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REPORT

OF THE

STUDY GROUP ON THE CASELOAD

OF THE

SUPREME COURT

DECEMBER, 1972 WASHINGTON, D.C.

FEDERAL JUDICIAL CENTER REPORT

OF THE STUDY GROUP

on the

CASE LOAD OF THE SUPREME COURT

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PREFACE

This is one of a series of reports prepared by or for the Federal Judicial Center on problems of the several courts of the United States.

A principal statutory responsibility of the Federal Judicial Center, indeed the first listed by the Congress in the legislation which established it, is ". . . to conduct research and study of the operation of the courts of the United States . . . ." Most of the early studies initiated by the Center soon after it was organized in 1968 dealt with the many-faceted operations of the United States District Courts, beginning with such matters as causes of delay in the processing of cases and continuing with juror utilization, calendar problems, and court reporting services.

As its capabilities and resources grew the Center—during the summer of 1971—launched a comprehensive program of study related to appellate litigation where the swift multiplication of cases brought on a virtual crisis. This program includes an in-depth comparative survey of the operating procedures of the United States Courts of Appeals, collection and analysis of data on how the working time of Circuit Judges and their law clerks is occupied, and evaluation of various proposals for changes in the alignment of the circuits and in the intermediate federal appellate structure.

Accompanying these developments a study of problems of the Supreme Court was initiated in 1971 and entrusted to a distinguished committee composed of seven scholars and lawyers, assembled by the Center and serving without compensation. The report of that Study Group is published for circulation to the Congress and the profession to stimulate discussion.

While the progressive spirit, which prompts us to search continually for greater knowledge and better ways

of doing things, would alone justify these various studies, the current and anticipated rate of growth in the amount of business brought to the federal judiciary strikes a note of urgency. From 1960 to 1968 the number of filings in the District Courts increased from 87,421 to 102,263; from 1968 to 1972 the number went to 143,261. From 1960 to 1968 the number of matters taken to the Courts of Appeals increased from 3,899 to 9,116; from 1968 to 1972 the number went to 14,535. During this same overall period the number of authorized district judgeships increased from 245 to 400; and the number of authorized circuit judgeships from 78 to only 97.

The October 1972 meeting of the Judicial Conference of the United States, having considered the increase in court business, authorized a request to the Congress for 51 more district judgeships and 11 more circuit judgeships. The number would have been greater had not the 15 judges of the Fifth Judicial Circuit concluded that the additional four judgeships to which their circuit would be entitled would produce administrative problems which would far outweigh even the problems of greatly increased workload and inevitable backlogs.

As noted in the report which follows, the recent growth of Supreme Court business has been equally dramatic. For example, during Chief Justice Stone's tenure (1941–1946), the docketed cases in the Supreme Court increased only 158 cases from 1,302 to 1,460. In marked contrast, cases increased 956 during the past five years from 3,559 in the 1967 Term to 4,515 in the 1971 Term.

Aside from the warning given us by the Fifth Circuit Judges that the conventional response of more judgeships is unsatisfactory even at the intermediate appellate level, that response at the Supreme Court level is not regarded as a sound solution, would constitute a substantial alteration of the character of that institution, and would not afford relief. The number of Justices on the Supreme Court has been constant since 1869 and, unless the Court were to sit in panels as do the Courts of Appeals and

some state courts of last resort, an increase in numbers would make little difference in the individual workload. It would mean, for the most part, that more Justices would be doing the same acts. No substantial change affecting the Court's capacity to deal with the increasing workload (other than an increase in the number of law clerks) has occurred since 1925, when the Court was permitted to be selective with respect to the matters which would be fully argued and briefed. The 1925 statutory change nevertheless contemplated that all business brought to the Court would receive the individual attention of every Justice. It is in this respect that the problems of the Supreme Court differ from all other Federal Courts in which the addition of judges divides increasing caseloads. The work of Justices of the Supreme Court can be aided to some extent by increasing professional staffs but the decision on each petition, jurisdictional statement and application for relief must be made by each Justice as an individual member of the Court.

The Study Group designated to assess and grapple with these problems represents, we believe, an extraordinary accumulation of experience and scholarship relating to the Court and its operations. Three members, who have served at different times as Justices' law clerks, brought to the study a first-hand knowledge of the workings of the Court over a period commencing approximately 40 years ago. Virtually all members of the group have argued before the Court, some frequently.

The Chairman, Professor Paul A. Freund of Harvard Law School, is not only one of the Nation's leading constitutional scholars and students of the Supreme Court, but began his legal career as clerk to Mr. Justice Brandeis in 1932 and later served as an assistant to the Solicitor General. Another leading scholar and student of the Court, Professor Alexander M. Bickel of Yale Law School, served as Mr. Justice Frankfurter's clerk during the 1952 Term. A third member of the

group, Peter D. Ehrenhaft, a Washington, D. C., lawyer, had similar experience during the 1961 Term as clerk to The Chief Justice. Dr. Russell D. Niles is Director of the Institute of Judicial Administration and former Chancellor of New York University and Dean of its Law School. Bernard G. Segal of Philadelphia is a former president of both the American Bar Association and American College of Trial Lawyers, and has had extensive experience in Supreme Court litigation. Robert L. Stern, a Chicago lawyer, served for 13 years in the Office of Solicitor General, culminating with service as First Assistant to the Solicitor General and as Acting Solicitor General. Professor Charles Alan Wright of the University of Texas School of Law has written extensively on federal courts, practice and procedure, and appears frequently in the Supreme Court. (See Appendix for more detailed biographies.)

The report is presented here as it was submitted to the Center. Both the Study Group and the Center welcome comment upon it, and ask that communications and copies of any writings regarding it be sent to the Director, Federal Judicial Center, 1520 H Street, N. W., Washington, D. C. 20005.

December 1972.

ALFRED P. MURRAH
Director of the Federal
Judicial Center
(Senior U. S. Circuit Judge)

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FOREWORD

In the fall of 1971 the Chief Justice, as Chairman of the Federal Judicial Center, appointed a Study Group, under the auspices of the Center, to study the case load of the Supreme Court and to make such recommendations as its findings warranted. The membership of the Study Group includes lawyers in private practice with experience in Supreme Court litigation and professors of constitutional law and federal procedure. Three have served as law clerks to Supreme Court Justices, each in a different decade. The Study Group members are:

Professor Paul A. Freund, Chairman
Harvard Law School

Professor Alexander M. Bickel
Yale Law School

Peter D. Ehrenhaft, Esq.
Member of the District of Columbia bar

Dean Russell D. Niles
Director, Institute of Judicial Administration, New York

Bernard G. Segal, Esq.
Member of the Philadelphia bar, former President of the American Bar Association

Robert L. Stern, Esq.
Member of the Chicago bar, former Acting Solicitor General

Professor Charles A. Wright
University of Texas Law School

The Study Group had the privilege of meeting as a group with each of the Justices presently serving. Three law clerks were also interviewed: one was then serving the Chief Justice; the others had served, respectively, Jus-

tices Black and Harlan during their last Term on the Court. The Office of the Clerk of the Supreme Court provided helpful data from its records on the current docket of the Court. The Study Group was furnished invaluable assistance in the collection and analysis of a wide range of statistical information by the staff of the Federal Judicial Center, and in particular by Mr. William Eldridge, the Center's Director of Research. Mr. Eldridge's contribution is reflected in the appendices of this Report.

The Study Group considered a great variety of possible jurisdictional and procedural changes, the more important of which are discussed in this Report. The proposals that we make may seem unduly modest to some. Others may believe that, however unsatisfactory the present situation may be, any substantial change would be inadvisable. But our recommendations express the group's unanimous judgment that some significant remedial measures are required now. The changes proposed are advanced in the conviction that they will better enable the Court to perform its unique and vital role in our federal democracy without reducing its opportunities for providing justice and protecting the rights of all our citizens.

I. NATURE AND DIMENSIONS OF THE PROBLEM

Any assessment of the Court's workload will be affected by the conception that is held of the Court's function in our judicial system and in our national life. We accept and underscore the traditional view that the Supreme Court is not simply another court of errors and appeals. Its role is a distinctive and essential one in our legal and constitutional order: to define and vindicate the rights guaranteed by the Constitution, to assure the uniformity of federal law, and to maintain the constitutional distribution of powers in our federal union.

The cases which it is the primary duty of the Court to decide are those that, by hypothesis, present the most fundamental and difficult issues of law and judgment. To secure the uniform application of federal law the Court must resolve problems on which able judges in lower courts have differed among themselves. To maintain the constitutional order the Court must decide controversies that have sharply divided legislators, lawyers, and the public. And in deciding, the Court must strive to understand and elucidate the complexities of the issues, to give direction to the law, and to be as precise, persuasive, and invulnerable as possible in its exposition. The task of decision must clearly be a process, not an event, a process at the opposite pole from the "processing" of cases in a high-speed, high-volume enterprise. The indispensable condition for the discharge of the Court's responsibility is adequate time and ease of mind for research, reflection, and consultation in reaching a judgment, for critical review by colleagues when a draft opinion is prepared, and for clarification and revision in light of all that has gone before.

We turn now to examine the development of the Court's business over recent years.

The bare figures of the Court's workload present the problem most vividly. Approximately three times as many cases were filed in the 1971 Term as in the 1951 Term. The growth between 1935 and 1951 was gradual and sporadic, from 983 new filings to 1,234. But by 1961 the number was 2,185, an increase of 951, and by 1971, 3,643 [1] new cases were filed, an increase of 1,458 in ten years. See Table II, Appendix. Since the Court endeavors to keep abreast of its docket, the number of cases disposed of at each Term conformed closely to the number filed, not dropping below 95% of that number in any of the last ten Terms. Indeed, in the 1971 Term, the Court disposed of 3,651 cases, which was eight more than the number of new filings. Nevertheless the carryover or backlog has been growing gradually from 146 in 1951 to 428 in 1961 and 864 in 1971. See Table I, Appendix.

The most dramatic growth has been in the number of cases filed *in forma pauperis* (ifp) by persons unable to pay the cost of litigation, mostly defendants in criminal cases. The following table shows what has happened (see Table II, Appendix):

Term	Ifp Cases Filed
1941	178
1946	528
1951	517
1956	825
1961	1,295
1966	1,545
1971	1,930

This tremendous increase results both from a substantive enlargement of defendants' rights in the field of criminal justice and from the greater availability since *Gideon* v. *Wainwright,* 372 U. S. 335 (1963), of counsel to indigent criminal defendants. In the 1971 Term, provision of counsel was extended to misdemeanor cases in

[1] These figures do not include the few but increasing number of original docket cases.

which the defendant could be imprisoned. *Argersinger* v. *Hamlin*, 407 U. S. 25 (1972). There is no reason to believe that this number will decline; since it has remained about the same since the 1969 Term, we cannot be sure as to the future trend. The *in forma pauperis* cases now constitute over half of the cases filed.

The regular appellate filings (the non-ifp cases) have also steadily increased, only a little less explosively. The number was almost 2½ times as many in the 1971 Term as in 1951. (See Table II, Appendix.)

Term	Non-ifp Filings
1951	713
1956	977
1961	890
1966	1,207
1971	1,713

A number of factors have contributed to this trend. The population of the nation will have grown from 132 million in 1940 to 210.2 million at the end of 1972. More and more subjects are committed to the courts as the fields covered by legislation expand. Civil rights, environmental, safety, consumer, and other social and economic legislation are recent illustrations. And lawyers are now provided to a markedly increasing extent for persons who cannot afford litigation. Changes in constitutional doctrines have also contributed, as the reapportionment and school desegregation cases, as well as the criminal cases, attest.

Of course, no one can foresee how future events, laws or cases will affect the Supreme Court's docket. The lesson of history teaches that, independent of other factors, the number of cases will continue to increase as population grows and the economy expands.

With no substantial difference in the number of cases argued, the percentage of petitions for certiorari granted has sharply dropped as the filings have increased, as appears from Table III, Appendix. In 1971, 5.8% were

granted,[2] in contrast to 17.5%, 11.1% and 7.4% in 1941, 1951 and 1961 respectively.

This diminution is in part attributable to the fact that a much larger proportion of the ifp cases (only 3.3% of which were granted in 1971 [2]) lacks any merit. But the decline also in the percentage of paid petitions granted (19.4%, 15.4%, 13.4% and 8.9% for 1941, 1951, 1961 and 1971) would seem to reflect, not a lessening of the proportion of cases worthy of review, but rather the need to keep the number of cases argued and decided on the merits within manageable limits as the docket increases. One result is that a conflict between circuits is not as likely to be resolved, at least as speedily, by the Supreme Court as when the docket was much smaller.

The number of appeals to the Court has also substantially increased. The appeals, most of which come from three-judge federal district courts or state appellate courts, comprise less than 10% of the cases on the Court's docket (see Table VII–a), but they constitute about one third of the cases decided with opinion after argument. The appeals from district courts, in particular, impose a substantially heavier burden on the Court than their proportion of its case load would suggest. See Part III, *infra.*

The significance of these figures for the workload of the Justices appears even more clearly from a breakdown showing the Court's weekly burden. The number of filings during the 1971 Term, on a 52-week basis, averaged almost exactly 70 per week. The conference list for March 17, 1972, after a three-week recess, showed that the Court planned to consider and presumably took action on 17 jurisdictional statements on appeal, 193 petitions for certiorari and 55 miscellaneous motions, or a total of 265 different matters, in most of which at least two documents were filed, and in some as many as six.

[2] The figures for 1971 are adjusted to exclude an exceptional group of 133 cases in which petitions were granted and the cases remanded following the Court's controlling decision in the death-penalty case.

And this does not include the consideration given to deciding argued cases on the merits.

Many of these matters are necessarily disposed of without oral discussion at the Court's conferences. If all Justices agree that a petition for certiorari is without merit, it is not placed on the "discuss list"; it is denied without more. Otherwise the conferences would become hopelessly bogged down. But all matters must be considered by each Justice in preparation for the conference.

The actual time spent in hearing cases in which review has been granted has declined since the Court reduced the standard time for oral arguments from one hour to 30 minutes per side.

The number of cases argued and decided by opinion has not changed significantly despite the rising flood of petitions and appeals. Since 1948 the number of arguments has ranged between 105 in 1954 and 180 in 1967. In recent years the number of arguments rose from 144 in the 1969 Term to 177 in 1971, but in some still earlier years, when the total case load was less than one-third of what it is now, there were more oral arguments. The number of cases decided by full opinion has ranged from 84 in 1953 to 199 in 1944. At the 1971 Term 143 cases were so disposed of, with 129 opinions of the Court; during the preceding 15 years the average was 120 cases, with 100 opinions. (See Table IV.)

The statistics of the Court's current workload, both in absolute terms and in the mounting trend, are impressive evidence that the conditions essential for the performance of the Court's mission do not exist. For an ordinary appellate court the burgeoning volume of cases would be a staggering burden; for the Supreme Court the pressures of the docket are incompatible with the appropriate fulfillment of its historic and essential functions.

Over the past thirty-five years, as has been seen, the number of cases filed has grown about fourfold, while the number of cases in which the Court has heard oral

argument before decision has remained subtantially constant. Two consequences can be inferred. Issues that would have been decided on the merits a generation ago are passed over by the Court today; and second, the consideration given to the cases actually decided on the merits is compromised by the pressures of "processing" the inflated docket of petitions and appeals.

Statistics, to be sure, do not reveal in a qualitative way the difficulty of the cases on the docket; and in fact the character of the cases filed, and particularly of those granted review, has changed within the past generation. But the change has hardly mitigated the demands on a Justice's time and intellectual energy. The *in forma pauperis* category does yield a relatively small percentage of cases appropriate for review. And there are fewer cases involving patents, utility rates, and corporate reorganizations, which typically presented large and complex records. But there are very many more cases involving the most sensitive issues of human conflict, arising as problems of equal protection, public assembly, freedom of the press, church and state relations, and the administration of the criminal law, which surely are no less demanding of a judge and of the collegial process than the mastery of technical data. There has been a proliferation of federal regulatory and welfare legislation in recent years, legislation that requires interpretation, that produces conflicting judicial decisions, and that frequently raises constitutional problems. There is no basis to foresee anything but an intensification of this trend in the period ahead, and with a larger and active bar, increasing legal assistance, and the possibility of an increase in the number of federal judicial circuits, the prospects of a still further increase in the number of review-worthy cases reaching the Court cannot be gainsaid.

To be sure, each Justice now has the services of three law clerks, and these appear to be invaluable under existing conditions if the members of the Court are to keep up in any way with their docket. The law clerks,

however, do not provide an ultimate solution to the excessive workload of the Court. They do not relieve the Justices of responsibility for passing on each matter personally. They can provide only limited aid if the Justice himself is to do the judging. Moreover, the law clerks themselves are overburdened. Individual Justices, as might be expected, utilize their law clerks in somewhat different ways. The tendency appears to be to allot the greater part of a clerk's time to the study of petitions for certiorari and the preparation of memoranda on them for the Justice. Thus the emphasis is on the mitigation of the burden of the screening function of the Court, but at the cost of sacrificing the time of law clerks that might more fruitfully be applied to research, the critique of drafts of opinions, and service in general as intellectual foils for judges who are inevitably limited in their access to other minds.

There is an additional doubt about further resort to multiple law clerks. The Court is an institution of nine Justices, who bear non-delegable responsibilities of judgment and exposition; it must not become a federation of nine corporate aggregates or chambers. A certain amount of consultation and dialogue with a law clerk is highly useful and fruitful; but in the end the consultation, dialogue, reciprocal critique and accommodation ought to be carried on among the Justices themselves. It is important that inexorable pressures to keep abreast of the docket should not turn the center of gravity inward in the several chambers, depersonalize the work, and jeopardize the collegial character of the Court's labors.

The statutory membership of the Court was fixed at nine in 1837, with only brief fluctuations thereafter. An increase in membership, we are persuaded, would be counter-productive. As Chief Justice Hughes said of the President's court reorganization plan in 1937, there would be more judges to hear, more to consult, more to be convinced. Division into panels would not be

an acceptable device. Aside from the constitutional question whether a Court acting through panels would conform to the Article Three prescription of "one Supreme Court," a delegation to panels of responsibility for decision would depreciate the authority of the Court and would expose decisions in the name of the Court to the changes and chances of the composition of the panels. This element of a lottery, inescapable in the circuits and incongruous enough for litigants and counsel in particular cases, is incompatible with the responsibility of the Supreme Court to the law itself.

There has been a recognized need over the years for a periodic reexamination of the Court's business, to relieve its members of excessive pressure and to create conditions enabling them to perform their essential responsibility. In 1891 the Circuit Court of Appeals Act relieved the Justices of circuit riding duties and established regularized review in a separate tier of intermediate appellate courts. At the 1890 Term 623 new cases were filed. With the benefit of the Act of 1891, the number dropped sharply in the 1892 Term to 275. But a steady rise again set in as the volume of litigation rose in the lower courts. Thirty years later, at the 1923 Term, there were almost 750 new filings, a majority of which reached the Court on petition for certiorari. See Frankfurter and Landis, *The Business of the Supreme Court* (1928) 101–102, 295, 297. The cases on the obligatory docket were still, however, excessive in number. The burden was becoming unmanageable, and a more thoroughgoing reform was urged by the Court itself, under the aegis of Chief Justice Taft.

Accordingly, in 1925 Congress enacted the Judges' bill, sponsored by the Court, reducing drastically the obligatory appellate jurisdiction of the Court and introducing certiorari as the normal procedure for seeking review.

Now, however, these solutions have become part of the problem. The Courts of Appeals have encountered

a dramatic rise in their own business, with a proportionate outflow to the Supreme Court; and the task of coping with the discretionary jurisdiction on certiorari overhangs all of the Court's work.

We are concerned that the Court is now at the saturation point, if not actually overwhelmed. If trends continue, as there is every reason to believe they will, and if no relief is provided, the function of the Court must necessarily change. In one way or another, placing ever more reliance on an augmented staff, the Court could perhaps manage to administer its docket. But it will be unable adequately to meet its essential responsibilities.

Remedial measures comparable in scope to those of 1891 and 1925 are called for once again.

II. JURISDICTIONAL CHANGES

A. *Remedies Considered and Rejected.*

(a) *A constitutional court.* Suggestions have occasionally been made that the jurisdiction of the Supreme Court be limited to cases presenting constitutional issues. It is true that the proportion of so-called constitutional cases heard and decided has grown notably, and may presently exceed more than half the total. And yet a division of jurisdiction on these lines would be unfortunate for a number of reasons. Highly important questions of federal administrative authority and of judicial procedure may not be of a constitutional nature. Moreover, constitutional issues and issues of statutory construction are frequently intertwined, making awkward and artificial their separation in advance of decision. Flexibility and resourcefulness in determining appropriate grounds of decision would be sacrificed. Time and energy would be expended in an effort to draw jurisdictional lines between categories of cases that in fact have a double, rather than a distinct, aspect. Counsel and perhaps Justices themselves would tend to inflate legal questions to constitutional dimensions in justification of the jurisdiction of the Court. All in all, we believe that a limitation resting on a criterion of "constitutional" cases would be mistaken in conception and unhealthy in its consequences.

(b) *Exclusion of certain classes of cases.* The committee gave serious consideration to the possibility of providing by statute that certain classes of cases not be subject to review in the Supreme Court, but concluded that this would be unwise. It would be difficult to say of any class of litigation that there could *never* be a case within it important enough for Supreme Court

review. Even diversity cases, which are least likely to be accepted for review, can involve constitutional, procedural, or jurisdictional questions of importance. *E. g., Fletcher* v. *Peck,* 6 Cranch 87 (1810); *Dred Scott* v. *Sandford,* 19 How. 393 (1857); *Erie R. Co.* v. *Tompkins,* 304 U. S. 64 (1938). We believe that screening, rather than categorical exclusion, should be the practice.

(c) *Specialized courts of administrative appeals.* The carving out of subject-matter jurisdiction to be vested in one or more new tribunals of last resort has been advanced from time to time as a reform for its own sake, apart from its alleviation of the workload of the Supreme Court. Federal specialties such as taxation, labor law, or, more broadly, administrative law, have been candidates for a specialized tribunal, either supplementing the federal courts of appeals as a new tier of review, or supplanting those courts as a reviewing tribunal for cases from designated agencies. It is not necessary to rehearse the considerations for and against such tribunals in the general context of judicial review of administrative bodies. We would suggest that, in general, the more specialized the appellate tribunal the greater the risks. There would be a loss of the judicial perspective afforded by a broader range of review, and inconsistencies would develop among various specialized appellate tribunals in resolving pervasive, common problems of administrative justice. Moreover, there is the possibility that in dealing with a narrow subject-matter the judges might form polarized blocs; and that, as a corollary, there might be a politicization of the appointing process around a single set of issues.

Despite these risks and disadvantages, a case might be made for a specialized administrative court of appeals, national in scope, in one or more fields. Federal taxation, because of the complexity of the subject, the volume of litigation, and the urgent need to resolve uncertainties and conflicts in the interest of both taxpayers and Treas-

ury, may be deemed a particularly appropriate subject for a specialized court of appeals.

Without pursuing the question further, we suggest that, however the merits of specialized courts of administrative appeals may be appraised, such a plan would have only marginal value in conforming the work load of the Supreme Court to the Court's essential functions. It would have little impact on the volume of petitions confronting the Court, and no great effect on the task of hearing and deciding cases where review has been granted. (The special problem of appeals from three-judge district courts, including review of I. C. C. orders, is a separate and significant one, and is discussed in Part III of this Report.)

(d) *A court of criminal appeals. The problem of prisoners' petitions.* The dangers of polarization and politicization would be particularly intense in an appellate court whose only concern was the review of criminal convictions. Moreover, there is an inherent dilemma in such a plan, turning on whether or not there would be further review on certiorari in the Supreme Court. If such review were provided, the screening function of the Supreme Court would not be materially relieved. If review were not provided, defendants in criminal cases would be placed in an inferior and invidious position with respect to access to the Supreme Court. We reject a proposal that would put this class of litigants in that position.

But the problem of prisioner petitions, which the Supreme Court shares with lower federal courts and to some extent with State courts, has grown ever more pressing in the last decade or so, and does demand special attention. We refer both to collateral attacks on criminal convictions and to complaints concerning conditions in prisons.

On the Supreme Court's docket at the October Term, 1971, the number of petitions in habeas corpus and other collateral attack cases was 758. Total State and federal

prisoner cases filed in the lower federal courts in 1971 came to 16,266. Most of the cases are brought by State rather than federal prisoners, although filed in federal courts, and most are habeas corpus petitions. But a substantial number of prisoner cases—3,129 filed in the federal courts in 1971—are civil rights complaints concerning conditions in prisons, and these will increasingly filter up to the Supreme Court. The continuing rise in the volume of prisoners' petitions, on the docket of the Supreme Court as also on the dockets of all federal courts, is reflected in figures collected by the Solicitor General. There is close identity between these petitions and filings *in forma pauperis*. The Solicitor General reports that the number of papers filed by his office in the Supreme Court at the 1971 Term in ifp cases increased by 35.1% over the previous Term. The comparable increase in paid cases was 17.3%. (Memorandum To The Solicitor General's Staff, July 6, 1972.)

The number of these petitions found to have merit is very small, both proportionately and absolutely. But it is of the greatest importance to society as well as to the individual that each meritorious petition be identified and dealt with. And yet it seems a misallocation of resources to impose the burden of sifting through the mass of these petitions on federal judges, let alone on Supreme Court Justices. Moreover—and this is at least as important—these overburdened judges and Justices, charged with so many other highly important functions, are less likely to give full and careful attention to each petition than officials whose special task it might be made to do so. The problem is somewhat analogous to one faced by the medical profession. Mass screening of thousands of people will uncover cancer in very few, but it will diagnose it in some at a stage where prospects of cure are good. The mass screening enterprise is, therefore, justified. But the screening is not conducted by highly trained surgeons. To use surgeons for this purpose would be to misuse

them. Nor, unless they are relieved of their other, more demanding functions, will surgeons likely perform this routine task with the care it routinely requires, if undertaking it at all is to be justified.

As the Solicitor General has remarked (Memorandum To The Staff, *supra*), "[i]t seems obvious that there should be a better way to deal with these questions [presented by ifp prisoner petitions], at least with respect to collateral review." It is satisfying to believe that the most untutored and poorest prisoner can have his complaints or petitions considered by a federal judge, and ultimately by the Supreme Court of the United States. But we are, in truth, fostering an illusion. What the prisoner really has access to is the necessarily fleeting attention of a judge or law clerk. The question is, would it not be better to substitute for the edifying symbol, and the illusion that it presents, the reality of actual, initial consideration by a non-judicial federal institution charged exclusively with the task of investigating and assessing prisoner complaints of the denial of federal constitutional rights. This institution, headed by an official of high rank, would have a staff of lawyers and investigators, and a measure of subpoena and visitatorial powers. It would be charged to investigate complaints, make a response to them, and where possible, try to settle in-prison grievances by mediation.

All petitions for collateral review or for redress of grievances concerning prison conditions, from State or federal prisoners, which could now be filed in a federal court, would go initially to this new institution at the election of the prisoner or by referral to it at the discretion of the court in which a petition is filed. Three months might be allowed the new service for dealing with a complaint or petition lodged originally with it. At the end of this period the prisoner could file his papers with an appropriate court, but the papers would be accompanied by a report from the new institution. Thereafter, the matter would proceed as it would now.

Obviously, the details of this proposal remain to be worked out; we believe it merits prompt further study and consideration.

(e) *Screening measures.* Certain devices that have been proposed for relief of the Court in its screening function are properly classified as procedural measures or as changes in internal practice, subjects considered later in this Report. Since, however, they furnish a convenient introduction to jurisdictional changes about to be discussed, it seems appropriate to discuss them at this point.

The right to file jurisdictional statements and petitions for certiorari in the Supreme Court of the United States might be conditioned upon certification of the case by the State or federal court in which final judgment was had, or by its chief judge. Such a method of screening would, we fear, lack coherence, and might at times lack as well, and more often appear to lack, objectivity.

Assistance might be provided to the Court by forming a new, quite small, senior staff responsible to it somewhat after the fashion of a master, which would screen petitions for certiorari, or both petitions and jurisdictional statements, and make recommendations to the Court. Since this would be a staff, not in any sense a body exercising judicial powers, and the responsibility would remain with the Court, the Court would necessarily select and appoint the persons involved. At present, each Justice has at his disposal the assistance of three law clerks. If they make recommendations, they make them to their own Justice, not to the Court, and their recommendations will not have the weight that could be accorded to the recommendations of senior, experienced staff. Yet if each Justice is to retain the responsibility, then some Justices at any rate, though perhaps not all, would find themselves no more relieved by the recommendations of a senior staff than they are now by the recommenda-

tions of their own law clerks. They would find, as they do now, that the responsibility carries with it the function; that they can be, as they are now, aided in the discharge of the function, but that they cannot be relieved of it so long as they retain the responsibility. If, on the other hand, the scheme were to operate "successfully," so that in practice staff recommendations were accepted in a large number of cases as a matter of course, and an acknowledged gap were thus to be opened between function and responsibility in the denial of certioraris and the dismissal of appeals, then we fear that public confidence in the Court would be impaired.

(f) *A new national court: various proposals.* Creation of a new national court of one sort or another would avoid the difficulties with the suggestions discussed above for relief in the screening of cases. Proposals of a new national court take various forms, some of which we have touched on already. The idea is in the air, and as we shall indicate presently, a variant of it is what we recommend.

One proposal to which we gave close attention but which we concluded would do both too little and too much is a suggestion for a new court, intermediate between the present Courts of Appeals and the Supreme Court, to hear and decide cases referred to it by the Supreme Court and cases of conflict between circuits filed initially with it rather than with the Supreme Court. Decision in the new court would be final. This proposal does not address itself to the screening function and so fails appreciably to relieve the Supreme Court of the burden of the docket. On the other hand, the proposal is largely intended to, and if fully availed of might, turn the Supreme Court into a purely constitutional court, less and less in touch, in its decision of argued cases, with other major aspects of national law. This is an outcome which, as we have said, we consider undesirable.

A second proposal to which we gave the most serious consideration would establish a National Court of Review composed of fifteen judges, whose jurisdiction would be as extensive as the present appellate jurisdiction of the Supreme Court, including all cases coming from State as well as federal courts. The National Court of Review would sit in three divisions of five: a civil, an administrative, and a criminal division. But it would be a single court. All of its judges would be qualified to sit in any division, and none would sit in the same division longer than a given period of time, perhaps five years. There would be no further recourse to the Supreme Court in cases which the Court of Review had declined to hear, but the Supreme Court would have discretionary jurisdiction by certiorari after final judgment in all cases decided in the National Court of Review, and also before judgment in the National Court of Review or in a court of appeals. The Court of Review might be expected to decide on the merits some 450 cases a year, on the average 150 in each division, which would be reviewable on certiorari in the Supreme Court. These cases would constitute the maximum possible total appellate docket of the Supreme Court, save only the exceptional case that it might take before judgment below. From the cases decided by the Court of Review, the Supreme Court would select a limited number for further review. Matters decided in the Supreme Court could be expected to continue to range over the entire body of national law.

We believe that the time may come when this proposal, or one closely similar to it, may have to be adopted, and a new court of great dignity created that speaks to and for the entire nation. But the change is a drastic one. While increasing the opportunity for decision in a national court, the change would add yet another stage of litigation in some hundreds of cases each year. And in considerable measure the National

Court of Review, sitting in panels defined by subject matter, would labor under many of the disadvantages to which we believe specialized courts are subject. Such a change as this should not be made until the need is undeniable and the change unavoidable. In our judgment, the time is not yet. The change can still be avoided, and may never prove necessary.

B. *Recommended: A National Court of Appeals.*

Our own recommendation builds on the Judiciary Act of 1925. Its aim is twofold. It deals first with that part of the solution embodied in the Act of 1925 which has since itself become a problem, namely the screening of a mass of petitions for review; and, second, with the pressure exerted on the Supreme Court by cases of conflict between circuits that ought to be resolved but that are otherwise not of such importance as to merit adjudication in the Supreme Court.

We recommend creation of a National Court of Appeals which would screen all petitions for review now filed in the Supreme Court, and hear and decide on the merits many cases of conflicts between circuits. Petitions for review would be filed initially in the National Court of Appeals. The great majority, it is to be expected, would be finally denied by that court. Several hundred would be certified annually to the Supreme Court for further screening and choice of cases to be heard and adjudicated there. Petitions found to establish a true conflict between circuits would be granted by the National Court of Appeals and the cases heard and finally disposed of there, except as to those petitions deemed important enough for certification to the Supreme Court.

The composition of the National Court of Appeals could be determined in a number of ways. The method of selection outlined here draws on the membership of the existing courts of appeals, vesting the judges of

those courts with new functions in relation to the new Court. The National Court of Appeals, under this plan, would consist of seven United States circuit judges in active service. Assignment to this Court should be for limited, staggered terms. Thus the opportunity to serve on the National Court of Appeals would be made available to many circuit judges, the Court would draw on a wide range of talents and varied experience while not losing its identity and continuity as a court, and the burden of any personal inconvenience would not fall too heavily on any small group of judges. Appointments should be made by a method that will ensure the rapid filling of vacancies, and itself tend to provide the court with the widest diversity of experience, outlook and age, in order to help secure for it the confidence of the profession, of the Supreme Court, and of the country.

Assignment of circuit judges to the National Court of Appeals could be made for three-year staggered terms by a system of automatic rotation, as follows. A list of all United States circuit judges in active service would be made up in order of seniority. All judges serving as chief judges, or who would have succeeded to a chief judgeship during their term of service on the National Court of Appeals had they been selected, and all judges with less than five years' service as United States circuit judges would be struck from the list. Appointments to the National Court of Appeals would be made from the resulting list by alternating the judge most senior in service and the most junior, except that each judge would have the privilege of declining appointment for good cause; no two judges from the same circuit could serve at the same time on the National Court of Appeals, and no judge who had served once would be selected again until all other eligible judges had served. It is to be noted that some additional circuit judgeships would have to be created.

In any case in which the National Court of Appeals lacked a quorum because of the extended absence or the disqualification of one or more members, the next circuit judge who would be assigned to the court if there were a vacancy would be called to sit on an *ad hoc* basis for the disposition of that case.

The seat of the National Court of Appeals would be in Washington, but its members would have the right to remain in residence in their circuits, if they chose.

The threshold jurisdiction of the National Court of Appeals would be co-extensive with the present appellate jurisdiction of the Supreme Court. We assume, as we shall urge, that access to that jurisdiction will be entirely by certiorari. The optimum operation of this proposal is an additional argument for converting what are now appeals into certioraris. But the proposal is, strictly speaking, independent of that recommendation. We shall recommend also that three-judge courts and certain opportunities for direct review of decisions of a single district judge be abolished, but again the present proposal is independent of that recommendation.

Aside from its original jurisdiction, and from a rarely invoked jurisdiction in cases certified by courts of appeals, the Supreme Court now exercises appellate jurisdiction by appeal or certiorari in cases coming from state and federal courts. We recommend that all cases now within the Supreme Court's jurisdiction, excepting only original cases, be filed initially in the National Court of Appeals, preferably on certiorari, but in any event on papers having the same form and content they would have if they continued to be filed in the Supreme Court directly.

The National Court of Appeals would have discretion to deny review, governed by the considerations now mentioned in Rule 19 (1) of the Rules of the Supreme Court, or in such further Rules of the Supreme Court as may be made, or in Rules of the National Court of Appeals made subject to the supervening rule-making power

of the Supreme Court. Denial of review by the National Court of Appeals would be final, and there would then be no access to the Supreme Court.

The National Court of Appeals would also have discretion, similarly governed, to certify a case to the Supreme Court for disposition. Possibly the concurrence of three judges (one less than a majority) of the National Court of Appeals might suffice for a decision to certify a case to the Supreme Court. In cases where a court of appeals has rendered a decision in conflict with a decision of another court of appeals, the National Court of Appeals would certify the case to the Supreme Court for disposition if it finds the conflict to be real and if the issue on which the conflict arises, or another issue in the case, is otherwise of adequate importance. In all other cases of real conflict between circuits, the National Court of Appeals would set the case down for argument, and proceed to adjudication on the merits of the whole case. Its decision would be final, and would not be reviewable in the Supreme Court.[3]

It should be plain on the face of the proposal, and if found necessary could be made plain by statement, that where there is serious doubt, the National Court of Appeals should certify a petition rather than denying review. The expectation would be that the National Court of Appeals would certify several times as many cases as the Supreme Court could be expected to hear and decide—perhaps something of the order of 400 cases a year. These cases would constitute the appellate docket of the Supreme Court, except that the Court would retain its power to grant certiorari before judgment in a Court of Appeals, before denial of review in the National Court of Appeals, or before judgment in a case set down for hearing or heard there. The expectation would be that exercises of this power would be exceptional.

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[3] This function of the National Court of Appeals could be extended to cover also intra-circuit conflicts between panels and thus avoid the increasing problems of *en banc* hearings by the courts of appeals.

Once a case had been certified to it, the Supreme Court would, as now, have full discretion to grant or deny review or limited review, to reverse or affirm without argument, or to hear the case. In cases of conflict among circuits, the Supreme Court would, in addition, be able to grant review and remand to the National Court of Appeals with an order that the case be heard and adjudicated. This would be the disposition indicated in a case in which the Supreme Court agreed that the conflict was a true one, but did not view the issue involved as being of sufficient comparative importance to warrant a hearing in that Court.

In no instance would the parties need to file additional papers. A certified petition and the brief in opposition would come forward to the Supreme Court, and in the rare event of a remand of a conflict to the National Court of Appeals, the papers would simply go back.

The National Court of Appeals, or any judge thereof, would have power to issue stays, writs, and the like. The expectation would be that litigants would come to this Court or its members before going to the Supreme Court or to its members and that there would be a diminution in the chambers practice of Supreme Court Justices, although none of their powers in this respect would be affected.

The Supreme Court would have power to make rules governing the practice in the National Court of Appeals, although that court would also have rule-making power for itself, on matters not affected by Supreme Court rules.

The National Court of Appeals would not have power to make a limited certification of a case to the Supreme Court, but it could append a statement to the certification pointing to the issues in the case that it deemed of special importance.

We are aware of objections that can be raised against this recommendation. But relief is imperative, and among possible remedies, none of which is perfect, this appears to us to be the least problematic.

Undoubtedly some room is opened up for the play of the subjectivity of the judges of the National Court of Appeals in the exercise of discretionary judgments to deny review. But someone's subjectivity is unavoidable. We believe our recommendation minimizes the chances of an erratic subjectivity. There are safeguards in the method of designation of the judges; and if the vote of three of the seven judges were to suffice for certification to the Supreme Court the concurrence of five of the seven would be required to deny the certification. We believe that a National Court of Appeals such as we propose would succeed in gaining the confidence of the country, the Supreme Court and the profession.

Again, some measure of loss of control by the Supreme Court itself is inevitable if the Court's burden is to be lessened. We believe this recommendation involves the least possible loss of control. The Supreme Court would select cases for decision on the merits from a docket of several times the number it would be expected thus to decide. Certiorari before final action in the court below, though not a procedure to be encouraged, remains available. Finally, the Supreme Court's readiness to reopen what had seemed to be settled issues, its impatience with, or its interest in, one or another category of cases—all this, we think, would communicate itself to the National Court of Appeals, and would be acted upon. We suggest, however, that the Supreme Court would be well-advised to return to the early practice of writing an occasional opinion to accompany a denial or dismissal of certiorari, and to offer a sentence or two in opinions on the merits by way of explanation of the grant.

We know of no way to quantify the relief that this recommendation would provide for the Supreme Court. Obviously, the chaff on the docket is less time-consuming than the marginal cases that hover between a grant and a denial, and of the latter the Court would still see some few hundred. But when the chaff is counted in the thousands, the burden is bound to be considerable. We

are confident that a substantial amount of Justices' and law clerks' time would be conserved, and more imponderably, that there would be an appreciable lessening of pressure. We think that the costs of the proposal recommend—not merely the material ones, and not merely to litigants, but in terms of the values of the legal order and of the judicial process—are minimal. Balancing these costs against probable benefits, we are entirely persuaded that the proposal is worth adopting. An incidental advantage is that it would allow for experimentation for a period of years without a commitment to a permanent new tier of judicial review and a permanent new judicial body. It may turn out merely to palliate, or it may serve as a cure for at least as long as the reforms of 1891 and 1925 did in their time. Only experience will tell. We believe it should be allowed to tell.

III. PROCEDURAL CHANGES: THREE-JUDGE COURTS AND DIRECT REVIEW; APPEALS AND CERTIORARI

In conjunction with our recommendation for a National Court of Appeals, or independently of it, we recommend that direct appeals from district courts to the highest court be abolished, and more broadly that all cases be brought to the Supreme Court (or to the National Court of Appeals) by certiorari rather than by appeal.[4] As we shall indicate, direct appeals are unduly burdensome to the Supreme Court, particularly in cases where a three-judge court has been convened to consider the constitutionality of a state or federal statute. The power to grant certiorari before judgment in a court of appeals, 28 U. S. C. § 1254 (1), although a measure that should be used very rarely, is a means by which the Supreme Court can act promptly when expedition is important.

At present, through the certiorari procedure, the Court largely has control of its own docket. Of the 4,371 cases on the appellate docket in the 1971 Term, 4,001, or 91.7%, came to the Court by certiorari rather than by appeal. The discretionary-mandatory distinction between certiorari and appeal has been largely eroded. The concept that all appeals are argued while most certiorari cases are disposed of summarily has not been true for many years. A study made a decade ago showed that the Court heard argument in 22.8% of the cases brought to it by appeal. Douglas, *The Supreme Court and Its Case Load,* 45 Corn. L. Q. 401, 410 (1960). See also Note, *The Discretionary Power of the Supreme Court to Dismiss Appeals from State*

[4] For convenience, references are to the Supreme Court; but if a National Court of Appeals is established, the recommendations made herein are applicable to access to that Court.

Courts, 63 Col. L. Rev. 688 (1963). In an address to the Association of the Bar of the City of New York in 1970, Justice Douglas reported that in recent years the proportion of appeals that were heard on oral argument had run from 12% in the 1966 Term to 23% in the 1964 Term. These percentages would be much lower if direct appeals from three-judge and single-judge district courts were not included; the latter categories present special problems, which we consider at a later point.

In fact, then, apart from appeals from district courts, there is no substantial difference between certiorari and appeal from the standpoint of gaining a full hearing, but the existence of two different procedures for access to the Court is confusing and burdensome to the bar, and there is even some ambiguity about the significance of a dismissal for want of a substantial federal question or a summary affirmance. Compare, *e. g., Serrano* v. *Priest,* 5 Cal. 2d 584, 615–618, 487 P. 2d 1241, 1263–1264 (1971), with *Spano* v. *Board of Education,* 68 Misc. 2d 804, 328 N. Y. S. 2d 229 (1972). In theory, in passing upon a jurisdictional statement on appeal, the Court addresses itself to the substantive issues presented and not merely to whether the case is worthy of further review. But in view of the great number of cases now reaching the Court, and the little time available for each, the disposition of most appeals on a summary basis is not a satisfactory equivalent for the judgment on the merits it is supposed to be.

Since somewhat different considerations apply to direct appeals from district courts than to appeals from state courts or federal courts of appeals, we discuss these categories separately.

A. *Appeals from Federal District Courts*

(a) *Three-Judge Court Cases.* Although there are other situations in which the statutes provide for a three-judge district court with direct appeal to the Su-

preme Court, the most significant are those in which the constitutionality of state or federal statutes is challenged, 28 U. S. C. §§ 2281, 2282, and those for review of Interstate Commerce Commission orders, 28 U. S. C. § 2325. We recommend elimination of the three-judge court, and of direct review, in these classes of cases. The historical grounds for this jurisdiction, and its consequences in practice, have not been reviewed by Congress for more than a generation. In connection with such a reexamination Congress would have an opportunity to consider whether more recent special provisions for three-judge courts, in the Civil Rights Act of 1964 (42 U. S. C. §§ 1971g, 2000a–5 (b), 2000e–6 (b)) and the Voting Rights Act of 1965 (42 U. S. C. §§ 1973b (a), 1973c, 1973h (c)), should or should not be retained.

Review of ICC orders by a three-judge court with direct appeal to the Supreme Court is an historical anomaly. At one time there was similar review for other agencies, but this was changed in 1950, and review of the other agencies was transferred to the courts of appeals. 5 U. S. C. § 1032. The reasons given for making this change for the other agencies are fully applicable to the ICC.

> "The provision for review by the Supreme Court in its discretion upon certiorari, as in the review of other cases from circuit courts of appeals, will save the members of the Supreme Court from wasting their energies on cases which are not important enough to call for their attention, and enable them to concentrate more fully upon cases which require their careful consideration. By allowing certiorari, the Court * * * will not any longer be required automatically to hear cases which are not of a nature to merit its consideration." (H. Rep. 2122, p. 4, and S. Rep. 2618, p. 5, 81st Cong., 2d Sess. (1950).)

In recent years the Commission has abandoned its opposition to similar treatment for its orders. Proposals

for review of ICC orders by the courts of appeal, supported by the Judicial Conference of the United States and, so far as we know, opposed by no one, have been before Congress for several years. Since many ICC cases are not of sufficient importance to require review by the Supreme Court, it is clear that the unique treatment of ICC orders is a burden on the Supreme Court that can no longer be justified.

We also recommend abolition of three-judge courts and of direct appeals in cases challenging the constitutionality of statutes. It was possible only a few years ago to conclude that "the burden on the federal judicial system that a three-judge court creates is outweighed by the beneficial effect it has on federal-state relations." American Law Institute, *Study of the Division of Jurisdiction between State and Federal Courts* 320 (Off. Dr. 1969). Events of recent years require that the balance now be struck differently. The most recent figures available to the Institute when it took that position were for fiscal 1967, in which there were 171 cases heard by three-judge courts, and in the years 1960 to 1964 the average had been 95.6 cases per year. *Id.*, at 317. But the use of the three-judge court has increased very rapidly. In fiscal 1971 there were 318 cases requiring a court of three judges, an increase of 86% in the four years since the last year for which the Institute had figures.

The burden that this imposes on the judges of the district courts and courts of appeals is well known. It was primarily to alleviate that burden that the Judicial Conference of the United States endorsed abolition of three-judge courts. 1970 *Rept. Jud. Conf.* 78–79. The device has also become a burden on litigants, and particularly on the states, for whose protection it was first adopted. When, where, and how to obtain appellate review of an order by or relating to a three-judge court is a hopelessly complicated and confused subject that in itself has produced much unnecessary litigation. Judicial and other literature on the subject is voluminous. There are rules

and subrules and exceptions to rules. See Stern & Gressman, *Supreme Court Practice* 48–61 (4th ed. 1969); ALI, *Study of the Division of Jurisdiction between State and Federal Courts* 331–335 (Off. Dr. 1969); Wright, *Federal Courts* § 50 (1970 and 1972 Supp.). As is illustrated by such cases as *Gunn* v. *Committee to End the War in Vietnam,* 399 U. S. 383 (1970), and *Board of Regents of the University of Texas System* v. *New Left Education Project,* 404 U. S. 541 (1972), review of these matters has become so mysterious that even specialists in this area may be led astray.

But wholly aside from the burdens that the three-judge court imposes on lower court judges and on litigants, it creates heavy and unnecessary burdens on the Supreme Court. In terms of the total docket, this class of cases may not seem unduly burdensome. A study of all cases on the appellate docket in the 1971 Term shows that only 2.7% of the cases were from three-judge courts. This figure, however, is quite misleading, for the cases consume a disproportionate amount of the limited time for oral argument available to the Court. Over the last three terms, 22% of the cases argued orally were from three-judge courts, and the figure is quite stable from term to term.

Some of these were cases of great moment, and would ultimately have had to be resolved by the Supreme Court however they came to it. Many of them, however, were not, and were cases in which the Court might well have been content to allow a decision of a court of appeals to stand without further review.

Nor is the burden that these cases impose on the Court fully measured by the amount of argument time they require. A three-judge court is not well adapted for the trial of factual issues. Courts of that kind are reluctant to hold an evidentiary trial, even when there are factual matters to explore, and the judges are likely either to attempt to induce the parties to stipulate facts, where often a trial might be advisable, or to resort to pro-

cedural devices to shortcut the factual hearing. The situation that the Court criticized in *Askew* v. *Hargrave,* 401 U. S. 476, 478–489 (1971), is far from uncommon. On direct appeal from the decision of a three-judge court, the Supreme Court often must choose between reaching decision on the basis of an inadequate and defective record or, as in *Askew,* prolonging the litigation by remand for development of a better record. Even when the record is adequate, direct appeal means that the Supreme Court does not have the benefit of the preliminary screening and sharpening of issues that the courts of appeals ordinarily provide. See *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 937, 938 (1952) (separate opinion of Burton and Frankfurter, JJ.).

Important questions of constitutional law involving federal and state statutes can even now be decided by a single district judge, provided only that injunctive relief is not sought. Thus single judges render declaratory judgments on such questions, having binding effect on the litigants unless set aside. *Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144 (1963). Where there is the added element of a prayer for an injunction, resort would be available to a court of appeals for interlocutory relief from the improvident grant or denial of an injunction. Thus whatever ultimate protection a court of three judges may afford would not be lost.

For all these reasons, we regard the repeal of 28 U. S. C. §§ 2281, 2282 as a matter of urgent importance and we hope that Congress will act promptly to provide this relief for the federal judicial system, for litigants, and, most pertinently, for the Supreme Court.

(b) *Antitrust Suits under the Expediting Act.* Under § 2 of the Expediting Act of 1903, as it has been broadened over the years, direct appeal to the Supreme Court lies from final judgment of a district court in actions brought by the United States to enforce the antitrust laws, the Interstate Commerce Act, and portions of the

Communications Act. 15 U. S. C. §§ 28, 29; 49 U. S. C. §§ 44, 45; 47 U. S. C. § 401 (d).

As the Court has noted:

> "Whatever may have been the wisdom of the Expediting Act in providing direct appeals in antitrust cases at the time of its enactment in 1903, time has proven it unsatisfactory. * * * Direct appeals not only place a great burden on the Court but also deprive us of the valuable assistance of the Courts of Appeals." (*United States* v. *Singer Mfg. Co.*, 374 U. S. 174, 175 n. 1 (1963).)

The committee believes that this statement by the Court is sound with regard to all direct appeals, but the point is especially compelling in antitrust cases, for reasons expressed by Justice Harlan in his separate opinion in *Brown Shoe Co.* v. *United States,* 370 U. S. 294, 364–365 (1962):

> "At this period of mounting dockets there is certainly much to be said in favor of relieving this Court of the often arduous task of searching through voluminous trial testimony and exhibits to determine whether a single district judge's findings of fact are supportable. The legal issues in most civil antitrust cases are no longer so novel or unsettled as to make them especially appropriate for initial appellate consideration by this Court, as compared with those in a variety of other areas of federal law. And under modern conditions it may well be doubted whether direct review of such cases by this Court truly serves the purpose of expedition which underlay the original passage of the Enabling Act. I venture to predict that a critical reappraisal of the problem would lead to the conclusion that "expedition" and also, over-all, more satisfactory appellate review would be achieved in these cases were primary appellate jurisdiction returned to the

> Court of Appeals, leaving this Court free to exercise its certiorari power with respect to particular cases deemed deserving of further review. As things now stand this Court must deal with *all* government civil antitrust cases, often either at the unnecessary expenditure of its own time or at the risk of inadequate appellate review if a summary disposition of the appeal is made.

Over the last 5 terms an average of 6 cases per year have come directly to the Supreme Court by virtue of the Expediting Act. The Court has disposed of 60% of these summarily, with the risk of "inadequate appellate review" of which Justice Harlan wrote, and thus has given plenary consideration to an average of 2.4 cases of this kind per term. Although that number in itself is not large, the nature of the cases and the fact that there has been no preliminary review of them by a court of appeals means that they occupy a disproportionate share of the Court's time.

There is less consensus on how to replace the Expediting Act. Some proponents of repeal would continue to provide direct review if the Attorney General or the district court certifies that immediate appeal is in the public interest. ALI, *Study of the Division of Jurisdiction between State and Federal Courts,* 324 (Official Draft 1969). This would be an improvement over the present situation, in which all of these cases come directly to the Supreme Court, but our belief that the Supreme Court should not have cases forced upon it for decision on the merits and that intermediate review in a court of appeals is useful to the Court impels us to recommend that these cases should come to the Court by the usual procedure of certiorari to a court of appeals.

(c) *Direct Criminal Appeals.* Under the Criminal Appeals Act of 1907, a very ill-defined class of appeals in criminal cases went directly from the district courts

to the Supreme Court. It has been recognized for some years that this provision for direct appeals was "a failure." *United States* v. *Sisson,* 399 U. S. 267, 307 (1970). In 1971 Congress spoke to this problem and changed the statute so that all appeals in criminal cases, when permissible, go to the courts of appeals. 18 U. S. C. § 3731, as amended by the Act of Jan. 2, 1971, § 14 (a), 84 Stat. 1890. The amended statute applies only to criminal cases begun after the amendment became effective, and the Court still must grapple with cases brought directly to it under the former version of the statute. *E. g., United States* v. *Weller,* 401 U. S. 254 (1971); *United States* v. *Vuitch,* 402 U. S. 62 (1971); *United States* v. *Marion,* 404 U. S. 307 (1971). This, however, is a problem that will soon solve itself, and therefore we do not recommend further action in this regard.

(d) *Decisions invalidating Acts of Congress.* Direct appeal to the Supreme Court lies when any federal court, including a one-judge district court, has held a federal statute unconstitutional. 28 U. S. C. § 1252. That provision applies only if the United States or an agency, officer, or employee thereof, was a party to the suit, but this must be read in the light of 28 U. S. C. § 2403, allowing the United States to intervene in any case in which a constitutional question is raised about a federal statute.

Eliminating this basis for direct appeal will not unburden the Supreme Court to any significant extent. In recent years it has been very rare for district courts to strike down Acts of Congress and thus the direct appeal provision is used very little. But there is no need for the statute in the rare cases to which it might apply. Direct review is available, if it is truly necessary, through prejudgment certiorari, and even that drastic device ordinarily need not be invoked. It has been seen that the courts are capable of acting rapidly even while following the normal and desirable pattern

of certiorari after judgment in a court of appeals. In one important case in which time was of the essence, the judgment of the district court was entered on October 21st, the appeal was argued before the court of appeals on October 22nd and decided by that court on October 27th, and the case was argued before the Supreme Court on November 3d and decided November 7th. *United Steelworkers of America* v. *United States*, 361 U. S. 39 (1959). See also *Aaron* v. *Cooper*, 357 U. S. 566 (1958). Accordingly, we recommend repeal of 28 U. S. C. § 1252.

B. *Appeals from the Courts of Appeals.*

At the 1971 Term, 2,799 cases came to the Supreme Court from the federal courts of appeals. Of these, 2,784 came by petition for certiorari, and only 15 by appeal. More than 99% of all courts of appeals decisions are now reviewed in the Supreme Court only by certiorari. We recommend that the tiny fraction in which there is now a statutory right to appeal from a court of appeals to the Supreme Court be brought within the certiorari jurisdiction.

In theory appeal will lie to the Supreme Court under 28 U. S. C. § 1252 if the court of appeals holds an Act of Congress unconstitutional in a civil case, but this is theoretical only. So far as is known, no case has ever been appealed to the Supreme Court under that statute from a court of appeals. Stern & Gressman, *Supreme Court Practice* 31 (4th ed. 1969). In practice the handful of appeals that do come from the courts of appeals are those in which a state statute has been held unconstitutional on federal grounds. 28 U. S. C. § 1254 (2).

That statute has a complicating qualifying clause, limiting the scope of review if appeal is taken and providing that an appeal precludes review by certiorari. The precise effect of the qualifying clause, read as it must be with the 1962 amendment to 28 U. S. C. § 2103,

providing that improvident appeals are to be taken as petitions for certiorari, is not at all clear. See *City of El Paso* v. *Simmons,* 379 U. S. 497, 501–503 (1965). In a case involving both constitutional and other issues, counsel cannot be sure of the procedure best suited to the protection of his client's position, and may be well advised to forego his right of appeal and instead petition for certiorari. Stern & Gressman, *Supreme Court Practice* 33–34 (4th ed. 1969); Wright, *Federal Courts* 478–479 (2d ed. 1970).

All of these complications can be avoided by making all review of decisions of courts of appeals by certiorari. As things stand at present, this would be beneficial to litigants and lawyers but would have a measurable effect on the workload of the Supreme Court. In a five-year period for which statistics are available, the Court did not hear argument in a single case appealed to it from a court of appeals. Douglas, *The Supreme Court and its Case Load,* 45 Corn. L. Q. 401, 410 (1960). However, the situation will change if, as we have recommended earlier, 28 U. S. C. § 2281, providing for a three-judge court in cases seeking to enjoin enforcement of state statutes, is repealed. A case in which a state statute is held unconstitutional would then go to the courts of appeals, and its affirmance would go by appeal to the Supreme Court if 28 U. S. C. § 1254 (2) is allowed to stand. This could become a significant burden on the Court. It is preferable that all of this jurisdiction be by certiorari, so that the Court would not be required either to hear or to decide summarily on the merits those cases in which the decision of a court of appeals setting aside the application of a state statute is not sufficiently momentous or doubtful to justify a Supreme Court decision.

We also recommend repeal of the authorization for certification of questions from a court of appeals to the Supreme Court. This is an undesirable and virtually obsolete form of jurisdiction. Certificates bring to the

Court abstract questions of law, divorced from a complete factual setting in which they may be more carefully explored. The Court may, of course, order up the whole record; but in that event the situation resembles certiorari before judgment in the court of appeals, which may be sought by either litigant in that court, *United States* v. *Bankers Trust Co.*, 294 U. S. 240 (1935), but which remains subject to the discretion of the Supreme Court. The only case in which the Court has accepted a certificate in the last quarter century, *United States* v. *Barnett*, 376 U. S. 681 (1964), is a highly exceptional case, since the court of appeals, sitting as a court of original jurisdiction rather than as an appellate court, was equally divided on a threshold question, but even there review under 28 U. S. C. § 1254 (1) would have sufficed.

We recommend repeal of subdivisions (2) and (3) of 28 U. S. C. § 1254.

C. *Appeals from State Courts.*

Section 1257 of 28 U. S. C. provides for appeal from state courts to the Supreme Court (1) when a federal statute or treaty has been held unconstitutional, and (2) when a state law challenged under the United States Constitution has been held valid. All other cases involving federal questions come to the Supreme Court by certiorari. Once again the great bulk of the jurisdiction is certiorari jurisdiction. At the 1971 Term, 90% of the cases coming to the Supreme Court from state courts were on certiorari. The appeals from state courts made up only 3.6% of all of the cases coming to the Court in that period. See Table VII–a, Appendix.

Since state courts seldom hold federal laws unconstitutional, few appeals are taken under § 1257 (1). These few cases are cases that the Court would almost certainly choose to take if its jurisdiction over them were discretionary.

The cases are much more numerous in which a state court has upheld a state statute against attack on federal constitutional grounds, and in which appeal lies under § 1256 (2). But in the bulk of such cases there is no substantial basis for the constitutional claim. A study by Justice Douglas in 1960 showed that 87% of all appeals from state courts were disposed of summarily, usually for lack of a substantial federal question. Douglas, *The Supreme Court and Its Case Load*, 45 Corn. L. Q. 401, 410 (1960).

It is to be noted that whether a decision of a state court comes to the Supreme Court by appeal or certiorari depends on how the state court has decided the constitutional question. Appeal lies only if the state ruling is against the federal claim. Thus, for example, a challenge to state aid to parochial school pupils would give rise to an appeal if the decision dismissed the challenge, but to certiorari if the challenge was upheld. There is no reason to believe that the Court, in the exercise of a wholly discretionary jurisdiction, would not adequately protect the interests of our constitutional order as well in one situation as in the other.

Furthermore, the present system gives rise to confusion and complication. Some federal issues in a case may be reviewable on appeal while others are reviewable only by certiorari. Often it is difficult to tell which is which and a party may have to file both an appeal and a petition for certiorari to avoid mistake. Sometimes whether a case falls in one category or another depends on how the question has been phrased. An appeal lies if an application of a state statute to particular facts has been challenged as unconstitutional, but review is by certiorari if the attack is upon the constitutionality of an official's particular exercise of his statutory powers. *E. g., Zucht* v. *King*, 260 U. S. 174 (1922); *Charleston Federal Savings and Loan Ass'n.* v. *Alderson*, 324 U. S. 182, 185 (1945); *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 717, 726–

727 (1961). See also *Hanson* v. *Denckla,* 357 U. S. 235, 244 (1958).

These lines of distinction are difficult to follow, both for counsel and for the Court. "Clarity is to be desired in any statute, but in matters of jurisdiction it is especially important." *United States* v. *Sisson,* 399 U. S. 267, 307 (1970). The confusion is only partly alleviated by the provision, 28 U. S. C. § 2103, that if an appeal is improvidently taken, the appeal papers should be treated as a petition for certiorari. Although appellants' jurisdictional statements should contain all the arguments that would be presented for granting certiorari, often they do not. And the Supreme Court is supposed to apply different standards, depending upon the category in which an issue falls.

These complications for counsel and the Court arising from a bifurcated system of review can be avoided if all cases come to the Court via the discretionary route. There is no reason to presume that when a state court has rejected a federal constitutional claim it has done so erroneously. And the ambiguity that necessarily attaches to the orders of the Court summarily disposing of 87% of the appeals that come to it from state courts creates problems for lower courts and makes unnecessary work for the Court itself in the future as litigants, uncertain of the significance of a summary disposition, seek clarification by bringing to the Court other cases raising the same point.

For all of these reasons we conclude that the extra burden imposed by the distinction between appeal and certiorari outweighs the presumed advantages of supposedly mandatory review. We recommend that for cases coming from state courts, as for others, appeals to the Supreme Court be abolished and certiorari be made the exclusive method of review. This could be accomplished by deletion of subdivisions (1) and (2) of 28 U. S. C. § 1257.

IV. INTERNAL PRACTICES

Although it is of course difficult for outsiders to assess the internal practices of the Court, the Committee felt that it could appropriately consider existing practices that are well understood and evaluate possible measures for the assistance of the Court in coping with its docket.

(a) *The rule of four.* Passage of the Judges' bill of 1925 followed upon representations by the Court that it intended to exercise its certiorari jurisdiction through the "Rule of Four," that is, by permitting the vote of only four Justices to bring a case before the full Court. Permitting a minority of the Court to require plenary review was based, first, on the concept that if so substantial a number of Justices (though a minority) wanted to hear a given case, a grant was an appropriate act of discretion for the Court as a whole. Further, at the time the Act of 1925 was adopted, fear was expressed that the Court would undertake to hear too few cases. Relaxation of the usual rule that the majority acts for the Court was therefore considered particularly appropriate for actions committing the Court only to hear a case.

In the past thirty-five years, as has been pointed out in Part I of this Report, the Court has agreed to hear a remarkably constant number of cases. At most Terms it has heard oral argument in about 130 to 160 cases and written full opinions in about 120. But the number reviewed in comparison to the number filed has fallen substantially. Nevertheless, few would now say that the Court is shirking its duty to hear cases, although opinion may be divided on the question whether the Court, if its processing function were reduced, should hear more, different, or fewer cases.

It is clear that whatever one's views on the optimum number of cases the Supreme Court ideally should hear,

a material reduction in the number given plenary review should alleviate pressure on the Court's members. A change in the Rule of Four might produce that result.

The Committee believes this solution is, nevertheless, untenable. To be sure, circumstances have changed drastically since 1925 so that it might not be considered inappropriate for the Court to advise the Congress that the growth of the docket had impelled the abandonment of the Rule of Four. But if a change to five would produce only a marginal reduction in the caseload heard, it would probably not be worth the sacrifice of the important principle that a minority can at least require the Court to give a case consideration. A more drastic change to require, say, six to grant certiorari would raise the question whether it was an unconstitutional deviation from the principle that the "one Supreme Court" mandated by the Constitution always acts by a simple majority of its nondisqualified members. Such a change might make processing of the certiorari docket even more time-consuming and onerous than at present, since presumably even greater care would be needed to determine which cases would be selected for a contracted appellate docket. The change would not relieve what is a major burden on the Court: handling the load of applications for review. Finally, a change in the Rule of Four might be viewed as an invidious effort to reduce access to the Court with respect to particular classes of cases.

(b) *Prolonging or eliminating the annual Term.* In the early days of the Republic when the Justices performed circuit duty, Congress carefully prescribed the Court's Term to assure that it would not sit for more than a month. The Term was gradually lengthened, although today, while the beginning of each Term is fixed by law, tradition alone sets its end. The Term begins in early October and ends in late June. The pressure to complete all work on the docket—at least to hand down opinions in all argued cases—results in

what has been aptly described as the "end of Term crunch." After years of experience the press and the public are alert to awaiting decisions in the most difficult or controversial cases during those last few opinion days each Term. This drive to complete the Term's work must create substantial pressure on the Justices, perhaps to decide before they may be ready to decide; to agree to positions they might, with more time, modify; to write separate opinions that might be avoided if time were available for the necessarily time-consuming discussions of possible grounds of accommodation.

Nevertheless, the tradition of the close of the Term furnishes a certain discipline. It tends to prevent the accumulation of argued but undecided cases from one Term to the next. Moreover, the period between the end of Term and the beginning of the new Term is an important resource that the Justices should not be compelled to surrender. It is the only time when, free from the pressures of a regular schedule, they can reflect on some of the most important matters due to come before them. It is the only significant period available for relaxation, reading, and the recharging of intellectual batteries. A change would probably be illusory in any case. At the present time, the month of September is generally devoted to work on certiorari petitions and to conferences to pass on the petitions that have accumulated inexorably throughout the summer. During the summer these are distributed to the Justices at a rate of 70 or 80 per week. There is little room for changing advantageously the existing practice with respect to Terms of the Court.

There is, however, one practice whose retention seems to us to be dubious. Cases that have been argued but are, despite the efforts of the Justices, not ready for decision with opinions at the end of a Term are generally set down for re-argument at the next Term. Unless there is some special reason for a re-argument, such as the participation of a newly appointed Justice,

this practice seems to be of limited utility beyond preserving in form the principle that all cases finally argued during a Term are decided at that Term. Where there is no other reason for ordering a re-argument the costs of the practice militate against it, from the standpoint of the Court's time, delay in ultimate decision, and counsel fees and other expenses borne by the litigants. Instead, the Court could simply announce in an occasional case that the decision would be reached and delivered at the following Term.

(c) *Reducing oral arguments.* The Court has already found increased time by changing the standard argument time for each side from one hour to one-half hour. Additional time is given only on request or, on occasion, when the Court feels that some additional discussion would enable it or counsel to complete consideration of a point under discussion. But could oral argument be eliminated entirely? If not in all cases, in at least a substantial number? The average level of oral advocacy in the Court is judged to be disappointingly low. Nevertheless, good oral argument is often of significant aid to the Court in understanding a case, in providing an opportunity for clarifying troublesome points in the briefs or record and in ventilating theories about the case with counsel who have presumably given extensive thought to the facts, the law and the implications of a decision.

The Committee would not suggest that the Court could or should abandon oral arguments or reduce the argument time from the present standards. Quite the contrary. On the other hand, it does feel that consideration might perhaps be given to a reorganization of the Supreme Court bar, under which more would be required for admission than three years of membership in a State bar and a filing fee. But the creation of a specialized bar of Supreme Court "barristers" could well create problems of its own. And although oral arguments of a high order are undoubtedly of great value and might

make the task of the Justices at least somewhat more manageable, the Committee recognized that a higher level of arguments provided too intangible a benefit to be of present major significance. Accordingly, we have simply concluded that the creation of a new Supreme Court bar might appropriately be studied, perhaps by a committee of that bar, as a possible, long-range measure.

(d) *Law clerks; other professional assistance.* Before World War II, each Justice of the Court had a single law clerk. Beginning in 1947, each Justice was afforded two law clerks. Since 1969, each has had three. (The Chief Justice has generally had one more, who acts as a senior clerk.) These expansions in support staff have coincided with increases in the docket, in particular the *in forma pauperis* docket. The law clerks have, as a rule (although not universally), been recent graduates of the best known law schools and the position has been viewed as a recognition of outstanding achievement and as affording an opportunity for incomparable professional and personal education. Most clerks serve one term, some two; but service for more than two terms is a rare exception.

The members of the Court use their law clerks in different ways. Some require a memorandum concerning every petition for certiorari or other item to be considered by the Conference. When that is required, the law clerks have correspondingly more limited time for other matters, such as research for opinion drafts, the thorough review of records or the preparation of "bench memos" for use by a Justice on the bench during oral argument. Other Justice, drawing on long experience with the certiorari docket, and believing that they can far more easily than their law clerks review the weekly stack of petitions, prefer to invest more of their own time in this process, and to save their clerks for other tasks, particularly preparing memoranda embodying research on argued cases.

Could some of the pressure on the Justices be relieved if law clerks were older and more experienced; if they were employed for more than one or two Terms of the Court; if each Justice had, say, four, five, or six clerks; or if the law clerk staff were complemented by an increase in library and other supporting personnel?

To the extent that increasing numbers of clerks have had prior experience as clerks to judges of the Courts of Appeals or the District Courts, the factor of inexperience is partly alleviated. On the positive side, the recent legal education of the law clerks probably furnishes a valuable source of contact to the Justices with the currents of legal scholarship. The demanding work schedule and relatively modest compensation would probably make it difficult to attract more experienced lawyers of comparable zest and intellectual qualities, or to hold them for an indefinite tenure.

An increase in the number of law clerks would not be a constructive step, in the view of the Committee, for reasons suggested in Part I of this Report. Every decision must still be made by the Justice, and increasing his staff does not relieve him of that responsibility. Even three clerks have proved to be a large number for developing the close, personal relationship with a good clerk that a Justice requires (and, incidentally, that every good clerk seeks). Further expansion of personal professional staff would tend to reflect an operating model of nine insulated chambers rather than of one tribunal composed of nine members. As a practical matter, finally, the physical arrangements of the Justices' chambers make a further enlargement of their personal staffs almost impossible—at least without a massive remodeling of the Court's building.

For obvious reasons this study does not address itself to methods and practices employed by individual Justices in reviewing petitions, jurisdictional statements, and other aspects of cases. Some economy in the use of law clerks' time might be achieved by assigning to a

few law clerks, from different chambers, on a rotating basis, the task of preparing the preliminary memoranda for all or many of the Justices, analyzing the facts and issues in each case filed. Whether individual Justices would still prefer that this function be performed by their own law clerks is a decision that would lie with them; in any event the Justices themselves would continue to bear the responsibility of judgment in passing upon these voluminous preliminary applications.

The Committee is persuaded that the Court could well use assistance in other areas. Law firms are increasingly employing legal assistants, sometimes called paraprofessionals, to do statistical analyses and other kinds of research not exclusively legal. Persons could be attached to the office of the Clerk of the Court with particular, long-term responsibilities for statistical analysis of the Court's work, for maintaining an overview of developments in the *ifp* docket or for keeping abreast of the chambers practices of the Justices and of extraordinary actions requested of or taken by the Court. Qualified reference librarians, with backgrounds in other disciplines than the law but allied with it—economics, history or similar subjects—can make the Court's excellent collection of books and materials a much more useful resource.

(3) *Physical improvements.* The limited information available to the Committee has suggested that the work of the Court is made more difficult by the absence of physical amenities common to most well-administered law firms, university faculties and many other courts in the Nation. For example, the law clerks spend great amounts of time personally typing their memoranda. They do not have secretarial aid; they are not all even equipped with electric typewriters. With some practice the use of dictating equipment would undoubtedly increase their productivity. The Justices, too, should have greater assistance in handling the transcription of opinions, correspondence, filing, and receiving visitors than

is provided by the single secretary each now has. Data processing equipment might ease problems of the Justices, for example in reviewing prior litigation histories of criminal petitioners. The Committee is not in a position to make detailed recommendations on such items. But it is convinced that a study of these more routine matters could provide useful suggestions for enabling the Court to work more efficiently.

V. SUMMARY OF RECOMMENDATIONS

In summary, the Committee recommends:

1. The establishment by statute of a National Court of Appeals, with a membership of seven judges drawn on a rotating basis from the federal courts of appeals and serving staggered three-year terms. This Court would have the twofold function of (1) screening all petitions for certiorari and appeals that would at present be filed in the Supreme Court, referring the most review-worthy (perhaps 400 or 450 per Term) to the Supreme Court (except as provided in clause (2)), and denying the rest; and (2) retaining for decision on the merits cases of genuine conflict between circuits (except those of special moment, which would be certified to the Supreme Court). The Supreme Court would determine which of the cases thus referred to it should be granted review and decided on the merits in the Supreme Court. The residue would be denied, or in some instances remanded for decision by the National Court of Appeals.

2. The elimination by statute of three-judge district courts and direct review of their decisions in the Supreme Court; the elimination also of direct appeals in ICC and antitrust cases; and the substitution of certiorari for appeal in all cases where appeal is now the prescribed procedure for review in the Supreme Court. This recommendation is not dependent on the adoption of the preceding recommendation. If a National Court of Appeals is established, these recommended changes in appellate procedure would become applicable to it.

3. The establishment by statute of a non-judicial body whose members would investigate and report on complaints of prisoners, both collateral attacks on convictions and complaints of mistreatment in prison. Recourse to this procedure would be available to prisoners

before filing a petition in a federal court, and to the federal judges with whom petitions were filed.

4. Increased staff support for the Supreme Court in the Clerk's office and the Library, and improved secretarial facilities for the Justices and their law clerks.

Respectfully submitted,

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Peter D. Ehrenhaft
Russell D. Niles
Bernard G. Segal
Robert L. Stern
Charles A. Wright
Paul A. Freund,
Chairman

TABLE I

Overall Case Load

(a)	(b)	(c)	(d)	(e)
Term	Cases on Docket	I. F. P. Certiorari Cases on Docket	Cases Disposed Of	Cases Carried Over
1935	1,092	—	990	102
1936	1,052	—	942	110
1937	1,091	—	1,013	78
1938	1,020	—	923	97
1939	1,078	—	946	132
1940	1,109	120	985	124
1941	1,302	178	1,168	134
1942	1,118	147	997	121
1943	1,118	214	962	156
1944	1,393	339	1,249	144
1945	1,460	393	1,292	168
1946	1,678	528	1,520	158
1947	1,453	426	1,322	131
1948	1,596	456	1,425	171
1949	1,441	454	1,301	140
1950	1,321	533	1,202	119
1951	1,353	529	1,207	146
1952	1,429	559	1,278	151
1953	1,453	632	1,293	160
1954	1,557	709	1,352	205
1955	1,849	811	1,630	219
1956	2,021	875	1,670	351
1957	1,990	878	1,765	225
1958	2,044	995	1,763	281
1959	2,143	1,102	1,787	356
1960	2,296	1,085	1,911	385
1961	2,570	1,330	2,142	428
1962	2,801	1,412	2,327	474
1963	2,768	1,307	2,401	367
1964	2,655	1,170	2,173	482
1965	3,256	1,610	2,665	591
1966	3,343	1,615	2,890	453
1967	3,559	1,798	2,946	613
1968	3,884	2,121	3,117	767
1969	4,172	2,228	3,379	793
1970	4,192	2,289	3,315	877
1971	4,515	2,445	3,651	864

Sources: 1935–1939 terms: Annual Rep., Director of the Administrative Office of U. S. Courts. (Table A)

1970–1971 terms: Supreme Court of the United States, Office of the Clerk

TABLE II [1]

New Cases Filed

(a)	(b)	(c)	(d)
Term	Cases Filed	In Forma Pauperis Cases (Miscellaneous Docket) [2]	Paid Cases Filed [3]
1935	983	59	924
1936	950	60	890
1937	981	97	884
1938	942	85	857
1939	981	117	864
1940	977	120	857
1941	1,178	178	1,000
1942	984	147	837
1943	997	214	783
1944	1,237	339	898
1945	1,316	393	923
1946	1,510	528	982
1947	1,295	426	869
1948	1,465	447	1,018
1949	1,270	441	829
1950	1,181	522	659
1951	1,234	517	717
1952	1,283	539	744
1953	1,302	618	684
1954	1,397	684	713
1955	1,644	749	895
1956	1,802	825	977
1957	1,639	811	828
1958	1,819	930	889
1959	1,862	1,005	857
1960	1,940	1,098	842
1961	2,185	1,295	890
1962	2,373	1,414	959
1963	2,294	1,276	1,018
1964	2,288	1,246	1,042
1965	2,774	1,578	1,196
1966	2,752	1,545	1,207
1967	3,106	1,828	1,278
1968	3,271	1,947	1,324
1969	3,405	1,942	1,463
1970	3,419	1,831	1,588
1971	3,643	1,930	1,713

[1] Figures presented in this table are subject to the qualifications noted in footnotes 2 and 3. The impact of these qualifications on the overall distribution of filings between paid and unpaid classification, however, is considered negligible.

[2] At various times in the period from 1935–1971 the method of transferring cases between the appellate and miscellaneous dockets has changed, resulting in some variations in the precise makeup of the miscellaneous docket. Footnotes to Annual Reports of the Director of the Administrative Office of the United States Courts for the years 1945, 1950, 1959, and 1969 detail these changes. The miscellaneous docket was abolished beginning with the 1970 term and the clerk's office began reporting, as a category, the number of *in forma pauperis* cases docketed during a term.

[3] Paid cases from 1935–1969 have been calculated by subtracting column (c) from column (b). However, a small number of paid cases, *e. g.*, petitions for writs of mandamus, prohibition and habeas corpus were also carried on the miscellaneous docket; thus, the number of paid cases may be slightly understated for some terms.

Sources: 1935–1969 terms: Annual Report, Director of the Administrative Office of U. S. Courts (Table A1)
1970–1971 terms: Supreme Court of the United States, Office of the Clerk, Statistical Sheets (Final).

TABLE III

Certiorari Cases

(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)	(j)
Year	All Cert. Petitions Acted On	Cert. Petitions Granted	Percent Granted	Paid Petitions Acted On	Paid Petitions Granted	Percent Paid Pet. Granted	Ifp Petitions Acted On	Ifp Petitions Granted	Percent Ifp Pet. Granted
1941	951	166	17.5%	773	150	19.4%	178	16	9.0%
1951	1,017	113	11.1%	612	94	15.4%	405	19	4.7%
1956	1,425	177	12.4%	664	139	20.9%	622	38	6.1%
1961	1,899	141	7.4%	768	103	13.4%	1,131	38	3.4%
1966	2,470	177	7.2%	1,043	121	11.6%	1,427	56	3.9%
1971	3,286	317	9.6%	1,433	128	8.9%	1,853	189	10.2%
	*[3,153]	[184]	[5.8%]				[1,720]	[56]	[3.3%]

*At the 1971 Term 133 petitions *in forma pauperis,* many of them filed at previous Terms, were granted in cases challenging the validity of the death penalty, after the controlling decision of the Court was handed down. The figures in brackets, which exclude these 133 petitions, are therefore more reflective of the normal certiorari practice.

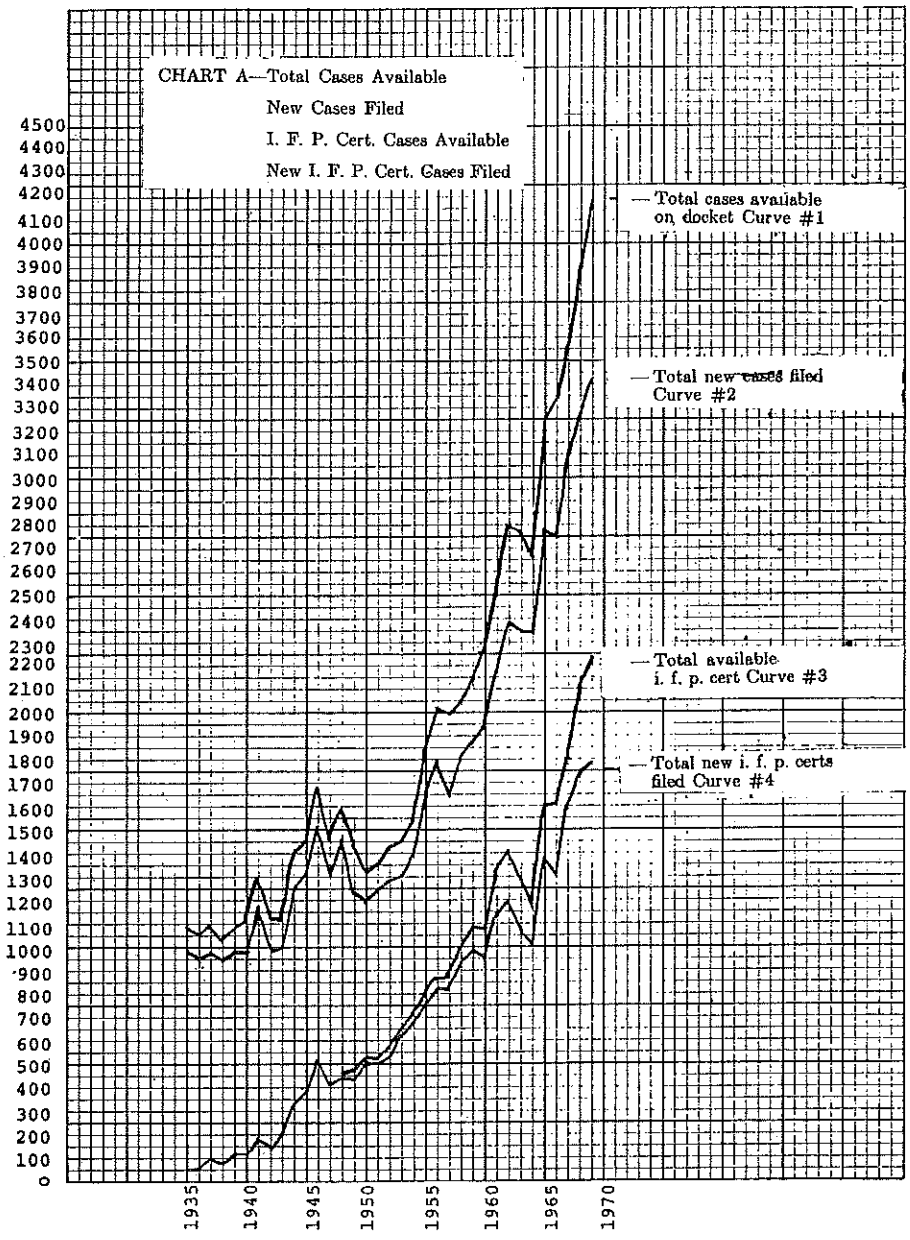
CHART A—Total Cases Available
New Cases Filed
I. F. P. Cert. Cases Available
New I. F. P. Cert. Cases Filed
— Total cases available on docket Curve #1
— Total new cases filed Curve #2
— Total available i. f. p. cert Curve #3
— Total new i. f. p. certs filed Curve #4
4500
4400
4300
4200
4100
4000
3900
3800
3700
3600
3500
3400
3300
3200
3100
3000
2900
2800
2700
2600
2500
2400
2300
2200
2100
2000
1900
1800
1700
1600
1500
1400
1300
1200
1100
1000
900
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700
600
500
400
300
200
100
0
1935
1940
1945
1950
1955
1960
1965
1970

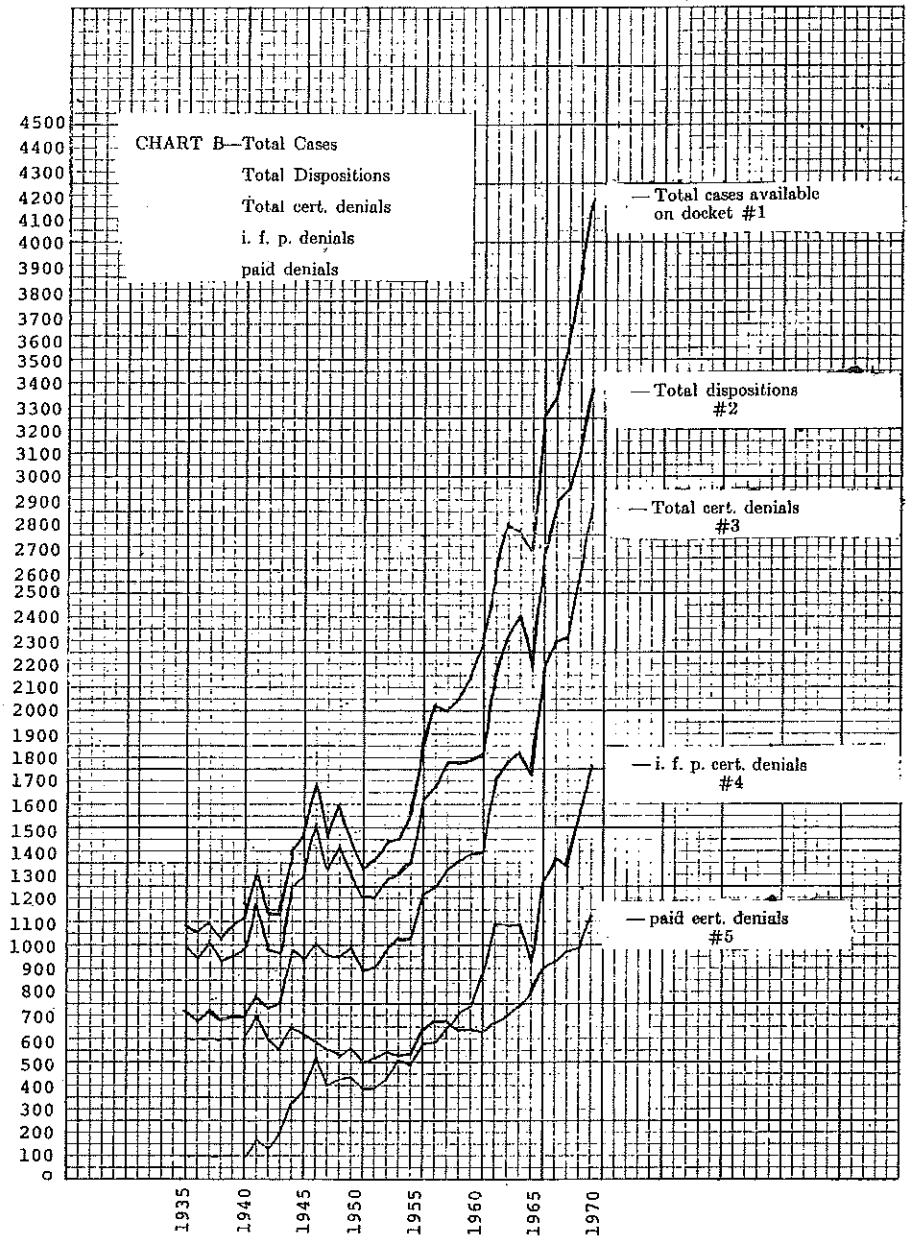
CHART B—Total Cases
Total Dispositions
Total cert. denials
i. f. p. denials
paid denials
— Total cases available on docket #1
— Total dispositions #2
— Total cert. denials #3
— i. f. p. cert. denials #4
— paid cert. denials #5
4500
4400
4300
4200
4100
4000
3900
3800
3700
3600
3500
3400
3300
3200
3100
3000
2900
2800
2700
2600
2500
2400
2300
2200
2100
2000
1900
1800
1700
1600
1500
1400
1300
1200
1100
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700
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400
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200
100
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1935
1940
1945
1950
1955
1960
1965
1970

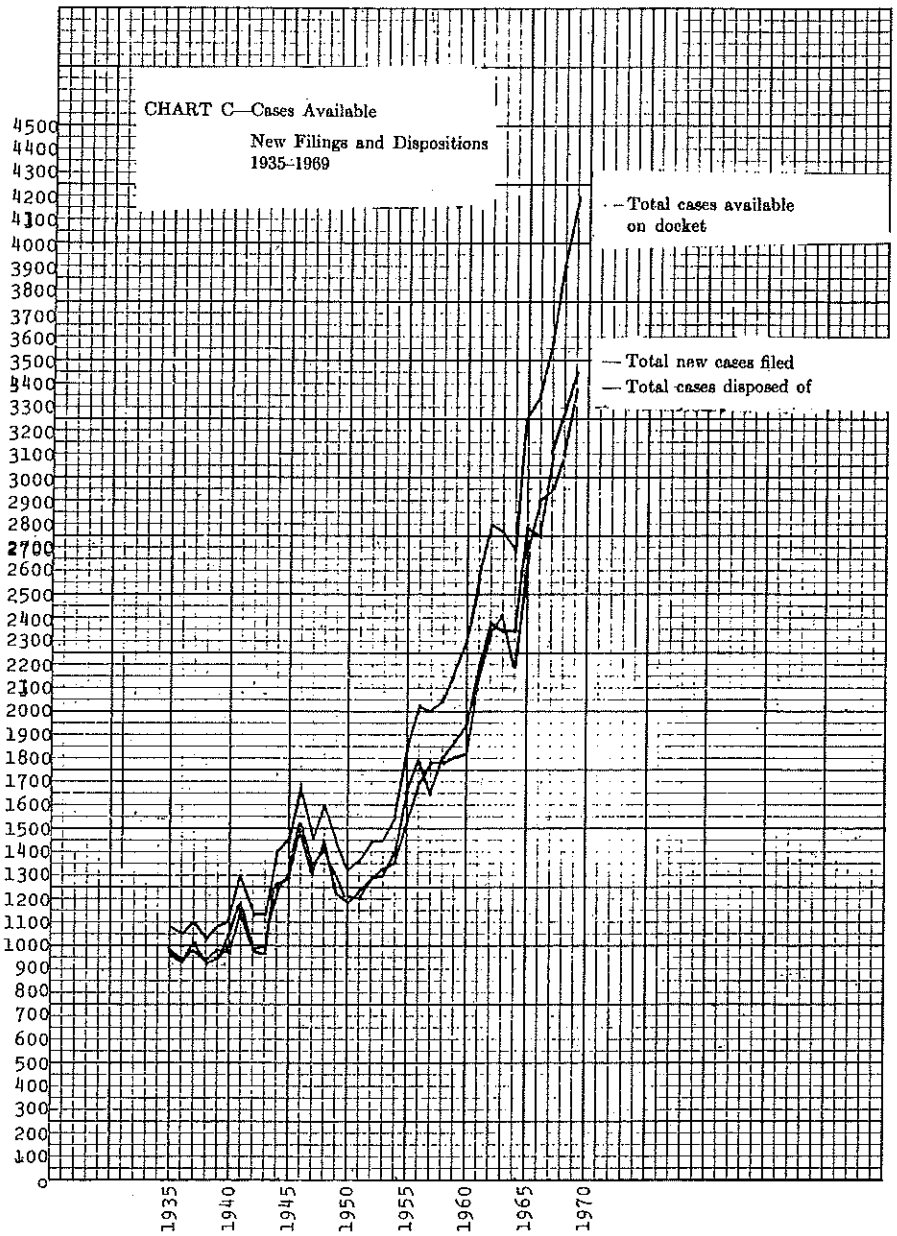
CHART C—Cases Available
New Filings and Dispositions
1935–1969
Total cases available on docket
Total new cases filed
Total cases disposed of
4500
4400
4300
4200
4100
4000
3900
3800
3700
3600
3500
3400
3300
3200
3100
3000
2900
2800
2700
2600
2500
2400
2300
2200
2100
2000
1900
1800
1700
1600
1500
1400
1300
1200
1100
1000
900
800
700
600
500
400
300
200
100
0
1935
1940
1945
1950
1955
1960
1965
1970

TABLE IV

Oral Arguments and Opinions

(a)	(b)	(c)		(d)	
Term	Number of Cases Argued Orally	Number of Cases Disposed of by Signed Opinions		Number of Cases Disposed of Without Signed Opinions	
1935	Not Available	187	[145] [1]	803	[72] [2]
1936	"	180	[149]	762	[80]
1937	"	180	[152]	833	[102]
1938	"	174	[139]	749	[65]
1939	"	151	[137]	795	[97]
1940	"	195	[165]	790	[86]
1941	"	175	[151]	993	[201]
1942	"	196	[147]	801	[63]
1943	"	154	[130]	808	[56]
1944	"	199	[156]	1,050	[75]
1945	"	170	[134]	1,122	[45]
1946	"	190	[142]	1,330	[66]
1947	"	143	[110]	1,179	[65]
1948	162	147	[114]	1,278	[91]
1949	128	108	[87]	1,193	[94]
1950	129	114	[91]	1,088	[77]
1951	128	96	[83]	1,111	[101]
1952	141	122	[104]	1,156	[71]
1953	113	84	[65]	1,209	[86]
1954	105	86	[78]	1,266	[102]
1955	123	103	[82]	1,527	[127]
1956	145	112	[100]	1,561	[134]
1957	154	125	[104]	1,640	[184]
1958	143	116	[99]	1,647	[135]
1959	131	110	[97]	1,677	[122]
1960	148	125	[110]	1,786	[136]
1961	137	100	[85]	2,042	[120]
1962	151	129	[110]	2,198	[225]
1963	144	123	[111]	2,278	[240]
1964	122	103	[91]	2,070	[150]
1965	131	120	[97]	2,545	[218]
1966	150	132	[100]	2,758	[270]
1967	180	156	[110]	2,790	[306]
1968	140	116	[99]	3,001	[230]
1969	144	105	[88]	3,274	[242]
1970	151	137	[109]	2,968	[292]
1971	177	140	[129]	3,190	[286]

[1] No. of written opinions shown in brackets.

[2] Includes number of cases disposed of by per curiams, which are in brackets.

TABLE V

Summary Tabulation of Characteristics

Cases Docketed in the Supreme Court of the United States
1971–72 Term

	Number	*% of Total*
I. TOTAL CASES DOCKETED	4371	100.0
A. *Nature of Cases*		
1. Civil	1751	40.1
2. Criminal	1862	42.6
3. Habeas and Other Collateral Attack	758	17.3
B. *Costs Status*		
1. Paid	2024	46.3
2. Unpaid	2347	53.7
C. *Jurisdictional Grounds*		
1. Certiorari	4001	91.5
2. Appeal	370	8.5
3. Certified Question	0	0.0
4. Extraordinary Remedy [See Attachment]		
5. Other	0	0.0
D. *Court Below*		
1. State Courts	1341	30.7
2. United States Courts of Appeals	2799	64.1
3. United States District Courts	79	1.8
4. Three-Judge Courts	120	2.8
5. Other Courts	32	0.7

	Number	*% of Civil*
II. CIVIL CASES DOCKETED	1751	100.0
A. *Costs Status*		
1. Paid	1352	77.2
2. In Forma Pauperis	399	22.8
B. *Jurisdictional Grounds*		
1. Certiorari	1440	82.2
2. Appeal	311	17.8
3. Other Grounds	0	0.0
C. *Court Below*		
1. State Courts	445	25.4
2. United States Courts of Appeals	1078	61.5
3. United States District Courts	77	4.4
4. Three-Judge Courts	119	6.8
5. Other Courts	32	1.9

Continued

TABLE V—*Continued*

	Number	% of Crim.
III. CRIMINAL CASES	1862	100.0
A. *Costs Status*		
1. Paid	579	31.1
2. In Forma Pauperis	1283	68.9
B. *Jurisdictional Grounds*		
1. Certiorari	1811	97.3
2. Appeal	51	2.7
3. Other Grounds	0	0.0
C. *Court Below*		
1. State Courts	765	41.0
2. United States Courts of Appeals	1095	58.8
3. United States District Courts	1	0.1
4. Three-Judge Courts	1	0.1
5. Other Courts	0	0.0

	Number	% of Habeas
IV. HABEAS AND OTHER COLLATERAL ATTACK	758	100.0
A. *Costs Status*		
1. Paid	93	12.3
2. In Forma Pauperis	665	87.7
B. *Jurisdictional Grounds*		
1. Certiorari	750	98.9
2. Appeal	8	1.1
3. Other Grounds	0	0.0
C. *Court Below*		
1. State Courts	131	17.3
2. United States Courts of Appeals	626	82.6
3. United States District Courts	1	0.1
4. Three-Judge Courts	0	0.0
5. Other Courts	0	0.0

EXCEPTIONAL CASES

These cases were not included in the total number of cases listed listed on the preceding summary of the Supreme Court's docket.

Original	20
Special	3
Miscellaneous—Paid	25
Miscellaneous—In Forma Pauperis	88
Total	136

TABLE VI

Appeals at 1971 Term

APPEALS ACTED ON

253

APPEALS DISPOSED OF
WITHOUT ARGUMENT

209

PERCENTAGE OF APPEALS
DISPOSED OF
WITHOUT ARGUMENT

82%

APPEALS ARGUED

44

TABLE VII-a

SUPREME COURT CASES DOCKETED—1971 Term

All Cases Filed; Each Category as Percent of Total Number of Cases Filed

JURISDICTIONAL GROUNDS

THE COURT BELOW	Certiorari	Appeal	Total
State Court	1183 27.1%	158 3.6%	1341 30.7%
U. S. Court of Appeals	2784 63.8%	15 0.3%	2799 64.1%
U. S. District Court	3 0.1%	76 1.7%	79 1.8%
Three-Judge Court		120 2.8%	120 2.8%
Other Court	31 0.7%	1 0.0%	32 0.7%
Total	4001 91.7%	370 8.3%	4371 100.0%

These figures do not include exceptional cases, for which figures are given on page A9.

TABLE VII–b

SUPREME COURT CASES DOCKETED—1971 Term

Total *Civil* Cases; Each Category as Percent of Total Number of Civil Cases Filed

JURISDICTIONAL GROUNDS

THE COURT BELOW	Certiorari	Appeal	Total
State Court	340 19.4%	105 6.0%	445 25.4%
U. S. Court of Appeals	1066 60.8%	12 0.7%	1078 61.5%
U. S. District Court	3 0.2%	74 4.2%	77 4.4%
Three-Judge Court		119 6.8%	119 6.8%
Other Court	31 1.8%	1 0.1%	32 1.9%
Total	1440 82.2%	311 17.8%	1751 100.0%

These figures do not include exceptional cases, for which figures are given on page A9.

TABLE VII–c

SUPREME COURT CASES DOCKETED—1971 Term

Total *Criminal* Cases; Each Category as Percent of Total Number of Criminal Cases Filed

JURISDICTIONAL GROUNDS

THE COURT BELOW	Certiorari	Appeal	Total
State Court	717 38.4%	48 2.6%	765 41.0%
U. S. Court of Appeals	1094 58.7%	1 0.1%	1095 58.8%
U. S. District Court		1 0.1%	1 0.1%
Three-Judge Court			
Other Court			
Total	1811 97.1%	51 2.9%	1862 100.0%

These figures do not include exceptional cases, for which figures are given on page A9.

TABLE VII–d

SUPREME COURT CASES DOCKETED—1971 Term

Total *Habeas* Cases; Each Category as Percent of Total Number of Habeas Cases Filed

JURISDICTIONAL GROUNDS

THE COURT BELOW	Certiorari	Appeal	Total
State Court	126 16.6%	5 0.7%	131 17.3%
U. S. Court of Appeals	624 82.3%	2 0.3%	626 82.6%
U. S. District Court		1 0.1%	1 0.1%
Three-Judge Court			
Other Court			
Total	750 98.9%	8 1.1%	758 100.0%

These figures do not include exceptional cases, for which figures are given on page A9.

APPENDIX

Biographies of Members of Study Group

PAUL A. FREUND, chairman, is Carl M. Loeb University Professor at Harvard University and has been a member of the Harvard Law School faculty since 1939. He served in the Office of the Solicitor General of the United States (1935–1939, 1942–1946) and was law clerk to Mr. Justice Brandeis during the 1932 Term. He is the author of several books on the Supreme Court and constitutional law, including *The Supreme Court of the United States: Its Business, Purposes and Performance* (1961), and *On Law and Justice* (1968); co-editor of *Cases on Constitutional Law* (3d edition 1967); and editor-in-chief of the *History of the Supreme Court.*

ALEXANDER M. BICKEL is Chancellor Kent Professor of Law and Legal History at Yale Law School, where he has been a member of the faculty since 1956. He served as law clerk to Mr. Justice Frankfurter during the 1952 Term. Before that (1949–1950), he served as law clerk to Chief Judge Calvert Magruder of the U. S. Court of Appeals for the First Circuit. He is author of several books on the Supreme Court, including *The Supreme Court and the Idea of Progress* (1970), *The Least Dangerous Branch* (1962), and *The Unpublished Opinions of Mr. Justice Brandeis* (1957). He has served as consultant to the Subcommittee on Separation of Powers, Committee on the Judiciary of the United States Senate (90th–91st Congress).

PETER D. EHRENHAFT, a member of the Washington, D. C., law firm of Fried, Frank, Harris, Shriver and Kampelman, practices before the Supreme Court, where he served during the 1961 Term, as law clerk to the Chief Justice. Before that (1957–1958), he served as a law clerk to the Court in the U. S. Court of Appeals

for the D. C. Circuit. He has authored various legal articles.

RUSSELL D. NILES is Director of the Institute of Judicial Administration and Charles Denison Professor at the School of Law of New York University. He was Chancellor and Executive Vice-President of N. Y. U. from 1964 to 1966 and Dean of its Law School from 1948 to 1964. He has been a member of the faculty since 1929. He served as president of the Association of the Bar of the City of New York from 1966 to 1968.

BERNARD G. SEGAL is a member of the Philadelphia law firm of Schnader, Harrison, Segal and Lewis and practices frequently before the Supreme Court. Among numerous bar and government positions in which he has served, he has been president of the American Bar Association (1969–1970), president of the American College of Trial Lawyers (1964–1965), chairman of the board of the American Judicature Society (1958–1961), vice-president of the American Law Institute (since 1968), and a member of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (since 1959).

ROBERT L. STERN is a member of the Chicago law firm of Mayer, Brown and Platt and participates frequently in litigation before the Supreme Court and other appellate courts. He was an attorney in the Office of the Solicitor General of the United States from 1941 to 1954, serving there as either Acting Solicitor General or as First Assistant (1950–1954). Before that (1934–1941), he served in the Anti-Trust Division of the Department of Justice. He was a member of the American Law Institute's Advisory Committee for the Study on the Division of Jurisdiction between State and Federal Courts (1963–1969). He is co-author (with Eugene Gressman) of *Supreme Court Practice* (4th edition, 1969) and served as a member of the Advisory Committee on Appellate Rules of the Judicial Conference of the United States (1960–1968).

CHARLES ALAN WRIGHT is McCormick Professor of Law at the University of Texas School of Law, where he has been a member of the faculty since 1955. He practices frequently before the Supreme Court. He served as law clerk to Judge Charles Clark of the U. S. Court of Appeals for the Second Circuit (1949–1950). He was a reporter for the American Law Institute's Study on the Division of Jurisdiction Between State and Federal Courts (1963–1969) and has served as a member of the Advisory Committee on Civil Rules (1961–1964) and the Committee on Rules of Practice and Procedure (since 1964), both of the Judicial Conference of the U. S. He is the author, co-author or editor of several works on federal courts, practice and procedure, including *Handbook of the Law of Federal Courts* (2nd edition, 1970), *Cases on Federal Courts* (5th edition, 1970), and *Federal Practice and Procedure* (1969 – ——).