treaty or (2) validated a state statute in light of a federal constitutional or legal challenge. The latter type of state cases constitutes the largest pocket of proceedings still remaining within the Court's obligatory jurisdiction.

2. Cases that are now directly appealable to the Supreme Court pursuant to 28 U.S.C. § 1252 from any lower federal court that has invalidated a federal statute. The repeal of Section 1252, as *proposed by S. 450, would mainly af*fect the few instances where a federal district court has upset some congressional enactment, but even that effect would be insignificant. The result of repealing Section 1252 would be to divert appeals from district court determinations to the respective courts of appeals, whose judgments are subject to Supreme Court review by certiorari under 28 U.S.C. § 1254(1). But Section 1254(1) has long made certiorari review available before as well as after a court of appeals has entered its judgment. Quick Supreme Court review of these obviously important constitutional rulings of district courts, which Section 1252 , as designed to promote, would simply be rerouted over the certiorari-before-judgment provisions of Section 1254(1). All of which illustrates how *superfluous Section 1252 is.*

3. Cases in the courts of appeals that 28 U.S.C. § 1254(2) makes appealable to the Supreme Court where the court has held a state statute unconstitutional. These cases do arise, but rarely, and when they do, certiorari has always been an alternative step under Section 1254(1).

4. A small miscellany of cases that are now appealable directly to the Supreme Court under various special statutes. These are: (1) cases in the Supreme Court of Puerto Rico that 28 U.S.C. § 1258(1) and (2) makes appealable; (2) cases in the courts of appeals arising under the Federal Election

Illustration by Bailey Wirth © 1979

Campaign Act Amendments of 1974, 2 U.S.C. § 437h; (3) certain cases in the Court of Claims involving California Indian lands, 25 U.S.C. § 652; and (4) certain cases in the federal district courts that might arise under Section 203 of the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. § 1652(d). The first two of these categories have only infrequently fathered any direct appeals to the Supreme Court, while the last two categories have been childless.

These excisions from the Supreme Court's obligatory workload represent the last significant step in the historic transformation of the Court's appellate jurisdiction into one that can be controlled and executed on a discretionary basis. From 1789 to 1891 the Court was under congressional mandate to take jurisdiction over every case that properly came before it, to consider the briefs, to hear the oral argument, and to resolve the merits of each case by written opinions or otherwise. In those early days the Court could afford to obey that mandate, for it had no need to limit the input of cases in order to control its docket. There was ample time to indulge in the notion that, assuming jurisdictional requirements were met, *every litigant had a "right" of appeal to* the Supreme Court, and the Court had the corresponding "obligation" to resolve the merits of each appeal.

But this notion began to founder as the waves of obligatory appeals became higher and more numerous. The latter part of the 19th century saw the beginnings of the modern era of overcrowded dockets and overworked tribunals. Congress attempted to solve the first of the Supreme Court's docket crises in 1891 by creating a new circuit court of appeals system, which proved to be only a temporary palliative for the docket problem. More significant, the 1891 legislation introduced a new docket control weapon—the discretionary writ of certiorari. Although its use was only sparingly authorized in the 1891 legislation, the idea that discretion could be used to control the Court's docket was destined to become the key to efficient operation of the Court's increased business in the 20th century.

Small accretions to the new certiorari *jurisdiction were made by Congress in* the years following 1891, but the vast majority of cases before the Court during the 1891–1925 period continued to invoke the traditional obligatory appeal jurisdiction. When the 1925 docket crisis arrived, a ready solution was at hand. Having had experience in administering a limited certiorari control over its docket, the Supreme Court suggested to Congress that this control device be greatly expanded in coverage. Congress responded with the enactment of the Judiciary Act of 1925, which cut the Court's obligatory jurisdiction almost to the bone.

The 1925 enactment gave the Court a vast extension of its certiorari review powers, enabling it to select for plenary review only those cases that, in the view of the justices, involve issues of far-reaching public importance. The disposition of these important cases is precisely the *raison d'être* of the modern Supreme Court. And the vested authority to use discretion in determining the numerical intake of cases worthy of plenary consideration is the very essence of modern docket control. The Court's experience with mounting dockets since 1925 has shown that certiorari can and does work as a docket control device.

Obligatory jurisdiction cases continue to clog docket

But the certiorari explosion of 1925 did not do away entirely with the Court's obligatory jurisdiction. Statutory appeals as of right, while of low percentage on the docket, continued by their sheer numbers to clog the argument calendar and to force the Court to resolve the merits of many issues of less than national import. Many of the original reasons for authorizing direct appeals to the Court had long disappeared; many of the issues that were thought important enough to warrant compulsory Supreme Court consideration had lost much of their strength and significance. But the Court was immobilized, for it had no statutory authority to refuse to decide these appeals on their merits.

Jurisdictional reform does not come quickly or easily. Not for 45 years after the jurisdictional revolution of 1925 did Congress renew its curtailment of the Court's obligatory assignments. A series of direct appeal statutes then fell in rapid fire order during the decade of the 1970s. In 1970 Congress amended *the Criminal Appeals Act, 18 U.S.C. §* 3731, to eliminate all direct appeals by the government in criminal cases. In 1974 Congress abolished virtually all direct appeals in civil actions brought to enforce the antitrust laws. Direct appeals from three-judge courts convened to enjoin Interstate Commerce Commission orders were stricken by 1975 legislation. And a most sweeping subtraction from obligatory jurisdiction came *in 1976, when Congress repealed Sec*tions 2281 and 2282 of Title 28. Those statutes had long authorized direct appeals to the Supreme Court from judgments of three-judge courts convened to hear and determine injunctive challenges to the constitutional validity of state and federal statutes. By repealing both the three-judge court and the direct appeal requirements, Congress rooted out the source of a significant number of cases the Court had been required to resolve on the merits.

If the provisions of S. 450 become law, they will deliver the *coup de grâce* to the Court's obligatory jurisdiction. Nothing will be left to the outmoded theory that certain classes of litigants have an absolute right to have their cases resolved by the Supreme Court, save in a small handful of federal court cases left untouched by S. 450. The Court would be left with obligatory appeal jurisdiction over the few remaining three-judge courts that are still authorized by Congress—those that are convened to consider reapportionment *matters or to adjudicate extraordinary* matters arising under the Civil Rights Act of 1964, the Voting Rights Act of 1965, or the Presidential Election Campaign Fund Act. Direct appeals also could be taken from certain rulings of the three-judge special court established by the Regional Rail Reorganization Act. All told, these isolated statutory proceedings can be expected to generate only an occasional direct appeal. That will be the low level to which has fallen the once grand and all-encompassing scheme of obligatory jurisdiction. The transition will have been virtually complete from an all-obligatory to an all-certiorari jurisdiction.

The reasons that support the enactment of S. 450 are not difficult to discern. The Supreme Court has said it all in a remarkable letter to the Senate Judiciary Subcommittee that was considering the predecessor, S. 3100, in 1978. That letter is reproduced with this article. It was signed by all nine justices and gave their unqualified *support to the enactment of the pro*visions of S. 3100 and therefore of the identical provisions of S. 450. The letter is an eloquent summation of all that is wrong with imposing on the Court any substantial amount of obligatory

juris liction in an era of overcrowded dockets and argument calendars.

The 1739 concept of an obligation to decide the merits of a case, however insignificant may be the issues, is no longer consistent with the function or the workload of th Supreme Court in the 20th century legal system. That obligation is always imposed in terms of general categories of cases to be decided, and many cases within a given category do not involve issues of wide public or governmental importance. To force the Court to decide all cases of a certain type tends to involve the justices in much litigation that is inconsequential, if not frivolous. Their energies are diverted away from their historic function of resolving only those issues that are truly important and far-reaching. With nearly 5,000 cases clamoring for attention each term, the Court has more than enough critical issues to select for resolution without having to address whole categories of cases that may involve only parochial and settled issues.

As the Court's own letter indicates, if it is forced by statute to devote time and attention to large numbers of unimportant cases, it cannot give the more important matters all the decisional consideration they deserve. This dissipation of the Court's finite resources also reflects the total incapacity of obligatory jurisdiction to provide any mean-

Supreme Court Supports Jurisdiction Act

The following letter, dated June 22, 1976, and signed by all justices of the Supreme Court of the United States, was addressed to Senator De Concini.

In response to your invitation and inquiries, we write to comment on proposed limitations of the Supreme Court's mandatory jurisdiction, specifically those contained in S. 3100. Various justices have spoken out publicly on the issue on prior occasions, all stating essentially the view that the Court's mandatory jurisdictinn should be severely limited or eliminated altogether. Your invitation however, enables all of us, after discussions within the Court, to express our common view on the matter.

We endorse S. 3100 without reservation and urge the Congress to enact it promptly.

Our reasons are similar to those so ably presented in hearings before the Senate on June 20, 1978, by Solicitor General McCree, Assistant Attorney General Meador, Professor Gressman, and others. First, any provision for mandatory jurisdiction by definition permits litigants to bring cases to this Court as of right and without regard to *whether those are of any general* public importance or concern. Thus, the Court is required to devote time and other finite resources to deciding on the *merits cases* which do *not*, in Chief Justice Taft's words, "involve principles, the application of which are of wide public inportance or governmental interest, and which should be authoritatively declared by the final court." To the extent that we are obligated by statute to devote our energies to these less important cases, we cannot devote our time and attention to the more important issues and cases constantly pressing for resolution in an increasing volume—as witness the current term now in its closing weeks.

The problem we describe is substantial. We are attaching to this letter an appendix consisting of statistical tables *covering* the October, 1976, term. As these tables indicate, during the 1976 term almost half of the cases decided by this Court on the merits were cases brought here as of right under the Court's mandatory jurisdic-

OCTOBER, 1976, TERM

TABLE 1

Cases brought as appeals

Properly brought	211
Improperly brought	94
Dismissed under Rule 60	6
Total	311

TABLE 2

Cases properly brought as appeals

Decided with opinion after oral argument	56
Decided with opinion without oral argument	10
Decided without opinion (145):	
Affirmed	54
Reversed	0
Vacated and remanded	26
Dismissed for want of a substantial federal question	65
Total	211

TABLE 3

Cases decided on the merits

Decided on appeal	211
Decided on certiorari	234
Total	445
Percentage decided on appeal	47.4
Percentage decided on certiorari	52.6

tion. Although presumably the percentage decreased during the 1977 *term because of congressional action* in 1976 severely limiting the jurisdiction of three-judge federal district courts, the burden posed by appeals as of right *remained substantial and* unduly expended the Court's resources on cases better left to other courts.

Second, the retention of mandatory jurisdiction at a time when the Court's caseload is heavy and growing requires the Court to resort to the generally unsatisfactory device of summary dispositions of appeals. There is no necessary correlation between the difficulty of the legal questions in a case and its public importance. Accordingly, the Court often is required to call for full briefing and oral argument in difficult cases of no general public importance. The Court cannot, however, accord plenary review to all appeals; to have done so during the October, 1976, term, for example, would have required at least 13 additional weeks of oral argument, almost a doubling of the argument calendar—an utterly impossible assignment. As a consequence, the Court must dispose summarily of a *substantial portion of cases within its* mandatory jurisdiction, often without written opinion. However, because these summary dispositions are *decisions on the merits, they are binding on* state courts and other federal courts. See *Mondel v. Bradley*, 432 U.S. 173 (1977); *Hicks v. Miranda*, 422 U.S. 332 (1975). Yet, as we know *from experience*, our summary dispositions often are uncertain guides to the courts bound to follow them and not infrequently create more confusion than clarity. From this dilemma we perceive only one escape consistent with past congressional decisions defining the Court's mandatory jurisdiction: congressional action eliminating that jurisdiction. Accordingly, we endorse S. 3108 and urge its adoption.

ingful degree of docket control. Efficient management of a 5,000 case docket cannot be achieved unless the Court has the authority to reject any and all cases that do not warrant plenary review. Authority to reject is the antithesis of an obligation to decide. Experience since 1891 has shown that only with the discretion that comes with the certiorari jurisdiction can the Court even begin to cope with its mounting caseloads.

The need for total docket control is so compelling that the Court has used all the stratagems at its command to bring some semblance of control over the intake of appeals, despite their so-called obligatory nature. The results have been somewhat effective, if not consistent or clear. In its determination not to be inundated with insignificant appeals, the Court has devised the practice of disposing of a majority of the appeals in a summary fashion, without briefs, without hearing oral argument, and without writing opinions. Thus, appeals from lower federal courts often have been summarily "affirmed," without more, while many state court appeals have been summarily resolved with the more elegant language, "Dismissed for want of a substantial federal question." Only a minority of appeals are accorded full or plenary review, replete with briefs on the merits and oral arguments.

This summary treatment is the control device the Court has built into its execution of obligatory jurisdiction. It works, at least to the extent that the Court can control which appeals are to be given summary treatment and which are to be accorded plenary treatment. But summary dispositions present the Court with a dilemma. It cannot concede that a summary affirmance or dismissal is simply a control device, the equivalent of a discretionary denial of a petition for certiorari. At the same time, it is difficult to convince any outsider that a summary order is truly a ruling on the merits of the appeal and entitled to respect as a precedent. A majority of the justices, feeling bound to give obeisance to the traditional notion that the Court must resolve all appeals on their merits, have consistently declared these summary dispositions to be rulings on the merits. Lower courts and the bar have been admonished to treat them as binding precedents, although the Court has excused itself from that admonishment.

The Court's effort to engraft precedential value on what is little more than a docket control device has been a disaster. The Court's letter candidly admits that its summary dispositions of appeals "often are uncertain guides to the courts bound to follow them and not infrequently create more confusion than clarity." In other words, it is virtually impossible to decipher what issues were resolved by the Supreme Court when it uses, without explanation, the device of summary affirmance or dismissal for want of a substantial federal question.

The Supreme Court has suggested that there is but one escape from the dilemma caused by trying to fuse docket control with the exercise of obligatory jurisdiction. That escape is legislative action erasing obligatory jurisdiction, as H.R. 2700 and S. 450 provide. The Court then would be freed of any compulsion to succumb to what has become an unworkable anachronism—the notion that certain classes of litigants are to be accorded a preferential right to appeals.

Court would have straightforward control device

Two important and interrelated benefits would quickly ensue from enactment of S. 450. By making the jurisdiction of the Court a virtual all-certiorari one, the Court would have a totally straightforward docket control device. Certiorari jurisdiction permits discretionary denial of review without any pretense of ruling on the merits. Through an informed exercise of this discretion to grant or deny certiorari, the Court acquires complete control over the docket of cases that deserve plenary consideration. With that control, the Court more effectively can achieve the second benefit flowing from abolition of obligatory jurisdiction—the Court's ability to execute its high task of forging the great and the important principles of our nation's legal system.

Drafted originally by the Department of Justice, neither H.R. 2700 nor S. 450 has encountered any opposition from the judiciary or the bar. The American Bar Association has endorsed this proposed restriction of obligatory jurisdiction. At hearings before the Senate Judiciary Subcommittee on Improvements in Judicial Machinery on June 20, 1978, witnesses gave unanimous support to the enactment of S. 3100, a support greatly augmented by the June 22 letter from the Supreme Court. The full Senate Judiciary Committee unanimously recommended in 1978 the passage of S. 3100 (Senate Report 95-985), and in 1979 it unanimously recommended the passage of S. 450 (Report 96-35).

But final passage of the noncontroversial legislation has been complicated if not jeopardized by a controversial amendment attached to S. 450 on the floor of the Senate by Jesse A. Helms, senator from North Carolina. This amendment, the very threat of which precluded S. 3100 from ever coming to a vote in the 95th Congress, would strip the Supreme Court and all federal district courts of any kind of jurisdiction over any case arising out of a state statute, ordinance, or regulation "which relates to voluntary prayers in public schools and public buildings." On April 9, 1979, the Helms amendment was adopted by a vote of 51–40. As so amended, S. 450 was then passed by a 61–30 vote, most of the negative vote reflecting opposition to the school prayer amendment. The fate of the amended S. 450 in the House of Representatives is not yet clear. As introduced H.R. 2700 does not mention the school prayer matter.

The constitutionality of the Helms amendment is highly dubious, to say the least. To most constitutional experts, the amendment appears to undermine the constitutionally established role of the Supreme Court as the ultimate interpreter and guardian of the Constitution, which obviously includes whatever First Amendment rights may attach to those who oppose voluntary prayers in public schools. The constitutional legacy of John Marshall teaches that the identification, interpretation, and protection of federal constitutional rights cannot be finally left to the various state courts.

It is to be hoped that the much needed procedural and jurisdictional reforms embodied in the Supreme Court Jurisdiction Act, as originally proposed, will not be lost in a welter of debate over the wisdom and constitutionality of an amendment bearing no germaneness to those reforms. ▲

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SURVEY OF STATE STATUTES AND CASE LAW CONCERNING WORKERS' COMPENSATION FOR JURORS

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July 16, 1982

SURVEY OF STATE STATUTES AND CASE LAW CONCERNING WORKERS' COMPENSATION FOR JURORS

I. Introduction:

This survey considers the question of whether jurors are entitled to recover workers' compensaton benefits under applicable state statutes, for injuries sustained in the course of jury duty.

In only two states do workers' compensation statutes specifically address the question of workers' compensation for jurors. One state provides for such coverage; the other denys coverage unless a "political subdivision" of the state votes to extend benefits to jurors.

In the absence of any statutory provisions, the courts in eleven states have considered the question of coverage for jurors. One state court has held that, under the applicable state statute, jurors are entitled to workers' compensation benefits for work related injuries; the other courts have reached a contrary result. The courts which have denied coverage to jurors have done so for a variety of reasons, including: the absence of a contract between employee (juror) and employer (county); the involuntary nature of jury service; the absence of "control" on the part of the employer (county) over employee (juror); and reluctance to tamper with legislative authority in this area.

II. State Statutes:

A. Texas:

The Texas Workers' Compensation Act in its definitional section qualifiedly excludes jurors from coverage under the statute: "no class of persons who are paid as a result of jury service or an appointment to serve in the conduct of elections may be considered employees under this article unless

declared to be employees by a majority vote of the members of the governing body of a political subdivision", Tex. Vernon's Stat., 1948, Art. 8309h.

B. Maryland

The Maryland legislature in 1980 amended the Maryland Workers' Compensation Act to specifically include non-federal jurors within the scope of "employee" as defined by the statute: "Any person on jury duty in a non-federal court in this state, shall be deemed an employee of the state for the purposes of workmen's compensation". Ann. Code of Maryland, 1957, Art. 101 §21. Compensation for jurors is to be calculated based on the juror's per diem for jury duty.

This amendment to the workers' compensation statute effectively overturns the Maryland Court of Appeals decision in Lockerman v. Prince George's County, 377 A.2d 1177 (1977). The court in Lockerman held that absent a specific statutory provision the traditional contractual elements of an employee-employer relationship must be present in order for a worker to be covered by the act. Since a juror does not voluntarily assent to jury duty, and voluntary assent is a necessary element of any contractual relationship - a juror must be denied workers' compensation benefits.

III. Cases

A. State court holdings denying workers' compensation benefits to jurors:

1. Colorado:

The Supreme Court of Colorado held in Board of Commissioners of Eagle County v. Evans, 99 Colo. 83, 60 P.2d 225 (1936) that the Colorado Workers' Compensation Act did not cover jurors because a juror was not an "employee" as that term is defined in the statute. The Colorado statute defines "employee" as persons "under an appointment or contract of hire express

or implied". The court found that a juror's service did not involve appointment or contract of hire since a juror does not negotiate with the county over his services and fulfills his responsibilities not by contract but "by the majesty of the law". The court emphasized that neither the juror nor the county determine how much the juror will be paid or for how long he will serve. In the absence of a statute specifically covering jurors the court found itself "not at liberty to extend the statutory provisions".

2. Florida

Similarly, the Supreme Court of Florida denied workers' compensation benefits to a juror in Metropolitan Dade County v. Glassman, 341 So. 2d 995 (Fla 1977), reversing the State Industrial Relations Commission which had awarded the juror compensation benefits for injuries he sustained when he was knocked down in the courthouse. The Court relied on a 1942 Florida decision denying workers' compensation benefits to a citizen killed while assisting a law enforcement officer who had requested help. The earlier decision emphasized reluctance on the part of the court to extend coverage to employees (such as jurors) not specifically contemplated by the state legislature in its enactment of the Workers' Compensation Act.

3. Louisiana:

In the most recent decision to consider the issue of workers' compensation benefits for jurors the Court of Appeals of Louisiana denied compensation benefits to an injured juror. Jeasonne v. Parish of East Baton Rouge, 354 So. 2d 619 (La. App. 1977). The court held that the juror was not "employed" by the parish where he participated in jury duty (and therefore was not covered by the compensation act), since "employment presupposes an agreement entered into between two parties", and there is no such agreement involved between a juror and the parish. The court emphasized that the

juror does not choose to perform but rather is bound to perform by statute. Additionally, the fact that jurors receive a slight compensation for their services does not itself qualify them as employees.

4. Massachusetts

The Supreme Court of Massachusetts, found in O'Malley's Case, 281 N.E. 2d 1977 (Mass. Sup. 1972) that a juror was not an employee of the county since "none of the criteria necessary for an employee/employer relationship exists between the court and juror." The court found that in the case of jurors there are no contractual negotiations, and no contract of employment. In addition, the county exercises no control over the jurors, i.e. cannot supervise them. Only the court exercises such control. A juror may not refuse service and the county cannot terminate the juror's service. The court further noted that, jurors may continue regular employment outside of court hours and "jury service merely causes a temporary separation from regular employment". supra, p. 279.

5. Michigan

Without deciding the issue of whether a juror is an employee within the meaning of the Michigan Workers' Compensation Act, the Supreme Court of Michigan denied workers' compensation benefits to a juror in Jochen v. County of Saginaw, 363 Mich. 648, 110 N.W. 2d 780 (1961), on other grounds. The court did however treat the issue of jurors as "employees" in its discussion, with three mebers of the court finding that jurors are not employees of the county in which they serve since they are not subject to the direction of the county and their rate of compensation is not fixed by the county but is prescribed by law. The court here as in North Carolina, pointed out that had the legislature intended to include jurors under the workers' compensation act they would have specifically so provided. The court also noted

that the manner in which a juror's name is selected for service is prescribed by statute and permits no discretion as to who will be called.

6. New Jersey

The court in Silagy v. State of New Jersey, 101 N.J. Super. 455, 244 A.2d 542 (1965) in denying workers' compensation benefits to a juror emphasized as did the Massachusetts court, the absence of the element of "control" or supervisory power between county and juror which is central to an employee/employer relationship. The court found that the state cannot among other things control what a juror does while on jury duty or how a juror's duties are performed. Nor does the state control the hiring, discharge, hours or rate of compensation of a juror - factors which are in the exclusive control of the courts.

7. New Mexico

The Supreme Court of New Mexico citing the holding in Board of Commissioners of Eagle County v. Evans, supra, and without any analysis denied workers' compensation to a juror injured in the course of jury duty.

8. North Carolina

Also following the Colorado court's rationale in Board of Commissioners of Eagle County v. Evans, supra, the Supreme Court of North Carolina denied a juror workers' compensation benefits in Hicks v. Guilford County, 267 N.C. 364, 148 S.E. 2d 240 (1966). The Court emphasized that in determining whether or not an employee/employer relationship existed between juror and State the common law test i.e. whether or not the party for whom the work is being done has a right to control the worker, is to be applied. Since county officials could not hire, fire or supervise a juror - a juror was not an employee of the county and therefore not entitled to workers' compensation benefits. The court noted that where a worker is not considered an "employee" because his employment is

"voluntary", the North Carolina legislature has chosen to either specifically bring those workers within the aegis of the Act, as in the case of prisoners, or not specifically provide coverage, as in the case of a trial witness or a juror.

In their dissent, three members of the court emphasized that the workers' compensation statute should be "broadly and liberally interpreted" and that words in a statute are to be given their ordinary meaning. Specifically, the dissent noted that the statute covered all those "under any appointment or contract of hire" and that in keeping with the ordinary definition of the word "appointment" (as the "designation of a person to discharge a trust") a juror is "appointed" to jury duty. The dissent adopts the rationale of the Ohio Supreme Court in Industrial Commission of Ohio v. Rogers, 122 Ohio St. 134, 171 N.E. 35 (see below) which granted a juror workers' compensation under similar circumstances

9. Pennaylvania

The Washington County court in Parsons v. Washington County, 51 Wash. Co. 27 (1970), held that a juror is not an employee within the meaning of the Pennsylvania Workers' Compensation Act since a juror has no contract of employment with the county. The court cites as authority, earlier findings by the Pennsylvania workers' compensation board, that jurors are not employees of the county, since they do not volunteer for jury duty but are bound to serve under penalty of law.

B. State court holding granting workers' compensation benefits to jurors:

1. Ohio

In Industrial Commission of Ohio v. Rogers, 122 Ohio St. 134, 171 N.E. 35 (1930), rev'd on other grounds, 123 Ohio St. 451, 175 N.E. 697 (1931), the Supreme Court of Ohio granted workers' compensation benefits to a juror

injured while on jury duty. Pursuant to the Ohio statute a person must be under "an appointment of hire" within the meaning of the statute in order to receive workers' compensation benefits. The court held that the claimant was under an appointment of hire while on jury service and in addition, was not an "official" of the state or of the county and so excepted from coverage according to the statute. The court rejected the arguments put forth by the Industrial Commission, that a juror is not under an appointment for hire because 1) a juror may not decline jury duty and 2) a juror's compensation for jury service is so small that he does not serve for the purpose of receiving compensation but rather serves because has no choice. According to the court, "the legislature having fixed the compensation, it does not lie within the power of an administrative body to determine that such compensation is inadequate, nor does the fact that the juror has no option to decline such appointment render the appointment any less one for hire, since theoretically the consideration provided by law for the service is adequate." supra, at 37.

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APPENDIX

CITATIONS TO STATE WORKERS' COMPENSATION STATUTES

Alabama	Ala. Code §§ 25-5-1 to 25-5-231
Alaska	Alaska Stat. §§ 23.05.010 — 23.40.260
Arizona	Ariz. Rev. Stat. Ann. §§ 23-901 to 23-1091
Arkansas	Ark. Stat. Ann. §§ 81-1301 to 81-1363
California	Cal. Labor Code §§ 3201 -- 4417 (West)
Colorado	Colo. Rev. Stat. §§ 8-43-104 to 8-54-127
Connecticut	Conn. Gen. Stat. Ann. §§ 31-275 to 31-355 (West)
Delaware	Del. Code Ann. tit. 19, §§ 2101 — 2127
District of Columbia	D.C. Code Ann. §§ 36-301 to 36-344
Florida	Fla. Stat. Ann. §§ 440-440.60 (West)
Georgia	Ga. Code Ann. §§ 114-101 to 114-9905
Hawaii	Hawaii Rev. Stat. §§ 386-1 to 386-174
Idaho	Idaho Code §§ 72-101 to 72-1434
Illinois	Ill. Ann. Stat. ch. 48, §§ 138.1 — 138.28
Indiana	Ind. Code Ann. §§ 22-3-11 to 22-3-38 (Burns)
Iowa	Iowa Code Ann. §§ 85.11 — 85.71
Kansas	Kan. Stat. Ann. §§ 44-501 to 44-580
Kentucky	Ky. Rev. Stat. Ann. §§ 342.001 — 342-990 (Baldwin)
Louisiana	La. Rev. Stat. Ann. §§ 1021-1379 (West)
Maine	Me. Rev. Stat. Ann. tit. 39, §§ 1-195
Maryland	Md. Ann. Code art. 101 §§ 1-102
Massachusetts	Mass. Gen. Laws Ann. ch. 152 §§ 1-75
Michigan	Mich. Comp. Laws Ann. §§ 411.1 — 419.301
Minnesota	Minn. Stat. Ann. §§ 176.01 — 176.82 (West)

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Mississippi	Miss. Code Ann. §§ 71-3-1 to 71-3-111
Missouri	Mo. Ann. Stat. §§ 287.010 -- 287.810 (Vernon)
Montana	Mont. Rev. Codes Ann. §§ 92-101 to 92-1406
Nebraska	Neb. Rev. Stat. §§ 48-101 to 48-1,109
Nevada	Nev. Rev. Stat. §§ 616.010 — 616.120
New Hampshire	N.H. Rev. Stat. Ann. §§ 28:1 — 28:55
New Jersey	N.J. Stat. Ann. §§ 34:15-1 to 34:15-127 (West)
New Mexico	N.M. Stat. Ann. §§ 52-1-1 to 51-1-69
New York	N.Y. [Work. Comp.] Law §§ 15-401 (McKinney)
North Carolina	N.C. Gen. Stat. §§ 97-1 to 97-122
North Dakota	N.D. Cent. Code §§ 65-01 to 65-13-20
Ohio	Ohio Rev. Code Ann. §§ 4123.01 - 4141.31 (Page)
Oklahoma	Okla. Stat. Ann. tit. 85 §§ 1-181 (West)
Oregon	Or. Rev. Stat. §§ 656.001 - 656.754
Pennsylvania	Pa. Stat. Ann. tit. 77 §§ 1-1066 (Purdon)
Rhode Island	R.I. Gen. Laws §§ 28-29-1 to 28-38-1
South Carolina	S.C. Code §§ 42-1-10 to 42-19-40
South Dakota	S.D. Codified Laws Ann. §§ 62-1-1 to 62-8-48
Tennessee	Tenn. Code Ann. §§ 51-1301 to 50-1362
Texas	Tex. Rev. Civ. Stat. Ann. art. 8306 to 8309-1 (Vernon)
Utah	Utah Code Ann. §§ 35-1-1 to 35-1-106
Vermont	Vt. Stat. Ann. tit. 21 §§ 601-709
Virginia	Va. Code §§ 65.1 to 65.1-163
Washington	Wash. Rev. Code Ann. §§1 51.04-51.52.150
West Virginia	W.Va. Code §§ 23-1-1 to 23-5-6
Wisconsin	Wis. Stat. Ann. §§ 102.01-102.75 (West)
Wyoming	Wyo. Stat. §§ 27-12-101 to 27-12-805

THE MANDATORY JURISDICTION OF THE SUPREME COURT— SOME RECENT DEVELOPMENTS

Mark Tushnet°

46 University of Cincinnati Law Review 347 (1977)

I. INTRODUCTION

The appellate jurisdiction of the Supreme Court has two branches, mandatory and discretionary. In the discretionary jurisdiction, review is by writ of certiorari;[1] in the mandatory jurisdiction, review is by appeal or, extremely infrequently, by certificate.[2] The mandatory jurisdiction may be invoked when federal statutes are held unconstitutional by a state or federal court,[3] when a federal court of appeals holds a state statute "invalid as repugnant to the Constitution, treaties, or laws of the United States," or when a state court upholds the validity of a state statute against a similar challenge.[4] In addition, mandatory review is available from orders granting or denying injunctions "in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."[5] Finally, the courts of appeals and the Court of Claims may certify questions of law "as to which instructions are desired," and the Supreme Court must answer the questions if they have been framed properly.[6] Review in all other cases is discretionary.

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1. 28 U.S.C. §§ 1254(1), 1255(1), 1256, 1257(3) (1970).

2. 28 U.S.C. §§ 1252, 1253, 1254(2), 1254(3), 1257(2) (1970).

3. 28 U.S.C. §§ 1257(1), 1252 (1970). The latter provision applies only to cases in which the United States is a party. However, 28 U.S.C. § 2403 (1970) requires a court to notify the Attorney General that the constitutionality of a federal statute is being questioned in litigation to which the United States is not a party, and provides for intervention as of right for the United States. *See, e.g.*, United States v. Johnson, 319 U.S. 302 (1943).

4. 28 U.S.C. §§ 1254(2), 1257(2) (1970).

5. 28 U.S.C. § 1253 (1970).

6. 28 U.S.C. §§ 1254(3), 1255(2) (1970). *See* C. WRIGHT, LAW OF FEDERAL COURTS 479 (2d ed. 1970). The Antitrust Procedures and Penalties Act of 1974, 15 U.S.C.A. § 29 (Supp. 1976), while abolishing the provision for exclusive review of final judgments only in the Supreme Court in antitrust actions brought by the government, *see* Tidewater Oil Co. v. United States, 409 U.S. 151 (1972), purports to preserve a sort of certification by the district court in cases where "immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice." However, the section further provides that the Court may accept the appeal or "in its discretion, deny the direct appeal and remand the case to the court of appeals." Thus, the provision simply augments the existing procedure for

Most commentators treat the mandatory and discretionary jurisdictions as functionally indistinguishable, and they can cite high authority for doing so.[7] That understanding has led to proposals that the mandatory jurisdiction be abolished, and those proposals have received almost universal support.[8] For the most part, these discussions of the mandatory jurisdiction have assumed too quickly that the only policies relevant to the definition of the scope of that jurisdiction are wholly internal to the Supreme Court—policies respecting the Court's control of and ability to manage its own docket.[9] In fact, much more is at stake in defining the Court's mandatory jurisdiction; its scope depends, in part, upon the resolution of serious questions about the proper relation between federal and state courts, and between Congress and the Supreme Court.

Proposals for legislative change in the jurisdiction must at least face up to the seriousness of the questions and, in fact, some proposals may run into constitutional barriers because their proponents have ignored these questions.[10] Legislative action would take place against the background

procuring certiorari before judgment in the court of appeals, 28 U.S.C. §§ 1254(1), 2101(e) (1970), by eliminating the requirement that the case first be placed "in" the court of appeals, *see* United States v. Nixon, 418 U.S. 683, 642 (1974), and by adding whatever weight is provided by a district court's decision to certify the case.

7. *See, e.g.*, R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 195 (4th ed. 1969); *see* notes 121-22 *infra* and accompanying text.

8. For statements supporting the abolition of the mandatory jurisdiction by opponents of other changes in the Court's jurisdiction, *see* H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 50 (1973); Black, *The National Court of Appeals: An Unwise Proposal*, 83 YALE L.J. 883, 887-88 (1974); Brennan, *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473, 474 (1973); Poe, Schmidt & Whalen, *A National Court of Appeals: A Dissenting View*, 67 NW. L. REV. 842 (1973). *See also* Casper & Posner, *A Study of the Supreme Court's Caseload*, 3 J. LEGAL STUD. 339, 343 (1974) (proposal to eliminate mandatory jurisdiction "has encountered no real opposition"); Rehnquist, *Whither the Courts*, 60 A.B.A.J. 787, 790 (1974).

9. *See, e.g.*, Comment, *The Three-Judge Federal Court in Constitutional Litigation: A Procedural Anachronism*, 27 U. CHI. L. REV. 555, 563-66 (1960); Note, *The Three-Judge District Court and Appellate Review*, 49 VA. L. REV. 538, 545-46 (1963); 50 CALIF. L. REV. 788, 732-33 (1963); 61 MICH. L. REV. 1528, 1529-30 (1963). *But see* Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1, 3 (1964).

10. *See* notes 74-83 *infra* and accompanying text. I must emphasize that no single proposal raises all of the questions discussed in this article. The proposal by the Study Group on the Caseload of the Supreme Court—the Freund Commission—does not raise the separation of powers question, for example, because the National Court of Appeals would, under that scheme, be the channel for all cases. *See* STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT, REPORT 18 (1972) [hereinafter cited as REPORT]. Judge Hufstedler's proposal, *Courtship and Other Legal Arts*, 60 A.B.A.J. 545 (1974), avoids federalism problems by permitting the Supreme Court to define the jurisdiction of the National Court of Appeals by rules that might be responsive to federalism concerns, but that device raises the separation of powers problem. Finally, it should be noted that the proposal with the most current vitality is not directed at the Supreme Court's jurisdiction, and is in any event so deracinated that one can hardly care very much about it. *See* COMMISSION ON REVISION OF THE FEDERAL APPELLATE SYSTEM,

of anomalous judicial activity. Recent Supreme Court decisions exhibit a curious tension. The Supreme Court has indicated its distaste for the jurisdiction by restricting the availability of mandatory review somewhat.[11] At the same time it has increased the significance of cases within the mandatory jurisdiction, which are disposed of without plenary consideration, by emphasizing that such summary dispositions are decisions on the merits with precedential value.[12] These latter decisions, of course, might mean that the Court expects litigants to take seriously the proposition that the Court's jurisdiction is mandatory. However, it is apparent that the Court does not treat cases in the mandatory jurisdiction differently, with respect to internal procedures, from cases reviewed on petitions for certiorari,[13] and it is hard to see why litigants should be more concerned about the Court's compliance with a congressional directive for mandatory consideration of certain cases than the Court itself is. In any event, the Court's recent decisions display apparent anomalies, if not outright inconsistencies. Detailed examination of the basis in policy for the current structure of the mandatory jurisdiction will provide some hints as to the sources of those anomalies.

II. The Theory of the Mandatory Jurisdiction

A. *The Utility of a Unitary Theory*

Respectable authority supports the proposition that the structure of the mandatory jurisdiction is justified by no theory whatsoever. Rather, on this view, that structure is the result of legislative action in response to transitory urges, and can be rationalized only by reference to "the historic congressional policy of minimizing the mandatory docket of the Court in the interest of sound judicial administration."[14] Justice Frankfurter's opinion in *Phillips v. United States* is the source of this approach; in construing the three-judge court statute, he said, we must be aware that the statute is "not . . . a measure of broad social policy to be construed with great liberality, but . . . an enactment technical in the strict sense of the term and to be applied as such."[15]

Structure and International Procedures: Recommendations for Change—A Preliminary Report 8, at 48, 52 (1975).

11. MTM, Inc. v. Baxley, 420 U.S. 799 (1975), *discussed in* note 55 *infra*.

12. Hicks v. Miranda, 422 U.S. 332 (1975); Edelman v. Jordan, 415 U.S. 651, 670-71 (1974). *See* note 98 *infra* and accompanying text.

13. *See* note 121 *infra* and accompanying text.

14. MTM, Inc. v. Baxley, 420 U.S. 799, 804 (1975). *See also* Gonzales v. Automatic Employees Credit Union, 419 U.S. 90, 98 n.16 (1974), and sources cited therein.

15. Phillips v. United States, 312 U.S. 246, 251 (1941). The approach had been foreshadowed in F. Frankfurter & J. Landis, The Business of The Supreme Court 42 (1928) ("Legislation affecting judicial structure, unless it calls for wholesale appointments, is without the driving force of a powerful, concentrated economic, political, or social interest."). *But see id.* at 85, 217.

Although serious questions have been raised about the accuracy of this statement as a characterization of the three-judge court statute,[16] the statement raises the broader question of the method of statutory interpretation which its author employed. The Frankfurter approach in practice has proven barren of sensible results, as might have been expected. The opinion of the unanimous Supreme Court in *Gonzalez v. Automatic Employees Credit Union* recited cases from the past fifteen years, during which the Frankfurter approach to the statutes predominated,[17] to demonstrate beyond doubt that no coherent structure of law had been erected.[18] The problem has its roots in a method that either focuses exclusively on the language of "awkwardly drafted" statutes, as the Court characterized them in *Gonzalez*,[19] or, acknowledging the "opaque terms and prolix syntax of these statutes," [20] ignores or seriously undervalues the competing play of policies that led to their enactment and instead reads the statutes as if the only concern were reduction of the Court's caseload.

The Supreme Court has a natural bias in favor of reducing its caseload, which ought to caution against easy acceptance of judicial assertions that generous construction of jurisdictional statutes would conflict with an "overriding policy, historically encouraged by Congress," of reducing the Court's mandatory jurisdiction.[21] It is true, of course, that Congress' actions have consistently reduced the Court's mandatory jurisdiction. However, Congress has acted well after the Court and its supporters began to decry the burdens on the Court. This suggests that Congress has been responding to concerns other than those asserted by the Court. Thus, the history of legislative modifications of the Court's jurisdiction should be read to reveal deep conflicts over core issues of constitutional politics relating to federalism and the felt importance of certain kinds of legislation. Those conflicts, which led to substantial delays before Congress responded to obvious caseload pressures, were not overridden by a single-minded concern for efficiency, as then-Professor Frankfurter claimed in 1927,[22] but were accommodated in the enacted statutes. Because the Justices retained a fleeting awareness of the "broad social policy" embodied in the jurisdictional statutes, they could not consistently maintain the single-valued Frankfurter approach and instead constructed a jerry-built body of law.

If the jurisdictional statutes are to be interpreted in a way that will lead to a stable and internally-consistent body of law, all the policies that they

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16. H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 968 (2d ed. 1973); Currie, *supra* note 9, at 9.

17. *See, e.g.*, Swift & Co. v. Wickham, 382 U.S. 111 (1965).

18. Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90, 96 (1974).

19. *Id.*

20. *Id.* at 97.

21. *Id.*

22. FRANKFURTER & LANDIS, *supra* note 15, at 217-18.

comprehend must be considered. That might lead to either a unitary or an amalgamated theory of jurisdiction. The latter would find varying purposes in the different statutes enacted at different times. The Court would not seek a single policy, or set of policies, to use when interpreting every jurisdictional provision; instead, it would identify the policies involved as to each provision, without expecting that the sets of policies would intersect substantially. This approach would, if carefully followed, avoid the problems of incoherence that flawed the decisions following the Frankfurter approach.

The Supreme Court, however, has not even tried to distinguish among the jurisdictional statutes in this manner. For example, no case distinguishes between direct appeals from single-judge district courts that have held federal statutes unconstitutional,[23] and direct appeals from three-judge district courts that have enjoined the enforcement of federal statutes "for repugnance to the Constitution," [24] even though the statutes creating both forms of appeal were enacted at widely separated times.[25] Similarly, the Court's summary dispositions of appeals from state courts and from three-judge district courts are analytically indistinguishable, although the resemblance is somewhat concealed. The Court's locution for summarily letting a state court judgment, within the mandatory jurisdiction, stand without plenary consideration, is "dismissed for want of a substantial federal question." [26] Its locution in three-judge court cases is "affirmed." [27] That difference, however, results solely from the rule that the three-judge court need not be convened where the constitutional claim is frivolous or insubstantial.[28] Indeed, I have chanced upon one appeal from a three-judge district court that the Supreme Court dismissed for want of a substantial federal question.[29] In principle, the disposition practice does not vary according to the precise jurisdictional provisions at stake.[30]

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23. 28 U.S.C. § 1252 (1970).

24. 28 U.S.C. § 2282 (1970). *See* 28 U.S.C. § 1253 (1970).

25. *See* HART & WECHSLER, *supra* note 16, at 45-46.

26. *Id.* at 645-48.

27. *See* STERN & GRESSMAN, *supra* note 7, at 233.

28. Bailey v. Patterson, 369 U.S. 31 (1962). For the other side of the problem, *see* Goosby v. Osser, 409 U.S. 512 (1973). For a general discussion, *see* Colorado Springs Amusements Ltd. v. Rizzo, 428 U.S. 913, 922-23 (1976) (Brennan, J., dissenting from denial of certiorari).

29. Webb v. State University of New York, 348 U.S. 867 (1954). The case was decided before the expansion of the test of "substantiality" that required the convening of a three-judge district court, as represented by Hagans v. Lavine, 415 U.S. 528 (1974), but not before the Court had held that a single judge might properly refuse to convene a three-judge court if the challenge was insubstantial. *Ex parte* Poresky, 329 U.S. 674 (1933).

30. A testing case would be one in which a single district judge enjoined the operation of a state statute on constitutional grounds, refusing to convene a three-judge court because the claim of constitutionality was frivolous, and the court of ap-

As the next subsections of this article show, it is fairly easy to devise a unitary theory of the mandatory jurisdiction. While not an argument against an amalgamated theory, this fact suggests that, on those occasions when Congress addressed jurisdictional matters, it may have been invoking an institutionalized approach to the problems rather than mobilizing varying approaches depending on the varying policy questions involved. Since a residue of technicality is inevitably a component of jurisdictional legislation, one could certainly understand why an institutionalized approach would develop. I turn, therefore, to suggesting two theories of the mandatory jurisdiction and their implications for recent proposals to alter the jurisdiction.

B. *A Federalism Theory*

The federalism theory begins with the observation that the largest proportion of the Court's mandatory jurisdiction is made up of appeals from state courts that have upheld state statutes against federal challenges.[31] This suggests that Congress has singled out for the mandatory jurisdiction cases in which there is a realistic possibility that the courts of one system will be insufficiently responsive to the interests of the other system. That is, Congress may have thought that state courts would be endemically hostile to federal interests.

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peals affirmed. The state might then appeal, 28 U.S.C. § 1254(2) (1970), but the limitations on review—confining it to the federal questions presented, and precluding review by certiorari—despite the ambiguity that leaves some latitude for fuller consideration, have led Stern and Gressman to counsel the losing party to forego the appeal and petition for certiorari. STERN & GRESSMAN, *supra* note 7, at 33-34 (containing a full discussion of section 1254(2)). However, I know of no cases in which appeals were taken under these circumstances and review was denied. *See* City of New Orleans v. Barthe, 376 U.S. 189 (1964) (appeal dismissed, petition for certiorari before judgment granted, and judgment summarily affirmed). For cases in which plenary consideration was given, *see* Dutton v. Evans, 400 U.S. 74 (1971) (habeas corpus); Dusch v. Davis, 387 U.S. 112 (1967) (reapportionment case); Watson v. Employer's Liab. Assurance Corp., 348 U.S. 66 (1954) (diversity).

31. This was even more true prior to the restriction on three-judge courts. Appeals from state courts and three-judge courts convened to dispose of claims for injunctive relief against the enforcement of an allegedly unconstitutional state statute constituted approximately 85% of the appeals during the 1973-74 Term. For the 1974-75 Term, the figure is 85%. (The calculations are based upon the paid cases only.) The numbers relied on here and elsewhere in this article derive from counts made by Thomas Adkins, whose research assistance is acknowledged. The chore is quite tedious, and I make no claims for complete accuracy. The figures should be considered as ballpark estimates based upon conscientious effort. Another study reports a rate of 90% for the 1972-73 Term. Note, *The Freund Report: A Statistical Analysis and Critique*, 27 RUTGERS L. REV., 878, 903 (1974) [hereinafter cited as *The Freund Report*]. Injunctions against the enforcement of state statutes might too readily have been issued by the federal courts so that mandatory review would protect against federal hostility to state interests.

A preliminary objection to this theory must be recognized. Federalism alone would not support the statutory distinction between federal challenges to state statutes, as to which review is by appeal, and other federal challenges to proceedings in state courts, as to which review is by certiorari. Some reason must be found for thinking that state supreme courts would be sensitive to federal interests where action by state enforcement officers or judges is questioned but not as protective where state legislative action is concerned. Such a behavior assumption reaches close to the limits of plausibility; if anything, the hypothesis that state supreme courts are insensitive to federal interests no matter what the context seems far more plausible.[32]

Perhaps the way to deal with this objection is to deny, rather than to explain the significance of the statutory distinction between appeal and certiorari. Under the rule of *Dahnke-Walker Milling Co. v. Bondurant*,[33] any federal challenge to the application of a state statute to specific behavior can be phrased as a challenge to the validity of the statute as applied, and appeal may be taken. Consequently, as Justice Brandeis' dissent in *Dahnke-Walker* noted, "the right to review will depend, in large classes of cases, . . . upon the skill of counsel."[34] Therefore, a rebuttal to an objection which is premised upon a distinction between appeal and certiorari is unnecessary since the source of the distinction lies not in the statute but in the ingenuity of lawyers.

Even if the objection were sound, the federalism theory is worth exploring for what it reveals about the assumptions of Congress and the Supreme Court as they have constructed the mandatory jurisdiction. One way to begin that exploration is to consider the implications of the federalism theory for proposals to alter the mandatory jurisdiction. The federalism theory rests on assumptions about how judges in specified structural positions in a complex governmental organization will respond to the needs of other parts of that system. Assumptions about behavior can be tested by experience, and if experience has shown that state and federal judges are adequately responsive to federal and state interests, the theory should warrant modifications of the mandatory jurisdiction rather readily, in light of the burdens that the jurisdiction imposes on the Court.[35] However,

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32. Another distinction is that a decision involving the constitutionality of a statute is likely to have a more substantial impact on the administration of local law than a decision involving the constitutionality of individual prosecutorial, judicial, or administrative decisions. However, this distinction does not invoke any peculiarities of federalism, and is best considered as a justification of the statutory scheme based upon concepts of "importance," which is the theory discussed below. *See* text, Part C *infra*.

33. 257 U.S. 282 (1921).

34. *Id.* at 298. For discussions of the manipulability of the doctrine, *see* STERN & GRESSMAN, *supra* note 7, at 85-86; HART & WECHSLER, *supra* note 16, at 637-40.

35. *See* REPORT, *supra* note 10, at 38.

several recent decisions by the Supreme Court suggest that the Court is not persuaded that the appropriate accommodation of attitudes has permeated the lower courts. Thus, in the Court's view, a statutory scheme premised upon assumptions of mutual unresponsiveness remains justified.

Most dramatic support for this proposition is provided by the line of cases beginning with *Younger v. Harris*,[36] a clear response to the Court's perception that federal courts had been improvidently intervening in state proceedings without due regard for state interests. Briefly confined to criminal cases, and perhaps analogous to the special requirement of exhaustion of state remedies in habeas corpus cases,[37] the *Younger* doctrine recently has been extended to civil cases "in aid of and closely related to criminal statutes."[38] Other limitations on the doctrine have been narrowly confined. For example, *Steffel v. Thompson*,[39] which authorized federal declaratory relief without regard to the *Younger* rule in the absence of a pending state proceeding, was converted into a rule encouraging a race to the courthouse in *Hicks v. Miranda*, which held that the *Younger* principles apply "in full force" when a state criminal charge is filed after the commencement of a federal declaratory action but "before any proceedings of substance on the merits have taken place in the federal court."[40] *Younger* and nearly all of the subsequent cases involved appeals by state officials in cases where the federal court had held the state statute unconstitutional. The Supreme Court's enthusiasm for *Younger* in these circumstances is good evidence that the Court has not yet been persuaded that district judges' attitudes are acceptable; the Court obviously believes that strict rules of law must be invoked in order to keep the district courts away from state legislation.[41]

A similar, though more muted development has occurred in the law of exhaustion in habeas corpus cases. The Court has held that the constitu-

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36. 401 U.S. 37 (1971).

37. *Compare* 28 U.S.C. § 2254(b) (1970) *with* Steffel v. Thompson, 415 U.S. 452, 472-73 (1974). For a full, recent discussion of the problem, *see* McCray v. Burrell, 516 F.2d 357, 361-65, 375-77 (4th Cir. 1975), *cert. dismissed as improvidently granted*, 426 U.S. 471 (1976). *But see* Huffman v. Pursue, Ltd., 420 U.S. 592, 611 (1975).

38. Huffman v. Pursue, Ltd., 420 U.S. 592, 604 (1975).

39. 415 U.S. 452 (1974).

40. Hicks v. Miranda, 422 U.S. 332, 349 (1975). Although the "race to the courthouse" phrase leaps from the holding, I must acknowledge that neither Mr. Justice Stewart nor I was able to refrain from its use. He did, however, elaborate the phrase rather more elegantly. *See id. at* 354 (Stewart, J., dissenting).

41. The only caveat that I wish to add is a citation to Doran v. Salem Inn, Inc., 422 U.S. 922 (1975), holding that preliminary injunctive relief is available in the absence of an existing prosecution, pending the disposition of a request for declaratory relief. Even so, the Court said that such an injunction "implicates the concerns for federalism which lie at the heart of *Younger*." *Id.* at 931.

tional claim allegedly giving rise to the right of relief must be presented rather clearly to the state courts; general citation to the relevant constitutional provision will not do,[42] nor will presentation of a very closely related claim.[43]

While these developments underscore the Supreme Court's suspicion that lower federal courts are not sensitive to state interests, no precisely parallel development has occurred with respect to state courts. Nonetheless, there is some evidence that the Supreme Court will scrutinize state court decisions with great care where the state court has arrived at a result with which the Supreme Court disagrees, even if no federally protected interests are at stake. It would be fair to conclude, then, that the Court remains uncomfortable with the assumption that state courts will arrive at an appropriate accommodation of local and national interests.

The case that supports this rather weak proposition, *Oregon v. Hass*,[44] must be described in some detail. In 1967, the Oregon Supreme Court decided that statements made by a defendant who had not received adequate *Miranda* warnings could not be used to impeach his testimony at trial.[45] In 1971, the United States Supreme Court decided that such statements could be used for impeachment purposes.[46] The Oregon Supreme Court accepted the *Hass* case for review in order to decide whether to overrule its 1967 decision. It thereby rather strongly suggested that the state decision survived the federal one, and that the original state decision was therefore based on state constitutional grounds. However, instead of explicitly confronting the apparent clash between the state and federal rules, the state supreme court distinguished Hass' case from the earlier ones and held that Hass' statement could not be used for impeachment purposes.

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42. Picard v. Connor, 404 U.S. 270 (1971).

43. Pitchess v. Davis, 421 U.S. 482 (1975). There habeas corpus had first been granted on the ground that a laboratory report had been withheld improperly from the defendant. When the state sought to retry the defendant, it discovered that the physical evidence upon which the report had been based had been destroyed as a matter of routine. Prior to retrial, the federal habeas court held that the destruction of the materials justified the issuance of pretrial habeas. The Supreme Court held that the claim relating to the destruction of the physical evidence was not linked closely enough to the claim relating to the failure to produce the report based upon that evidence to allow exhaustion as to the latter to count as exhaustion as to the former.

The Supreme Court relied upon 28 U.S.C. § 2254(b) (1970), which was, by its terms, inapplicable because the applicant was not in custody "pursuant to a judgment of a state court," other than the already suspended first judgment of conviction. *Ex parte* Royall, 117 U.S. 241 (1886), imposes the exhaustion requirement when habeas is sought before trial. The Court in *Pitchess* failed to explore the possibility that the scope of exhaustion prior to trial might differ from its scope after trial.

44. 420 U.S. 714 (1975).

45. State v. Brewton, 247 Ore. 241, 422 P.2d 581, *cert. denied*, 387 U.S. 943 (1967).

46. Harris v. New York, 401 U.S. 222 (1971).

The Supreme Court, running roughshod over these difficulties in four sentences, one of which simply misunderstood the argument,[47] reversed, holding Hass' case indistinguishable from the prior federal case. Although a decision on federal grounds is arguably appropriate, given an ambiguous state ruling, the ambiguity plainly required that the Supreme Court not reverse the state court judgment, but rather vacate and remand it so that the state court could decide, unembarrassed by its "belief" about federal law, whether Hass was nonetheless entitled to relief on state law grounds. Only hostility to *Miranda*, and skepticism about the state court's receptivity to changing evaluations of the interest at stake in constitutional litigation, even where the state court's refusal to follow the Burger Court impaired no federally protected rights,[48] can explain the Court's disposition.[49]

The *Younger* doctrine, the exhaustion cases, and *Hass* show that the Supreme Court may not be convinced that state and federal judicial systems have developed to the point where no special controls are needed to guarantee mutual sensitivity. Perhaps, though, the appropriate control mechanism is not mandatory review in the Supreme Court, but a set of rules that control the exercise of jurisdiction in cases where insensitivity is possible. That alternative, of course, is not available in connection with state courts, which are allowed to organize their jurisdiction without substantial federal control.[50] *Younger* and the exhaustion doctrine are the primary examples of rules restricting the power of district courts in order to avoid unnecessary intrusions on matters of state concern.[51]

Limitations on district court jurisdiction seem, however, to respond to only one of two historic concerns about federal court interference with

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47. 420 U.S. at 720. The sentence reads, in part, "furthermore, *Brewton* is pre-*Harris*," which is precisely the point. The entire argument is carefully made in the dissent. *Id.* at 724 (Marshall, J., dissenting).

48. *See* Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952); HART & WECHSLER, *supra* note 16, at 478-83.

49. "Extending" *Miranda* arguably does make it harder to secure convictions, and so impairs the ordinary citizen's freedom from depredation by criminals, but a sensitive federalism would recognize that freedom is protected by state, not federal constitutional law.

50. The Court's conclusory statement that "of course, a State may not impose . . . greater restrictions on the prosecution as a matter of *federal constitutional law* when this Court specifically refrains from imposing them," 420 U.S. at 719, is troublesome for similar reasons. The Court cited two inapposite circuit court cases for its "of course." I can think of only one valid federalism concern that ought to preclude state courts from interpreting the federal constitution more restrictively than the Supreme Court would, *see* note 49 *supra*, since their decisions would only be persuasive authority in other jurisdictions anyway. A decision on federal grounds places the result beyond the state's amendatory powers, and so may needlessly limit the range of choice that federalism is designed to protect. But that argument surely deserves more than an "of course."

51. Doremus v. Board of Educ., 342 U.S. 429, 434-35 (1952); HART & WECHSLER, *supra* note 16, at 160, 181.

state officers. The classic example of such limitations is the eleventh amendment; another is the Tax Injunction Act, prohibiting federal courts from enjoining the collection of state taxes where there is an adequate remedy available in state courts.[52] These bars to the exercise of district court jurisdiction do not exhaust the techniques for policing the federal courts. Another set of techniques involves the timing of the exercise of federal jurisdiction, as with the abstention and exhaustion doctrines.[53] *Younger*, at least as confined to criminal cases, falls into this category, for it simply postpones federal consideration of the constitutional issues presented until habeas corpus is sought after the state court's processes have been completed.[54] These rules leave a significant residue of cases in which the federal courts may nonetheless intrude on state interests. Congress has occasionally treated this residue in an important structural way, through provisions for three-judge courts.

The recently abolished general provision for three-judge courts[55] cannot easily be explained by the federalism theory of the mandatory jurisdiction. The most plausible explanation is that Congress recognized that each district judge brings a distinctive cast of mind, biased against state interests, to the analysis of the problem he faces. Limitations on jurisdiction, short of an absolute prohibition on its exercise, do not dispose of this problem, which lies in the way judges read precedents. The three-judge court statutes attempt to reduce the structural bias by adding more judges, in the hope that individual variations in pro-federal prejudice will force the court to confront fairly the question of interference with state interests.[56] The ultimate protection is the Supreme Court. Appointed through a process that takes a much wider range of interests into account than does the traditional process of appointing other federal judges, the Justices may be thought to be more sensitive to the needs of the federal system as a whole. At this point, however, the federalism theory of mandatory jurisdiction

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52. 28 U.S.C. § 1341 (1970).

53. *See, e.g.*, England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964); Currie, *supra* note 9, at 7.

54. If *Younger* is fully extended to civil cases, as Huffman v. Pursue, Ltd., 420 U.S. 592, 613 (Brennan, J., dissenting), portends, the Supreme Court will have to confront the controverted question of whether ordinary principles of res judicata apply in actions under 42 U.S.C. § 1983 (1970). *See generally* Note, 1974 WIS. L. REV. 1180 (1974).

55. Prior to the abolition of three-judge courts, the Court had limited the scope of its mandatory jurisdiction by routing appeals from denials of injunctive relief to the courts of appeals where the denial was based upon grounds such as standing, abstention, or *Younger*, which are themselves designed to protect state interests against federal judicial encroachment. MTM, Inc. v. Baxley, 420 U.S. 799 (1975); Gonzales v. Automatic Employees Credit Union, 419 U.S. 90 (1974).

56. *See* Currie, *supra* note 9, at 5, 78. *See* Note, *The Three-Judge Court Reassessed: Changing Roles in Federal-State Relationships*, 72 YALE L.J. 1646, 1652-53 (1963); 61 MICH. L. REV. 1528, 1529-30 (1963).

seems to break down. If the Justices are the ultimate guarantors of both state and federal concerns, there would appear to be little reason for placing any cases within a mandatory jurisdiction, for the application of discretionary criteria in determining whether to grant a petition for certiorari would do nearly as well.

The exploration of the federalism theory has led both to a discussion of some important contours of the mandatory jurisdiction and to a recognition that federalism alone will not fully explain the existence and scope of that jurisdiction. The next subsection deals with an alternative theory that incorporates many of the aspects of the federalism theory, but goes beyond it in several details.

C. *The Separation of Powers Theory*

The literature on the mandatory jurisdiction is shot through with expressions that the jurisdiction exists to deal with "important" classes of cases.[57] Sometimes this may be only a stylistic condensation of the federalism theory,[58] but in fact it should point to a rather different theory. The federalism analysis serves only to isolate a particular class of important cases. As will be shown, the alternative theory is best characterized as a separation of powers theory, although it has rarely received attention in those terms, and therefore has meaning on a different analytic level.

The "importance" standard explains, first, the use of mandatory jurisdiction for review in many cases not comprehended by the federalism theory, such as review of district court decisions holding federal statutes unconstitutional. It also accounts for the phrasing of the provision for appeals from orders granting or denying injunctions in suits "required by any Act of Congress to be heard and determined by a district court of three judges,"[59] on the plausible assumption that Congress settled upon the three-judge court as the proper forum for determining especially important cases.[60] An "importance" standard, too, helps to explain why Congress might provide for mandatory review of state court decisions upholding state statutes

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57. *See, e.g.*, FRANKFURTER & LANDIS, *supra* note 15, at 100, 120, 260, 261, 263; STERN & GRESSMAN, *supra* note 7, at 193.

58. *See, e.g.*, FRANKFURTER & LANDIS, *supra* note 15, at 213:

> Where a case concerned the power of the state to enact laws or exercise authority in alleged defiance of a federal bar, the issue obviously partakes of that public interest upon which the Supreme Court sits in judgment. Where, however, a claim relates to the assertion of a federal right apart from the conflict of such rights with the power of a state, the matter is apt to be of restricted private concern, and the national interest is sufficiently safeguarded through appeal to the Court's discretionary jurisdiction.

See also id. at 277-78.

59. 28 U.S.C. § 1253 (1970).

60. *See* 36 CONG. REC. 1679 (1903) (Sen. Fairbanks) (three-judge courts used for cases of "great and general importance").

against federal attack while allowing only discretionary review of other state court decisions. Since the impact of a ruling regarding a statute is likely to be broader than other decisions, Congress may well have thought that the former class of cases deserved closer federal attention. Finally, the certification device, as judicially construed, is useful for those cases in which lower court operations are paralyzed, clearly "important" cases in terms of the administration of justice, if not always in terms of the merits.[61]

Once again, a fruitful way of exploring this second theory is by examining its implications for proposals to change the mandatory jurisdiction. One implication is plain: ordinarily, restriction of the jurisdiction ought to be done retail, not wholesale, because it is prima facie unlikely that several distinct classes of cases will simultaneously lose their importance. The theory requires that each category be examined individually. Indeed, that seems to be the clear import of Congress' record in legislating with respect to the mandatory jurisdiction. Recently, four classes of cases have been removed from the mandatory jurisdiction. In 1971, Congress repealed the Criminal Appeals Act of 1907, thus eliminating direct appeal of district court decisions holding indictments insufficient because of the invalidity or construction of the underlying statute, or sustaining pleas in bar of prosecution.[62] In 1974, Congress repealed the provision for direct review under the Expediting Act of final judgments in government antitrust cases, substituting review in the courts of appeals.[63] Two weeks later, it abolished the requirement that review of certain orders of the Interstate Commerce Commission be in three-judge district courts, thereby removing them from the Supreme Court's mandatory jurisdiction.[64] In 1976, the general requirement that three-judge courts be convened to consider challenges to state statutes was repealed and replaced by a far more limited requirement that they be convened only in apportionment cases involving congressional districting or state legislative apportionment.[65]

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61. 28 U.S.C. § 1254(3) (1970); HART & WECHSLER, *supra* note 16, at 1585-86. Since 1945, the Supreme Court has accepted certificates only twice. In United States v. Barnett, 376 U.S. 681 (1964), the court of appeals was sitting as a court of original jurisdiction, and was equally divided on the question of the constitutional right to a jury trial for contempt. In Moody v. Albermarle Paper Co., 417 U.S. 622 (1974), the court of appeals, before sitting en banc, asked whether senior circuit judges assigned to the original panel could vote on the petition for rehearing en banc. Subsequently, the Supreme Court reviewed the case on the merits. 422 U.S. 405 (1975). Both cases involved problems of the administration of justice and important questions on the merits.

62. Act of Jan. 2, 1971, Pub. L. No. 91-644, § 14, 84 Stat. 1890 (amending 18 U.S.C. § 3731 (1970)).

63. Antitrust Procedures and Penalties Act of 1974, Pub. L. No. 93-528, § 5, 88 Stat. 1709 (amending 15 U.S.C. § 29 (1970)). *See* note 6 *supra*.

64. Act of Jan. 2, 1974, Pub. L. No. 93-584, 88 Stat. 1917.

65. Act of Aug. 12, 1976, Pub. L. No. 94-381, 45 U.S.L.W. 1.

The near-simultaneity of two of the more recent legislative decisions and the scope of the most recent one might seem to rebut the contention that Congress has historically treated distinct categories of cases as raising distinct questions. In fact, the closeness in time is largely an artifact. The antitrust revisions slipped through Congress rather quickly, whereas the ICC revisions had languished in Congress for many years.[66] The legislative histories reveal concern over sometimes overlapping but often distinct problems. In the antitrust area, Congress was primarily concerned that government antitrust litigation was impeded, not expedited, by the special provisions limiting review to appeals of final judgments to the Supreme Court.[67] In contrast, Congress was not worried about the slow pace of ICC review, but about the burdens on the courts that three-judge courts and direct review created.[68]

Even the large-scale restriction of the past year preserves a general structure consistent with the "importance" rationale. The provision for mandatory review of three-judge courts was left undisturbed; thus, whenever Congress decides that some particular class of cases deserves initial consideration by such a court, Supreme Court review will be mandatory. In one sense, all that Congress did was to assess the importance of suits challenging the enforcement of state statutes and decide that these cases were no longer as important as they had been. Thus, in recent years Congress' actions have been consistent with the theory that each category of cases within the mandatory jurisdiction raises discrete problems.

The failure to recognize this implication of the "importance" rationale for the mandatory jurisdiction flaws the *Report of the Study Group on the Caseload of the Supreme Court.* The *Report* recommends that every category of mandatory jurisdiction be abolished, leaving only discretionary review for every case.[69] In light of its charge, the Study Group understandably focused almost exclusively on the burdens that mandatory jurisdiction places on the Court, without detailed consideration of interests that vary depending on the precise context.[70] Single-minded attention to only one aspect of a complicated scheme, whatever its virtues as a method of clarifying certain kinds of issues or of drawing public attention to the problem, is unlikely to provide sound guidance for the construction of alternative schemes; that is another way of understanding the failure of

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66. *Compare* H.R. REP. No. 93-1463, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 6535 (Antitrust Procedures & Penalties Act) *with* H.R. REP. No. 93-1569, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7025 (Interstate Commerce Commission). *See also* REPORT, *supra* note 10, at 27-28.

67. [1974] U.S. CODE CONG. & AD. NEWS 6535, 6541.

68. [1974] U.S. CODE CONG. & AD. NEWS 7025, 7026-29.

69. REPORT, *supra* note 10, at 47.

70. *See generally id.* at 26-38.

the Frankfurter approach to the interpretation of the three-judge court statutes.[71]

The standard response to the argument that the mandatory jurisdiction exists for the disposition of important classes of cases is that the Supreme Court must identify the same cases in applying the discretionary criteria embodied in its Rule 19, which refers in terms to questions of "substance" and "important" questions in describing the considerations that must be shown in order to justify granting discretionary review.[72] This response is inadequate, for it fails to recognize a significant issue of the separation of powers. The current system is a result of legislative determinations of importance, and for several reasons it would be improper to permit those determinations, with respect to entire classes of cases, to be made by courts. Explicating this point will also clarify the distinction between making discriminations based on importance as to individual cases and as to categories of cases, a distinction of some significance in analyzing Judge Hufstedler's well-considered proposal for a National Court of Appeals.[73]

It is important to note a significant shift in the nature of the discussion from this point on. The federalism theory attempts to isolate some reasons why Congress might consider certain cases important enough to require the Supreme Court to consider them on the merits. The separation of powers theory operates at a different level: it explains why Congress, and not the Supreme Court, should make decisions regarding the importance of classes of cases. In one sense, the separation of powers theory is less powerful than the federalism theory, for it provides no direct guidance to legislators seeking to modify the Court's jurisdiction. In another sense, though, the separation of powers theory is more powerful, for it helps to explain and justify institutional arrangements at the federal level, where the jurisdiction is defined.

My argument is most easily made by first considering judgments of importance with respect to statutes. It probably can be agreed that the Freedom of Information Act,[74] because of its impact on the process by which an informed and therefore responsible electorate is created, is a more important piece of legislation than the Perishable Agricultural Commodities Act.[75] Why would it be improper for a court to come to the same conclusion? First, experience seems to show that courts cannot derive stable criteria for ranking statutes in order of importance. For example, soon after the enactment of the National Environmental Policy Act (NEPA),[76]

71. *See* notes 14-20 *supra* and accompanying text.

72. Sup. Ct. R. 19(a). *See, e.g.*, REPORT, *supra* note 10, at 29, 33, 37.

73. Hufstedtler, *supra* note 10.

74. 5 U.S.C. § 552 (1970).

75. 7 U.S.C. §§ 499 a-r (1970).

76. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Saat. 852 (codified at 42 U.S.C. §§ 4321-73 (1970)).

courts treated it as a statute of overriding importance. It has become clear, however, that the NEPA must be coordinated with a whole range of other statutes if a satisfactory national policy is to be developed. In addition, every federal statute has survived precisely the same process of legislative deliberation, and if courts were to treat some statutes as more important than others, or to give some more niggardly readings on grounds of relative unimportance, they would introduce another layer of the same kind of legislative deliberation that the statutes had already undergone.[77]

It is hard to find considered judicial expressions that support the preceding argument, perhaps because its fundamentals are so widely accepted as never to need explicit statement. Nevertheless, corroboration is found in the debates between Justice Frankfurter and most of the other Justices in the 1950's over the Court's propensity to review decisions denying jury trials on the evidence in workmen's compensation cases. The debates never quite turned on evaluations of the importance of the Federal Employers Liability Act (FELA),[78] but those evaluations were only thinly concealed. Justice Frankfurter argued that plenary review in FELA cases was unjustified, because the importance of the questions presented, ordinarily the sufficiency of the evidence, was slight. In part, the cases had little importance because, he claimed, each turned on a precise evaluation of particular facts; the Court's disposition of any one case could not markedly influence the administration of justice in other, factually distinguishable cases.[80] It is unimportant, for present purposes, to discuss whether this is a correct interpretation of the FELA, for Justice Frankfurter never confronted the majority on this issue, which does, after all, quite plainly relate to the administration of federal justice. The failure to address a principled response to his argument suggests that something else bothered Justice Frankfurter—a feeling that the class of cases was insignificant and unimportant.[81] But, as the majority implicitly said, that decision was for Congress to make.

The FELA cases offer two possible perspectives on the decision to grant plenary review. One view of the cases was Justice Frankfurter's expressed position, that each FELA case was no more important than many others

77. I do not mean to suggest that the same principles of statutory interpretation must be invoked for every statute. Congress may well have instructed the courts to use one set of interpretive instruments with respect to one statute, and another set with respect to another. But that instruction is one that Congress must give; the courts interpret the Sherman Act in a different manner from the tax statutes because the scope of the Congressional delegation differs. The courts' tool chest remains the same.

78. 45 U.S.C. §§ 51-60 (1970).

79. *See* Ferguson v. Moore-McCormack Lines, Inc., 352 U.S. 521, 536-37, 540 (1957) (Frankfurter, J., dissenting).

80. Rogers v. Missouri Pac. R.R., 352 U.S. 500, 508-09 (1957).

81. *See* Ferguson v. Moore-McCormack Lines, Inc., 352 U.S. 521, 546 (1957) (Frankfurter, J., dissenting).

competing for the Court's attention. The other view was hsi implicit position that the FELA was a relatively unimportant statute. The majority rejected the first view and properly refused to take the second. In judging the potential significance of an individual case for the structure of national law, the Justices must of course estimate the impact of a ruling on society; the Court does not generally sit to do individualized justice. But, because they must focus on individual cases, the Justices cannot exclude whole classes of cases *a priori* from plenary consideration on the ground that the statutes involved are unimportant. To the extent that judicial review is justified as a consequence of a court's duty to consider all the law relevant to an individual case, the court's lawmaking role is necessarily incidental to its disposition of individual cases.[82] The discretion invoked in denying plenary review is, one hopes, a judicial discretion, not a legislative one, for anything short of judiciousness on the Court raises serious questions of legitimacy.[83]

Federal statutes do not exhaust the areas of the Court's concern, and no problem of separation of powers would arise if the Court were allowed to distinguish systematically, for purposes of its jurisdiction, between cases raising constitutional issues and cases raising other federal issues.[84] The scope of the Constitution is so broad, however, that a "reform" which is that limited would be of little use. It would not even reproduce the current statutory distinction between constitutional issues cognizable by appeal and those subject only to discretionary review.[85] Yet attempts by courts to distinguish among constitutional rights seem disastrously ill-advised. The major effort to do so drew distinctions between political rights and economic rights.[86] Those distinctions are now deservedly discredited.[87] To some extent, they lost favor because of the growing awareness that economic rights, no less than political rights, are ultimately exercised by people. Instability among the distinctions contributed to the decline, too. To revive a term used in a debate over substantive constitutional law, there seem to be no principles by which to distinguish among constitutional principles. Since we demand principled decision-making by judges,[88] a jurisdictional scheme that permits the Justices explicitly to distinguish among constitutional rights should be rejected.

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82. Bice, *The Limited Grant of Certiorari and the Justification of Judicial Review*, 1975 WIS. L. REV. 343, 382-83.

83. *See* Gunther, *The Subtle Vice of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).

84. *See* Kurland, *Jurisdiction of the United States Supreme Court: Time for a Change?*, 59 CORNELL L. REV. 616, 628 (1974).

85. *See* note 33 *supra* and accompanying text.

86. *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

87. *See* Lynch v. Household Fin. Co., 405 U.S. 538, 542-44 (1972).

88. *See* H. Wechsler, *Toward Neutral Principles of Constitutional Law*, in PRINCIPLES, POLITICS & FUNDAMENTAL LAW 3 (1961).

We do not, however, demand the same sort of principle from legislators,[89] and Congress might well draw lines that we could not accept if drawn by judges.[90] This observation suggests a modification of Judge Hufstedler's proposal, under which Congress would authorize the Court "to promulgate rules by which the Supreme Court can refer classes of cases" to a new National Court of Appeals.[91] I have argued that the delegation would be improper because it would require the Court to make explicit political judgments.[92] Instead, Congress itself might devise the categories.[93] Indeed, it has an easy model in the existing jurisdictional structure: review in all cases currently subject to mandatory review would become discretionary, but would remain in the Supreme Court, while review in cases currently subject to discretionary review would be transferred to the National Court of Appeals. One disadvantage inherent in this proposal is that it would make even more significant the extent to which the ability of counsel affects the availability of review in the Supreme Court, in light of the manipulability of the distinction between appeal and certiorari.[94] Another, more important disadvantage is that the process of selecting categories for transfer to the National Court would lose the benefit of the experience of the Justices.[95] Unhappily, there may be no way to incorporate that experience in the legislative process without violating the separation of powers. I have serious doubts about the propriety of the process that lay behind the previous major modification of the Court"s jurisdiction, the Judges' Bill of 1925, which was drafted by a committee of the Justices.[96] In any event, the present Court is so deeply divided over proposals to alter its jurisdiction that a new Judges' Bill is unlikely to be forthcoming.

89. *See* Tushnet, *Invitation to a Wedding: Some Thought on Article III and a Problem of Statutory Interpretation*, 60 IOWA L. REV. 937, 948 (1975).

90. We might ask the Justices to act as legislators, but that would violate the separation of powers in direct and important ways. *See id.* at 948-49.

91. Hufstedler, *supra* note 10, at 548. HEARINGS BEFORE THE COMMISSION ON REVISION OF THE FEDERAL APPELLATE SYSTEM, SECOND PHASE 7 (1974-1975), (testimony of Hufstedler, J.) (hereinafter cited as HEARINGS). *See also* Stokes, *National Court of Appeals: An Alternative Proposal*, 60 A.B.A.J. 179 (1974).

92. *See* HEARINGS, *supra* note 91, at 59, 62-66, 82-83 (testimony of A. Goldberg), 226 (testimony of Gibson, J.). Delegation of the rule-making power in the area of procedure, 28 U.S.C. § 2071 (1970), is distinguishable from delegation in the area of jurisdiction: the political judgments implicit in procedural rule-making are much less explicit, particularly in light of the fundamental policy of our procedural system that the rules should not treat plaintiffs and defendants differently. Of course, this is a question of degree, but so are many questions of constitutional law.

93. This is the method proposed by Judge Haynsworth, *A New Court to Improve the Administration of Justice*, 59 A.B.A.J. 841, 842 (1973). *See also* Rosenberg, *Planned Flexibility to Meet Changing Needs of the Federal Appellate System*, 59 CORNELL L. REV. 576, 592-94 (1974) (limited delegation to Court).

94. *See* note 33 *supra* and accompanying text.

95. *See* Bice, *supra* note 82, at 365; Stokes, *supra* note 91, at 180.

96. *See* Blumstein, *The Supreme Court's Jurisdiction—Reform Proposals, Discretionary Review, and Writ Dismissals*, 26 VAND. L. REV. 895, 903-94 (1973).

This section has established, I believe, that the standard justification for mandatory review in "important" classes of cases runs very deep indeed. It implicates some of the most significant aspects of the fundamental doctrine of the separation of powers. It is necessary to examine next whether the Court has taken seriously the responsibilities conferred on it by Congress.

III. The Consequences of Summary Affirmance—Some Recent Decisions

In 1972 the Study Group on the Caseload of the Supreme Court argued that the existence of a mandatory jurisdiction was "confusing and burdensome to the bar" and led to "some ambiguity about the significance" of summary disposition of appeals.[97] Since then, the Court has tried to eliminate the ambiguity by twice declaring that summary dispositions are adjudications on the merits.[98] Simple declarations do not really help, though, for what the Court has done, even considered at the simplest level, introduces troublesome anomalies, and, at more complicated levels, becomes unintelligible.

Seemingly the simplest case is the appeal by a convicted defendant challenging the constitutionality of the state statute under which he was convicted. If the Supreme Court's dismissal of the appeal for want of a substantial federal question is a determination of the merits of the appeal, habeas corpus relief is barred by 28 U.S.C. § 2244(c).[99] Moreover, it probably is reasonable to assume that most attorneys would expect that a district court would give a habeas petition more careful attention than the Supreme Court gives to jurisdictional statements. Thus, treating summary dispositions as adjudications on the merits provides a positive inducement for an attorney to forego an appeal to the Supreme Court, or at least to construct his claim so that it is within the discretionary jurisdiction where refusals to grant plenary review have no impact on subsequent habeas actions.[100] This may help to control the Court's docket, but a rule with such consequences does not represent a sensitive accommodation of state and federal interests; although the argument has been overblown,[101] it is still true that state statutes are more appropriately held unconstitutional by the Supreme Court than by district courts.

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97. Report, *supra* note 10, at 26.

98. Hicks v. Miranda, 422 U.S. 332, 344 (1975); Edelman v. Jordan, 415 U.S. 651, 670-71 (1974).

99. 28 U.S.C. § 2244(c) (1970). *See* Connor v. Hutto, 516 F.2d 853 (8th Cir.), *cert. denied*, 423 U.S. 929 (1975); Wojtycha v. Hopkins, 517 F.2d 420, 424-25 (3d. Cir. 1975). *Cf.* Neil v. Biggers, 409 U.S. 188 (1972) (section 2244(c) does not preclude habeas where Supreme Court affirmed conviction on direct appeal by equally divided vote).

100. *See* Brown v. Allen, 344 U.S. 443 (1953).

101. *See* Tushnet, *Judicial Revision of the Habeas Corpus Statutes: A Note on* Schneckloth v. Bustamonte, 1975 Wis. L. Rev. 484, 492-93 (1975).

The habeas situation involves the repetition of a challenge by the same person whose prior appeal had been dismissed. The next step is to consider an identical challenge brought later by another party. *Hicks v. Miranda,* where the Court stated the rule that prior dismissals are adjudications on the merits, was such a case.[102] In *Miller v. California,* the Supreme Court dismissed a vagueness and overbreadth challenge to California's obscenity statutes as construed by the state court in light of the Supreme Court's modifications of the obscenity doctrine.[103] Subsequently, Miranda sought an injunction against the enforcement of the statutes, claiming before the three-judge court that the statutes were vague and overbroad. The Supreme Court held that Miranda's challenge was foreclosed by *Miller.*[104] The cases cited by the Court in *Hicks* also involved identical challenges by new parties.[105] On first impression, the *Hicks* rule seems appropriately limited. All that is lost is the minor benefit from the fact that occasionally the disposition of the case may be affected by the precise facts upon which it arises. Where the governing substantive law is not in terms affected by varying fact settings, for example, where contract clause challenges are made, we can expect the effect of varying fact settings to be small.

However, once the next stage in the analysis is reached, the problems with treating summary dispositions as adjudications on the merits become enormous. What does it mean to say that a summary disposition is a "controlling precedent" when a challenge similar to the previous one is made to a similar but not identical statute? Ordinarily, we use the reasoning embodied in the precedents to discover the grounds upon which the similar case may be decided, but there are no opinions in summary dispositions. One thing is clear: the summary disposition cannot be "as controlling" as a decision rendered after plenary review. To give the decisions equal weight would introduce an intolerable degree of rigidity into the system. Cases disposed of summarily frequently arise on factual records that fail to frame the constitutional question well, or present issues before the time is ripe for their careful consideration, or have been badly litigated; sometimes several of these defects coincide. The school finance litigation prior to *San Antonio Independent School District v. Rodriguez,*[106] for example, was focused on unacceptable theories of equalization;[107] it also was premature, although its time had come and gone by the time that *Rodriguez* was de-

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102. 422 U.S. 332 (1975).

103. 418 U.S. 915 (1974).

104. 422 U.S. at 343-44.

105. Doe v. Hodgson, 478 F.2d 537 (2d. Cir. 1973), *cert. denied,* 414 U.S. 1096 (1974); Port Auth. Bondholders Protective Comm. v. Port of New York Auth., 387 F.2d 259 (2d Cir. 1967).

106. 411 U.S. 1 (1973).

107. *See* J. COONS, W. CLUNE & S. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION (1970).

ided. Similarly, questions of procedural due process for civil commitments were addressed in *Logan v. Arafeh*,[108] some time before the notion that mental patients have civil rights began to percolate through the courts; in addition, the district court in *Logan* made dubious but not clearly erroneous findings of fact. That the issues in *Logan* are serious and deserve plenary consideration is illustrated by *Lessard v. Schmidt*,[109] which the Supreme Court considered twice before the case was ultimately made moot by changes in the state's legislation.[110]

Doctrines which limit the risk of inflexibility must be developed. The Supreme Court already has suggested two.[111] In *Edelman v. Jordan*, the Court hinted that it might overrule decisions arrived at summarily more readily than those decided after plenary consideration. However, in the same paragraph, the Court also said that, when dealing with constitutional questions, it was "less constrained by the principle of *stare decisis* than [it was] in other areas of law."[112] Since nearly all summary dispositions deal with constitutional issues, the increment of enthusiasm for overruling, which is provided by the fact that the decision to be overruled was made summarily, is likely to be small. Still, it may exist. Even so, this device of limitation provides little help for lower courts attempting to determine the weight which they should give to a summary disposition.[113]

The Court's second limiting device also proves unhelpful when analyzed, for it makes the precedent almost valueless, which is not what the Court in *Edelman* and *Hicks* seemed to say. *Fusari v. Steinberg* involved an attack on Connecticut's policy of determining continuing eligibility for unemployment compensation through informal fact-finding interviews.[114] The policy was challenged as violating the due process clause and as engendering delays that violated the statutory requirement that benefits be paid when due. In rejecting the latter challenge, the district court relied on the Supreme Court's summary affirmance of a similar challenge to New

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108. 346 F. Supp. 1265 (D. Conn. 1972), *aff'd sub nom.* Briggs v. Arafeh, 411 U.S. 911 (1973).

109. 349 F. Supp. 1078 (E.D. Wis. 1973), *vacated and remanded*, 414 U.S. 473 (1974), *on remand*, 379 F. Supp. 1376 (1974), *vacated and remanded*, 421 U.S. 957 (1975).

110. *See* WIS. STAT. ANN. ch. 51 (West Supp. 1976).

111. In addition to the doctrines discussed in the text, the Court in Hicks v. Miranda, 422 U.S. 332, 342 (1975), approved by adoption the Second Circuit's qualification that summary dispositions may be undermined by later developments. As with the doctrines discussed in the text, however, this approach seriously diminishes the precedential weight of the summary action.

112. 415 U.S. 651, 671 (1974).

113. *See, e.g.*, Goult v. Garrison, 523 F.2d 205 (7th Cir. 1975). For a full discussion, *see* Colorado Springs Amusements, Ltd. v. Rizzo, 428 U.S. 913, 917-18 (1976) (Brennan, J., dissenting from denial of certiorari).

114. 419 U.S. 379 (1975).

York's procedures.[115] It read the affirmance as approving an interpretation of the federal statute that treated "when due" as meaning "when determined administratively to be payable." The Supreme Court vacated the judgment so that the district court could consider the impact of intervening changes in the state's procedures. It also added an unnecessary footnote on the meaning of the summary affirmance that was amplified in the Chief Justice's concurrence. The footnote began by conceding that the district court's reading of the summary affirmance was "plausible." Nonetheless, the Court said, that reading should have been rejected because it "heightened the tension" between the summary affirmance and a prior decision made after full agreement.[116] It is important to notice that the Court could not have meant that the district court's reading was legally untenable, nor that the prior plenary disposition clearly controlled.

What the Court did mean, though, is unclear. The second paragraph of the footnote shifted direction, implicitly construing "when due" to make reference to "timeliness, accuracy, and administrative feasibility."[117] Thus, while disclaiming any effort to decide the summarily affirmed case again, the Court informed readers that the affirmance rested on the Court's implicit approval of an interpretation of the statute that was not adopted by the district court in that case. The Court's admonition leaves lower courts without substantial guidance where, as is sure to be true, the summary affirmance may rest on any of several plausible grounds. The Court merely advised lower courts to choose the "narrowest" ground which minimized tension between the summary disposition and other decisions rendered with full opinion. I am afraid that this almost reduces to an instruction to decide the case consistent with the Court's decisions with full opinion, which is to ignore the summary affirmance's precedential value.

The Chief Justice's concurrence makes this implication explicit, by saying that the summary disposition "settles the issues for the parties, and is not to be read as a renunciation by this Court of doctrines previously announced in our opinions after full argument."[118] Again, this means that summary dispositions add almost nothing to full opinions and presumably can be ignored. Suggesting this ten months after *Edelman* had said that summary affirmances were dispositions on the merits, and five months before *Hicks* said the same about dismissals for want of a substantial federal question, took some audacity.

What is needed to make sense of all this is, to use one commentator's phrase, a theory of limited precedent.[119] However, devising such a theory

115. Torres v. New York State Dept. of Labor, 405 U.S. 949 (1972).
116. 419 U.S. at 388 n.15.
117. *Id.*
118. *Id.* at 392.
119. Note, *Summary Disposition of Supreme Court Appeals: The Significance of Limited Discretion and a Theory of Limited Precedent*, 52 B.U.L. REV. 373, 404 (1972).

is no simple task. "Some weight but not very much" is not terribly specific.[120] Alternatively, a federal court might consider a summary disposition as equivalent to a relevant decision by the court of appeals for another circuit, or slightly more strongly, as equivalent to a relevant decision by another panel in the same circuit. The idea is that, in the case of summary affirmances, the fact that the affirmance was by the Supreme Court elevates the district court's decision, but the fact that the affirmance was summary lowers it a bit; similarly, in the case of dismissals, the Supreme Court's actions shifts the state decision into the federal framework, where it is given greater weight than it would have as a decision by a state court.

Judges do think along these lines; some circuit judges, for example, routinely disregard as lacking in precedential value decisions by district courts. In a sense, then, a legally acceptable solution to the problem of determining the precedential weight of a summary disposition can be devised. However, when a rule necessitates the kinds of contortions that this section has performed and introduces serious anomalies into the entire structure of the law, we can fairly question the necessity for the rule that summary dispositions are dispositions on the merits. The rule should be adopted only if it is responsive to important policies, as I believe it is. What is more, the important policies that justify the rule should in turn be reflected in the seriousness with which the Court undertakes the task of reviewing the preliminary requests for plenary consideration of appeals.

In practice, then, does the Court treat jurisdictional statements differently from petitions for certiorari? The short answer is no. Everyone writing on the Study Group's proposal to eliminate the mandatory jurisdiction approved the recommendation on the ground that it would bring "stated rule ... into line with usual practice."[121] The only perceptible difference between appeals and certiorari is that a higher proportion of appeals are given plenary consideration,[122] and that may well reflect only the fact that Congress' identification of categories of important cases coincides roughly with the Court's efforts to identify important cases using its discretionary criteria.

The situation, then, is this: The Supreme Court's decisions reflect an uneasy balance between those that assume the absence of a justification in policy for the mandatory jurisdiction, and those that acknowledge, to some

120. Mr. Justice Brennan's formulation would be that the lower courts give "appropriate, but not necessarily conclusive, weight to our summary dispositions." Colorado Springs Amusmtnts, Ltd. v. Rizzo, 428 U.S. 913, 923 (1976) (Brennan, J., dissenting from denial of certiorari).

121. Black, *supra* note 8, at 888. *See also* sources cited at note 8 *supra*.

122. For example, during the 1973-74 and 1974-75 Terms, the Court granted plenary review in 20% of the appealed cases and in only 7-8% of the cases on certiorari. STERN & GRESSMAN, *supra* note 7, at 151, 198, report rates of 23% in appealed cases and 10-15% in certiorari cases. *The Freund Report, supra* note 31, at 902, reports rates of 20% and 6% for the 1972-73 Term.

extent, the federalism theory of the jurisdiction. The decisions also show that the Court has accepted Congress' decision to make jurisdiction over certain cases mandatory, but that it has refrained from acting in full accord with Congress' decision. What remains is to explain why the Court has made litigants take seriously the fact that review is mandatory and that summary dispositions are decisions on the merits, while the Court itself has not altered its procedures to take the same fact seriously.

IV. An Explanation of Recent Judicial Developments

My discussion again shifts levels at this point. The preceding sections have dealt with the policies that underlie the mandatory jurisdiction. I now turn to examining why the Supreme Court's actions cannot be rationalized by any of the available theories. Two political explanations are initially attractive, but must ultimately be rejected.

The first possibility is that the Court's recent decisions constitute an attempt to increase the pressure on Congress to eliminate the mandatory jurisdiction by inducing litigators, who are faced with the threat of summary dispositions having great consequences, to lobby with Congress for a change in the Court's jurisdiction. This, however, is too oblique a method of placing pressure on Congress. Litigators are generally not lobbyists, and the political support for eliminating the mandatory jurisdiction is already large.[123]

The Court's actions might instead be viewed as an exercise in Machiavellian politics by the conservative majority. Most summary dispositions go against individuals asserting denial of personal rights guaranteed to them by the Constitution, for the Court is extremely sensitive to appeals by governmental authorities.[124] Thus, treating summary dispositions as decisions on the merits without giving the cases special consideration may be a cheap way of establishing rigid precedents against individual claimants. The Court's time is not taken up by the cases and, from the conservatives' point of view, the risk of error is quite low because decisions favoring individuals probably will receive plenary consideration.

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123. *See* note 8 *supra.*

124. For example, in ahe 1973-74 Term, the Court gave plenary consideration to 50% of the appeals brought by state authorities and to 100% of those brought by the Solicitor General. In the next Term, the corresponding figures were 40% and 77%. This contrasts with the overall rate of roughly 20% for all appeals.

The figures for certiorari are also interesting. In the 1973-74 Term, 78% of the petitions by state authorities and 97% of those by the Solicitor General were granted. The next Term's figures were 97% and 96%. The higher rate of success on certiorari is probably due to the Court's solicitude for criminal cases, both on direct appeal and on habeas corpus, that were decided against the government. These cases come up almost exclusively by certiorari. (Stern & Gressman, *supra* note 7, at 151, report the Solicitor General's success rate as 50-75%.)

There are several problems with this explanation. If it were accurate, one would expect the conservatives to resist changes in the mandatory jurisdiction; but they have not. Moreover, the liberal Justices have not fought for the retention of the mandatory jurisdiction,[125] although that may reflect only a choice of the terrain on which to fight. Finally, the decision in *Fusari* to limit the scope of summary dispositions [126] undermines their value as devices for locking the Court into particular constitutional decisions.

I am left with an explanation that is perhaps the simplest and, to an academic lawyer, the most disquieting. The major portion of this article has been devoted to establishing that the existence and current definition of the mandatory jurisdiction rest on important policies relating to the basic structure of our government. The Court's erratic behavior probably reflects only a failure to attend to the policies of the mandatory jurisdiction in a systematic way; a decision in January is not seen as bearing on problems raised by a case argued in February. That is perhaps the most serious criticism that an academic lawyer can make of a line of decisions, and, in the end, may serve as further support for the proposition that the definition of the Supreme Court's jurisdiction is too important to be left to the Court.[127]

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125. *See* sources cited at note 8 *supra.*

126. *See notes* 114-18 *supra* and accompanying text.

127. Although I would not draw the difference too sharply, some contrasts with the Commission on the Revision of the Federal Appellate System are instructive. The Commission's Hearings, *supra* note 91, are sprinkled with acknowledgements of the full range of policy concerns; that the Commission seemed to place little value on some is, in the present context, irrelevant. Unlike the Court, the Commission appears to have considered the problems in a systematic manner.

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Turning Over The Reins: The Abolition Of The Mandatory Appellate Jurisdiction Of The Supreme Court

By JOHN M. SIMPSON*

Introduction

The papers for 4704 cases were filed during the Supreme Court's October, 1977 Term,[1] as compared with only 1426 filed in the 1948-1949 session.[2] Despite this enormous rise in the number of requests for review, the Court has consistently handed down approximately 150 opinions each year,[3] and has managed to fully dispose of its docket by the end of each term. The dramatic increase in the quantity of cases filed, coupled with the number actually receiving plenary consideration, has convinced many members of the legal community that the exigencies of the current caseload are forcing the Court to "ration justice."[4] Justice Douglas was accurate to a degree when he asserted that many areas of the law once serving as abundant sources of litigation have now become fallow under the weight of settled precedent.[5] Yet, in light of the growing complexity of the state and federal legal systems and the general increase in constitutional litigation,[6] it has become apparent that not every case the Court declines to review is either frivolous or of no national importance.

Against this background, several proposals to reform the appellate

* A.B., Harvard University, 1972; J.D., Columbia University, 1978. The author wishes to express his appreciation to Professor Louis Henkin of the Columbia Law School for his inspiration and thoughtful criticism in the preparation of this article.

1. *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 57,332 (1978).
2. *The Supreme Court, 1948 Term*, 63 HARV. L. REV. 119, 121 (1949).
3. Rehnquist, *Whither the Courts*, 60 A.B.A.J. 787, 789 (1974).
4. Griswold, *Rationing Justice—The Supreme Court's Caseload and What the Court Does Not Do*, 60 CORNELL L. REV. 335, 340 (1975).
5. Douglas, *The Supreme Court and Its Case Load*, 45 CORNELL L.Q. 401, 411-12 (1960).
6. *See* Rehnquist, *supra* note 3, at 788.

jurisdiction of the Supreme Court have been advanced.[7] On May 18,

7. Past landmark reforms, spawned by concern over the federal court caseload, structure and jurisdiction, have included: the Circuit Court of Appeals Act (Evarts Act), ch. 517, 26 Stat. 826 (1891) (codified in scattered sections of 28 U.S.C.), which established both the present system of circuit courts of appeals and introduced discretionary review by certiorari, and the Judges' Bill of 1925, ch. 229, § 1, 43 Stat. 936 (codified in scattered sections of 11, 28, & 48 U.S.C.), which narrowed the scope of mandatory review and broadened that of Supreme Court review by certiorari. *See generally* P. FISH, THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION 5-14, 109 (1973); F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT (1927) [hereinafter cited as FRANKFURTHER & LANDIS]; Blumstein, *The Supreme Court's Jurisdiction—Reform Proposals, Discretionary Review, and Writ Dismissals*, 26 VAND. L. REV. 895 (1973); Surrency, *A History of Federal Courts*, 28 MO. L. REV. 214 (1963); Note, *Congressional Prerogatives, the Constitution and a National Court of Appeals*, 5 HASTINGS CONST. L.Q. 715 (1978).

The major contemporary concern has been the burgeoning number of cases handled by the national judiciary. The general goal of the proposed changes is to improve the judicial decision-making process by lessening or diffusing federal judicial responsibilities. Such reforms ostensibly would improve the judicial process first by relieving the Supreme Court of part of its caseload, thus allowing the Court to devote more time and energy to its remaining cases, and second, by creating new tribunals to handle the diverted cases and to make the decisions necessary for the maintenance of a coherent body of national law and precedent.

A full description of all recent proposals is beyond the scope of this article, but the work of two groups, the Federal Judicial Center Study Group on the Caseload of the Supreme Court (chaired by Paul Freund) [hereinafter cited as Freund Study Group] and the U.S. Commission on Revision of the Federal Court Appellate System (chaired by former Senator Roman L. Hruska) [hereinafter cited as Hruska Commission], typify current suggestions.

The Freund Study Group, appointed by Chief Justice Burger in 1971, studied the Supreme Court's workload and concluded that the Court was overburdened. Their recommendations included (1) the formation of a National Court of Appeals, sitting above the circuit courts of appeals but below the Supreme Court, to screen petitions for certiorari and resolve federal circuit court conflicts not meritorious of Supreme Court review, and (2) the curtailment of mandatory Supreme Court appellate jurisdiction. *See* FEDERAL JUDICIAL CENTER, REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT, *reprinted at* 57 F.R.D. 573 (1972). *See also* A. BICKEL, THE CASELOAD OF THE SUPREME COURT (1973); H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 49-53 (1973); Alsup, *A Policy Assessment of The National Court of Appeals*, 25 HASTINGS L.J. 1313 (1974); Black, *The National Court of Appeals: An Unwise Proposal*, 83 YALE L.J. 883 (1974); Brennan, *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473 (1973); Freund, *A National Court of Appeals*, 25 HASTINGS L.J. 1301 (1974); Goldberg, *One Supreme Court*, THE NEW REPUBLIC, Feb. 10, 1973, at 14; Poe, Schmidt & Whalen, *A National Court of Appeals: A Dissenting View*, 67 NW. U.L. REV. 842 (1973); *Retired Chief Justice Warren Attacks, Chief Justice Burger Defends Freund Study Group's Composition and Proposal*, 59 A.B.A. J. 721 (1973).

The Hruska Commission, established by order of Congress, Act of Oct. 13, 1972, Pub. L. No. 92-489, § 31, 86 Stat. 807, *as amended by* Act of Sept. 19, 1974, Pub. L. No. 93-420, 88 Stat. 1153, was prevented by its charter from considering questions of federal court jurisdiction. It did, however, propose a National Court of Appeals to handle cases presently being denied Supreme Court review due to simple lack of capacity and also, in a different phase of its work, proposed splitting both the Fifth and Ninth Circuit Courts of Appeals to better handle increasing caseloads in those areas. *See* COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE (1975), *reprinted at* 67 F.R.D. 195 (1975). *See also Hearings Before the*

1978, Senator DeConcini[8] introduced Senate bill 3100, the proposed Supreme Court Jurisdiction Act of 1978, which was designed to eliminate the major portion of the Court's obligatory appellate jurisdiction.[9] On July 13, 1978, the Senate Judiciary Committee reported favorably on the bill,[10] with the following comment:

> The long historic experiment of imposing on the Supreme Court an obligation to resolve appeals taken to it as of right has utterly failed. The modern problems and practices of the Court simply do not permit the luxury of determining the merits of all cases within any designated jurisdictional class. To survive as a viable institution, to control its docket to perform its great mission, the Supreme Court must be given total freedom to select for resolution those few hundred cases—out of the several thousands that are filed each year—that are found truly worthy of review. S. 3100 will help to achieve that goal by reducing the needless mandatory burdens virtually to the vanishing point.[11]

Commission on Revision of the Federal Court Appellate System, Second Phase, (1974-75); Alsup, *Reservations on the Proposal of the Hruska Commission to Establish a National Court of Appeals*, 7 U. TOL. L. REV. 431 (1976); Feinberg, *A National Court of Appeals?*, 42 BROOKLYN L. REV. 611 (1976); Hruska, *The National Court of Appeals: An Analysis of Viewpoints*, 9 CREIGHTON L. REV. 286 (1975); Levin, *Do We Need a New National Court?*, TRIAL, Jan. 1976, at 32; Owens, *The Hruska Commission's Proposed National Court of Appeals*, 23 U.C.L.A. L. REV. 580 (1976); Swygert, *The Proposed National Court of Appeals: A Threat to Judicial Symmetry*, 51 IND. L.J. 327 (1976).

Although neither proposed National Court plan has made much headway, the calls for curtailment of mandatory Supreme Court appellate jurisdiction met with some success when Congress abolished direct appeals to the Supreme Court from most three-judge district courts. Act of Aug. 12, 1976, Pub. L. No. 94-381, §§ 1, 2, 5, 90 Stat. 1120 (repealing 28 U.S.C. §§ 2281, 2282, 2403).

8. Senator Dennis DeConcini (Dem., Arizona) is a member of the Senate Committee on the Judiciary, and is chairman of the Subcommittee on Improvements in Judicial Machinery.

9. S. 3100, 95th Cong., 2d Sess., 124 CONG. REC. S7748-49 (1978). Of the categories of compulsory appellate jurisdiction described in note 14 *infra*, S. 3100 preserves only appeals from three-judge district courts and the certified question provisions.

S. 3100 is the successor to a similar but less comprehensive measure introduced by Senator Bumpers in early 1977, S. 83, 95th Cong., 1st Sess., 123 CONG. REC. S284 (1977). Although the Senate failed to act upon S. 3100 before the end of the ninety-fifth Congress, the same measure has been introduced by Senators DeConcini and Bumpers in the form of the proposed Supreme Court Jurisdiction Act of 1979, S. 450, 96th Cong., 1st Sess., 125 CONG. REC. S1666, S1671-72 (daily ed. Feb. 22, 1979).

10. 124 CONG. REC. S10683 (1978).

11. SENATE COMM. ON THE JUDICIARY, THE SUPREME COURT JURISDICTION ACT OF 1978, S. REP. NO. 95-985, 95th Cong., 2d Sess. 8 (1978) [hereinafter cited as 1978 SENATE REPORT]. The report outlined six principal reasons for abolishing the Court's mandatory appellate jurisdiction: "First, it is unnecessary to the Court's performance of its role in our society. Second, it impairs the Court's ability to select the right time and the right case for the definitive resolution of recurring issues. Third, it imposes burdens on the Justices that may hinder the Court in the performance of its function as expositor of the national law. Fourth, the existence of the obligatory jurisdiction has made it necessary for the Court to

Hearings conducted on Senate bill 3100 revealed no opposition from academic, government or judicial quarters or from the bar,[12] and the bill has received the unanimous and unqualified endorsement of the Supreme Court.[13]

This article will focus on the merits of eliminating the Supreme Court's mandatory appellate jurisdiction over state court decisions raising federal issues.[14] Part I will examine the origins of obligatory review and the historical underpinnings of the present legislative framework. Part II will focus on the current practice of the Supreme Court and the problems stemming from the exercise of its mandatory jurisdiction.

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hand down summary dispositions that create confusion for lawyers, for lower court judges and for citizens who must conform their conduct to the requirements of federal law. Fifth, the obligatory jurisdiction creates burdens for lawyers seeking Supreme Court review. Finally, even if the idea of having an obligatory jurisdiction were sound, there is no practical way of describing, in legislation, the kinds of cases that should fall within it." *Id.* at 2.

12. *Supreme Court Jurisdiction Act of 1978: Hearings on S. 3100 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. (1978) [hereinafter cited as *DeConcini Committee Hearings*].

13. Letter from the Supreme Court to Senator DeConcini (June 22, 1978), *reprinted in* 1978 SENATE REPORT, *supra* note 11, at 15-16 app. I.

14. The present jurisdictional scheme is embodied in 28 U.S.C. § 1257 (1976): "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: (1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity. (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity. (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. For the purposes of this section, the term 'highest court of a State' includes the District of Columbia Court of Appeals."

The remaining instances of obligatory Supreme Court review include: (i) cases to which the United States is a party, wherein a federal court declares a federal law unconstitutional, 28 U.S.C. § 1252 (1976); (ii) cases in which a federal court declares a state statute unconstitutional, 28 U.S.C. § 1254(2) (1976); (iii) appeals under 28 U.S.C. § 1253 of decisions of three-judge courts convened to consider apportionment matters, 28 U.S.C. § 2284(a) (1976); extraordinary matters arising under the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-5(b), 2000e-6(b) (1976); various cases under the Voting Rights Act of 1965 and related statutes, 42 U.S.C. §§ 1971(g), 1973(b)-(c) (1976); and actions brought under the Presidential Election Campaign Fund Act, 26 U.S.C. § 9010(c) (1976); (iv) certified questions from the federal courts of appeals and the Court of Claims, 28 U.S.C. §§ 1254(3), 1255(2) (1976); (v) appeals from the Supreme Court of Puerto Rico, 28 U.S.C. § 1258(1)-(2) (1976); (vi) certified questions from district courts involving construction of the Federal Election Campaign Act Amendments of 1974, 2 U.S.C. § 437h(b) (1976); (vii) actions in the Court of Claims concerning appropriation of certain Indian lands, 25 U.S.C. § 652 (1976); (viii) challenges to construction authorizations under the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. § 1652(d) (1976).

Part III will assess the effect of Senate bill 3100, outlining and discussing possible objections to that bill.

I. Historical Antecedents And Evolution Of The Statutory Framework

A. Early Developments

Although the delegates to the Constitutional Convention advanced a wide variety of proposals concerning the structure of the national judiciary, the record of that gathering demonstrates widespread agreement that the Supreme Court should be vested with the power to review state court decisions on matters of federal concern.[15] One participant observed that, in the absence of a supreme national tribunal, "the judicial authority of the Union may be eluded at the pleasure of every plaintiff or prosecutor."[16] Cognizant of this problem and pursuant to its authority under the "exceptions and regulations" clause,[17] the first Congress prescribed the appellate authority of the Supreme Court over state cases in section 25 of the Judiciary Act of 1789.[18] Under this provision, writs of error were to issue to state courts in three situations: (i) where a state tribunal invalidated a federal statute, treaty or authority; (ii) where a state statute or authority was sustained against a challenge based upon the federal constitution, laws or treaties; and (iii) where the construction of a federal constitutional, statutory or treaty provision was called into question, and the title, right, privilege or exemption thereunder was denied by the state court.[19]

15. P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 12 (2d ed. 1973) [hereinafter cited as HART & WECHSLER].

16. THE FEDERALIST No. 82 at 456 (rev. ed. 1901) (A. Hamilton). *See also* 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 18 (1926); FRANKFURTER & LANDIS, *supra* note 7, at 190-91.

17. U.S. CONST. art. III, § 2, cl. 2: "In all the other Cases, before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

18. Act of Sept. 24, 1789, 1 Stat. 73, 85-87.

19. Section 25 of the Judiciary Act of 1789 provided as follows: "Sec. 25. *And be it further enacted*, That a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of such their validity, or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such

> As Professor Warren aptly described it, the 1789 Act was
> a measure in the nature of a compromise between the extreme Federalist view that the full extent of judicial power granted by the Constitution should be vested by Congress in the Federal Courts, and the view of those who feared the new Government as a destroyer of the rights of the States, who wished all suits to be decided first in the State Courts, and only on appeal by the Federal Supreme Court.[20]

In section 25, this compromise was reflected specifically in the selection of the common law writ of error as the exclusive mode of review. In the contemporaneous English practice, the writ of error allowed the courts of King's Bench to review lower court decisions only as to questions of law; the procedure was designed simply to affirm or deny the existence of error in the trial proceedings.[21] In the courts of Chancery however, the appeal carried both facts and legal theory to the higher court. In the absence of trial by jury in equity practice, the appellate judge was free to consider the facts *de novo* in determining whether the chancellor below had arrived at a just result.[22] During the ratification debates on the Constitution, a major attack had been leveled against the article III provision permitting Supreme Court review of issues of law and fact. To its antagonists, this broadened scope of review appeared to abrogate the common law practice of commending factual determinations exclusively to the jury. This criticism not only led to the inclusion of the Seventh Amendment in the Bill of Rights, but it also shaped the drafting of section 25. Eager to provide some assurance that the right to trial by jury would be preserved, the draftsmen of section 25 employed the writ of error and delimited the ambit of Supreme

clause of the said constitution, treaty, statute or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error, the citation being signed by the chief justice, or judge or chancellor of the court rendering or passing the judgment or decree complained of, or by a justice of the Supreme Court of the United States, in the same manner and under the same regulations, and the writ shall have the same effect, as if the judgment or decree complained of had been rendered or passed in a circuit court, and the proceeding upon the reversal shall also be the same, except that the Supreme Court, instead of remanding the cause for a final decision as before provided, may at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution. But no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before mentioned questions of validity or construction of the said constitution, treaties, statutes, commissions, or authorities in dispute." *Id.* (footnotes omitted).

20. Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 131 (1923).

21. Sunderland, *A Simplified System of Appellate Procedure*, 17 TENN. L. REV. 651, 652 (1943).

22. *Id.* at 653-54.

Court review in all cases to questions of law.[23]

In view of the foregoing, it is clear that the utilization of the writ of error in section 25 was not motivated by considerations of whether or not the Supreme Court should exercise discretion in reviewing state court decisions. Although the writ of error in England had for centuries issued *ex debito justitiae*, as an obligation of justice, and although the equity appeal was available only as a matter of royal grace,[24] this distinction played no role in the drafting of section 25. The central concern was the possible erosion of the right to trial by jury, and the concept of obligatory review was implanted in the jurisdictional statute as an accoutrement of proceedings in error, with no real consideration of the merits of mandatory versus discretionary jurisdiction.

Even though the presence of the writ of error in section 25 embodied only the unitary concern for the scope of Supreme Court review, the Court in its earliest terms adopted the full panoply of English writ of error procedures. In 1792, the Court promulgated the following rule: "The Court considers the practice of the courts of King's Bench and Chancery in England, as affording outlines for the practice of this court; and that they will, from time to time, make such alterations therein, as circumstances may render necessary."[25] The Court thereby incorporated the English notion that writs of error issued as of right. It should be noted that even though the Court embraced the obligatory aspects of the writ of error, it was not necessarily compelled to do so, as the eighteenth century experience in the colonies demonstrates. In colonial Connecticut and Virginia, for example, the writ of error was a

23. Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 102 (1923). In 1803, Congress reinstated the practice of reviewing law and fact in equity and admiralty cases. Act of Mar. 3, 1803, ch. 40, 2 Stat. 244. In the wake of congressional attacks on the appellate jurisdiction of the Supreme Court in the 1950's and 1960's, some commentators pointed to the use of the writ of error in section 25 as evidence of a general limitation on congressional power under the exceptions and regulations clause. It has been argued that the exceptions and regulations clause appeared in article III merely to provide Congress with a method of limiting the scope of Supreme Court review and that use of the writ of error in section 25 represented an exercise of this narrow congressional power. Consequently, it was said to be grossly overstating the case to contend that Congress had authority to effect fundamental changes in the Court's jurisdiction. Merry, *Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis*, 47 MINN. L. REV. 53, 57, 63-68 (1962).

24. Thompson, *The Development of the Anglo-American Judicial System*, 17 CORNELL L.Q. 395, 427-29 (1931).

25. 2 U.S. (2 Dall.) 414 (1792). The English writ of error issued out of the writ office of Chancery, and since there was no federal chancery, writs of error under section 25 were to issue out of the Supreme Court clerk's office. West v. Barnes, 2 U.S. (2 Dall.) 400, 401 (1792).

discretionary writ and not one of right.[26] In Connecticut, only the court rendering the judgment complained of could grant a writ of error, and that would transpire only upon a demonstration of good grounds. In Virginia, where cases were reviewed by the governor and the judges of the General Court (the legislature), the reviewing authority could reject the writ of error as it saw fit.[27] Therefore, even though precedent existed in colonial practice for infusing the common law writ of error with a measure of judicial discretion, the Court resorted to the more formalized English version. This coincided with the trend in most state courts. Although early colonial appellate practice was a variegated construct of homemade procedures,[28] the tendency in the late eighteenth century was toward a more complete acceptance of the English common law model. This was attributable in large part to the inherent distrust of courts of equity, especially in New England. At the time of the Revolution, the writ of error was almost universally regarded in those jurisdictions which employed it as a writ of right. In the early nineteenth century, some states proceeded to guarantee it by constitutional provision. Even if proceedings in error were not provided for by statute, as part of the received common law, actions at law were reviewable as of right by writ of error.[29]

The mandatory nature of the writ of error had its roots firmly entrenched in English jurisprudence. Under the colonial system, the monarch reserved the right to entertain appeals from colonial courts of last resort, and, notwithstanding any monetary limitation imposed by colonial legislatures, the crown regarded the writ of error as an inherent right.[30] As Justice Story characterized it, the writ of error "was deemed rather a protection than a grievance"[31] for three apparent reasons:

> (1) That, otherwise, the law appointed or permitted to such inferior dominion might be considerably changed without the assent of the superior dominion; (2) Judgments might be given to the disadvantage or lessening of the superiority, or to make the superiority of the king only, and not of the crown of England; and, (3) That the practice has been accordingly.[32]

26. R. POUND, APPELLATE PROCEDURE IN CIVIL CASES 89 (1941).

27. *Id.*

28. R. POUND, *supra* note 26, at 72-105; Frank, *Historical Bases of the Federal Judicial System*, 13 L. & CONTEMP. PROB. 3, 5 (1948).

29. R. POUND, *supra* note 26, at 116.

30. 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 175 (4th ed. 1873) (citation omitted).

31. *Id.* § 176.

32. *Id.* § 175 (citations omitted).

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Yet, as the practice developed in the United States, the compulsory nature of proceedings in error stemmed more from the rigidities which cut across all common law forms of action than from protective notions derived from the common law. Throughout the nineteenth century, appeal by way of error was an action wholly separate from the proceedings in the trial court. Derived from the ancient action for false judgment, whereby the trial judge who rendered the allegedly erroneous judgment was made the subject of a semi-criminal action, the writ of error initiated a completely new proceeding in the higher court.[33] The parties prepared a new set of pleadings, and their positions often varied from those taken in the lower court.[34] Proceedings in error involved a complicated series of procedural steps,[35] yet the formalities of common law pleading cut both ways. Although the plaintiff in error might be frustrated by nonsuit at several stages in the action for the barest irregularity, once he had complied with all procedural requirements the appellate tribunal had no choice but to hear the case.[36]

While the Supreme Court adopted the notion that a writ of error would issue to a state court as a matter of right in a proper case, in practice, the writ was not allowed simply as a matter of course.[37] Section 25 of the 1789 Act required that the chief judge or judge or chancellor below sign the writ of error coming from the Supreme Court, and the Court interpreted this to require that an appeal be applied for and allowed by the lower court.[38] A party whose application for a writ of error had been denied by the state court could then apply to the justice who sat in the federal judicial circuit where the state court was situated. That justice might grant or deny the application or refer it to the entire Court for consideration.[39] In *Twitchell v. Commonwealth of*

33. Sunderland, *supra* note 21, at 651.

34. R. POUND, *supra* note 26, at 47.

35. *Id.* at 47-48; Thompson, *supra* note 24, at 425 n.525.

36. This is illustrated by an 1884 decision of the Supreme Court of Tennessee: "A writ of error is in the nature of a new suit, and may be obtained as of right by any person entitled to it, just exactly as he may sue out a summons in an ordinary action upon compliance with the prescribed requirements. . . . [T]he writ is a matter of right . . . when the party shows himself entitled to it, whether the applicant can obtain any relief or not." Ridgely v. Bennett, 81 Tenn. 206, 208, 210 (1884) (citations omitted). For similar statements, see McCreary v. Rogers, 35 Ark. 298 (1880); Hall v. Thode, 75 Ill. 173 (1874); Ricketson v. Compton, 23 Cal. 636 (1863); Thompson v. M'Kin, 6 H. & J. 249 (Md. 1825); Skipwith v. Hill, 2 Mass. 35 (1806).

37. R. ROBERTSON & F. KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES §§ 377-378 (2d ed., R. Wolfson & P. Kurland ed. 1951) [hereinafter cited as ROBERTSON & KIRKHAM].

38. Havnor v. New York, 170 U.S. 408, 410 (1898).

39. ROBERTSON & KIRKHAM, *supra* note 37, § 378.

Pennsylvania,[40] Chief Justice Chase spoke of the screening function performed by this procedure:

> [W]rits of error to State courts have never been allowed, as of right. It has always been the practice to submit the record of the State courts to a judge of this court, whose duty has been to ascertain upon examination whether any question, cognizable here upon appeal, was made and decided in the proper court of the State, and whether the case upon the face of the record will justify the allowance of the writ.
>
> In general, the allowance will be made where the decision appears to have involved a question within our appellate jurisdiction; but refusal to allow the writ is the proper course when no such question appears to have been made or decided; and also where, although a claim of right under the Constitution or laws of the United States may have been made, it is nevertheless clear that the application for the writ is made under manifest misapprehension as to the jurisdiction of this court.[41]

In a handful of cases, the Court actually heard oral argument and wrote opinions on whether the application for the writ should be allowed.[42] A practice soon developed whereby the Court would reject the application if allowance of the writ would only result in affirmation of the state court's decision.[43]

In addition to the foregoing shift in procedures, the Supreme Court amended its rules in 1876 to provide that when the defendant in error united a motion to affirm with a motion to dismiss the writ of error for want of jurisdiction, the Court would generally grant the motion to affirm when the record manifestly demonstrated that the state court's decision had been correct.[44] It should be noted, however, that this and the previously outlined procedures involved an approach quite different from the certiorari-like treatment that many commentators contend is accorded appeals today.[45] With these early screening techniques, the Court was determining whether the plaintiff in error had made out a prima facie case under the jurisdictional statute. Most of these cases presented no federal question whatsoever; no federal statute had been invalidated and no state law had been challenged on federal

40. 74 U.S. (7 Wall.) 321 (1868).

41. *Id.* at 324-25. *Accord*, Butler v. Gage, 138 U.S. 52, 55 (1891); Bartemeyer v. Iowa, 81 U.S. (14 Wall.) 26, 27 (1871); Hartford Fire Ins. Co. v. Van Duzer, 76 U.S. (9 Wall.) 784 (1869); Gleason v. Florida, 76 U.S. (9 Wall.) 779, 783 (1869).

42. *In re* Buchanan, 158 U.S. 31 (1895); *In re* Kemmler, 136 U.S. 436 (1890); Spies v. Illinois, 123 U.S. 131 (1887).

43. ROBERTSON & KIRKHAM, *supra* note 37, § 378.

44. Amendment to Sup. Ct. R. 6, 91 U.S. vii (1876).

45. *See* notes 88-92 and accompanying text *infra*.

grounds. The process of determining whether "a question cognizable here was made and decided in the State court"[46] is quite distinct from deciding whether a federal question properly raised below is substantial enough to warrant Supreme Court resolution.

B. Birth of the Modern Statutory Regime

With the exception of certain variations not central to this discussion,[47] state court decisions were reviewed under section 25 and its successor provisions without change for 125 years. In 1914, however, Congress initiated a series of enactments which brought about a fundamental restructuring of the Supreme Court's appellate jurisdiction over state and federal cases. Whereas review in the nineteenth century had proceeded almost exclusively by writ of error, these early twentieth century reforms vested the Court with a greater degree of discretion in handling its docket. By dividing the cases into two distinct categories of appellate jurisdiction—mandatory appeal and discretionary certiorari—Congress began to differentiate among various types of cases on the basis of their national importance. In the process, the category of cases triggering obligatory review was steadily narrowed.

In 1911, the New York Court of Appeals held in *Ives v. South Buffalo Railway Co.*[48] that the New York workmen's compensation law constituted a deprivation of property without due process of law in violation of the Fourteenth Amendment. Because the state statute had been invalidated on federal grounds, the case was not cognizable under section 237 of the Judicial Code (the successor provision to section 25). Sensitive to the outrage engendered by the merits of the New York decision,[49] and to the fact that the people of New York were bound by

46. Butler v. Gage, 138 U.S. 52, 55 (1891).

47. In 1867, the last sentence of section 25 was deleted. Act of Feb. 5, 1867, § 28, 14 Stat. 385, 386. That Congress did not intend thereby to enlarge the scope of Supreme Court review was settled in Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875). The 1867 statute was carried over into Rev. Stat. § 709 (1875) without significant change. Section 709 was amended and incorporated into section 237 of the Judicial Code in 1911. Act of Mar. 3, 1911, ch. 231, 36 Stat. 1087, 1156.

Two significant developments in the late nineteenth century should be noted. In 1875, Congress gave the circuit courts federal question jurisdiction. Act of Mar. 3, 1875, ch. 137, § 2, 18 Stat. 470, 471. In 1891, the Evarts Act established the federal circuit courts of appeals. Act of Mar. 3, 1891, ch. 517, 26 Stat. 826. Under the Evarts Act, certiorari made its first appearance in federal practice. Although writs of error still issued to the courts of appeals, the Supreme Court was given certiorari authority over cases based upon diversity, revenue and patent laws, federal criminal statutes and admiralty law. HART & WECHSLER, *supra* note 15, at 40-41.

48. 201 N.Y. 271, 94 N.E. 431 (1911).

49. *See* SENATE COMM. ON THE JUDICIARY, ENLARGEMENT OF THE APPELLATE JURIS-

an interpretation of the Fourteenth Amendment "more drastic and restrictive" than that established by any previous Supreme Court opinion,[50] Congress enlarged the Court's appellate jurisdiction for the first and only time since 1789.[51] The Act of December 23, 1914, gave the Court certiorari jurisdiction over cases in which a federal statute, treaty, authority or right had been sustained in a state court, or in which a state statute had failed to withstand a federal challenge in a state court proceeding.[52]

Although certiorari had been employed in the Evarts Act[53] in establishing the federal circuit courts of appeals, the 1914 Act marked the first appearance of this discretionary mode of review in the Court's appellate jurisdiction over state cases. The legislative history of the statute demonstrates that the decision to use certiorari rather than obligatory review was based upon a consideration of the relative importance of cases such as *Ives*. It also indirectly indicates how significant Congress regarded the cases which remained within the mandatory classification:

> The committee considers that this [use of certiorari] will secure a review in all cases which have any public importance whatever and at the same time will protect the calendar of the Supreme Court of the United States from being overburdened with a multitude of cases in which appeals are taken for the purposes of delay.[54]

A second major congressional alteration of the Court's appellate jurisdiction over the states occurred in 1916. After the *Employers' Liability Cases*,[55] the coverage of the Federal Employers' Liability Act turned on whether the injured employee had been engaged in interstate or intrastate commerce. The difficulty of making this distinction stimulated a spate of litigation in state and lower federal courts. Because these cases involved complicated factual issues, which were rarely of any general importance, their review by the Supreme Court placed a substantial and unnecessary burden on that tribunal's obligatory juris-

DICTION OF THE SUPREME COURT OF THE UNITED STATES, S. REP. NO. 161, 63d Cong., 2d Sess. 2 (1914); HOUSE COMM. ON THE JUDICIARY, AMENDING AN ACT ENTITLED "AN ACT TO CODIFY, REVISE AND AMEND THE LAWS RELATING TO THE JUDICIARY," H.R. REP. NO. 1222, 63d Cong., 3d Sess. 2 (1914).

50. S. REP. NO. 161, *supra* note 49, at 2.
51. FRANKFURTER & LANDIS, *supra* note 7, at 198.
52. Act of Dec. 23, 1914, ch. 2, 38 Stat. 790.
53. Act of Mar. 3, 1891, ch. 517, 26 Stat. 826.
54. S. REP. NO. 161, *supra* note 49, at 2.
55. 207 U.S. 463 (1908).

jiction.[56] Seizing upon the *Employers' Liability Cases* as a predicate,[57] Congress effected a significant curtailment of the Court's obligatory jurisdiction. Under the Act of September 6, 1916, writs of error under section 237 were available in only two situations: (i) when a federal authority or constitutional, statutory or treaty provision was stricken down in a state court; and (ii) when a state law or authority was upheld against a federal attack.[58] All other cases fell within the certiorari category. This was a significant departure from prior practice, for in all cases involving a title, right, privilege or exemption specially set up under federal law, the Supreme Court now had certiorari jurisdiction—regardless of how the state court had ruled.

Since the 1916 Act was intended primarily to cure the problem posed by the Employers' Liability litigation, Congress may not have completely considered the broader implications of the measure. This becomes apparent when one realizes that this legislation, which fundamentally altered a jurisdictional framework that had prevailed since 1789, passed through both houses without debate.[59] Nevertheless, the Senate report accompanying the bill shows that the basic distinctions drawn by the statute were grounded upon the national significance of certain kinds of cases:

> This section [addressed to state appeals] leaves unchanged the absolute right to sue out writs of error in the first two classes of cases provided for by Section 237, and it permits in all other cases from State courts which may now be reviewed by the Supreme Court to be brought up by certiorari only. A great number of cases included within the terms of the third class but not of general importance are being brought to the Supreme Court. This is especially true of suits based upon the Employers' Liability Act. Many of these cases ought not to be reviewed; the delays are unfortunate, and the time that should be devoted to important subjects is much trenched upon.[60]

The 1916 Act temporarily diminished the stream of cases coming to the Supreme Court by writ of error, but the period after the First

56. This additional burden was reflected in the number of cases on the Court's docket, which grew from 509 in 1910 to 647 in 1916. FRANKFURTER & LANDIS, *supra* note 7, at 205-06.

57. *See* SENATE COMM. ON THE JUDICIARY, RELIEF OF THE SUPREME COURT, S. REP. NO. 775, 64th Cong., 1st Sess. 2 (1916); HOUSE COMM. ON THE JUDICIARY, AMENDMENT OF JUDICIAL CODE IN RELATION TO UNITED STATES SUPREME COURT, H.R. REP. NO. 794, 64th Cong., 1st Sess. 2 (1916).

58. Act of Sept. 6, 1916, ch. 448, 39 Stat. 726.

59. FRANKFURTER & LANDIS, *supra* note 7, at 213.

60. S. REP. NO. 775, *supra* note 57, at 2.

World War witnessed a dramatic rise in the Court's caseload.[61] The extensive cancellation of government war contracts and the new prohibition laws contributed prolifically to the crush of litigation, especially in federal courts. By the beginning of the October, 1925, Term, the appellate backlog in the Supreme Court had reached crisis proportions. Cases on writ of error accounted for better than eighty per cent of the Court's calendar,[62] and delays of eighteen to twenty-four months between docketing and oral argument were not uncommon.[63]

Chief Justice Taft had campaigned vigorously for comprehensive judicial reform before coming to the Court,[64] and upon his appointment in 1921, he called upon a committee of the justices to assist in drafting remedial legislation.[65] Under the guidance of Justice Van Devanter, the committee focused on two particular facets of writ of error practice: (i) the time absorbed by cases which, after oral argument, turned solely on questions of jurisdiction and (ii) the ease with which the writ of error could become an instrument of delay.[66] The screening mechanisms which evolved during the nineteenth century[67] had deteriorated. Most state judges approved applications for writs of error with little more than perfunctory examination of the case; a great number of meritless appeals found their way to the docket, and their frivolity was not revealed until oral argument.[68]

The successful operation of certiorari under the Evarts Act had a

61. In the 1916 Term, the Court decided 157 cases on error to state courts; by 1920, the number had dwindled to 75. FRANKFURTER & LANDIS, *supra* note 7, at 255. In 1916, 1169 cases were docketed and 637 were disposed of during the session. In 1925, the figures were 1282 and 844 respectively. *Id.* at 256 n.5.

62. Burton, *"Judging is Also Administration": An Appreciation of Constructive Leadership*, 33 A.B.A. J. 1099, 1102 (1947).

63. Gressman, *Much Ado About Certiorari*, 52 GEO. L.J. 742, 748 n.23 (1964).

64. Taft, *The Attacks on the Courts and Legal Procedure*, 5 KY. L.J. 3 (1916). In this address, the Chief Justice indicated what he felt the Court's obligatory jurisdiction should be confined to: "[T]he only jurisdiction that [the Supreme Court] should be obliged to exercise, and which a litigant may, as a matter of course, bring to the court, should be questions of constitutional construction. By giving an opportunity to litigants in all other cases to apply for a writ of certiorari to bring any case from a lower court to the Supreme Court, so that it may exercise absolute and arbitrary discretion with respect to all business but constitutional business, will enable the court so to restrict its docket that it can do all its work, and do it well." *Id.* at 18.

65. The committee originally consisted of Justices McReynolds and Day, and Chief Justice White as member ex officio. Justices Van Devanter and Sutherland were added by Chief Justice Taft. Burton, *supra* note 62, at 1102 n.19.

66. *Procedure in Federal Courts: Hearings on S. 2060 and S. 2061 Before a Subcomm. of the Senate Comm. on the Judiciary*, 68th Cong., 1st Sess. 25-26, 34 (1924) (statement of Justice Van Devanter) [hereinafter cited as *Judges' Bill Hearings*].

67. *See* notes 38-43 and accompanying text *supra*.

68. *Judges' Bill Hearings, supra* note 66, at 26.

profound effect upon the committee of justices; they approached their task free of the conservative view that the Supreme Court should be the only source of finality. As a result, the Act of February 13, 1925,[69] also known as the Judges' Bill, liberally employed certiorari as a substitute for great portions of the Court's obligatory jurisdiction. Of the fourteen classes of federal court cases which had previously qualified for writ of error, only five remained.[70] As the report prepared by the justices stressed, the central theme of the Judges' Bill was the conservation of the Supreme Court as the arbiter of issues of national importance:

> The primary object of the bill is to relieve the congestion resulting from the present overcrowded docket of the Supreme Court, and thus enable a more expeditious disposition of the cases which that court is called upon to decide, by restricting the obligatory appellate jurisdiction of the court to cases and proceedings of a character and importance which render a review of right in the Supreme Court desirable from the public point of view.[71]

Although the Judges' Bill concentrated principally on shutting the doors of the Court to federal cases of minor importance, the legislation also touched upon writs of error issued to state courts. The 1925 Act carred over the framework established in 1916 with one further contraction.[72] Under the 1916 law, cases in which the "validity" of a federal authority had been challenged were deemed to merit review by writ of error; while situations involving an "exercise" of the same authority were reviewable only by certiorari. In the interest of clarity, the Judges' Bill placed both cases under the certiorari heading.[73] In addition, an amendment was added to minimize the significance of the hazy distinction between certiorari and writ of error. Since 1916, attorneys who were uncertain as to which route to pursue frequently employed certiorari and writ of error simultaneously. The 1925 Act permitted review by either method in cases of overlapping jurisdiction.[74]

69. Act of Feb. 13, 1925, ch. 229, 43 Stat. 936.

70. Obligatory jurisdiction now only extended to: (i) equity actions brought by the United States to enforce the Interstate Commerce Act and the antitrust laws; (ii) criminal cases brought by the United States where the government loses and where the defendant has not been acquitted or exposed to jeopardy; (iii) interlocutory injunctions against enforcement of a state statute or against the exercise of a state authority; (iv) interlocutory and final decrees of injunctions and suspensions of orders of the Interstate Commerce Commission; (v) cases in the courts of appeals involving invalidation of a state statute. *Id.*

71. *Judges' Bill Hearings, supra* note 66, at 6-7. *See also* HOUSE COMM. ON THE JUDICIARY, JURISDICTION OF THE CIRCUIT COURTS OF APPEALS AND THE SUPREME COURT, H.R. REP. NO. 1075, 68th Cong., 2d Sess. 3 (1925).

72. Act of Feb. 13, 1925, ch. 229, 43 Stat. 936, 937.

73. Taft, *The Jurisdiction of the Supreme Court under the Act of February 13, 1925*, 35 YALE L.J. 1, 8-9 (1925).

74. FRANKFURTER & LANDIS, *supra* note 7, at 276.

The Judges' Bill marked the culmination of efforts, begun in 1914, to identify a class of cases which, in light of the Court's burgeoning caseload, were important enough to call for mandatory review. Some commentators have suggested that the certiorari/appeal distinction is "no more than an historical accident, stemming from the fact that the appeal provision was a feature of the original jurisdictional scheme, while certiorari was introduced relatively late in the Court's history."[75] The Senate debates[76] on the Judges' Bill do not support this argument. Indeed, they indicate that Congress was not only aware of the residuum of cases left in the obligatory category, but made that classification based upon what were conceived to be important considerations of federalism. This conclusion is borne out by the debate over cases coming from circuit courts of appeals in which a state statute had been invalidated. The original draft of the Judges' Bill gave the Supreme Court no obligatory jurisdiction over the courts of appeals. When the measure reached the Senate floor, Senator Copeland of New York suggested that this might create a disparity in view of the two classes of mandatory jurisdiction over state decisions. Quoting from a report prepared by an advisor, he observed that " 'the bill gives the circuit court of appeals appellate jurisdiction and makes it the court of last resort in an important class of cases in which a State supreme court is in effect only an intermediate tribunal.' "[77] Senator Copeland then read into the record certain correspondence he had conducted with Chief Justice Taft. Because Senator Copeland believed the Judges' Bill raised the dignity of the courts of appeals over that of the state courts, he proffered two solutions: (i) permit a writ of error to issue to a court of appeals when a state statute has been overturned; or (ii) make all Supreme Court review discretionary. Rejecting both suggestions, the Chief Justice sought to justify the distinction contained in the original bill:

> We would have been glad to make the same rule requiring certiori to permit review of State decisions and would be glad now to have the rule uniform as to the two courts, but we felt that there would be objection if one interested in the validity of a Federal treaty or statute set aside by a State court could not of right come to our court or where against a claim of conflict with the Federal Constitution the State court had affirmed the validity of a State

75. Note, *The Precedential Weight of a Dismissal by the Supreme Court for Want of a Substantial Federal Question: Some Implications of Hicks v. Miranda*, 76 COLUM. L. REV. 508, 514-15 (1976) [hereinafter cited as Note, *Hicks v. Miranda*].

76. In contrast, in the House of Representatives, "[a] few minutes of desultory discussion led to its passage in the first instance." FRANKFURTER & LANDIS, *supra* note 7, at 279.

77. 66 CONG. REC. 2921 (1925).

> statute. On the other hand, with respect to a decision of a circuit court of appeals on a similar question such a court would be more likely to preserve the Federal view of the issue than the State court, at least to an extent to justify making a review of its decision by our court conditioned upon our approval.[78]

Notwithstanding Chief Justice Taft's remarks, the Senate adopted the first of Senator Copeland's solutions. According to Senator Walsh, the Senate thereby

> intended to put the two on a perfect parity, allowing a writ of error from the circuit court of appeals under conditions exactly the same except reversed, and allowing a writ of certiorari in the one case as in the other case, so that the two would be entirely harmonious.[79]

The foregoing discussion illustrates that the final version of the Judges' Bill was more than a one-dimensional response to the problems of the Court's caseload. Indeed, had that been the only consideration, Congress might very well have pursued Senator Copeland's suggestion and made all review discretionary through certiorari. Chief Justice Taft indicated that he might have advanced such a solution had he not anticipated serious political resistance.[80] The same could be said of the Senate's action, but the statute that emerged embodied more than mere political expediency. The final legislation represented an effort to relieve the heavy burden on the Court, but in a way that remained attuned to those important issues of federalism which arise when a state court invalidates a federal statute or sustains its own law, or when a federal court strikes down a state law.[81]

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78. *Id.* at 2922.

79. *Id.* at 2923.

80. At the outset, the Chief Justice was faced with substantial opposition from the Senate Judiciary Committee, the members of which had reservations about the degree of judicial participation in the drafting process. Chief Justice Taft's remarks to Senator Copeland may indicate that although he favored dispensing with obligatory review altogether, he did not press the point for fear that the reforms which had been included in the bill would not pass through Congress. For a background discussion of the political history of the Judges' Bill, see A. MASON, WILLIAM HOWARD TAFT, CHIEF JUSTICE 109-13 (1964).

81. The observations of Senator George evince the tone of the 1925 law: "Under the general scheme contemplated in this act . . . and as it has manifested itself from the time of the enactment of the judiciary act in 1789 to the present, the citizen asserting a right under a State law has preserved to him the right to maintain the dignity of his own constitution. Similarly, the citizen asserting that the Federal Constitution is being undermined has had the right preserved to him to maintain that Constitution. In other words, the whole system of review has constantly in mind this principle—that the State could not destroy the Federal Constitution and the Federal courts could not destroy the State laws. There is a balance there, and there is not an unrestricted right of appeal, and there never has been an unrestricted right of appeal as a matter of right.

"Perhaps it would have been wisest and best in the beginning to have left all decisions,

A few technical changes following the enactment of the Judges' Bill completed the statutory evolution. In 1928, the term "appeal" was substituted for "writ of error" without substantively altering the statute.[82] In that same year, the Court promulgated Rule 12 of the Rules of the Supreme Court, which was designed to differentiate between frivolous and meritorious appeal.[83] By requiring an appellant to file a jurisdictional statement, Rule 12 enabled the Court to determine, on the basis of the papers, whether an appeal raised an issue worthy of its consideration. In 1936, the Court amended Rule 12 to reflect its already well established practice of hearing only those appeals presenting substantial federal questions.[84] This amendment, however, provided no definition of the word "substantial." The foregoing developments, together with the Judges' Bill, form the bases of the Supreme Court's appellate practice today.[85]

II. Problems In Current Practice

A. Has Obligatory Appellate Jurisdiction Vanished?

In theory, certiorari and appeal encompass different factors.

either of State courts or of lower Federal courts to review on writs of certiorari. That was the logical process. But there was the apprehension that the State courts might not be duly regardful of rights under the Federal Constitution, and therefore when there was a decision in a State court sustaining a law which was said to be violative of the Federal Constitution, the Supreme Court of the United States had the right to review that decision.

"In a broad way, we naturally think that a litigant should have the unrestricted right of appeal, whether the decision be for or against the validity of the law, but when we think of it from a practical point of view, since there must be some restriction of the right of appeal because it is always possible to bring a Federal question into any sort of litigation—since there must be some restrictions growing out of the practical necessities, it seems that these restrictions are justified." 66 CONG. REC. 2924 (1925).

82. Act of Jan. 31, 1928, ch. 14, 45 Stat. 54, *as amended by* Act of Apr. 26, 1928, ch. 440, 45 Stat. 466.

83. Sup. Ct. R. 12, 275 U.S. 603, 603-04 (1928) (amended by Sup. Ct. R. 15, 398 U.S. 1024, 1024-27 (1970)).

84. 297 U.S. 733 (1936). This practice was derived from cases such as Milheim v. Moffat Tunnel Improvement Dist., 262 U.S. 710, 717 (1923); Zucht v. King, 260 U.S. 174, 176-77 (1922); Equitable Life Assurance Soc'y v. Brown, 187 U.S. 308 (1902). *See generally* Ulman & Spears, *"Dismissed for Want of a Substantial Federal Question,"* 20 B.U. L. REV. 501, 514-23 (1940); Wiener, *The Supreme Court's New Rules*, 68 HARV. L. REV. 20, 29-30 (1954); Note, *The Insubstantial Federal Question*, 62 HARV. L. REV. 488, 489-91 (1949).

85. In 1926, section 237 of the Judicial Code was carried into 28 U.S.C. § 344 without change. Act of June 26, 1926, ch. 9, § 344, 44 Stat., pt. I, 1, 906. By the Act of June 25, 1948, Title 28 of the U.S.C. was revised to produce the current 28 U.S.C. § 1257(1)-(3) (1976). Act of June 25, 1948, ch. 646, 62 Stat. 869. A 1970 amendment provided that the term "highest court of a State" would include the District of Columbia Court of Appeals. *See* District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, § 173, 84 Stat. 590.

While certiorari review in practice is limited to cases presenting conflicts among lower courts or issues of general importance, review by appeal tends to have a broader sweep, taking in cases as long as they do not involve settled issues, are not frivolous or are of consequence to others besides the individual parties.[86] Perhaps, again only in theory, the two types of review pose quite distinct problems for the litigant. With certiorari, a petitioner must not only convince the Court that the case ought to be heard on the merits, but if that requirement is satisfied, he must show that the case warrants plenary consideration. An appellant does not face the first obstacle, for once the statutory criteria are met the decision whether or not to grant review on the merits is foreclosed by congressional direction. The appellant's task is thus reduced to that of persuading the Court to give his appeal plenary consideration.[87]

Despite these theoretical dissimilarities, the enormous growth in the Court's workload and its evolving tactics of "self-defense" have somewhat blurred the certiorari/appeal distinction.[88] Chief Justice Marshall once declared that the Court has "no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given."[89] Recent experience, however, casts considerable doubt on the present viability of the Chief Justice's pronouncement. Today, it is frequently argued that eliminating the appeal/certiorari distinction would conform theory to practice because the Court has assimilated essentially all of the certiorari criteria into the standards for the disposition of appeals. As Francis R. Kirkham has stated:

> With few exceptions, the Court—driven by sheer necessity to ration justice—has taken upon itself to rewrite the statute [dealing with obligatory review] and to treat most appeals as the equivalent of petitions for certiorari, subject only to discretionary review. With few exceptions, these appeals, without hearing, are

86. *Symposium, Should the Appellate Jurisdiction of the United States Supreme Court Be Changed? An Evaluation of the Freund Report Proposals*, 27 RUTGERS L. REV. 878, 890 (1974) [hereinafter cited as *Rutgers Symposium*]; Note, *Summary Disposition of Supreme Court Appeals: The Significance of Limited Discretion and a Theory of Limited Precedent*, 52 B.U. L. REV. 373, 394-95 (1972) [hereinafter cited as Note, *Summary Disposition*]. *Compare* Sup. Ct. R. 19 *with* Sup. Ct. R. 15.

87. *Rutgers Symposium, supra* note 86, at 890; Note, *Summary Disposition, supra* note 86, at 395.

88. Today, the jurisdictional statement and the petition for certiorari perform largely the same screening function by forcing the appellant or petitioner to make out a compelling case for review in a few pages. The 1967 amendments to the Supreme Court Rules also placed appeal and certiorari on the same time schedule. Boskey & Gressman, *The 1967 Changes in the Supreme Court's Rules*, 42 F.R.D. 139, 142 (1967).

89. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821).

> affirmed or are dismissed with only the routine phrase "for want of a substantial Federal question."[90]

Concurring in this analysis, Dean Griswold also points out that virtually every case heard in the Supreme Court arrives there solely by the grace of that tribunal.[91] Both appellate and original jurisdiction have become subject to discretionary control; in the latter context, the Court has declined to hear cases which fall squarely within its original jurisdiction.[92]

One of the strongest arguments supporting the view that appeals have become discretionary is based on the manner in which the Court has used the concept of substantiality. For quite some time, the Court has insisted that cognizable appeals raise substantial federal questions, but it has never defined the term "substantial." The vague parameters of substantiality have led some commentators to conclude that the concept is wholly subjective and therefore discretionary.[93] Yet despite this lack of definition, substantiality involves no greater mix of subjective and objective factors than that involved in any case where a judge must apply an abstract rule of law to concrete facts. It certainly does not afford the Court license to resort to the full range of certiorari considerations. Justice Frankfurter's characterization of substantiality, suggesting the presence of a limited form of discretion, is particularly instructive:

> Plainly, the criterion of substantiality is neither rigid nor narrow. The play of discretion is inevitable, and wherever discretion is operative in the work of the Court the pressure of the docket is bound to sway its exercise. To the extent that there are reasonable differences of opinion as to the solidity of a question presented for decision or the conclusiveness of prior rulings, the

90. *National Court of Appeals Act: Hearings on S. 2762 and S. 3423 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 94th Cong., 2d Sess. 117, 120 (1976) (statement of Francis R. Kirkham) [hereinafter cited as *Judicial Improvement Hearings*]. For similar positions, see Black, *The National Court of Appeals: An Unwise Proposal*, 83 YALE L. J. 883, 887-88 (1974); Frank, *The United States Supreme Court: 1950-1951*, 19 U. CHI. L. REV. 165, 231 (1952); Moore & Vestal, *Present and Potential Role of Certification in Federal Appellate Procedure*, 35 VA. L. REV. 1, 44-45 (1949); Poe, Schmidt & Whalen, *A National Court of Appeals: A Dissenting View*, 67 NW. L. REV. 842, 842 (1973); Strong, *The Time Has Come to Talk of Major Curtailment in the Supreme Court's Jurisdiction*, 48 N.C. L. REV. 1, 16-17 (1969).

91. *Judicial Improvement Hearings, supra* note 90, at 67 (statement of Erwin H. Griswold). *See also* Griswold, *supra* note 4, at 345.

92. *See* United States v. Nevada, 412 U.S. 534 (1973); Illinois v. City of Milwaukee, 406 U.S. 91 (1972); Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493 (1971).

93. *Judicial Improvement Hearings, supra* note 90, at 67 (statement of Erwin H. Griswold); Griswold, *supra* note 4, at 345; Note, *The Insubstantial Federal Question*, 62 HARV. L. REV. 488, 492 (1949).

> administration of Rule 12 [now Rule 15] operates to subject the obligatory jurisdiction of the Court to discretionary considerations not unlike those governing certiorari.[94]

Another aspect of appellate practice related to substantiality and bearing upon the issue of discretion is illustrated by *Rescue Army v. Municipal Court*.[95] The Court in *Rescue Army* admittedly had jurisdiction over the appeal, but it nevertheless declined to decide the case. Referring to the principles outlined by Justice Brandeis in *Ashwander v. Tennessee Valley Authority*,[96] Justice Rutledge dismissed the case without prejudice because he felt the opinion of the state court had left unclear its construction of the challenged state statute.[97] This deviation from obligatory review may have been justified on the ground that appellant in *Rescue Army* was not running the risk of having coercive governmental action taken directly against him. In this context, postponement for clarification of the record and granting appellant the option to return seem reasonable.

In two decisions since *Rescue Army*, however, the Court may have extended the doctrine of that case beyond its intended scope. In *Poe v. Ullman*,[98] the Court invoked *Rescue Army* to avoid rendering a decision even though there was no doubt what construction the lower court had given the Connecticut statute regulating the use of contraceptives. Justice Frankfurter relied heavily upon the fact that prosecutions under the law had been rare.[99] In *Naim v. Naim*,[100] the Court dismissed an

94. Frankfurter & Landis, *The Business of the Supreme Court at October Term, 1929*, 44 HARV. L. REV. 1, 12-14 (1930). After the Supreme Court promulgated Rule 12, Justice (then Professor) Frankfurter observed: "This [Rule 12 requirement of substantiality] serves formal notice of the discretionary ingredient even in review as of right. A claim of unsubstantiality inevitably invokes judgment, even in those cases where the question is whether its solidity has evaporated in the course of prior decisions." Frankfurter & Fisher, *The Business of the Supreme Court at the October Terms, 1935 and 1936*, 51 HARV. L. REV. 577, 583-84 (1938).

95. 331 U.S. 549 (1947).

96. 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring).

97. 331 U.S. at 578-82. For a recent case adopting an approach similar to that taken in *Rescue Army*, see Southern & N. Overlying Carrier Chapters of the Cal. Dump Truck Owners Ass'n v. Public Util. Comm'n of Cal., 434 U.S. 9 (1977).

The doctrine of *Rescue Army* is generally related to justiciability concepts such as ripeness, mootness and the political question doctrine. *See generally* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1581-652 (9th ed. 1975). To the extent that the Court is employing these concepts in closing its doors, they are related indirectly to the matter of discretion in the disposition of appeals. However, since *Rescue Army* is more closely connected as a gloss on the jurisdictional statute itself, it was included in this study and the other ideas are regarded as peripheral.

98. 367 U.S. 497 (1961).

99. *Id.* at 502-09.

100. 350 U.S. 891 (1955).

appeal from a conviction under a Virginia miscegenation statute because of an "inadequate record," even though clearly substantial federal questions were raised and even though appellant faced immediate, coercive governmental action.[101] Fortunately, dispositions such as these have been rare.

A third major indicium of discretion in the disposition of appeals is embodied in the "rule of four." In order to obtain plenary consideration, an appellant must secure the affirmative votes of at least four justices. The origins of the rule of four are unclear, but it was first publicly articulated by Justice Van Devanter in the hearings on the Judges' Bill.[102] Initially employed by the Court in processing petitions for certiorari, the rule now also applies to appeals.[103] The rule of four infuses the appellate process with a degree of discretion: to the extent that six justices can vote against noting probable jurisdiction, the Court has introduced a limited, discretionary avoidance of full consideration of the issues presented.[104] If briefing and oral argument would have made any difference in the decision to decline review, then a certain amount of arbitrariness has crept into the procedure.

The opinions and public statements of the justices vary and are inconclusive as to the exact measure of discretion present in the disposition of appeals. In a frequently cited speech to the American Law Institute in 1954, Chief Justice Warren asserted:

> It is only accurate to a degree to say that our jurisdiction in cases on appeal is obligatory as distinguished from discretionary on certiorari. As regards appeals from state courts our jurisdiction is limited to those cases which present substantial federal questions. In the absence of what we consider substantiality in the light of prior decisions, the appeal will be dismissed without opportunity for oral argument.[105]

More recently, Justice Clark stated that while he served on the Court, "appeals from state court decisions received treatment similar to that

101. *Id.* The issues in *Poe* and *Naim* were indeed substantial, for the Court later declared the same statutes unconstitutional in Griswold v. Connecticut, 381 U.S. 479 (1965) and Loving v. Virginia, 388 U.S. 1 (1967), respectively.

102. *Hearings on H.R. 8206 Before the House Judiciary Committee*, 68th Cong., 2d Sess. (1925) (testimony of Justice Van Devanter). *See* Leiman, *The Rule of Four*, 57 COLUM. L. REV. 975, 981 (1957).

103. Ohio *ex. rel.* Eaton v. Price, 360 U.S. 246, 247 (1959); R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE § 5.16 (5th ed. 1978) [hereinafter cited as STERN & GRESSMAN].

104. *See* Note, *Summary Disposition*, *supra* note 86, at 398.

105. Address by Chief Justice Warren, American Law Institute (May 19, 1954), *quoted in* Wiener, *The Supreme Court's New Rules*, 68 HARV. L. REV. 20, 51 (1954).

accorded petitions for certiorari."[106] Generally concurring in this appraisal, Justice Brennan has observed that "behind our summary dispositions of appeals lie many of the same considerations that account for denials of certiorari."[107] In this regard, it is useful to note that recent cases have shown greater resort to certiorari-like factors in the noting of probable jurisdiction.[108] Perhaps indicative of the position of other members of the Court, Justice Rehnquist has characterized the Court's task as not that of uncovering the meritorious request for review, but of choosing a limited number of cases from a pool of several hundred, "all of which have arguably strong claims."[109] Other members of the Court have recognized more force in the certiorari/appeal distinction, however. Justice Douglas has contended that the large number of appeals summarily decided "does not mean that the Court has converted an obligatory jurisdiction into a discretionary one. It means merely that the fields involved in these appeals do not need the delineation that was once necessary."[110]

The preceding discussion suggests that a degree of discretion has crept into the disposition of appeals; however, the extent of discretion is hard to determine. Theoretically, the Court should be exercising discretion only in deciding whether to permit counsel to submit briefs and engage in oral argument. Yet it is probably safe to assume that every docketing decision, regardless of the type of case, is somewhat colored by the reality that practical limitations will compel rejection of most requests for review. It is difficult to determine whether the Court has made a practical equation between certiorari and appeal. Although often cited as evidence of such an equation, Chief Justice Warren's 1954 American Law Institute address merely states that while appeal may lie as of right, it does not necessarily include the right to oral argument or to a full opinion. This is more than a mere subtlety, considering that dispositions of appeals, unlike denials of certiorari, are adjudications on the merits.[111]

It seems fair to say that despite the concept of substantiality, the doctrine of *Rescue Army* and the rule of four, the Court approaches appeals and petitions for certiorari differently. The reticence of the

106. Hogge v. Johnson, 526 F.2d 833, 836 (4th Cir. 1975), *cert. denied*, 428 U.S. 913 (1976) (Clark, J., concurring; sitting by designation).

107. Sidle v. Majors, 429 U.S. 945, 948 (1976) (Brennan, J., dissenting).

108. *See, e.g.*, Ludwig v. Massachusetts, 427 U.S. 618, 623-24 (1976); Memorial Hospital v. Maricopa County, 415 U.S. 250, 253 (1974).

109. Rehnquist, *supra* note 3, at 789.

110. Douglas, *supra* note 5, at 411.

111. *See* notes 119-25 and accompanying text *infra*.

Court to make a straightforward statement of what it is actually doing is at best ambiguous. It could be inferred that the Court is enforcing the appellate statute according to its letter, but this is undoubtedly naive in light of the very compelling cases which have failed to negotiate the gauntlet of substantiality.[112] Something more than literal application of the statute is obviously involved. It is also arguable that the justices have covertly subsumed the review of all cases under one discretionary heading and have skirted the matter in their opinions to avoid the appearance of deliberately subverting the legislative command. This serious allegation has been disputed by at least one commentator.[113] For the litigant, his assessment of how much discretion the Court will employ should probably be made in this manner: The appellant begins with a theoretically absolute right to review which the Court has made more inaccessible through an exercise of limited discretion. The petitioner however, knows that his papers will be treated with a maximum of discretion, although the basic guidelines contained in Rule 19 and interpretive cases prevent that disposition from becoming completely arbitrary.

B. The Precedential Value of a Summary Disposition

Apart from plenary consideration, appeals coming from lower courts meet with five possible fates: (i) dismissal for want of jurisdiction; (ii) remand; (iii) summary reversal; (iv) dismissal for want of a substantial federal question; or (v) summary affirmance. Dismissals for want of jurisdiction and remands are the least controversial, for they enable the Court to winnow out the appeals in which jurisdiction is lacking or in which other factors should have been considered below.[114] As with denials of certiorari, they have no effect on the merits of the case.[115] Although summary reversals are adjudications on the merits, they are infrequently used. The Court will not usually resort to this method unless it believes the lower court's opinion to be frivolous or in clear conflict with a decision directly on point.[116] In addition, the summary reversal imparts an element of unfairness, for the Supreme Court

112. *See* notes 126-27 and accompanying text *infra*.

113. *See, e.g.*, Wechsler, *The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and Logistics of Direct Review*, 34 WASH. & LEE L. REV. 1043 (1977). "It is simply inadmissible that the highest court of law should be lawless in relation to its own jurisdiction." *Id.* at 1061.

114. *Rutgers Symposium, supra* note 86, at 958.

115. Colorado Springs Amusements, Ltd. v. Rizzo, 428 U.S. 913, 914 n.1 (1976) (Brennan, J., dissenting).

116. STERN & GRESSMAN, *supra* note 103, at § 5.19.

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Rules provide no warning to the unwary appellee who neglects to file papers in opposition.[117] The fourth and fifth categories, however, have engendered a heated debate and have become prime focal points for those who would abolish obligatory jurisdiction.[118]

1. The rule in Hicks v. Miranda

In *Miller v. California (Miller II)*,[119] the Supreme Court dismissed for want of a substantial federal question an appeal from a state court challenging a state obscenity statute. A year later, a three-judge district court was presented with an attack on the same law and, failing to find any significance in the *Miller II* dismissal, declared the statute unconstitutional. In *Hicks v. Miranda*,[120] the Supreme Court reversed the three-judge panel and prescribed the governing rule:

> [T]he District Court was in error in holding that it could disregard the decision in *Miller II*. That case was an appeal from a decision by a state court upholding a state statute against federal constitutional attack. A federal constitutional issue was properly presented, it was within our appellate jurisdiction under 28 U.S.C. § 1257(2), and we had no discretion to refuse adjudication of the case on its merits as would have been true had the case been brought here under our certiorari jurisdiction. We were not obligated to grant the case plenary consideration, and we did not; but we were required to deal with its merits. We did so by concluding that the appeal should be dismissed because the constitutional challenge to the California statute was not a substantial one. The three-judge court was not free to disregard this pronouncement.[121]

As a result, dismissals for want of a substantial federal question are adjudications on the merits and, under the supremacy clause,[122] bind state and lower federal courts as completely as full opinions.

The principal effect of Justice White's majority opinion in *Hicks* was to resolve the debate among state and lower federal courts over the deference which should be accorded the summary disposition of cases reaching the Supreme Court under its obligatory jurisdiction. At the same time, however, Justice White endeavored to restrict the broad implications of the *Hicks* rule. In a footnote, he indicated that a summary

117. *Id.*; HART & WECHSLER, *supra* note 15, at 647.

118. *Judicial Improvement Hearings*, *supra* note 90, at 273-74 (statement of Paul A. Freund); *id.* at 93 (statement of Justice Goldberg); *Rutgers Symposium*, *supra* note 86, at 969; Note, *Hicks v. Miranda*, *supra* note 75, at 527.

119. 418 U.S. 915 (1974).

120. 422 U.S. 332 (1975).

121. *Id.* at 343-44.

122. U.S. CONST. art. VI, cl. 2.

disposition should control in a subsequent case only if the issues in both cases are "sufficiently the same."[123] A lower court must discern "what issues had been properly presented . . . and declared by this Court to be without substance."[124] Unfortunately, this qualification has gone largely unnoticed, and the major emphasis has been upon the strongly worded passage in the text of the opinion.[125]

2. Problems generated by Hicks v. Miranda

The rule of *Hicks* has spawned a wide spectrum of difficulties and has become the focus of critical comment by scholars, lower court judges and even members of the Court. One question, present before the decision in *Hicks* and perhaps made more critical by that ruling, is whether the summary disposition is a proper mode of decision. Nearly twenty years ago, Professor Hart, observing the increased frequency in dismissals for want of a substantial federal question, remarked,

> [I]t has long since become impossible to defend the thesis that all the appeals which the Court dismisses on this ground are without substance. And any pretense that jurisdictional statements are concerned only with jurisdiction vanished when the Court began to affirm and even reverse judgments on the basis of them.[126]

This statement appears no less accurate today. In *Doe v. Commonwealth's Attorney*,[127] the Court affirmed the decision of a three-judge panel rejecting the challenge to a Virginia sodomy law tendered by a group of homosexuals. Major constitutional issues were presented in the case, but the Court's disposition indicates that the question was so clear that briefing and oral argument were not necessary.

Summary dispositions of state appeals such as *Doe* carry an institutional ambiguity that the rule in *Hicks* only compounds. When the Supreme Court determines that a state appeal presents no substantial federal question, substantiality may assume one of two meanings: either (i) appellant has not demonstrated the existence of a nonfrivolous federal question in his case; or (ii) there is a cognizable federal question, but the Court agrees with its disposition below. A dismissal of cases of the first variety for want of jurisdiction would obviate confusion, but the Court has dismissed both types for want of a substantial

123. 422 U.S. at 345 n.14.

124. *Id.*

125. Note, *The Precedential Effect of Summary Affirmances and Dismissals for Want of a Substantial Federal Question by the Supreme Court after Hicks v. Miranda and Mandel v. Bradley*, 64 VA. L. REV. 117, 122 (1978) [hereinafter cited as Note, *Summary Affirmances*].

126. Hart, *The Supreme Court—1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 89 n.13 (1959).

127. 425 U.S. 901 (1976).

federal question.[128] This treatment of state appeals should be contrasted with that accorded appeals from the lower federal courts. If the Court believes the federal question to be insubstantial, in that it agrees with the decision below, it will summarily affirm, even though the same issue would have warranted a dismissal had it appeared in a case appealed from a state court. This anomaly has largely historical origins, but it is partially explicable on jurisdictional grounds. To avoid a dismissal, an appellant in a state court must clear two hurdles by showing: (i) that the federal question is substantial, and (ii) that it merits plenary consideration.[129] The federal appellant, however, need only overcome the second barrier, for the existence of a federal question is assumed. Therefore, with the summary affirmance, the Court may effectively screen clearly colorless federal appeals without having to determine whether the federal question was one meeting the requirements for invocation of the lower court's original federal question jurisdiction.[130]

Even if the Court were to abandon the illogical terminology employed in its disposition of state and federal appeals which do not call for plenary consideration, the precedential force conferred by *Hicks* still has the potential for creating uncertainty. When a lower court's opinion rests on several alternative grounds, it is no simple task to discern the exact basis for the Court's decision to dismiss or affirm. Examination of the jurisdictional statement often provides little guidance in view of the Supreme Court practice of construing the statement to include "every subsidiary question fairly comprised therein."[131] Additionally, in light of the functioning of the rule of four, no clear rationale can emerge when six justices can vote to dispose of the case summarily without agreeing on the grounds. Empathizing with state and federal judges who are faced with the prospect of unravelling the holding of a summary disposition, Justice Brennan has observed:

> When presented with the contention that our unexplained dispositions are conclusively binding, puzzled state and lower court judges are left to guess as to the meaning and scope of our unexplained dispositions. We ourselves have acknowledged that summary dispositions are "somewhat opaque," . . . and we cannot deny that they have sown confusion.[132]

128. Note, *The Significance of Dismissals "For Want of a Substantial Federal Question": Original Sin in the Federal Courts*, 68 COLUM. L. REV. 785, 786-87 (1968).

129. SUP. CT. R. 15(e).

130. STERN & GRESSMAN, *supra* note 103, at § 5.18; *Rutgers Symposium, supra* note 86, at 959.

131. Sup. Ct. R. 15(c).

132. Colorado Springs Amusements, Ltd. v. Rizzo, 428 U.S. 913, 919 (1976) (Brennan, J., dissenting) (citation omitted).

Although the basis for a summary decision may be fairly ascertainable in some instances,[133] the binding effect prescribed by *Hicks* may foreclose any further dialogue on the particular matter among state and lower federal courts. Several federal courts have expressly foregone consideration of what they regarded as meritorious federal issues because similar claims had been raised in prior appeals to the Supreme Court, only to be dismissed for want of a substantial federal question.[134] Precluding debate among lower courts on important constitutional issues is a consequence that should follow only when the Supreme Court announces what is to become the law of the land in a fully considered opinion.[135]

A further difficulty engendered by *Hicks* and closely related to the problem of foreclosing dialogue is that of overgeneralization. Con-

133. The rule in *Hicks* has functioned fairly satisfactorily in cases applying summary dispositions wherein the jurisdictional statement raised a single, well-defined issue. In Amos v. Sims, 409 U.S. 942 (1972), the Court summarily affirmed a decision awarding attorney's fees in actions against a state or state officer acting in his official capacity. Inferring that *Sims* was based on a determination that such awards do not transgress the Eleventh Amendment, other courts have permitted similar awards. Bond v. Stanton, 528 F.2d 688 (7th Cir.), *vacated & remanded on other grounds*, 429 U.S. 973 (1976); Newman v. Alabama, 522 F.2d 71 (5th Cir. 1975); Gates v. Collier, 70 F.R.D. 341 (N.D. Miss. 1976).

Similarly, in Kimbell, Inc. v. Employment Sec. Comm'n, 429 U.S. 804 (1976), appellant argued that federal labor laws had preempted the field, prohibiting states from granting unemployment compensation to striking employees. The appeal was dismissed for want of a substantial federal question. Viewing as the predicate for the *Kimbell* dismissal the conclusion that federal labor policy did not preclude the payment of such compensation, other courts have sustained similar laws. New York Tel. Co. v. New York State Dep't of Labor, 566 F.2d 388 (2d Cir. 1977), *cert. granted*, 435 U.S. 941 (1978); Super Tire Eng'r Co. v. McCorkle, 550 F.2d 903 (3d Cir.), *cert. denied*, 434 U.S. 827 (1977). For other cases employing the *Hicks* rationale in similar fashion, see Government of Virgin Islands v. 19.623 Acres of Land, 536 F.2d 566 (3d Cir. 1976); Americans United for the Separation of Church and State v. Blanton, 433 F. Supp. 97 (M.D. Tenn.), *aff'd mem.*, 434 U.S. 803 (1977). For additional citations on the same point, see Note, *Summary Affirmances, supra* note 125, at 124-25.

134. In Sidle v. Majors, 536 F.2d 1156 (7th Cir.), *cert. denied*, 429 U.S. 945 (1976), the court refused to consider the constitutionality of a state guest-passenger statute. Although the court expressed the view that substantial constitutional issues were presented, it felt precluded from addressing them because of the prior summary dismissal of similar claims in Cannon v. Oviatt, 419 U.S. 810 (1974). For cases reaching similar results due to the preclusive effect of prior summary decisions, see Whitlow v. Hodges, 539 F.2d 582 (6th Cir.), *cert. denied*, 429 U.S. 1029 (1976); Hogge v. Johnson, 526 F.2d 833 (4th Cir. 1975), *cert. denied*, 428 U.S. 913 (1976); Archibald v. Whaland, 418 F. Supp. 991 (D.N.H. 1976), *rev'd on other grounds*, 555 F.2d 1061 (1st Cir. 1977).

135. In this regard, Justice Brennan has observed: "[I]t is a consequence that must bode ill for developing constitutional jurisprudence. If significant constitutional issues are to be decided summarily without any briefing or oral argument, and with only momentary and offhanded Conference discussion, and if these summary dispositions nevertheless bind the courts of the 50 States and all lower federal courts, respect for our constitutional decisionmaking must inevitably be impaired." Sidle v. Majors, 429 U.S. 945, 948 (Brennan, J., dissenting).

scious of the admonitory language in *Hicks*, some courts have tended to regard summary dispositions as conclusive on issues which in fact may not have been considered. In *Evans v. Buchanan*,[136] a case involving the desegregation of the Delaware public schools, the district judge found eight separate constitutional violations and fashioned an interdistrict desegregation remedy, which was summarily affirmed by the Supreme Court.[137] On remand to the Third Circuit, the controversy focused on which of the eight violations had been affirmed on appeal. Regarding the matter as precluded by the *Hicks* rule, the court simply assumed that the Supreme Court's summary action had embraced all eight findings. The court asserted that steps to divine the precise grounds of the Court's decision "would become a highly speculative exercise, if indeed, this court has the power to attempt a modification of the Supreme Court's judgment."[138]

3. *Qualification of the* Hicks *rule:* Mandel v. Bradley

Despite misgivings reflected in various dissenting opinions over the principle enunciated in *Hicks*,[139] the Court continued to apply that precedent without substantial qualification.[140] A departure came with *Mandel v. Bradley*,[141] wherein the Court articulated important limitations on the precedential value of summary dispositions. Appellant Bradley, an independent Maryland candidate for the United States Senate, had challenged the Maryland statute governing access to the ballot. The statutory procedure requires an individual to submit petitions signed by three per cent of the state's registered voters at least seventy days in advance of the date on which party primaries are to be

136. 393 F. Supp. 428 (D. Del.), *aff'd mem.*, 423 U.S. 963 (1975).

137. Buchanan v. Evans, 423 U.S. 963 (1975).

138. Evans v. Buchanan, 555 F.2d 373, 377 (3d Cir. 1977).

139. Although Justice Brennan has voiced the most vigorous criticism of summary dispositions, his views are shared by other members of the Court. See, for example, Justice Rehnquist's dissent in Buchanan v. Evans: "My dissent from that sort of affirmance here is based on my conviction that it is extraordinarily slipshod judicial procedure as well as my conviction that it is incorrect." 423 U.S. at 975 (Rehnquist, J., dissenting, joined by Burger, C.J. & Powell, J.).

140. *See, e.g.*, Tully v. Griffin, Inc., 429 U.S. 68 (1976); McCarthy v. Philadelphia Civil Serv. Comm'n, 424 U.S. 645 (1976). It should be noted that in *Tully*, the majority opinion endorsed the passing statement of Justice Rehnquist in Edelman v. Jordan, 415 U.S. 651 (1974), that insofar as they bind the Supreme Court, summary dispositions "are not of the same precedential value as would be an opinion of this Court treating the question on the merits." *Id.* at 671. In light of the relative impotence of *stare decisis* in constitutional adjudication, however, *see, e.g.*, United States v. Maine, 420 U.S. 515 (1975), the *Edelman* qualification seems to lose much of its significance.

141. 432 U.S. 173 (1977).

held. After the State Administrative Board of Elections had determined that Bradley had failed to provide the requisite signatures, he pressed his claim before a three-judge district court, contending that the Maryland law imposed unconstitutional burdens on his associational and voting rights under the First and Fourteenth Amendments. Relying upon a summary affirmance in *Tucker v. Salera*,[142] which struck down certain Pennsylvania ballotting procedures as applied to independents, the court held for Bradley.

On appeal, the Supreme Court vacated the judgment and remanded for further consideration.[143] In a *per curiam* opinion, the Court explained that the lower court's reliance on *Tucker* had been misplaced. The Pennsylvania statute in *Tucker* contained both an early filing deadline and a brief period during which the candidate could garner voter signatures. These differences were significant enough to distinguish *Tucker*, and the Court admonished the three-judge panel that the precedential significance of any summary disposition "is to be assessed in the light of all of the facts of that case."[144] Adopting a statement of Chief Justice Burger in *Fusari v. Steinberg*,[145] the *Mandel* Court stated that "a summary affirmance is an affirmance of the judgment only" and not necessarily a ratification of the reasoning underlying that judgment.[146] The Court then placed a major modification on the scope of *Hicks*:

> Summary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. They do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions. . . . Summary actions, however, . . . should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved.[147]

In his concurring opinion, Justice Brennan perceived a more significant erosion of the *Hicks* doctrine:

> After today, judges of the state and federal systems are on notice that, before deciding a case on the authority of a summary disposition by this Court in another case, they must (a) examine the jurisdictional statement in the earlier case to be certain that the

142. 424 U.S. 959 (1976).
143. 432 U.S. at 179.
144. *Id.* at 177.
145. 419 U.S. 379, 391 (1975) (Burger, C.J., concurring).
146. 432 U.S. at 176.
147. *Id.*

> constitutional questions presented were the same and, if they were, (b) determine that the judgment in fact rests upon decision of those questions and not even arguably upon some alternative nonconstitutional ground. The judgment should not be interpreted as deciding the constitutional questions unless no other construction of the disposition is plausible. In other words, after today, "appropriate, but not necessarily conclusive, weight" is to be given this Court's summary dispositions.[148]

It is difficult to assess the precise impact of *Mandel* on the precedential role of summary dispositions. In many respects, *Mandel* is not a significant departure, for it merely underscores the limiting language of Justice White's footnote in *Hicks*.[149] At the same time, *Mandel* is not an unqualified endorsement of *Hicks*, for it reflects the Court's growing disenchantment with the effects of summary dispositions. Lower courts have been instructed to establish factual and legal parallels between cases *sub judice* and prior summary dispositions before applying the latter as controlling authority. More significantly, *Mandel* cautions state and federal judges against assuming too readily that summary actions have broken "new ground;" such decisions should be interpreted as "applying principles established by prior decisions to the particular facts involved."[150]

Recent cases suggest that *Mandel* may have diminished some of the difficulties associated with *Hicks*, especially the foreclosure of debate on important constitutional issues among lower courts. In *State v. Saunders*,[151] the New Jersey Supreme Court sustained an attack on the New Jersey fornication statute as an infringement of the constitutional right of privacy. Although the court drew heavily upon mainstream privacy decisions,[152] it did not overlook the summary disposition in *Doe v. Commonwealth's Attorney*,[153] which presumably upheld the Virginia sodomy statute as applied to sexual conduct among consenting adults. Following the direction in *Mandel*, the court noted that "[W]e are not inclined to read this controversial decision [*Doe*] too

148. *Id.* at 180 (Brennan, J., concurring).

149. *See* notes 123-24 and accompanying text *supra*.

150. 432 U.S. at 176. Prior to *Mandel*, some lower courts had devised theories for alleviating the rigors of a strict application of *Hicks*. B & P Dev. v. Walker, 420 F. Supp. 704 (W.D. Pa. 1976), set forth two possible situations in which a lower court might feel free to disregard a summary disposition: (i) significant factual differences between the two cases involved; and (ii) apparent doctrinal changes in subsequent opinions of the Court. *Id.* at 707-08.

151. 75 N.J. 200, 381 A.2d 333 (1977).

152. *E.g.*, Carey v. Population Serv. Int'l., 431 U.S. 678 (1977); Griswold v. Connecticut, 381 U.S. 479 (1965).

153. 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd*, 425 U.S. 901 (1976).

broadly."[154] Thus, for courts willing to take strides in advancing the development of constitutional law, *Hicks* no longer compels the blind acceptance of summary dispositions as conclusive authority.[155]

III. Should Obligatory Jurisdiction Be Retained?

Current proposals to eliminate the mandatory jurisdiction of the Supreme Court inevitably stem from a concern over the Court's current workload. Sometimes advanced only as a corollary to suggestions for more drastic structural alterations,[156] the argument for eliminating obligatory review ultimately rests on the assumption that such a change will resolve the problems engendered by an overcrowded calendar and that any justification for preserving review by appeal must be weighed against the consequences of that caseload.[157] But any forthright ap-

154. 75 N.J. at 207, 381 A.2d at 341.

155. The New Jersey Supreme Court took a similar view of a prior summary disposition in K.S.B. Technical Sales Corp. v. North Jersey Dist. Water Supply Comm'n, 75 N.J. 272, 381 A.2d 774 (1977). Other courts have also detected the shift of emphasis embodied in *Mandel*. In Drumright v. Padzieski, 436 F. Supp. 310 (E.D. Mich. 1977), the court observed that "[s]ummary affirmances should be narrowly limited to the issues in their jurisdictional statements." *Id.* at 316. For other preliminary indications of the flexibility that *Mandel* has introduced into the rule of *Hicks v. Miranda*, see Pollard v. Cockrell, 578 F.2d 1002, 1010-11 (5th Cir. 1978); Plante v. Gonzalez, 575 F.2d 1119, 1125-26 (5th Cir. 1978); Bangor & A.R.R. v. ICC, 574 F.2d 1096, 1104 (1st Cir. 1978); Moritt v. Governor of New York, 42 N.Y.2d 347, 352-53, 366 N.E.2d 1285, 1288, 397 N.Y.S.2d 929, 932 (1977) (Fuchsberg, J., dissenting).

156. *See, e.g.*, Freund Study Group, *supra* note 7, at 36-37.

157. At the root of many of the more sweeping proposals for Supreme Court reform (such as creation of an additional judicial tier between lower tribunals and the Court or taking from the Court some of its major categories of jurisdiction) is the assumption that the Court's caseload will continue to burgeon as the population and economy expand. *E.g.*, Freund Study Group, *supra* note 7, at 3. In a statistical study of the subject, Professors Casper and Posner have demonstrated that the foregoing characterization of the Court's caseload may be inaccurate. Focusing on the trend between the October, 1957, and October, 1971, Terms, the authors attributed the rise in cases filed to the Court's substantive and procedural rulings, not to advances in population or national income. Casper & Posner, *A Study of the Supreme Court's Caseload*, 3 J. LEGAL STUDIES 339, 360 (1974) [hereinafter cited as Casper & Posner, *1957-1971 Terms*]. Moreover, the authors predicted a long term diminution in the Court's caseload. They reasoned that the value of seeking review is partly a function of the probability of obtaining it. Consequently, "as that probability declines over time due to increases in the number of cases filed coupled with the Court's inability to increase significantly the number of cases that it accepts for review, the value of seeking review will fall, and, other things being equal, the number of cases should decline." *Id.* at 361. In light of these observations, the authors saw no justification for radical alterations of the Court's jurisdiction.

Updating their original study in 1977, Professors Casper and Posner noted that there had indeed been no growth in the number of annual filings between the 1974 and 1976 Terms. Casper & Posner, *The Caseload of the Supreme Court: 1975 and 1976 Terms*, 1977 SUP. CT. REV. 87, 95 [hereinafter cited as Casper & Posner, *1975 & 1976 Terms*]. The two scholars were reluctant to generalize, but they did speculate that this leveling off stemmed

praisal of obligatory review must be divorced from the temporal dimension for two reasons. In the first instance, an end to compulsory appeals will probably have no appreciable effect on the volume of papers filed with the Court each term. The litigious client who goes to the expense of having his attorney prepare a tenuous jurisdictional statement in a last-ditch effort to avoid an adverse judgment will not be deterred in his attempt to secure Supreme Court review simply because the only available procedure is certiorari. Because the Court presumably does read each petition received, the burden of sifting through colorless requests will remain. Although others have ignored this aspect, the proponents of Senate bill 3100 do recognize the bill's minimal effect on the Court's caseload.[158]

Secondly and more importantly, an innovation in the jurisdictional framework motivated solely by the heavy volume of cases reaching the Court could obscure the significant congressional policies reflected in jurisdictional legislation. If one is willing to accept that the Supreme Court will probably never be capable of hearing all of the cases it should, uniform discretionary review would be an effective stopgap measure, at least for eradicating the problems created by *Hicks v. Miranda*.[159] Viewing the matter from this perspective, there would be little difficulty in dismissing the current statutory regime as an incoherent patchwork of efforts to deal with the Court's workload instituted at various points in history. And respectable authority may be relied upon for doing so.[160] However, if one believes that the present burden on the Court can be eased and that the change will come at other points in the judicial system, then the near-term benefits of discarding mandatory review are of only secondary importance, if not irrelevant.

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from a balancing of factors such as termination of litigation related to the Vietnam War and the establishment of precedent in areas such as elections. *Id.* at 97. Although this represented but a brief trend, the authors still found "no evidence of a worsening crisis requiring precipitate measures." *Id.*

The Casper and Posner studies put the Court's caseload into perspective, but they do not detract from the thrust of measures such as S. 3100. Although the authors forecast no long range caseload expansion, they have not disputed the fact that the Court's existing burden is onerous. Casper & Posner, *1957-1971 Terms* 362; Casper & Posner, *1975 & 1976 Terms* 97. Additionally, the conclusions in these studies do not bear on the problems posed by *Hicks v. Miranda*, *see* notes 126-38 and accompanying text *supra*, nor are they helpful in resolving the question of whether the continuation of mandatory review would really foster important policies.

158. 124 CONG. REC. S7748 (daily ed. May 18, 1978) (statement of Senator DeConcini); *DeConcini Committee Hearings*, *supra* note 12, at 10 (statement of Assistant Attorney General Meador); *id.* at 22 (statement of Eugene Gressman).

159. 422 U.S. 332 (1975). *See* notes 126-38 and accompanying text *supra*.

160. FRANKFURTER & LANDIS, *supra* note 7, at 42.

The advisability of retaining appeal as of right must be viewed apart from the problem of docket congestion and against the backdrop of the policies which undergird compulsory review in our appellate process. The remainder of this article is devoted to a discussion of those policies and to an analysis of possible objections to abandoning obligatory jurisdiction.

A. Vesting "Trust" in State Courts

As was previously demonstrated,[161] the 1925 Court probably seemed as ominously overburdened to the sixty-eighth Congress as today's Court appears to the sponsors of Senate bill 3100.[162] The resulting legislative palliative was motivated principally by a desire for more expeditious and authoritative Supreme Court review. The legislative history of the Judges' Bill suggests, however, that the measure may have been more than a unitary response. Although obligatory jurisdiction, through the writ of error, had been transplanted into our jurisprudence for reasons unrelated to the propriety of discretionary review,[163] Congress began utilizing mandatory jurisdiction as an instrument for singling out those cases which required a decision by the highest tribunal. The discussions in the period immediately prior to adoption of the 1925 Act in its final form indicate that Congress did not delete certain classes of cases from the appeal category merely for reasons of expediency without reflecting upon the types of cases remaining in the mandatory classification. Rather, the final form of the Judges' Bill suggests that Congress focused upon all cases then reviewable by appeal and determined that important values were perpetuated by the lines which were ultimately drawn between mandatory and discretionary review.

It will be recalled that Chief Justice Taft defended the initial draft of the 1925 Act with the questionable proposition that when presented with a choice between local and national interests, a federal court would be more likely to preserve the federal view than would a state court.[164] The Senate disregarded this argument and amended the law to provide for writs of error to a court of appeals which invalidates a state statute.[165] It is often hazardous to infer legislative intent from the

161. *See* notes 61-81 and accompanying text *supra*.

162. Although the 1925 Court was faced with barely half the caseload of today, that Court had not yet instituted the jurisdictional statement as a screening device.

163. *See* notes 20-24 and accompanying text *supra*.

164. *See* note 78 and accompanying text *supra*.

165. *See* notes 77-79 and accompanying text *supra*.

refinements and modifications of a bill as it winds its way through the legislature. Yet, these changes by the Senate indicate that the framers of the Judges' Bill were not willing to trust state judiciaries to the extent of relinquishing mandatory review of cases in which a state statute is sustained against federal attack or in which a state tribunal invalidates federal law. Similarly, the Senate could not accept the Chief Justice's argument that, as between state and federal courts, the latter would more predictably arrive at results which achieve a proper accommodation of federal and state interests. When either court is presented with challenges to the laws of the other sovereignty, neither could be fully trusted to the extent of making its decisions final with review only by leave of the Supreme Court.

Senate bill 3100 would remove both of these categories from the Court's obligatory jurisdiction. The bill's sponsors and others of a similar view contend that the implicit distrust of state courts manifested in the 1925 Act no longer supports the appeal/certiorari distinction. This position is typified by a recent Department of Justice Report:

> Nor is there sufficient reason to require the Supreme Court to review on the merits all cases in which the highest court of a state invalidates a federal law or upholds a state statute in the face of a federal constitutional attack. Mandatory Supreme Court review in these circumstances implies that we cannot rely on state courts to reach the proper result in such cases. This residue of implicit distrust has no place in our federal system. State judges, like federal judges, are charged with upholding the federal constitution.[166]

The interaction between the state and federal governments today may produce fewer clashes than in earlier, more sectionally divisive years. Yet, one commentator has observed that current decisions of the Supreme Court indicate that it is not convinced that the present accommodation between federal and state interests warrants relinquishing special controls.[167] It has been argued that in the federal sector, the renewed enthusiasm for the doctrine of *Younger v. Harris*[168] suggests a view on the Court that federal judges still do not show a proper respect for state interests before intervening in state proceedings. Moreover,

166. DEPARTMENT OF JUSTICE COMMITTEE ON REVISION OF THE FEDERAL JUDICIAL SYSTEM, THE NEEDS OF THE FEDERAL COURTS 13 (1977). *See also DeConcini Committee Hearings, supra* note 12, at 21 (statement of Eugene Gressman).

167. Tushnet, *The Mandatory Jurisdiction of the Supreme Court—Some Recent Developments*, 46 U. CIN. L. REV. 347, 354-56 (1977).

168. 401 U.S. 37 (1971). "[A] federal court must not, save in exceptional and extremely limited circumstances, intervene by way of either injunction or declaration in an existing state criminal prosecution. Such circumstances exist only when there is a threat of irreparable injury 'both great and immediate.'" (footnote omitted). *Id.* at 56.

Oregon v. Hass[169] is said to show that the Court will carefully scrutinize a state court decision when it believes that the state tribunal is not according sufficient weight to current interpretations of the Constitution.[170]

Activity in a separate but not unrelated area of federal law is also claimed to cast doubt on the propriety of placing greater trust in the states through uniform discretionary review. The majority position today seems to be that local prejudices, against which federal diversity jurisdiction was designed to protect the non-resident litigant, no longer exist; even if they do, diversity jurisdiction is still an ill-conceived safeguard.[171] But even the limited curtailment of diversity jurisdiction suggested by the American Law Institute generated a vigorous reply from distinguished quarters that the prospect of local prejudice was significant enough to counsel retention of diversity jurisdiction in its present form.[172] Justice Jackson once remarked that the two most critical federal intrusions on state sovereignty contained in the Judiciary Act of 1789 were review of state court decisions by the Supreme Court and diversity jurisdiction.[173] This suggests a possible institutional interrelation between the two controls, and perhaps any decision to constrict one of these inroads should be made only upon considering the impact on the other. If substantial doubt still exists that the states can be trusted to the extent of abolishing diversity jurisdiction, Congress might well reflect on whether it should manifest a similar trust by making Supreme Court review of state cases permissive. Even if diversity should be done away with, it may be argued that it is undesirable to place a trust in the states at two points in the federal system by abolishing mandatory Supreme Court review.

The preceding discussion of whether the states may be trusted to the extent of converting the present categories of obligatory appeal into review by certiorari is derived from arguments which are disingenuous at best. If there is a valid concern that a state judge will not abide by his oath to enforce the Constitution, the availability of certiorari would provide an adequate safeguard against serious federal/state collisions.

169. 420 U.S. 714 (1975). Ironically, the state court in *Hass* was balking at application of the Court's more restricted version of the *Miranda* rule.

170. Tushnet, *supra* note 167, at 355.

171. Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 L. & CONTEMP. PROB. 216, 234-40 (1948).

172. For authorities opposing and supporting the A.L.I. proposals, see Shapiro, *Federal Diversity Jurisdiction: A Survey and A Proposal*, 91 HARV. L. REV. 317, 318 n.8 (1977).

173. R. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 33 (1957).

The apparent subversion of federal law by a state court would certainly be an element in the Court's judgment in granting or denying certiorari. In support of this position, two scholars have concluded:

> By completely eliminating the right of appeal, it may be thought that civil rights would be imperilled, particularly where the state court has denied the federal claim and sustained the state statute. But the Supreme Court has been particularly watchful where civil rights have been involved, and it can be relied on in these situations, as in all others, to review cases that are worthy of its consideration. If the ranking Court can be trusted to decide cases—to establish the supreme law of the land, it can surely be trusted to determine what cases it should decide.[174]

This type of statement has become a stock response to the argument that mandatory jurisdiction should exist for the disposition of important classes of cases.[175] Perhaps the proponents of this thesis should heed the admonition of one federal judge that "[t]he constitutionality of [a] procedure should not rest on the dubious assumption that discretion will always be exercised as the Constitution demands."[176] But it does seem reasonable to assume that any case significant enough to claim an obligatory appeal would fulfill the criteria set out in Rule 19 for discretionary review.

The hypothesis that the *Younger* line of "abstention" cases and *Oregon v. Hass* demonstrate a belief on the Court that there has not been an accomodation of federal and state interests sufficient to abandon special controls is also unpersuasive. The Court has actually manifested a willingness to give state judiciaries a freer hand in the development of constitutional principles.[177] In a recent opinion, Justice Powell specifically addressed the issue of placing trust in state judges:

> Despite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of some state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States. State

174. Moore & Vestal, *supra* note 90, at 45.

175. Freund Study Group, *supra* note 7, at 37; Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1, 74 (1964); Note, *The Insubstantial Federal Question, supra* note 84, at 494.

176. Minichiello v. Rosenberg, 410 F.2d 106, 122 (2d Cir.), *cert. denied*, 396 U.S. 844 (1969) (Anderson, J., dissenting).

177. With the tendency of the current Court to foreclose federal remedies, this trust vested in state courts assumes critical importance. As Justice Brennan has stated: "With the federal locus of our double protections weakened, our liberties cannot survive if the states betray the trust the Court has put in them. . . . With federal scrutiny diminished, state courts must respond by increasing their own." Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977).

courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law.[178]

Senate bill 3100 is consistent with Justice Powell's observations and accurately reflects the current accommodation of state and federal interests. By eliminating the mandatory Supreme Court review of state cases raising federal issues, Senate bill 3100 vests a degree of trust in state courts which properly discounts any lingering misgivings about the fidelity of state jurists to the principles of the supremacy clause. Moreover, Senate bill 3100 comports with the scheme of federalism contemplated by the Constitution. In view of the fact that the Constitution does not mandate the establishment of lower federal courts, it is clear that the framers anticipated that most, if not all, federal questions would be initially litigated in state tribunals with ultimate review by the Supreme Court.[179] Therefore, state judiciaries were envisioned as the primary guarantors of constitutional rights.[180] Senate bill 3100 complements this principle by mitigating the lack of trust which inheres in the concept of compulsory review.

B. "Trusting" the Supreme Court.

It has been posited by one writer that the line of reasoning pointing to the total elimination of appeal as of right depreciates important aspects of separation of powers.[181] The wholesale substitution of discretionary review would invest sole authority in the Court for deciding which classes of cases are worthy of its attention. Under its current exercise of certiorari jurisdiction, the Court is making distinctions based upon importance only as to *individual* cases; completely turning over to the Court the task of identifying important *classes* of cases for its review may be an impermissible surrender of a legislative prerogative. The current range of mandatory appeals is based primarily upon cases involving the invalidation of state and federal legislation. Implementation of universal discretionary review would allow the Court to distinguish among statutes on the basis of that tribunal's notions of national significance. This may put the Court in the position of making essentially political judgments and is an area in which lines drawn by Congress may be more acceptable than those drawn by judges.[182]

178. Stone v. Powell, 428 U.S. 465, 494 n.35 (1976).

179. This is also borne out by the fact that Congress did not confer general federal question jurisdiction on the lower federal courts until the latter part of the nineteenth century. *See* note 47 *supra*.

180. HART & WECHSLER, *supra* note 15, at 359-60.

181. Tushnet, *supra* note 167, at 358-65.

182. *Id.*

Senate bill 3100 and other broadly based proposals calling for the total abandonment of mandatory jurisdiction either discount or completely ignore these "separation of powers" objections. In defense of the reformists' position, however, the preceding "separation of powers" considerations are probably more supposed than real. In any dispute over the Supreme Court's appellate jurisdiction, Congress, under the exceptions and regulations clause, will have the final word. In recent years, the constitutional debate has centered upon how far Congress may go in controlling the Supreme Court by putting certain types of cases beyond its purview. Most proposals of this stripe collapsed under intense political resistance, and the constitutional power of Congress to regulate the Court remains somewhat uncertain.[183] Undoubtedly, there are limits to the exceptions and regulations clause at both ends of the spectrum, but the shift from obligatory to discretionary review does not appear to be an abdication of congressional power.[184] There may be practical objections to making all Supreme Court review optional, for if the Court exercises permissive review in a manner that proves undesirable, legislative inertia may make it difficult for Congress to undo what it has done. However, this practical observation hardly rises to the stature of a constitutional prohibition.

Any defense or condemnation of obligatory jurisdiction ultimately reveals its exponent's conception of the role of the Supreme Court in our system of government, and the putative separation of powers argument essentially expresses an unwillingness to place complete trust in the Court as an institution. If this distrust stems from a deep-seated concern over the frailties of human-designed institutions, it is an objection not easily answered. On this level of analysis, ultimate reliance must be placed on "a judiciary of high competence and character and the constant play of an informed professional critique upon its work"[185] to insure the proper functioning of a standard under which the jurist must exercise discretion. On the other hand, if these misgivings have a limited basis and grow only out of the notion that a congressional directive is needed to restrain the Court, a sufficient reply seems available. Professor Wechsler has insisted that the courts do not

183. HART & WECHSLER, *supra* note 15, at 360-65.

184. The drafters of S. 3100 have kept this proposition firmly in view: "In establishing the Court's appellate jurisdiction under Article III, Congress can confer as much or as little compulsory jurisdiction as it deems necessary and proper, including such exceptions as Congress thinks appropriate. If Congress wants to make the Court's appellate jurisdiction totally discretionary or totally obligatory in nature, nothing in the Constitution says 'no.'" 1978 SENATE REPORT, *supra* note 11, at 3 (citation omitted).

185. Universal Camera Corp. v. NLRB, 340 U.S. 474, 489 (1951).

have a "discretion to abstain or intervene when constitutional infringements are established in cases properly before them in the course of litigation."[186] If this judicial duty is embedded in the Constitution, then it should not necessitate legislative action to ensure its observance.

As a practical matter, perhaps Congress should employ obligatory review to correlate the constitutional duty of the Court more fully with the types of cases which are coming before it.[187] In this connection, it might be useful to consider one scholar's reservations about the reach of the Judges' Bill. Although Justice (then Professor) Frankfurter favored the increased use of certiorari, he was not entirely convinced that writ of error should not lie when a federal court declares a federal statute unconstitutional. If the variety of cases now contained in section 1257 is seen as critical enough to require compulsory review, the justice's remarks are particularly appropriate:

> To be sure, there is little likelihood that the Supreme Court would withhold permissive review of a case in which a circuit court of appeals invalidated an act of Congress. But a scientifically framed judicial code ought to give formal as well as practical expression to the governing ideas of a judicial system. If the invalidation of an act of Congress by a lower federal court is, as a matter of fact, one of the clearest cases for invoking the judgment of the Supreme Court, the opportunity for review should be explicit and not left to discretion.[188]

In light of the foregoing, it seems clear that Congress, through Senate bill 3100, has outlined the appropriate role for the Supreme Court in reviewing state decisions raising federal issues. Replacing appeals as of right with discretionary review is not an abdication of congressional power under the exceptions and regulations clause, but rather expresses a sound interpretation of the Supreme Court's obligations under the supremacy clause.

C. The Problem of Summary Dispositions

The most serious objection to retaining obligatory review stems from the inevitable resort by the Court to summary dispositions and the precedential weight accorded such treatment of appeals. The difficulties created by the rule in *Hicks v. Miranda*[189] are a principal target of Senate bill 3100. The elimination of mandatory jurisdiction would

186. Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1011 (1965).

187. *See* Henkin, *Foreword: On Drawing Lines*, 82 HARV. L. REV. 63, 89 n.89 (1968); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 10 (1959); Shanks, Book Review, 84 HARV. L. REV. 256, 258 n.17 (1970).

188. FRANKFURTER & LANDIS, *supra* note 7, at 286.

189. 422 U.S. 332 (1975). *See* notes 126-38 and accompanying text *supra*.

reduce the inflexibility that *Hicks* introduced into the process of interpreting Supreme Court decisions. All summary dispositions would have only the effect of a denial of certiorari which "carries with it no implication whatever regarding the Court's views on the merits."[190] State and lower federal judges would not be compelled under the Supremacy clause to adhere to precedents, the reasoning of which cannot be ascertained.

Even in this context, however, the abolition of the right of appeal would have a questionable impact. Much of the opposition to *Hicks* as the inevitable consequence of obligatory review grows out of the ambiguity that that rule produces in the law. But it is difficult to accept the proposition that equating summary dispositions with denials of certiorari will impart greater certainty. Denials of certiorari are rarely accompanied by explanatory remarks. Dissents from such refusals may cast some light on the reasons for the Court's disposition, but since Justice Douglas' retirement, the volume of these dissenting opinions has steadily decreased. Nor would making all review permissive reduce the stimulus for relitigating unresolved issues; summary dispositions with no binding effect might even foster more litigation. The certiorari process encompasses a wide range of variables, for Rule 19 is only a nonexclusive list of factors drawn upon by the Court. As Justice Harlan noted, "[I]f a lawyer cannot assess with some degree of confidence the imponderables involved it is quite understandable that he should conceive it to be his duty to try for certiorari."[191]

On a more elevated plane of analysis, the emphasis on certainty may be misplaced, for similarly to the one-dimensional concern for caseload, it minimizes the overriding policies reflected in obligatory review. Even with cases receiving plenary consideration which result in opinions absorbing several hundred pages of the *United States Reports*, it is sometimes difficult to divine just what the Court held.[192] This observation is certainly no argument for promoting needless legal complexities, for while the vagaries in the law may intrigue the academician, they often frustrate the practitioner trying to advise a client. But the fact that the judicial process inevitably results in a certain

190. Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 919 (1950).

191. Harlan, *Manning the Dikes*, 13 RECORD OF N.Y.C.B.A. 541, 549 (1958). *See also* Prettyman, *Petitioning the Supreme Court—A Primer for Hopeful Neophytes*, 51 VA. L. REV. 582, 583 (1965).

192. *See* Buckley v. Valeo, 424 U.S. 1 (1976) (*per curiam*; five separate opinions); New York Times v. United States, 403 U.S. 713 (1971) (*per curiam*; six concurring and three dissenting opinions).

lack of clarity indicates that the interest in certainty should not be the sole determinant in the debate over obligatory review.

The advantages of repealing mandatory jurisdiction in terms of the resulting certainty in the law are unclear. If important values are perpetuated by the retention of obligatory review, the specific problem posed by *Hicks* could be remedied by less drastic means. *Mandel* is an indication that the Court has already gravitated to a position which accords summary dispositions less precedential weight than full opinions, even with respect to their binding effect on lower courts.[193] This theory of limited precedential effect may prove difficult to administer without destroying the significance of mandatory jurisdiction, but if obligatory review furthers important policies in our scheme of government, this approach is well worth investigating.

D. Should Any Form of Mandatory Jurisdiction Survive?

1. The present structure

In recent years, Congress has embarked on a program of constricting the scope of the Court's mandatory jurisdiction. In 1971, direct appeals from district court invalidations of federal indictments were discontinued.[194] In 1974, Congress repealed the requirement contained in the Expediting Act of immediate Supreme Court review of government antitrust cases.[195] That same year witnessed the elimination of three-judge review of certain Interstate Commerce Commission orders.[196] In 1976, Congress narrowed the requirement that challenges to state statutes be brought before three-judge district courts; these panels are now convened only in civil rights cases and cases involving congressional redistricting or state legislative reapportionment.[197] Despite these substantial excisions, Congress retained review by appeal for three-judge district court decisions.[198]

193. *See* notes 139-55 and accompanying text *supra*.

194. Omnibus Crime Control Act of 1970, Pub. L. No. 91-644, § 14, 84 Stat. 1890.

195. Antitrust Procedures and Penalties Act of 1974, Pub. L. No. 93-528, § 5, 88 Stat. 1709.

196. Act of Jan. 2, 1974, Pub. L. No. 93-584, 88 Stat. 1917.

197. Act of Aug. 12, 1976, Pub. L. No. 94-381, 90 Stat. 1119.

198. 28 U.S.C. § 1253 (1976). It should be noted that S. 3100 would also retain this category of obligatory appeals. 1978 SENATE REPORT, *supra* note 11, at 10-11. Preserving the mandatory review of three-judge panels is explicable on grounds quite distinguishable from the policies undergirding obligatory review of state court decisions. The three-judge procedure might be viewed as a necessary compromise: In certain types of cases Congress has decided to bypass the single-judge level and, as if in exchange, has guaranteed Supreme Court review. The three-judge court has come under increasing criticism and may no longer be justified. Yet if one is willing to accept this procedure in principle, mandatory Supreme

As a result of this legislative activity, the current principal categories of mandatory appeals include a fairly narrow range of cases: (i) cases in which a state court declares a federal statute unconstitutional or sustains a state law against a federal challenge;[199] (ii) cases in which a federal court of appeals invalidates a state law;[200] (iii) cases in which a federal court invalidates a federal statute where the United States is a party to the litigation;[201] (iv) orders by three-judge panels granting or denying injunctive relief;[202] and (v) certified questions from the federal courts of appeals and the Court of Claims.[203]

In view of the above discussion, it is doubtful that discretionary Supreme Court review of state cases would present genuine constitutional objections. The current statute apparently reflects, and its defenders operate under, assumptions about the degree of trust which should be vested in state courts and the Supreme Court which are probably no longer valid.[204] Indeed, these assumptions may not have been completely sound even in 1925. Whatever constraining influence mandatory review may have on a state judge would be difficult to test empirically. It is a rare occurrence for a state court to invalidate a federal statute or treaty.[205] Cases in which a state judge upholds a state law against a federal attack are more frequent, but the vast majority of state cases reaching the Supreme Court today arrive there by way of certiorari.[206] This evidence is at best ambiguous on the issue of how far state courts may be trusted, but it does suggest that certiorari would be adequate to the task of preserving the supremacy of federal law in cases in which federal and state provisions clash.

Even if misgivings as to the degree of trust that should be vested in state courts are serious enough to warrant the maintenance of obligatory jurisdiction, they do not justify preserving the existing statutory scheme. If these considerations require mandatory review, it makes little sense to differentiate between federal challenges to state legislative

Court review may well be irresistible. The absence of obligatory review of three-judge decisions would create a class of cases in which the losing party has no review as of right at all. With state cases raising federal issues, the unsuccessful party usually has access to at least one compulsory appeal in the state system.

199. 28 U.S.C. § 1257(1)-(2) (1976).

200. 28 U.S.C. § 1254(2) (1976).

201. 28 U.S.C. § 1252 (1976).

202. 28 U.S.C. § 1253 (1976).

203. 28 U.S.C. §§ 1254(3), 1255(2) (1976). For other extremely narrow and rarely invoked classifications of appeals, see note 14 *supra*.

204. *See* notes 162-88 and accompanying text *supra*.

205. STERN & GRESSMAN, *supra* note 103, at §§ 3.3-.4.

206. *Id.* at § 3.4.

action, where under section 1257(2) review is by appeal,[207] and those to state judicial or executive action, where certiorari is prescribed by section 1257(3).[208] This distinction assumes that a state supreme court is more receptive to local interests in cases dealing with a state statute than in cases involving state judicial or executive action. It might be argued that a statute tends to have broader reach than judicial or executive decisions and therefore presents a greater potential encroachment upon federal interests. Yet, if hostility to federal values is to be the touchstone of obligatory review in this field, this dichotomy is difficult to defend.[209]

This inconsistency is compounded by *Dahnke-Walker Milling Co. v. Bondurant*,[210] wherein the Court held that in terms of general importance, a federal challenge to the application of a state statute presented an issue as serious as an attack on the statute on its face. Accordingly, a case sustaining a state law as applied can be reviewed by appeal. Justice Brandeis' dissent warned that "the right to a review will depend, in large classes of cases, . . . upon the skill of counsel,"[211] and experience has borne this out.[212] If the difference between paragraphs (2) and (3) of section 1257 is not responsive to the issue of trust, the gloss contributed by *Dahnke-Walker* makes the distinction even more tenuous. *Dahnke-Walker* has been criticized as a "needless complexity,"[213] and if obligatory review of state decisions were to remain, this excrescence should be removed.[214]

Congress could undoubtedly revamp section 1257 to rid it of its internal inconsistencies and to remove the *Dahnke-Walker* complexity, but the question remains whether the existing scheme, if so modified, would really perpetuate important policies. Arguments based upon distrust of state judges and the Supreme Court do not seem valid, but perhaps mandatory jurisdiction fosters a desirable political objective. As was noted at the outset of this subsection,[215] obligatory jurisdiction has been pared down to a narrow range of situations which, save the certified question provisions and litigations to which the United States

207. 28 U.S.C. § 1257(2) (1976).

208. 28 U.S.C. § 1257(3) (1976).

209. Tushnet, *supra* note 167, at 353.

210. 257 U.S. 282 (1921).

211. *Id.* at 298 (Brandeis, J., dissenting).

212. *See* HART & WECHSLER, *supra* note 15, at 637.

213. *Judicial Improvement Hearings*, *supra* note 90, at 275-76 (statement of Paul A. Freund). *See also* FRANKFURTER & LANDIS, *supra* note 7, at 215.

214. The Supreme Court has reaffirmed *Dahnke-Walker* on similar facts. Allenberg Cotton Co. v. Pittman, 419 U.S. 20 (1974).

215. *See* notes 194-203 and accompanying text *supra*.

is a party, involve cases in which the legislation of one sovereignty is invalidated by the courts of another. When a federal judge overturns a state statute, he is confounding the will of the people as voiced by their representatives in the legislature. When a state judge upholds a state statute against a federal challenge or sets aside a federal law, he is placing the judgment of the local representative body above the collective wisdom of the nation as reflected in Congress. By now, it is beyond peradventure that judicial review, even though it may lead to examination of the acts of the political branches, is an integral component of the constitutional framework. Certiorari seems sufficient for policing excessive activism by state and lower federal judges. Yet, perhaps there is some symbolic value in Congress expressing, through mandatory jurisdiction, that this class of cases should not be left to Supreme Court review by chance, even though the likelihood of an actual denial of review in a truly important case would otherwise be remote. It may be worthwhile, from the standpoint of a rationally designed democratic system, that in situations in which the undemocratic branches are likely to have acted most undemocratically, the invocation of the highest tribunal's refereeing powers is guaranteed by law and is not a matter of discretion.

The costs of preserving this form of symbolism may be prohibitive, for it necessarily comes at the expense of perpetuating the current system of summary dispositions which operate as binding adjudications on the merits. The dilemma posed by *Hicks*[216] may have been mitigated by the qualifications in *Mandel*,[217] but the burden of administering such an uncertain rule would probably outweigh any symbolic value which the current system of obligatory review may embody. From this perspective, the proponents of Senate bill 3100 have the stronger argument.

2. Obligatory jurisdiction generally

In the final analysis, Senate bill 3100 is justifiable as a legitimate, temporary response to the problems created by mandatory review. This does not necessarily mean, however, that obligatory jurisdiction can serve no valid function in the appellate process. Congress might reflect upon whether compulsory jurisdiction can be reformulated to encompass a class of cases which are agreed to raise issues of a fundamental nature. Because the Bill of Rights, as written, interpreted and applied to the states under the Fourteenth Amendment, is meant to

216. *See* notes 126-38 and accompanying text *supra*.
217. *See* notes 141-55 and accompanying text *supra*.

restrain government as it affects individuals, perhaps cases which implicate these safeguards should form the core of a new obligatory jurisdiction. Considering the ease with which conventional common law actions are converted into constitutional claims, however, the task of drafting a sufficiently precise mandatory classification might prove nearly impossible. Indeed, even a narrow categorization would probably worsen the Court's workload, putting it on a footing similar to that in the 1925 Term when obligatory cases occupied eighty percent of the docket.[218]

Even if an acceptable compulsory classification were devised, the constitutional obligations of the Supreme Court and the availability of certiorari suggest that compulsory review of any sort may have no place in our federal system. Even with cases based upon the Bill of Rights, obligatory review would ultimately rest upon the same assumptions about the degree of trust which should be lodged in the Court—assumptions which this article has explored and discounted.[219] Nonetheless, Congress might well consider all the possibilities before definitively concluding that it can conceive of no class of cases significant enough to warrant Supreme Court review with only a minimal exercise of discretion.

Conclusion

The concept of obligatory review was imported into American practice through the writ of error for reasons entirely distinct from the question of whether or not the Supreme Court should have discretion in exercising its appellate jurisdiction over state courts.[220] In its early twentieth century efforts to curtail the Court's mandatory jurisdiction and to make its caseload more manageable, Congress utilized the right of appeal to designate classes of cases significant enough to warrant compulsory review.[221] In recent years, the Court's calendar has swollen, forcing that tribunal to infuse more discretion into the handling of appeals.[222] In addition, the rule in *Hicks v. Miranda*[223] has made summary dispositions binding,[224] and lower courts have encountered difficulty in determining the exact effect of such dispositions.[225] A repeal of mandatory review does not raise serious constitutional questions and is defensible as a temporary solution to the problems flowing from *Hicks*.

218. *See* note 62 and accompanying text *supra*.
219. *See* notes 181-88 and accompanying text *supra*.
220. *See* notes 20-24 and accompanying text *supra*.
221. *See* notes 53-54 and accompanying text *supra*.
222. *See* notes 1-2 & 88-109 and accompanying text *supra*.
223. 422 U.S. 322 (1975).
224. *See* notes 119-22 and accompanying text *supra*.
225. *See* notes 126-38 and accompanying text *supra*.

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THE JOHN RANDOLPH TUCKER LECTURE

HERBERT WECHSLER*

THE APPELLATE JURISDICTION OF THE SUPREME COURT: REFLECTIONS ON THE LAW AND THE LOGISTICS OF DIRECT REVIEW

I am honored by the invitation to present the John Randolph Tucker lecture for this year and grateful for the opportunity to join you as you dedicate this gracious building to the cause of law and legal education.

Those who have heard or read the Tucker lectures through the years need not be told they are held in high esteem, both for the tribute they express and for the contributions they have made. Since the inaugural in 1949 by John W. Davis, a son of Washington & Lee who was assuredly the greatest advocate of our century, your lecturers, including in their number friends whose memory we cherish, set a standard it is difficult to meet.

My subject, as you know, concerns the jurisdiction of our highest court, the tribunal that is certainly without an analogue throughout the world in the magnitude of its responsibilities, measured by the difficulty and importance of the issues it confronts, the finality of many of its most transforming judgments short of constitutional amendment, the number of judicial systems from which cases on its docket may derive and the complexity of the mixed legal system in the ordering of which it has the final voice.

The vehicle through which the Supreme Court discharges this responsibility is its appellate jurisdiction, which presents in our time two different but related types of challenge. The Court is vested, on the one hand, with the old authority to review state court judgments turning on the interpretation or the application of the Constitution, laws and treaties of the Nation. It is, secondly, the ultimate authority

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with respect to judgments of the "inferior" federal tribunals, the two-tiered system of District and Circuit Courts endowed with jurisdiction to enforce the ever-growing corpus of congressional enactments, to hold the federal government, including Congress, within the legal limits of its charters and (subject to complex standards governing the timing and appropriateness of its intervention) to afford redress against the state officialdom when it has infringed or, in some cases, threatens to infringe rights guaranteed by the supreme law.

On the face of things, this dual task recalls what Dr. Johnson said about a very different matter: "it is like a dog walking on its hind legs. It is not done well; but you are surprised to find it done at all." If this sounds like irreverence, I assure you that it is not so intended. I mean only to express in the most graphic terms my sense for the enormous difficulties of the role in our polity and legal system that we have accorded to the highest court. It is, indeed, precisely that abiding sense that leads me to invite you to reflect on the establishment and growth of the appellate jurisdiction, on some major issues posed in the delineation of its scope and, finally, on the question whether current problems of logistics (to conscript a military term that has the overtones I seek) make a case for legislative action.

I

Establishment and Growth

The jurisdiction as it stands derives from almost two centuries of controversy, growth and change. The main elements in that development may profitably be recalled.

It will be well to start at the beginning. The Constitution, as you know, provides in Article III that "the judicial power of the United States" shall be vested in "one supreme court" and "such inferior courts as the Congress may from time to time ordain and establish." It then lists nine categories of "cases" and "controversies" to which "the judicial power shall extend," including most importantly "all cases, in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." In two of the nine categories of cases, it provides that the Supreme Court shall have "original jurisdiction." In all the others it is said that "the supreme court shall have appellate jurisdiction, both as to Law and Fact, which such exceptions and under such Regulations as the Congress shall make." This is, with minor additions, the full text that has generated over time the court structure and enormous jurisdiction we now know.

The agent of this creation was, of course, the Congress, which, starting in 1789, properly considered that, apart from the mandate

to establish a supreme court vested with the two categories of original jurisdiction, the Constitution posed questions of legislative policy as to whether courts "inferior" to the supreme court should be established and, if so, how much of the possible range of the federal judicial power should be encompassed in their jurisdiction, what "exceptions" should be made to the appellate jurisdiction of the supreme court and what "regulations" on its exercise imposed.

The first Judiciary Act took up the option to establish lower courts but vested them with narrow jurisdiction, not including any general competence in cases arising under federal law. The choice was rather to leave such litigation for the most part to the state judiciaries, subject under famous section 25 to review and reversal by the supreme court of a final judgment of the highest state tribunal having jurisdiction to decide if, but only if, such judgment wrongly held invalid a treaty or an Act of Congress or other national authority, wrongly sustained a state statute or authority against a federal claim of invalidity, or more generally, construed federal law or a federal commission so as to hold against a right asserted thereunder, provided that the error assigned appeared on the face of the record and "immediately" involved one of the enumerated federal rulings.

The net of this was that neither the jurisdiction of the lower courts nor that of the highest court, nor both in combination, came close to encompassing the full extent of the judicial power described in the Constitution. The deficiency was promptly challenged in the courts and the challenge no less promptly held unfounded. As to the lower courts, the Supreme Court said in 1799: "Congress is not bound to enlarge the jurisdiction of the Federal courts to every subject, in every form which the Constitution might warrant."[1] As to the Supreme Court, the affirmative delineation of the scope of jurisdiction in the Judiciary Act was read to negative by implication all jurisdiction not conferred, and thus to exercise *pro tanto* the power explicitly conferred on Congress to make exceptions to and regulate the Court's appellate jurisdiction.[2] These conclusions were foreshadowed by Hamilton's exposition of the judiciary article in Nos. 81 and 82 of *The Federalist* and reflect the Framers' premises and purposes as since revealed by Madison's notes on the proceedings of the Convention.[3]

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[1] Turner v. Bank of North America, 4 U.S. (4 Dall.) 8, 10 (1799).

[2] Durousseau v. United States, 10 U.S. (6 Cranch) 307 (1810); Wiscart v. Dauchy, 3 U.S. (3 Dall.) 321 (1796).

[3] The principal steps in the development of the judiciary article are summarized in P. BATOR, P. MISHKIN, D. SHAPIRO, H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1-21 (2d ed. 1973) [hereinafter cited as THE FEDERAL COURTS AND THE FEDERAL SYSTEM].

These dispositions were at first accepted without question but they soon evoked a cross fire of attack from both friends and foes of national authority. Mr. Justice Story, writing *obiter* in *Martin v. Hunter's Lessee,*[4] floated the nationalist critique, insisting that the constitutional words "the judicial power . . . shall be vested" are "used in an imperative sense", meaning that the "whole judicial power of the United States should be, at all times, vested, either in an original or appellate form, in some courts created under its authority". In the same case, however, the Virginia Court of Appeals had held below that the appellate jurisdiction of the Supreme Court could not constitutionally be exerted to review a state court judgment, because the "term appellate . . . necessarily includes the idea of superiority" and "one Court cannot be correctly said to be superior to another, unless both of them belong to the same sovereignty."[5] The Supreme Court's disagreement was, of course, reflected in its judgment and reaffirmed in the great cases of succeeding years.[6]

I shall not dwell upon the nationalist critique put forth by Justice Story, though its echoes still find some receptive ears.[7] As Justice White put it simply in a recent opinion "it did not survive later cases."[8] Story was engaged in a sustained campaign to stimulate the Congress to enlarge the jurisdiction of the lower courts and to expand the fragmentary corpus of the national statutory law;[9] and his dictum must be viewed in that perspective. Even he did not consider the constitutional "imperative" that he proclaimed (with only Justice Johnson voicing disagreement) to be self-executing as a legal matter, judged by his decisions sitting in the Circuit Court.[10]

It is worth pausing for a moment on the stance taken by the

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[4] 14 U.S. (1 Wheat.) 304, 329-30 (1816).

[5] Hunter v. Martin, Devisee of Fairfax, 18 Va. (4 Munf.) 1, 12 (1815).

[6] *E.g.,* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Craig v. Missouri, 29 U.S. (4 Pet.) 410 (1830); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821). *See* Warren, *Legislative and Judicial Attacks on the Twenty-Fifth Section of the Judiciary Act,* 47 AM. L. REV. 1, 161 (1913).

[7] *See, e.g.,* R. BERGER, CONGRESS v. THE SUPREME COURT 285-96 (1969); 2 W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 785-814 (1953); J. GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801 240-47 (1971); Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction,* 83 YALE L.J. 498 (1974); Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court,* 109 U. PA. L. REV. 157, 201-02 (1960); *cf.* Redish & Woods, *Congressional Power to Control Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis,* 124 U. PA. L. REV. 45 (1975).

[8] Palmore v. United States, 411 U.S. 389, 401 n.9 (1973).

[9] *See* 1 THE LIFE AND LETTERS OF JOSEPH STORY 271, 293 (W. W. Story ed. 1851).

[10] *See, e.g.,* White v. Fenner, 29 F. Cas. 1015 (C.C.R.I. 1818) (No. 17,547).

Virginia court against Supreme Court review of state court judgments, for it presents a puzzle I am not sure I can solve. Unlike the later theorists of nullification and secession, the Court of Appeals did not deny that federal judicial power could be used to achieve and to enforce against litigants a nationwide interpretation of the federal law which the Constitution explicitly declared to be supreme and binding on state judges. It maintained rather that this uniformity could only be attained by drawing cases to the original jurisdiction of the lower national tribunals, whose judgments, it was granted, the Supreme Court could review. That would have meant, however, as John Randolph Tucker put it critically in his treatise on the Constitution, "a great abridgement of State jurisdiction in the primary stages of the litigation, and a need for constant removal from the State to the Federal courts, even in the midst of a trial when the Federal question first emerged."[11]

Why should the protagonists of state autonomy have preferred to the marginal intrusion of direct review, with all the limitations it imported, an alternative so plainly pointing to a larger federal preemption? Was it a stratagem, based on the judgment that the legislation necessary to expand the jurisdiction of the lower courts could be obstructed in the Congress (as the expansion in the Federalist Judiciary Act of 1801 had been aborted promptly by repeal when the Republicans obtained control) — with the result that the state courts would actually have the final word within the boundaries of each state? This seems a likely explanation until it is remembered that precisely the same issue, the review of state court judgments, so divided the Congress of the Confederacy that the Supreme Court mandated by its Constitution never was established.[12] Is the clue to understanding simply that in this case, as no doubt in many others, what to some was at the most a point of protocol for others was a point of principle, transcending any practical considerations?

The crucial fact, in any case, was that the constitutional position articulated in the early days survived the attacks from both directions, permitting the scope of federal judicial jurisdiction — both initial and appellate — to be shaped by Congress over time, responding as in other legislative matters to felt needs for the displacement of state competence and law by the exercise of national authority.

There was little change in the initial legislative plan before the Civil War but I need hardly note that change was very rapid in its

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[11] 2 THE CONSTITUTION OF THE UNITED STATES: A CRITICAL DISCUSSION OF ITS GENESIS, DEVELOPMENT AND INTERPRETATION 799 (Henry St. George Tucker ed. 1899).

[12] *See* W. ROBINSON, JUSTICE IN GREY 437 (1941).

wake. The power vested in the Nation's courts soon equaled and transcended the ideal of Justice Story, with a strength, however, that his view could not have possibly conferred. For the expanded jurisdiction did not derive only from the mandate of the generation that approved and ratified the Constitution but also from a continuous, contemporaneous approval, expressed in the statutes as they stood at any time. Charles L. Black, Jr., in his Tucker lecture of two years ago spoke of this role of Congress as "the rock on which rests the legitimacy of judicial work in a democracy"[13] and that for me is not an overstatement.

It would more than exhaust my time to trace all the steps by which judicial jurisdiction was enlarged to the enormous scope it has today,[14] but I shall mention some. The Civil Rights Acts of 1866, 1870 and 1871, enacted under the enforcement clauses of the War Amendments, the surviving parts of which have grown so strong in their old age, began the practice of resorting to the lower courts rather than to state tribunals for enforcement of the rights conferred. So too federal habeas corpus was extended by the Act of 1868 to prisoners in state custody who averred that their confinement was illegal under federal law. Beyond this, the Act of 1875 conferred federal question jurisdiction across the board in civil cases, subject only to a jurisdictional amount. The significance of these initial steps has steadily increased with the enormous growth of federal enactments and judicial extrapolation of the constitutional restraints upon state action. Within our lifetimes, the magnitude of federal regulation of enterprise and of existence, with concomitant reliance on the federal courts for review and for enforcement, surely has been the most striking fact of legal life. Its magnitude is no doubt growing even as we pause for these reflections.

Needless to say, this great development has placed a burden on the federal courts that always has grown heavier more quickly than judicial personnel has been enlarged; congressional neglect upon this score has not only been a recent scandal. The burden on the Supreme Court was, however, lightened when the Evarts Act of 1891 established the circuit courts of appeals, which increasingly became the only forum for appellate review of federal judgments as of right, with further access to the Supreme Court only on certiorari in the Court's discretion. The culmination of that progression in the Judges' Bill of

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[13] Black, *The Presidency and Congress*, 32 WASH. & LEE L. REV. 841, 846 (1975).

[14] The progressive legislative expansion is traced in detail in THE FEDERAL COURTS AND THE FEDERAL SYSTEM, *supra* note 3, at 439-41 (Supreme Court), 844-50 (federal question: inferior courts), 1424-30 (federal habeas corpus), 1326-39 (civil actions against federal government and officials). *See also id.* 125, 218-19 (Supp. 1977).

1925, sponsored by the Court itself, has recently become more meaningful as legislation, including significant enactments of the last three years, has done away with the requirements of three-judge district courts, and direct appeal of their judgments to the Supreme Court, in almost all the cases for which that alternate system had been established and for many years maintained.[15] The few remaining categories in which the Supreme Court still is obliged to assume jurisdiction over federal decisions should have small practical importance and may soon succumb to the extension of the present legislative trend.

The statute governing appellate jurisdiction over state court judgments is still closer to its formulation in the Act of 1789 but here too there has been important change. The jurisdiction was enlarged in 1914 to include cases where the federal claim was sustained by the state court as well as those in which it was denied. In such case, however, review was made discretionary on certiorari, a plan that was adopted on a wider scale in the Judges Bill of 1925. Review as of right (the term "appeal" being substituted for writ of error in 1928) was preserved only when the state court final[16] judgment holds invalid a treaty or an Act of Congress or sustains a state statute[17] challenged on federal grounds. That is the present situation.

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[15] The recent enactments are: P.L. No. 93-528, §§ 4 & 5 (1974), 15 U.S.C. §§ 28, 29, 49 U.S.C. §§ 44, 45 (Expediting Act); P.L. No. 93-584, § 7 (1975) *repealing* 28 U.S.C. § 2325 (review of I.C.C. orders); P.L. No. 94-381 (1976) *repealing* 28 U.S.C. §§ 2281, 2282 and adding § 2284 and § 2403(b) (three judge court preserved only in actions challenging constitutionality of apportionment of congressional districts or state-wide legislative body or otherwise "required by act of Congress"). The latter reference encompasses Civil Rights Act of 1964, 42 U.S.C. §§ 1971(g), 2000a-5(b), 2000e-6(b) (1970), and Voting Rights Act of 1965, 42 U.S.C. §§ 1973b(a), 1973c, 1973h(c) (1970).

[16] The Supreme Court's interpretation of the finality requirement, importing significant relaxation of its rigor, is summarized by Mr. Justice White in Cox Broadcasting Corp. v. Cohn, 420 U.S. 466, 477-86 (1975).

[17] The term "statute" is interpreted to include not only state constitutional provisions and legislative enactments but also municipal ordinances and administrative regulations or orders. Jamison v. Texas, 318 U.S. 413 (1943); Hamilton v. Regents of Univ. of California, 293 U.S. 245 (1934); Sultan Ry. v. Department of Labor, 277 U.S. 135 (1928); King Mfg. Co. v. Augusta, 277 U.S. 100 (1928). Moreover, "validity" is held to have been drawn in issue and sustained by rejection of a challenge to a statute "as applied" in the particular case, *i.e.*, to the determinative facts before the court, notwithstanding its validity upon its face, *i.e.*, in its general application. Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921). The point must have been raised explicitly, however, as an issue of validity, as distinguished from a claim of immunity to the attempted application. *See, e.g.*, Marcus v. Search Warrant, 367 U.S. 717, 721 (1961); Hanson v. Denckla, 357 U.S. 235, 244 (1958); Memphis Natural Gas Co. v. Beeler, 315 U.S. 649, 650-51 (1942).

II
Problems of Scope

In sketching the development of the appellate jurisdiction, I have painted necessarily with a broad brush, omitting matters of detail. I turn now to a closer scrutiny of the scope of the authority implicit in the granted jurisdiction.

Few questions of this order should arise in the review of federal decisions. The system now established for that function, with the virtual elimination of direct appeals from district courts, should present a minimum of legal problems. Cases will derive almost entirely from the federal appellate courts; and whether to review, how far and when (for certiorari may be granted before judgment) are questions to be answered in the Court's discretion. How such discretion can be best employed, and what its full potentialities may be, are matters of immense importance for the legal system that have recently commanded much attention, as you know.[18] I pass them, however, to consider the scope of jurisdiction to review decisions of state courts. Here legal questions of importance have arisen and quite plainly will continue to arise.

1. *Adequate State Ground: Substantive.* The initial question is the old one of how far the tradition that confines review to the adjudication of controlling federal questions (a point you will recall that was explicit in the Act of 1789 though the proviso was repealed in 1867)[19] precludes the Court from passing upon issues of state law. This always has been viewed as a matter of much moment for the dual system, epitomized by the much quoted statement by Justice Benja-

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[18] *See, e.g.*, the materials and references collected in THE FEDERAL COURTS AND THE FEDERAL SYSTEM, *supra* note 3, at 1600-31, and at 1-4, 278-79 (Supp. 1977).

[19] In Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875), and companion cases it was argued that the effect of the repeal of the proviso was to extend the scope of Supreme Court review of a state judgment beyond the claim that a federal right had been denied to the entire case, including independent issues of state law. Mr. Justice Curtis, who had resigned from the Supreme Court after the decision in *Dred Scott*, filed a brief *amicus* in support of this submission, see 87 U.S. (20 Wall.) at 602-06; B. CURTIS, JURISDICTION, PRACTICE AND PECULIAR JURISPRUDENCE OF THE COURTS OF THE UNITED STATES 54-58 (1880), which enlisted the votes of three of the eight sitting justices (Bradley, Clifford and Swayne), notwithstanding the useless distortion of the dual system such a change would have involved. The majority declined to attribute to Congress a purpose to accomplish that result, reserving the question of its constitutionality.

The repeal was, however, accorded one effect of prime importance, that of including the state court opinions in the record on review. It is hard to understand today how the system was administered for eighty-five years without recourse to state court opinions in appraising what the state decision held and on what grounds.

min R. Curtis that "questions of jurisdiction were questions of power as between the United States and the several States."[20] The regime of *Swift v. Tyson* posed an analogous problem that my generation studied with great passion, hailing its demise in 1938.[21] The issue was, however, even more intense in the setting of direct review, since by hypothesis the state court then had expounded the state law not merely in its earlier decisions but in the very case at bar. It was clear nonetheless that complete state autonomy was inadmissible and that the answer had to turn on the relationship of the state ruling to the federal right that was asserted and denied.

To illustrate, I turn again to *Martin v. Hunter's Lessee,* though it was not the first case that provided an example.[22] The Treaty of Paris of 1783 ending the Revolutionary War embodied a guarantee against "future confiscations" by either nation of property belonging to individuals with allegiance to the other. The Jay Treaty of 1794 enhanced the safeguard by explicitly assuring the security of such alien land titles "according to the nature and tenure of their respective estates," with the aliens accorded the right to "grant, sell or devise" to anyone "as if they were natives." Lord Fairfax had died in 1781, devising his huge estate in the Virginia Northern Neck to his British nephew, Martin, who in turn assigned his interest to a syndicate including John Marshall and his brother James. The question litigated was whether Martin had a title when the treaties came in force. If he did, it was common ground that it received protection. But Hunter, claiming under a grant from the Commonwealth in 1789 denied that there was any title to protect, claiming that the property had escheated or been confiscated by the state before the treaties could apply. Though Virginia judges differed on the point, the Court of Appeals sustained Hunter. The Supreme Court reversed,[23] holding that the question of title, and not merely the uncontroverted meaning of the treaties, was subject to review. Justice Johnson dissented on the ground that "the interest acquired under the devise was a mere *scintilla juris*" that had been "extinguished by the grant of the state" but he shared the view of the Court (Marshall, C.J., not participating) that under the Judiciary Act, as he put it, an inquiry into "the title of the parties" was necessary and "must, in the nature of things, precede the consideration how far the law, treaty, and so forth, is applicable to it; otherwise, an appeal to this court would be worse than nugatory."[24]

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[20] Tribute to Chief Justice Taney, October 15, 1864, *reprinted in*, 2 A MEMOIR OF BENJAMIN ROBBINS CURTIS 336, 340-41 (B. Curtis ed. 1879).

[21] Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

[22] *See, e.g.*, Smith v. Maryland, 10 U.S. (6 Cranch) 286 (1810).

[23] Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603 (1813).

[24] *Id.* at 631-32.

This was a treaty case but note its analogue in many areas of constitutional litigation. Article I, section 10 forbids a state to pass any law impairing the obligation of contract, but whether particular transactions or events created a contract and, if so, what its obligations were, surely are matters governed usually by state law.[25] A state may not deprive of "property" without due process of law and presumably may not take it for a public use without payment of just compensation. But apart from exceptional cases where entitlements may be derived from Acts of Congress, must not the property interest claimed to be impaired or taken derive its existence from the law established or accepted by the state?[26] Other examples might be given, such as full faith and credit cases or the recent judgments as to when the due process clause demands a hearing,[27] but these illustrations should suffice to make the point.

In such situations, where, to put the matter analytically, the existence or the application of a federal right turns on a logically antecedent finding on a matter of state law, it is essential to the Court's performance of its function that it exercise an ancillary jurisdiction to consider the state question. Federal rights could otherwise be nullified by the manipulation of state law. How rigorous the scrutiny of the state finding is or ought to be presents a harder question. The decisions cover a wide range from Justice Story's wholly independent judgment on the title issue in the *Hunter* case, often duplicated in the contracts cases,[28] to a more lenient criterion, phrased as whether there was "a fair or substantial basis"[29] for the state court's judgment or even whether it was "manifestly wrong."[30] I should suppose that some degree of deference is plainly due to the state finding but that, whatever formula is used, any meaningful review obliges the Supreme Court to consider whether, given the relevant state materials, it clearly would have judged the issue differently if it were the state's highest court. When dubiety persists, the state determination should prevail and normally it does.

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[25] *See, e.g.*, Indiana *ex rel.* Anderson v. Brand, 303 U.S. 95 (1938); Appleby v. City of New York, 271 U.S. 364 (1926).

[26] *See, e.g.*, Demorest v. City Bank Co., 321 U.S. 36 (1944); Muhlker v. Harlem R.R., 197 U.S. 544 (1905); *cf.* Broad River Power Co. v. South Carolina, 281 U.S. 537, *aff'd on rehearing*, 282 U.S. 187 (1930).

[27] *E.g.*, Bishop v. Wood, 426 U.S. 341 (1976); Board of Regents v. Roth, 408 U.S. 564 (1972); *cf.* Meachum v. Fano, 427 U.S. 215 (1976).

[28] *See* note 25 *supra; see also, e.g.*, Irving Trust Co. v. Day, 314 U.S. 556, 561 (1942); Columbia Ry., Gas & Elec. Co. v. South Carolina, 261 U.S. 236 (1923).

[29] *E.g.*, Demorest v. City Bank Co., 321 U.S. 36, 42 (1944).

[30] Hale v. State Board, 302 U.S. 95, 101 (1937).

2. *Adequate State Ground: Procedural.* I have referred thus far to situations where the antecedent question involves the substantive law of the state, property, contract and the like. But since federal claims in state proceedings must, like other claims, be put forth in accordance with the state procedure (the statute says they must be "drawn in question"),[31] there is an important class of cases where the antecedent state law finding is that the requirements of state procedure were not met, with the results that the claim was not considered on the merits. The case is easy if the state procedural requirement does not afford a reasonable opportunity to raise the claim at all. It will be rejected as invalid on due process grounds,[32] and also probably a disrespect for federal supremacy, and thus will not obstruct review, since an improper state refusal to adjudicate a federal contention is equivalent to its denial.[33] This is, however, the rare case. The more common case, where the state procedural requirement invoked by the state court is not itself unconstitutional, presents the problem with which we are here concerned. It was long considered that unless the procedural determination imposed a novel ruling in the case at hand without substantial basis in the prior state materials,[34] the Supreme Court could not review the merits of the federal assertion.[35] Procedural rulings were, in short, treated very much in the same way as substantive rulings on antecedent issues of state law. Indeed, my colleague, Alfred Hill, concluded after a long study of the cases that the high Court probably had shown more deference to state decisions on procedure than to those on substance in considering such ancillary questions.[36]

In *Henry v. Mississippi*[37] in 1965, the Supreme Court by a bare majority took a contrary view. The Mississippi Supreme Court had held, after some vacillation on the question, that the failure to object to evidence obtained in violation of the fourth amendment when the evidence was offered barred consideration of the question, even though the point was taken later on a motion for directed verdict. In

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[31] 28 U.S.C. § 1257 (1970). The phrase derives from § 25 of the Act of 1789, 1 Stat. 85.

[32] *E.g.*, Reece v. Georgia, 350 U.S. 85 (1955); Saunders v. Shaw, 244 U.S. 317 (1917).

[33] Lawrence v. State Tax Comm'n, 286 U.S. 276, 282 (1932).

[34] *See, e.g.*, Barr v. City of Columbia, 378 U.S. 146, 149-50 (1964); NAACP v. Alabama *ex rel.* Flowers, 377 U.S. 288, 294-302 (1964); NAACP v. Alabama *ex. rel.* Patterson, 357 U.S. 449, 457-58 (1958).

[35] *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 264 n.4 (1964) (involuntary general appearance as waiver of objection to personal jurisdiction).

[36] Hill, *The Inadequate State Ground*, 65 COLUM. L. REV. 943, 991 (1965).

[37] 379 U.S. 443 (1965).

reversing and remanding, Mr. Justice Brennan's opinion distinguished between rulings on substance and procedure on the surprising ground that in the substantive situation, decision of the federal question by the Supreme Court would amount to an advisory opinion only, because the ruling on the state law question is not subject to review (and accordingly would stand) whereas "a procedural default which is held to bar challenge to a conviction in state courts, even on federal constitutional grounds, prevents implementation of the federal right."[38]

The opinion suffers, in my view, from a patent analytical defect in the significance that it attaches to the distinction between substance and procedure. State court rulings on substantive state questions obviously may prevent "the implementation" of a federal right no less than state procedural determinations, witness the title issue in the *Hunter* case, the contract issue when impairment is asserted, the property issue when a deprivation without due process is claimed, and other illustrations I have given. In such cases, as in those where the state ruling found procedural default, the point is simply that the existence, application or implementation of a federal right turns on the resolution of a logically antecedent issue of state law. Because of that relationship the state court does not speak the final word on the state question, though the state materials remain controlling in the Supreme Court's review. The problem of federal-state relations is the same, moreover, whether the antecedent state law issue is substantive or procedural. It is difficult to understand, therefore, why there should be a difference in the nature or the scope of the Supreme Court's examination of the state determination. The thrust of the decisions before *Henry* was, indeed, to find a common measure of review for all such antecedent questions.[39]

Nonetheless, the principle advanced in *Henry* that a state procedural rule that bars a federal challenge must be one that serves "a legitimate state interest"[40] may be regarded as constructive, whatever one may think of its application in that case. In criminal cases especially, where under *Fay v. Noia*,[41] decided in 1963, federal collateral

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[38] *Id.* at 447.

[39] *See, e.g.*, Demorest v. City Bank Co., 321 U.S. 36 (1944); Broad River Power Co. v. South Carolina, 281 U.S. 537 (1930); *see also, e.g.*, Memphis Natural Gas Co. v. Beeler, 315 U.S. 649, 654-55 (1942).

[40] 379 U.S. 443, 447 (1965).

[41] 372 U.S. 391 (1963) (holding that a procedural default that would constitute an adequate state ground precluding direct review of the federal claim asserted does not bar post-conviction review of the claim on petition for a writ of habeas corpus, subject to a "limited discretion" to deny relief to a petitioner who "has deliberately by-passed

attack is broader than federal direct review, the system presents an anomaly[42] that *Henry* would reduce to some extent. That was undoubtedly a factor in its motivation, unless we are to think that it was merely an *ad hoc* decision in an especially appealing case. But whether the *Henry* principle has really been established may still be an open question. The decisions of the last twelve years do not dispel the possibility that it is merely being treated with intelligent neglect.[43] Congress might, however, make a contribution here if it should ever legislate to limit federal collateral attack, as many, including notably Judge Henry Friendly,[44] have been urging for so long, by also legislating against hypertechnical refusal by state courts to rule on constitutional objections, opening the issue in such cases to direct review. Some adaptation of the *Henry* concept might be used in drafting such a safeguard. Congress traditionally has been hesitant to impose procedural requirements on state courts, even with respect to litigation that has federal dimension, but its power to do so seems entirely clear on principle as well as on authority.[45]

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the orderly procedure of the state courts and in so doing has forfeited his state court remedies" *id.* at 438).

[42] The extent of the anomaly was reduced to some extent by the decisions in Stone v. Powell, 428 U.S. 465 (1976) (claims under exclusionary rule of fourth amendment not litigable on federal habeas when petitioner had opportunity for "full and fair" litigation of claim in state courts) and Francis v. Henderson, 425 U.S. 536 (1976) (federal habeas corpus unavailable to litigate constitutional challenge to composition of state grand jury where petitioner failed to raise the question before trial as required by state procedural rule similar to FED. R. CRIM. P. 12(b)(2), *see* Davis v. United States, 411 U.S. 233 (1973), absent showing of cause for non-compliance with state rule and prejudice resulting from alleged federal deprivation. *See also* Estelle v. Williams, 425 U.S. 501 (1976); Tollett v. Henderson, 411 U.S. 258 (1973).

Since this lecture was delivered, the availability of federal habeas in cases involving state procedural default has been curtailed in general by the Supreme Court's abandonment of the "deliberate by-pass" test of Fay v. Noia in favor of the "cause" and "prejudice" requirements of Francis v. Henderson. Wainwright v. Sykes, 97 S. Ct. 2497 (1977). How far federal collateral attack will still be broader than direct review turns on the content that is given these new terms. The Court went no further than to say that the new formula "will afford an adequate guarantee . . . that the rule will not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice." 97 S. Ct. at 2508.

[43] The cases are collected in THE FEDERAL COURTS AND THE FEDERAL SYSTEM, *supra* note 3, at 557-62 (2d ed. 1973), 99 (Supp. 1977).

[44] Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970).

[45] No direct holding on the proposition can be adduced but this surely is the necessary implication of decisions such as Dice v. Akron, Canton & Youngstown R.R., 342 U.S. 359 (1952); Brown v. Western Ry. of Alabama, 338 U.S. 294 (1949); Testa v. Katt, 330 U.S. 386 (1947); *cf.* Katzenbach v. Morgan, 384 U.S. 641, 657 (1966). *See also* C. WRIGHT, THE LAW OF FEDERAL COURTS 196 (3d ed. 1976).

What I have said is not addressed at all to cases that present state and federal contentions that are wholly independent of each other, so that either, if sustained, would be dispositive.[46] The simple illustration is the case where a litigant relies on both the national and the state constitutions to support a claim of invalidity of a state action. Here it is true that if the state court sustains the claim on the state ground, or even on both state and federal, the Supreme Court quite properly disclaims all jurisdiction.[47] The ruling on state law neither evades nor threatens rights deriving from the national authority, and a finding of error on the federal ground would not undermine the state law basis of the judgment. There is, in short, no pendent jurisdiction on direct review because, unlike the situation as to cases in the lower courts, it would serve no valid purpose in the dual system. This is, indeed, one of the major virtues of direct review, its marginal intrusion upon state authority; federal adjudication is confined to cases where it is a bare necessity to maintain the effectiveness and uniformity of the federal law. Far from expanding jurisdiction in this area, the tempting course is to find ways to induce state courts to forego federal determinations until and unless dispositive state grounds have been eliminated from the case. That seems to me what a responsible state court should do, contrary to some recent illustrations,[48] but whether Congress or the Supreme Court could require that result, without penalizing litigants who by hypothesis are not at fault, is a puzzle, I confess, I have not solved.

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[46] That was the case, for example, in Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875) cited by Justice Brennan in Henry v. Mississippi, 379 U.S. 443 (1965), as the prototype of "cases involving state substantive grounds." The point was, however, that the state ground was separately and independently dispositive, rather than logically antecedent as in *Hunter*.

[47] *E.g.*, New York City v. Central Savings Bank, 306 U.S. 661 (1939); *see* Minnesota v. National Tea Co., 309 U.S. 551, 556-57 (1940); Zacchini v. Scripps-Howard Broadcasting Co., 97 S. Ct. 2849, 2852-54 (1977); *cf.* Department of Mental Hygiene v. Kirchner, 380 U.S. 194, 200-01 (1965).

[48] *See, e.g.*, Oregon v. Hass, 420 U.S. 714 (1975); United Air Lines, Inc. v. Mahin, 410 U.S. 623 (1973).

Compare the incredible attack on the Supreme Court of California by the State Attorney General for that Court's invalidation of capital punishment under the "cruel *or* unusual" clause of the state constitution (People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972)), while the issue of federal validity was pending in other cases in the Supreme Court. *See* Falk, Jr., *The State Constitution: A More Than "Adequate" Nonfederal Ground*, 61 CALIF. L. REV. 273, 274 n.5 (1973). For a general discussion of the issue see Falk, Jr., *supra;* Bice, *Anderson and the Adequate State Ground*, 45 S. CAL. L. REV. 750 (1972); Barrett, Jr., *Anderson and the Judicial Function*, 45 S. CAL. L. REV. 739 (1972). *See also* Linde, *Without "Due Process"*, 49 ORE. L. REV. 125 (1970).

3. *Review of Factual Findings.* Another aspect of review of state court judgments is the question of how far findings of fact in the state system are open to review when they control the disposition of the federal claim. This was a problem that hardly could arise under the old practice that employed the writ of error with its narrow limitation of the record. Under modern practice it presents a frequently recurring issue.

I need not tell you how important this can be. In *Norris v. Alabama,*[49] for example, the 1935 seminal decision on racial exclusion from juries, the Alabama Court had held that a trial court finding that no exclusion had been practiced was sufficiently supported by the testimony of the jury commissioners to that effect. The unanimous reversal, with opinion by Chief Justice Hughes, held that "whenever a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured." If "this requires an examination of evidence, that examination must be made."[50] In the particular case the Court concluded that discrimination had been clearly proved, notwithstanding the "mere general asseverations"[51] of the commissioners, as their testimony was pungently described.

A multitude of cases in the modern Court attest the vitality and the importance of this concept of the scope of review, especially in cases that have constitutional dimension: contempt, libel, obscenity, protest and political agitation, other first amendment areas, coerced confessions and pleas, involuntary waiver of counsel or other protections and the evergrowing field in which purposeful discrimination is forbidden.[52] It is certainly a modest judgment that the scope and intensity of the Supreme Court's scrutiny of state fact findings in such cases has steadily expanded through the years.

A further principle has been developed that has bearing on this matter, the rule that a state court judgment, at least a criminal conviction, even though it has no other federal dimension, entails a deprivation of procedural due process if there was "no evidence" to support a finding that was necessary under the state law to sustain the judgment rendered. This was declared in *Thompson v.*

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[49] 294 U.S. 587 (1935).

[50] *Id.* at 590.

[51] *Id.* at 595.

[52] For an extensive collection of the cases, see THE FEDERAL COURTS AND THE FEDERAL SYSTEM, *supra* note 3, at 574-610 (2d ed. 1973), 100-02 (Supp. 1977).

Louisville,[53] decided unanimously in 1960, in opinion by Justice Black (a case in which my colleague Louis Lusky was counsel for the petitioner). The principle was invoked and applied, some may believe, as I do, somewhat excessively applied, in many cases of importance during the civil rights struggle of recent memory,[54] avoiding thereby a pronouncement on constitutional contentions with respect to which there was a close division in the Court.[55] It is apparently a settled interpretation of the meaning of "due process," not to be avoided, as it would have been in former years, by reading the affirmance of the judgment by the highest state court as an implied ruling that the element on which there was no evidence had been excluded from the state rule involved. The case for perceiving such an implication was put strongly in a recent dissent by Justice Rehnquist, but he was supported only by the Chief Justice and by Justice White.[56] If the *Thompson* principle is settled, I should suppose that it may apply to civil cases also;[57] indeed, Thompson's sentence was no more than a small fine. But I know of no civil applications thus far handed down.

An even more significant review of facts may yet be found appropriate in criminal cases. This was suggested in a very recent dissent to a denial of certiorari by Mr. Justice Stewart.[58] The case was one that Mr. Justice Marshall thought deserved review on the issue of no evidence. Justice Stewart did not agree with that but thought that a more fundamental question ought to be considered. Since *In re Winship*[59] held that due process forbids a criminal conviction under any lesser standard of evaluation of the evidence than proof beyond a reasonable doubt, does not any criminal conviction violate due process "where the evidence cannot fairly be considered sufficient to establish guilt beyond a reasonable doubt?" That is not, as I see it,

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[53] 362 U.S. 199 (1960) (conviction of loitering and disorderly conduct based solely on evidence that defendant had been in cafe half an hour without buying anything, was "on the floor dancing by himself" and argued with policeman after they arrested him for loitering).

[54] *See, e.g.*, Johnson v. Florida, 391 U.S. 596 (1968); Shuttlesworth v. City of Birmingham, 382 U.S. 87 (1965); Barr v. City of Columbia, 378 U.S. 146 (1964); Garner v. Louisiana, 368 U.S. 157 (1961).

[55] *Cf.* Bouie v. City of Columbia, 378 U.S. 347 (1964); Bell v. Maryland, 378 U.S. 226 (1964).

[56] Vachon v. New Hampshire, 414 U.S. 478, 484 (1974).

[57] There is a suggestion, however, in Bouie v. City of Columbia, 378 U.S. 347, 354-56 (1964), that the principle is rooted in the due process requirement that a criminal statute give fair notice of the conduct proscribed as a crime, but the rationale of *Thompson* was not so limited. *See* Thompson v. Louisville, 362 U.S. 199, 206 n.13 (1960).

[58] Freeman v. Zahradnick, 97 S. Ct. 1150 (1977).

[59] 397 U.S. 358 (1970).

a question that can easily be turned aside; federal review not only tests a standard on its face but also in its application. An affirmative response would, however, mean that even though no other federal dimension is presented by the case, a submission that the evidence did not suffice for a rational determination of guilt beyond a reasonable doubt would present a federal question. All state convictions would thus be subject to no less evidential scrutiny by the federal courts than state systems normally provide upon a state appeal. It is worth keeping such a possibility in mind in turning, as I now propose to do, from the legal scope of the appellate jurisdiction to the practical limits on its exercise, given the size of the Supreme Court's docket in our time.

III

The Problem of Logistics

The jurisdiction I have attempted to delineate has, as you know, produced a dramatic increase in the number of cases filed in recent years in the Supreme Court, reflecting the explosive growth of litigation in the country, particularly in the lower federal courts. In 1950, for example, the Supreme Court filings totaled 1181. In 1971, they had risen to 3643; in 1975 to 3939. The growth in the number of cases filed in the federal courts of appeals, from which almost three quarters of the cases of the high Court's docket now derive, was no less spectacular: from 3899 in 1960 to 18,408 in 1976. Some twenty-six percent of Supreme Court filings were from the state courts in 1972, compared to almost fifty percent in 1962.

Most of the cases filed in the high court are, to be sure, petitions for discretionary review. Some are, however, appeals, invoking review that the statute conceives to be obligatory, i.e., to entitle the appellant to a decision on the merits of his claim of error. Precise data are not available, but it would seem that appeals in recent years have not exceeded ten percent of all the cases filed and the number should substantially diminish with the virtual elimination now of direct appeals from three-judge district courts.[60] There were, however, in 1971, according to one study, appeals on the docket from state courts in 158 cases.[61]

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[60] That dimunition may, however, be accompanied by an increase in appeals under 28 U.S.C. § 1254(2) (1970) from Court of Appeals decisions holding state statutes invalid on federal grounds.

[61] REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT, Table VII-a, at A 11 (1972). Petitions for certiorari in state cases totaled 1183.

Despite this increase in the number of cases seeking to be heard, the Supreme Court allows, and in the nature of things is able to allow, plenary hearings in a very small number, determined quite inexorably by the number of hours in the day, days in the week and weeks in the year, together with the time required for adequate deliberation, reasoned decision and the preparation of opinions that will both explain results and provide guidance to all other courts.[62] The number of cases thus decided in recent terms has ranged from perhaps 130 to 160, with a norm below 150, exclusive of multiple causes dealt with together. At the 1975-76 term, there were 135 signed opinions of the Court, not counting concurrences or dissents, and 21 *per curiam* opinions of substantial length, disposing in all of 181 cases. There were, in addition, 175 dispositions without opinion, mostly in unargued cases, and an as yet uncounted number of dismissals of appeals that constitute adjudication on the merits.[63] It seems clear, therefore, that given present volume the great functions of the Court must be performed by denying most of the petitions for discretionary review and by summary disposition on the initial papers of a great part of the business claiming the right to a decision on the merits.

In last year's Tucker lecture, former Dean and Solicitor General Erwin N. Griswold spoke critically of the Court's summary disposition (without full briefs and oral argument) of cases reviewable as of right upon appeal.[64] If he meant that this is never permissible, I disagree. It was a reasonable view of the statute to treat the substantiality of the federal question as jurisdictional and to determine that preliminarily. That was, indeed, what happened in the Court when John Randolph Tucker represented the Chicago anarchists, a great episode in the history of our profession.[65] As a Supreme Court rule of 1876 expressed the point, a motion to dismiss or affirm would be entertained on the ground that "the question on which the jurisdiction depends is so frivolous as not to need further argument."[66] The jurisdictional statement was required by rule in 1928 to raise the

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[62] *Cf.* Hart, *Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959).

[63] *The Supreme Court 1975 Term*, 90 HARV. L. REV. 56, 276, 279 (1976).

[64] Griswold, *Equal Justice Under Law*, 33 WASH. & LEE L. REV. 813, 818-21 (1976).

[65] Spies v. Illinois, 123 U.S. 131 (1887) (denying a motion made in open court to allow a writ of error to the Supreme Court of Illinois, which had denied the application). The Court in its discretion heard oral argument in support of the motion but that practice was unusual, since, as Chief Justice Waite said, it had been settled that "the writ ought not to be allowed by the court, if it appears from the face of the record that the decision of the Federal question which is complained of was so plainly right as not to require argument . . . ." *Id.* at 164.

[66] 91 U.S. vii (1876) (amendment to Rule 6).

question for the Court even in the absence of a motion. That basic concept is reflected and elaborated in the current rules.

It follows therefore, and was never doubted when I was a law clerk in 1932, that a dismissal on the ground that a federal submission is not substantial is a disposition on the merits. Justice Brennan articulated this in 1959[67] and the Court reaffirmed the proposition quite explicitly in 1975.[68] That means that, as the *Hicks* case squarely held, the dismissal creates a precedent binding on lower courts until and unless the Supreme Court overrules it.[69] There may be difficulty, to be sure, in ascertaining precisely what was decided[70] but whatever was decided is the law. It is, therefore, hard to understand the recent statement by Mr. Justice Clark, sitting in this Circuit, that during his eighteen years of service on the Supreme Court, "appeals from state decisions received treatment similar to that accorded petitions for certiorari . . . ."[71] If that was so, and I well know, of course, that others have asserted that it was,[72] the Court simply disregarded its statutory duty to decide appealed cases on the merits. It may be hoped the practice now has changed. It is simply inadmissible that the highest court of law should be lawless in relation to its own jurisdiction. On that point, I agree entirely with Dean Griswold.

Whether the statute ought to be amended is, however, as Dean Griswold recognized, a different question. Lawyers will understanda-

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[67] Ohio *ex rel.* Eaton v. Price, 360 U.S. 246, 247 (1959).

[68] Hicks v. Miranda, 422 U.S. 332 (1975); *see also* McCarthy v. Philadelphia Civil Serv. Comm'n, 424 U.S. 645, 646 (1976); Port Auth. Bondholders Protective Comm. v. Port of New York Auth., 387 F.2d 259 (2d Cir. 1967) (Friendly, J.). *But cf.* Serrano v. Priest, 5 Cal. 3d 584, 615-16, 487 P.2d 1241, 1263-64, 96 Cal. Rptr. 601, 623-24 (1971).

[69] Though the Supreme Court has announced that it accords less precedential weight to summary dispositions than to decisions supported by opinion, *see* Edelman v. Jordan, 415 U.S. 651, 671 (1974), it has not agreed with Justice Brennan that the same latitude should be allowed to state and lower federal courts. *See* Colorado Springs Amusements Ltd. v. Rizzo, 428 U.S. 913 (1976) (Brennan, J., dissenting from denial of certiorari); Sidle v. Majors, 97 S. Ct. 366, 367 (1976) (Brennan and Marshall, JJ., dissenting from denial of certiorari).

[70] Mandel v. Bradley, 97 S. Ct. 2238 (1977); *cf.* Fusari v. Steinberg, 419 U.S. 379, 390-92 (1974) (Burger, C.J., concurring) (summary affirmance extends to the lower court's judgment but not to the lower court's reasoning and should not be read, therefore, as a renunciation of any previously announced Supreme Court opinion); *see also, e.g.*, Torres v. Department of Labor, 405 U.S. 949 (1972).

[71] Hogge v. Johnson, 526 F.2d 833, 836 (1975) (Clark, J., concurring).

[72] *See, e.g.*, G. CASPER & A. POSNER, THE WORKLOAD OF THE SUPREME COURT 1 (1976); REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT 25 (1972); Remarks of Mr. Justice Marshall, *Acceptance of Learned Hand Medal*, May 1, 1975, at 10. The most informative study is that of Levin & Hellman, *The Many Roles of the Supreme Court and the Constraints of Time and Caseload*, 7 U. TOL. L. REV. 399, 404-17 (1976).

bly be reluctant to surrender any right of access to the Court that the law now allows, but the problem of volume places a heavy burden of persuasion on those who would support the present rule. It is hard to argue that every case in which a state statute or ordinance is sustained against a substantial federal attack, especially if it is only challenged as applied,[73] merits priority in the selection of the very finite number of cases that the high Court can decide.

I should myself place emphasis, however, on a different question. Given the intrinsic quantitative limits on the adjudications that the Court can make, the need for authoritative settlement of issues that divide the courts of appeals, the importance of a viable procedure to correct egregious error by state courts in applying principles and standards the Supreme Court has developed, especially in constitutional interpretation, can the Supreme Court's options be enlarged in a constructive way?

The Commission on the Revision of the Federal Court Appellate System (the Hruska Commission, on which I served) recommended some two years ago the creation of a National Court of Appeals, whose jurisdiction would be limited to cases referred for adjudication by the Supreme Court (or transferred to it by a regional court of appeals).[74] The purpose was primarily to enlarge the appellate capacity of the federal courts to settle questions that are not now settled soon enough because of docket pressures in the Supreme Court.[75] This was a wholly different proposition from that offered by the Study Group on the Caseload of the Supreme Court[76] (Freund Committee) whose main target was to relieve the Court of most of the burden involved in screening petitions for review. That proposal met insuper-

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[73] *See* note 17 *supra*.

[74] S. 2762, 94th Cong., 1st Sess., embodying the recommendations of the Commission, included provision for such transfers. That feature of the plan drew such widespread opposition that it was withdrawn in the revised bill, S. 3423, 94th Cong., 2d Sess., which limits the jurisdiction of the National Court to cases referred by the Supreme Court. *See Hearings on S. 2762 and S. 3423, The National Court of Appeals Act*, 94th Cong., 2d Sess., at 52 (1976) [hereinafter cited as *Hearings*].

[75] Some members of the Commission, myself included, were concerned as well to enhance the capacity of federal courts to correct egregious state court errors in applying settled federal standards, a matter given insufficient attention in the Commission's report. *Cf.* Stolz, *Federal Review of State Court Decisions of Federal Questions: The Need for Additional Appellate Capacity*, 64 CALIF. L. REV. 943 (1976). I do not agree, however, with the proposal of Professor Stolz that the National Court of Appeals should be given obligatory jurisdiction to review state court judgments involving federal questions, subject to discretionary review by the Supreme Court. The Supreme Court's power to refer state as well as federal cases, as the Commission recommended, serves the purpose adequately, in my view.

[76] *See* note 61 *supra*.

able opposition, grounded in the view that the Court should not be deprived of the control of its own docket. Under the Commission plan, such control would be maintained. Judgments of the National Court would bind the country as a whole but they would be reviewable by the Supreme Court on certiorari. It was anticipated, however, that, having referred the case, the high Court would not often grant review. No one, of course, can predict with confidence whether or how soon the new Court's docket would be full[77] but nothing would be lost if the development were slow. The judges could devote their extra time to sitting in the circuits on assignment; their assistance there would certainly be welcome for as far ahead as we can see.

There are objections to the plan, of course: it would add to rather than diminish the screening task of the Supreme Court because of the option to refer; it would diminish somewhat the prestige of the regional courts of appeals; it would add a fourth appellate tier in the federal system if the Supreme Court were subsequently to review a case it had referred; and it would offend the highest state courts to have their judgments subject to reversal by a court inferior to the Supreme Court.

These are all points of substance, I admit, but the great question is if there is an alternative that presents lesser difficulties. Judge Henry Friendly argues strongly that there is: avert "the flood by lessening the flow."[78] He would eliminate diversity of citizenship jurisdiction, cut back on civil rights cases by requiring exhaustion of administrative remedies and greater abstention, limit the scope of federal habeas corpus, transfer much litigation to administrative agencies and processes, reduce the ambit of the federal criminal law, and establish specialized courts, at least for tax and patent cases.[79] This is a solid program, with a great deal of which I find myself in full agreement. The trouble is that it is most improbable that much of it can be enacted, or so it seemed to me as I heard testimony in the hearings of the Hruska Commission. Time may, however, prove

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[77] For varying forecasts, *see, e.g.*, G. CASPER & A. POSNER, THE WORKLOAD OF THE SUPREME COURT 106 (1976); Feinberg, *Foreword — A National Court of Appeals?*, 42 BROOKLYN L. REV. 611, 619-25 (1976); Owens, *The Hruska Commission's Proposed National Court of Appeals*, 23 U.C.L.A. L. REV. 580, 603 (1976); Alsup, *Reservations on the Proposal of the Hruska Commission to Establish a National Court of Appeals*, 7 U. TOL. L. REV. 431, 435 (1976); *Hearings, supra* note 74, at 135 (Judge Lay), 172, 184 (Judge Coffin), 248, 256 (Judge Friendly).

[78] Friendly, *Averting the Flood by Lessening the Flow*, 59 CORNELL L. REV. 634 (1974); *see also Hearings, supra* note 74, at 250-56; *cf.* THE NEEDS OF THE FEDERAL COURTS: REPORT OF THE DEPARTMENT OF JUSTICE COMMITTEE ON REVISION OF THE FEDERAL JUDICIAL SYSTEM (1977).

[79] *See generally* H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW (1973).

me wrong on this, as all too often it has proved me wrong before, but thus far I perceive no reason for confessing error.

The crucial point is that alternatives be canvassed with a will to getting something done. The appellate jurisdiction of the Supreme Court is a great national achievement, but we do not honor it by failing to perceive and to respect its limitations of capacity. We must reduce the burden it is asked to carry in the legal system or accord it supplementary resources. The promise that is spoken to the ear will otherwise be broken to the hope.

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