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Supreme Court's Workload Problem: Current Congressional Reforms, The;Note

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THE SUPREME COURT'S WORKLOAD PROBLEM: CURRENT CONGRESSIONAL REFORMS

The rapidly expanding and increasingly complex workload of the Supreme Court of the United States has created what Chief Justice Warren Burger describes as a "grave problem."[1] The number of petitions for writ of *certiorari* which litigants present to the Court for review has increased tremendously during the past thirty years. During the October term of 1950, 1,181 petitions for writ of *certiorari* were filed with the Court;[2] while in the October term of 1980, the Court received 4,242 petitions.[3] As the Court's caseload continues to grow unchecked, the issues presented to the Court are becoming increasingly complex.[4] This substantial increase in the size and complexity of the Court's workload has two important effects: the quality of the Court's decisions has suffered[5] and the Court is unable to grant *certiorari* to a substantial number of cases which merit further review.[6]

There are two proposed congressional reforms that address the Court's workload problem. The Court of Appeals for the Federal Circuit Act of 1981 [CAFCA][7] and the Supreme Court Jurisdiction Act of 1981 [SCJA][8] both set forth proposed congressional solutions to the Court's burgeoning workload. The CAFCA proposes to establish a National Court of Appeals which would review cases presenting areas of the law in which the federal circuits are in conflict and which the Supreme Court is unable to review because of its workload.[9] The SCJA would eliminate the Supreme Court's mandatory jurisdiction and would thereby provide greater discretion to the Supreme Court in

1. Address by Chief Justice Warren Burger, American Bar Association (August, 1973), *reprinted in part in* A. BICKEL, THE CASELOAD OF THE SUPREME COURT 14 (1973) [hereinafter cited as BICKEL].
2. FEDERAL JUDICIAL CENTER, REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT (1972), [hereinafter cited as REPORT]*reprinted in* 57 F.R.D. 573, 614 (1972).
3. 127 CONG. REC. S8749 (daily ed. July 29, 1981) (statement of Sen. Heflin).
4. See p. 54 of this note, *infra*.
5. See pp. 54-55 of this note, *infra*.
6. See pp. 55-56 of this note, *infra*.
7. H.R. 4482, 97th Cong., 1st Sess. (1981), S. 1700, 97th Cong., 1st Sess. (1981). Representative Kastenmeier introduced H.R. 4482 on September 15, 1981. The House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice approved an amended version of H.R. 2405, 97th Cong., 1st Sess. on September 10, 1981. 127 CONG. REC. D 1036 (daily ed. Sept. 10, 1981).

   Senator DeConcini introduced S. 1700 on October 5, 1981. The Senate Judiciary Subcommittee approved S. 1700, which is substantially the same as S. 21, 97th Cong., 1st Sess., 127 CONG. REC. S32 (daily ed. Jan. 5, 1981), and S. 1529, 97th Cong., 1st Sess. (1981).
8. H.R. 2406, 97th Cong., 1st Sess. (1981). S. 1531, 97th Cong., 1st Sess. (1981). Representative Kastenmeier introduced H.R. 2406 on March 10, 1981. 147 CONG. REC. H864 (daily ed. March 10, 1981). Senator Heflin introduced S. 1531 on July 7, 1981.
9. 127 CONG. REC. S8749 (daily ed. July 29, 1981) (statement of Sen. Heflin).

selecting the cases it would review.[10] Both Congress and the Supreme Court show strong support for these two pieces of legislation.

THE WORKLOAD PROBLEM

Past Remedies

Previous increases in the workload of the Supreme Court have merited congressional remedies.[11] In 1802 Congress relaxed the obligation of the Justices to ride circuit when the burden grew unreasonable.[12] A rise in the number of cases presented to the Court from 636 in 1870, to 1,816 in 1890[13] resulted in what then Professor Felix Frankfurter described as "a very empiric response to very definite needs."[14] That response was the Court of Appeals Act of 1891[15] which divided the country into nine circuits, each containing an intermediate federal court of appeals. More importantly, the 1891 legislation produced a new docket control weapon, the discretionary writ of *certiorari*.[16] Though the Court of Appeals Act of 1891 initially authorized its use only in a small percentage of the cases, it provided a ready solution when the docket size again reached crisis level in 1925. The Judiciary Act of 1925 converted most of the Court's jurisdiction from obligatory to discretionary.[17] This temporarily relieved the workload problem. The past thirty years, however, have again seen the Supreme Court burdened with more cases than it can adequately review.

The Present Workload Problem

A rapid increase in the workload of the Supreme Court has again created serious problems which affect our judicial system. The caseload has more than tripled in the past thirty years. At the October term of 1950, there were 1,181 cases filed. At the October term of 1960, the number had risen to 1,940, and in 1970 to 3,419.[18] During the October term of 1980, the Court received 4,242 petitions.

The increasing complexity of the cases which litigants present compounds this workload problem. Chief Justice Burger states that this "new" complexity represents even more of an increase in the workload

10. *Id.*
11. *See* Bickel, *supra* note 1, at 3.
12. *Id.*
13. *Id.*
14. F. FRANKFURTER & J.M. LANDIS, THE BUSINESS OF THE SUPREME COURT 13 (1st ed. 1928).
15. Court of Appeals Act of 1891, ch. 517, § 6, 26 Stat. 828 (1891) (current version at 28 U.S.C. § 1254 (1976).
16. A writ of *certiorari* is granted at the discretion of the Supreme Court. The writ of *certiorari* is an order from the Court calling up the record in a lower proceeding for review. With the other form of jurisdiction, the appeal, the Court must decide the case on the merits.
17. The Judiciary Act of 1925, § 1, 43 Stat. 938 (1925) (current version at 28 U.S.C. § 41 (1976), *as amended by* the Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. 96-452, § 1, 94 Stat. 1994 (1980)).
18. REPORT, *supra* note 2, *reprinted in* 57 F.R.D. 573, 614 (1972).

than the expanding case load reflects.[19] Complexity increases the workload due to the additional time required to decide more complex issues adequately. This, in turn, further reduces the time available to resolve other issues presented to the Court. During the October term of 1889 virtually every losing litigant in the federal trial court could then appeal and argue his or her case in the Supreme Court.[20] Consequently, the Court dealt with established areas of the law. Only a handful of constitutional decisions were handled during that term.[21] The increase in the percentage of constitutional issues which the Court currently reviews demonstrates that present issues are increasingly complex.[22]

THE EFFECT ON THE SUPREME COURT'S DECISION MAKING PROCESS

Quality of the Opinions

The prime task of each Justice is to reflect on the nation's most important constitutional and statutory problems and then to engage in the difficult and time-consuming process of constructing enduring principles of law. Each Justice must set aside time for personal research, reflection, and collegial exchange. Justice Frankfurter emphasized that this task presupposes a freshness of mind and adequate time to reflect and discuss the issues.[23] Unfortunately, the Court's growing caseload, compounded by increasingly important and complex cases, has created an atmosphere at the Court described as "hydraulic pressure."[24] Professor Henry Hart best states the result of this intense working atmosphere:

> It has to be said that too many of the Court's opinions are about what one would expect to be written in twenty-four hours. . . . There are able opinions to be sure, including many that have manifestly taken much more time than that in thought and composition. But few of the Court's opinions, far too few, genuinely illumine the area of law with which they deal. Other opinions fail even by much more elementary standards. Issues are ducked which in good lawyership and good con-

19. Burger, *Report on the Federal Judiciary Branch—1973*, 59 A.B.A.J. 1125, 1129 (1973). Chief Justice Burger states that reasons for this increase in complexity of the cases presented for review include loosely drawn statutes from which the Justices must determine the intent of Congress. He also notes that constitutional claims are asserted which "would not have been thought of a few years ago." *Id.*

20. Rehnquist, *Whither the Courts* 60 A.B.A.J. 787, 788-89 (1974). For an indication of the variety of cases the Court presently decides, see Cox, *The Supreme Court 1979 Term—Foreward: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 293 (1980) (Table III, Subject Matter of Dispositions with Full Opinions).

21. Rehnquist, *supra* note 20, at 789.

22. Compare Frankfurter & Landis, *The Supreme Court Under the Jurisdiction Act of 1925*, 42 HARV. L. REV. 21 (1928) with *The Supreme Court, 1979 Term*, 94 HARV. L. REV. 1, 293-95 (1980). For example, in the mid-twenties, the Supreme Court decided 23 cases involving due process. The 1979 term produced 41 due process decisions. *Id.*

23. Ripple, *The Supreme Court's Workload: Some Thoughts for the Practitioner*, 66 A.B.A.J. 174, 175 (1980). Kenneth Ripple is a professor of law at Notre Dame Law School.

24. *Id.* at 174.

> science ought not be ducked. Technical mistakes are made which ought not to be made in decisions of the Supreme Court of the United States.[25]

This pressure creates a decrease in the time available for deliberation and results in a rising number of dissenting votes. In 1964 there were 152 dissenting votes.[26] By the 1977 term this had increased to 272 dissenting votes;[27] while in the 1979 term there were 301 dissenting votes.[28]

The Court itself agrees that the workload is substantial. Eight of the current Justices believe that the workload is "heavy and growing."[29] Chief Justice Burger,[30] and Justice Blackmun[31] agree that the quality of the Court's opinions suffers under the Court's present work load.[32]

Rationing Review

The increasing caseload causes a second problem. The Supreme Court must severely ration review because of the size of the Court's docket. In 1937, then Chief Justice Hughes stated that approximately twenty percent of the petitions for *certiorari* merited review.[33] Due to the high caseload, the present Court can only grant review to a fraction of twenty percent.[34] Even though the Court granted *certiorari* to about

25. Hart, *The Time Chart of the Justices*, 73 HARV. L. REV. 84, 100-01 (1959) (quoting Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 3 (1957)). Henry M. Hart, Jr. is the Charles Stebbins Fairchild Professor of Law at Harvard Law School.
26. Reiblich, *Summary of October 1964 Term*, 85 S. Ct. 133, 142 (1965) (Introductory Remarks).
27. Reiblich, *Summary of October 1977 Term*, 98 S. Ct. 247, 257 (1978) (Introductory Remarks).
28. *The Supreme Court*, 1979 Term, 94 HARV. L. REV. 1, 289 (1980) (Table I, Action of Individual Justices).
29. Letter from the Justices of the United States Supreme Court to Senator DeConcini by the full Court, reprinted at 125 Cong. Rec. S4140-41 (daily ed. April 9, 1979).
30. Warren & Burger, *Retired Chief Justice Attacks, Chief Justice Burger Defends Freund Study Group's Compilation and Proposal*, 59 A.B.A.J. 721 (1973).
31. Letter of Justice Blackmun to Senator Hruska (May 30, 1975), *reprinted in* 67 F.R.D. 404 (1975).
32. While their views have been thoroughly documented and discussed, a few are worth noting. Chief Justice Burger contends:

> Until someone perfects an eight—or nine—day week or a thirty hour day, the enormous increase in the Court's work over the past twenty years must produce undue stress somewhere and ultimately affect the quality of the product. To wait to do something until someone can empirically demonstrate that three or four thousand cases cannot be processed as well as one thousand is not my conception of how we on the Court should fulfill our responsibility to the Court as an institution.

Warren & Burger, *Retired Chief Justice Warren Attacks, Chief Justice Burger Defends Freund Study Group's Compilation and Proposal*, 59 A.B.A.J. 721, 723 (1973).

Justice Stewart has agreed. "This workload means, I am sorry to say, that there simply is not so much time as ideally there should be for the reflective deliberation so essential to the judicial process." Griswold, *The Supreme Court, 1959 Term—Foreward: Of Time and Attitudes—Professor Hart and Judge Arnold*, 79 HARV. L. REV. 81, 83 (1960) (quoting Justice Stewart from N.Y. Times, April 10, 1960, § 1, at 41, col. 3).

Justice Blackmun has also expressed a concern that the product of his work would become "second rate" because of the caseload problem. *See* note 31 *supra*.
33. Brown Transport. Corp. v. Atcon, Corp. Inc., 439 U.S. 1014, 1023 (1978) (White, J. dissenting).
34. *Id.*

eighteen percent of the "paid"[35] petitions for *certiorari* in 1955,[36] it presently grants review to less than ten percent of the paid petitions.[37] Justice White,[38] Justice Powell,[39] Justice Rehnquist,[40] and former Justice Stewart[41] all contend that there are petitions for which *certiorari* should be granted but are not because of the caseload. The Court is performing at its full capacity and extending plenary review to as many cases as it can "adequately consider, decide and explain by full opinion."[42] While the number of new cases requesting review increases, the number of cases which the Court can review remains constant.[43] Therefore, cases to which the Supreme Court would have given plenary consideration thirty years ago are refused review today.

The lack of review creates significant problems. Lack of uniformity within the federal circuits is increased by the Court's inability to define important questions of law. Justice White, in his dissent in the denial of the petition for writ of *certiorari* in *Brown Transport Corp. v. Atcon*[44] states that the Court is now performing at full capacity and lists numerous cases deserving review which were probably denied *certiorari* because of the caseload problem.

Another problem which the caseload causes is an increase in the number of summary decisions the Court renders. The number of paid[45] cases summarily decided increased from sixty in 1962[46] to 162 in the 1976 October term.[47] The Supreme Court has increased the number of its summary decisions in order both to decide more cases

35. "Paid" cases are those petitions submitted by counsel in which the filing fee is paid. The "in forma pauperis" petitions are layman-drafted requests usually presented by inmates of federal or state prisons. In 1951 there were 612 paid petitions and 405 *in forma pauperis* petitions. By the 1976 term there were 2,019 paid petitions and 2,083 in forma pauperis. Clearly both have risen dramatically. D. PROVINE, CASE SELECTION IN THE UNITED STATES SUPREME COURT (1980).
36. Griswold, *Rationing Justice—The Supreme Court's Caseload and What the Court Does Not Do*, 60 CORNELL L. REV. 335, 341 (1975).
37. *See* note 28 *supra*, at 289.
38. *See* Letter of Justice White to Senator Hruska (June 9, 1975), *reprinted in* 67 F.R.D. 401 (1975).
39. Letter of Justice Powell to Senator Hruska (June 10, 1975), *reprinted in* 67 F.R.D. 406 (1975).
40. Justice Rehnquist contends that the main concern is the sufficiency of judicial capacity. Letter of Justice Rehnquist to Senator Hruska (June 10, 1975), *reprinted in* 67 F.R.D. 407 (1975).
41. Griswold, *The Supreme Court, 1959 Term—Foreward: Of Time and Attitudes—Professor Hart and Judge Arnold*, 74 HARV. L. REV. 81, 84 (1960).
42. Brown Transport Corp. v. Atcon, 439 U.S. 1014, 1023 (1978) (White, J., dissenting).
43. Over the past thirty years the number of cases in which the Court has heard oral argument before reaching a decision has remained relatively constant. *See Report of the Study Group on the Caseload of the Supreme Court*, 57 F.R.D. 573, 581, 606 (1973). For example, even though 177 cases were "argued" during the 1973 term, three or four cases are often heard at a single argument. A total of about 150 "cases heard" is reasonably accurate. Griswold, *Rationing Justice—The Supreme Court's Caseload and What the Court Does Not Do*, 60 CORNELL L. REV. 335, 339 n.23 (1975).
44. 439 U.S. 1014, 1017-22 (1978) (White, J., dissenting). From 1969 to 1973, the number of dissents from denial of *certiorari* increased from 237 (involving 188 cases) to 625 (involving 499 cases), Wiggens, *The National Court of Appeals*, 13 Trial 36 (1977).
45. *See* note 39 *supra*.
46. *See* Reiblich, *Summary of October 1970 Term*, 91 S.Ct. 169, 176 (1970) (Introductory Remarks).
47. *See* Reiblich *supra* note 27.

under discretionary jurisdiction and to dispose of a substantial number of cases brought under mandatory jurisdiction. Many criticize this practice[48] as serving to confuse rather than clarify the law.[49] This pattern of summary decisions, like the pattern of the increasing caseload, will intensify without legislative action.

THE CURRENT PROPOSED LEGISLATIVE SOLUTIONS

Two current legislative proposals deal with the caseload problem. The SCJA[50] and the CAFCA[51] both propose solutions dealing with certain aspects of the problems which the Court's workload causes. The SCJA would remove most of the Supreme Court's mandatory jurisdiction and thus give the Court greater discretion in selecting cases for review.[52] This bill has drawn strong support and is relatively unopposed.[53] The purpose of the CAFCA is to create a United States Court

48. "While our heavy caseload necessarily leads us to dispose of cases summarily, it must never lead us to dispose of any case irresponsibly. Yet I fear precisely that is what happened here." U.S. v. Jacobs, 429 U.S. 909, 910 (1976) (Summarily vacated) (Stewart, J., dissenting).

49. *See* Note, *Summary Disposition of Supreme Court Appeals: The Significance of Limited Discretion and a Theory of Limited Precedent*, 52 B.U.L. REV. 373 (1972). In Stone v. Graham, 101 S.Ct. 192 (1980) (per curiam) (Rehnquist, J., dissenting.) Justice Rehnquist stated:

> I therefore dissent from what I cannot refrain from describing as a cavalier summary reversal, without benefit of oral argument or briefs on the merits, of the highest court of Kentucky. *Id.* at 196.

50. *See* note 8 *supra*.

51. *See* note 7 *supra*.

52. The Senate Committee on the Judiciary issued a report during the first session of the 96th Congress on the Supreme Court Jurisdiction Act of 1979, S. 450, which is identical to The Supreme Court Jurisdiction Act presently before the 97th Congress. In that report the Committee states:

> The main thrust of S. 450 is to eliminate the jurisdiction of the Supreme Court of the United States to review, by way of appeal, those classes of Federal court cases specified in 28 U.S.C. 1252 and 1254(2), and those classes of State court cases specified in 28 U.S.C. 1257 (1) and (2). All such cases would remain reviewable by the Supreme court, as alternatively they now are, by way of *certiorari* pursuant to either Sec. 1254(1) or Sec. 1257(3). S. 450 further excises three specialized types of statutory appeals to the Supreme Court from lower Federal courts, causing such cases to become reviewable only by way of certiorari.

S. Rep. No. 35, 96th Cong., 1st Sess. 1 (1979).

53. In 1978 the nine Justices of the Supreme Court signed a letter urging Congress to pass The Supreme Court Jurisdiction Act. Letter from the Justices of the United States Supreme Court to Senator DeConcini, (June 22, 1978), *reprinted in* 125 CONG. REC. S 4140-41 (daily ed. April 9, 1979).

Also in 1978, Justice Stevens prefaced his announcement of two opinions of the Supreme Court with the following oral statement on behalf of the Court:

> These two cases will be of interest to a limited segment of the Bar that practices in tax law and more narrowly in taxation by the states of various business entities. They both come here by appeal from the highest court of a state, one from the State of Massachusetts and the other from the State of Iowa.
>
> At least one of these cases almost certainly would not have been heard by the Court if the Court had discretion to decide whether or not to hear it. They are both here under our mandatory jurisdiction where the Court must decide on the merits the cases in which a state court has upheld a state statute against a federal constitutional challenge. They are examples, at least one of them, of the kind of cases in which the Court would hope that Congress would consider moving our mandatory jurisdiction.

S. REP. No. 35, 96th Cong., 1st Sess. 17 (1979).

The American Bar Association supports the legislation to the extent that it provides the Court with greater discretion in selecting cases to review. 67 A.B.A.J. 160 (1981).

The Senate could find no commentator on the Supreme Court who opposed any part of

of Appeals for the Federal Circuit. The new Court of Appeals would not establish a new tier in the judicial structure, but would operate at the same level as other federal courts of appeals. This court would exercise jurisdiction over appeals in areas of the law where Congress determines there exists a special need for nationwide uniformity. The area targeted for review by this new court is patent and trademark law.[54]

Elimination of Mandatory Jurisdiction

Benefits of the Bill. There are three principal benefits which flow from the elimination of the Court's mandatory jurisdiction. First, removal of mandatory jurisdiction would eliminate the confusing precedential value of the summary disposition of a substantial number of cases arriving before the Court under mandatory jurisdiction. Since an already overburdened Court must decide those cases before the Court under mandatory jurisdiction, the Court most often removes these mandatory jurisdiction cases by summary disposition.[55] The Court has held, however, in *Mandel v. Bradley*[56] and *Hicks v. Miranda*,[57] that because these summary dispositions constitute decisions on the merits, they are binding precedent. In a letter to Senator Dennis DeConcini (D-Ariz.) which discussed the problems which mandatory jurisdiction causes, all nine Justices observed:

> Yet, as we know from our experience, our summary dispositions often are uncertain guides to the courts bound to follow them and not infrequently create more confusion than clarity. From this dilemma we perceive only one escape consistent with past Congressional decisions defining the Court's mandatory jurisdiction: Congressional action eliminating that jurisdiction.[58]

Removing mandatory jurisdiction from the Court's shoulders will eliminate the need to resort to these confusing summary dispositions to ease the caseload.

Second, elimination of mandatory jurisdiction frees time for cases more worthy of review than those brought to the Court through mandatory jurisdiction. Each case given plenary review simply because it falls within the obligatory jurisdiction may take the place of other cases of greater importance. As the Justices have often empha-

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the same legislation introduced in the 95th Congress. *Hearings on Supreme Court Jurisdiction Act of 1978 (S. 3100) Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary 95th Cong., 2d Sess. 23 (1978).* (Statement of Eugene Gressman).

54. 127 CONG. REC. S 31 (daily ed. January 5, 1981).
55. Acknowledged by the Court in a letter from the nine Justices of the United States Supreme Court to Senator DeConcini, (June 22, 1978), *reprinted in* 125 CONG. REC. S 4140-41 (daily ed. April 9, 1979).
56. 432 U.S. 173 (1977).
57. 422 U.S. 332 (1975).
58. Letter from the Justices of the United States Supreme Court to Senator DeConcini, *reprinted in* 125 CONG. REC. S 4140-41 (daily ed. April 9, 1979).

sized, the function of the Supreme Court is not to correct the errors of the lower courts but is to settle questions of general importance to the nation.[59] Mandatory jurisdiction imposes burdens which make it more difficult to carry out this function in an efficient manner because the unnecessary mandatory jurisdiction forces the Justices' attention away from cases of national importance.

Third, the burden of mandatory jurisdiction adds to the overburdened Court. The burden posed by mandatory jurisdiction is, in the Court's words, "substantial."[60] Since the function of the Court is to formulate the national law, obligatory jurisdiction which burdens the Court and forces a "review for error" is unnecessary.

Likelihood of Passage. The elimination of mandatory jurisdiction is virtually unopposed, and draws strong support from the Supreme Court, the American Bar Association, and commentators on the Supreme Court.[61] In 1979, the Senate passed its version of the legislation from the Ninety-sixth Congress, the Supreme Court Jurisdiction Act of 1979.[62] This legislation died in the House of Representatives, however, because the Senate bill added Senator Jesse Helms' (Carolina) "prayer amendment,"[63] which restricted the authority of the Supreme Court of the United States to review state court decisions on the issue of voluntary school prayer. Though the amendment's constitutionality is questionable,[64] there is again strong support for a "prayer amendment."[65] Yet, supporters of the bill are optimistic of its likelihood of success, if it can escape the threatened prayer amendment.[66]

The Court of Appeals for the Federal Circuit

Benefits of the Bill. Senator DeConcini reintroduced the Federal

59. *Id.*
60. *Id.*
61. *See* note 53 *supra*.
62. 125 CONG. REC. S4156 (daily ed. April 9, 1979).
63. Senator Jesse Helms succeeded in adding the "prayer amendment", which proposed to restrict the United States Supreme Court's jurisdiction in cases involving voluntary prayer in public schools and public buildings to The Supreme Court Jurisdiction Act of 1979 just before the Senate voted to pass the measure. 125 CONG. REC. S 4152 (daily ed. April 9, 1979).
64. Letter from Attorney General Griffin B. Bell to Senator Abraham Ribicoff, (April 9, 1979) *reprinted in* 125 CONG. REC. S4144-45 (daily ed. April 9, 1979). *See also, Prayer in Public Schools and Buildings—Federal Court Jurisdiction: Hearings on S. 450 Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong. 2d Sess. 11 (1980). (Statement of John Harmon, Assistant Attorney General.)
65. During the first session of the 97th Congress the following bills containing proposals which would limit the Supreme Court's authority to review state court decisions concerning voluntary school prayer have been introduced: H.R. 72, H.R. 408, H.R. 865, H.R. 867, H.R. 869, and H.R. 989.
66. Robert Feidler states, "If no amendments are added, [The Supreme Court Jurisdiction Act] is likely to be adopted." Letter from Robert Feidler, Counsel for Senator DeConcini (February 17, 1981); Telephone interview with Mike Remmington, Staff Aid to the House Comm. on the Judiciary (March 27, 1981).

Court of Appeals for the Federal Circuit Act of 1981. During the first session of the Ninety-sixth Congress, the House passed the identical bill,[67] and the Senate passed this legislation in slightly modified form.[68] According to Senator DeConcini only end-of-the-session problems prevented final passage of this reform in the Ninety-sixth Congress.[69]

The heart of this bill is the creation of a new appellate court, the United States Court of Appeals for the Federal Circuit.[70] This court would have exclusive jurisdiction over all patent and trademark appeals. Such a court would address two problem areas caused by the caseload. First, the Supreme Court's rare review of patent cases allows conflicts among lower courts on important questions dealing with patent law to remain unaddressed. Such intercircuit disparity promotes unnecessary litigation and forum shopping. The Court of Appeals for the Federal Circuit, with its nationwide jurisdiction, would provide a uniform standard of patentability.[71] In addition to solving problems stemming from the Court's inadequate appellate capacity, the new court will slightly diminish the Court's caseload.[72]

The Court of Appeals for the Federal Circuit stems from a court termed the "National Court of Appeals" which the Freund Report first proposed in 1972.[73] The purpose of the National Court of Appeals was to lighten the Supreme Court's caseload by reviewing those cases of important national interest which the Supreme Court would review in the absence of a caseload problem. The Freund Report assumed that lessening the workload of the Court would increase the quality of the Supreme Court's opinions and would provide the needed uniformity in those areas which the Supreme Court is presently unable to address.[74] The purpose of the Freund Report's National Court of Appeals was to screen all petitions for *certiorari* and appeals in addition to resolving intercircuit conflict. This court would have had the power to deny petitions for *certiorari*, and such decisions would have been final. The chief objection to this proposal was the barrier the new court would

67. H.R. 3806, 96th Cong. 1st Sess. (1979), *reprinted in* 126 CONG. REC. H8775-80 (daily ed. Sept. 15, 1980).

68. S. 1477, 96th Cong. 1st Sess. (1979).

69. 127 CONG. REC. S 32 (daily ed. January 5, 1981) (prepared statement of Senator DeConcini).

70. The full text of S. 21 appears at 127 CONG. REC. S 31-40 (daily ed. January 5, 1981). This bill would amend the Fifth Circuit Court of Appeals Act of 1980 by adding a thirteenth circuit known as the "Federal Circuit." The Federal Circuit would be located in the District of Columbia.

71. 126 CONG. REC. H8, 780 (daily ed. September 15, 1980).

72. Even though the number of patent cases which the new court will decide does not constitute a great proportion of the Supreme Court's caseload, the impact of their loss will be more than their raw numbers would indicate because these cases often contain extremely complex and time-consuming issues. 126 CONG. REC. H 8780-81 (daily ed. September 15, 1980) (statement of Rep. Kastenmeier).

73. The Report of the Study Group on the Caseload of the Supreme Court or "Freund Report" was one of a series of reports prepared by or for the Federal Judicial Center. Professor Paul A. Freund of Harvard Law School served as chairman of the study group. The report was published in December, 1972 and is reproduced at 57 F.R.D. 573 (1972).

74. A. BICKEL, *supra* note 1, at 11.

place before the Supreme Court in the *certiorari* process. One of its main critics, Justice Brennan, contended that the subjective nature of the screening precluded its delegation and that only the Justices themselves could adequately perform the duty.[75]

Support for a national court of appeals gradually faded because of such objections, until the Hruska Commission proposed a variant of the National Court of Appeals.[76] The Hruska Commission proposed that the Supreme Court continue to review all petitions for *certiorari* and transfer cases of national importance, which the Court could not review, to the National Court of Appeals. This plan would allow the Justices to keep full control of the petition process. The Supreme Court would have the assistance of this intermediate court of appeals in resolving intercircuit conflicts of lesser issues of national importance.

The proposed Court of Appeals for the Federal Circuit, like the Hruska Commission's National Court of Appeals, does not erect any barrier between the Supreme Court and the review of petitions for *certiorari*. The Court of Appeals for the Federal Circuit could help lighten the burden on the Supreme Court by resolving conflicts in the federal circuits concerning issues the Supreme Court could not presently address.

Likelihood of Passage. Since only end-of-the-session problems prevented this bill from passage in the Ninety-sixth Congress, there is a substantial likelihood that this bill will become law if the legislation is passed out of the Senate in sufficient time for the House of Representatives also to act on the bill.[77] Given the strong support enjoyed by this proposed legislation, there is a high probability of success.[78]

Other Suggested Reforms

While a long term solution to the Supreme Court's workload problems may require significant legislation, there are other current noteworthy proposals. Professor Kenneth Ripple, a former legal officer of the Supreme Court and former special assistant to Chief Justice Burger, urges a "more scrupulous adherence to the norms of good practice and . . . the Court's more rigorous enforcement of its own rules."[79] For example, enlargements of time within which to file *certiorari* are often requested merely to grant a "comfort factor" to counsel instead of under "the most extraordinary circumstances."[80] This motion adds to

75. Brennan, *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473 (1973).
76. The Commission on Revision of the Federal Appellate System, or "Hruska Commission," submitted its recommendations for changes in the structure and internal procedures of the federal appellate system on June 20, 1975. Senator Roman L. Hruska was chairman of the commission. The recommendations are reproduced at 67 F.R.D. 195 (1975).
77. 127 CONG. REC. S 31-32 (daily ed. January 5, 1981).
78. *See* note 7 *supra*
79. *See* note 23 *supra*.
80. *Id.*

the distraction of the Supreme Court.[81] The busy Court could help itself through insistence on the enforcement of such rules.

Professor Philip Kurland suggests that the Court publicly announce that it will suspend review on certain categories of cases.[82] Professor Kurland also suggests that the Court voluntarily limit the length of each Justice's opinion to two thousand words. He proposes that "an effective editor could reduce the recent pages of the United States Reports by fifty percent or more without losing an iota of substance."[83] Another suggestion is that the Justices completely divide up the petitions for *certiorari* and leave the decision to accept or deny up to the individual Justices, with any five other justices having a type of veto power on an acceptance.[84]

These suggestions, however, only provide a temporary reprieve from the problem. A long term solution to the ever increasing caseload demands current congressional action.

CONCLUSION

Supporters of caseload elimination proposals indicate that change, in the Supreme Court's current appeals and *certiorari* procedures are forthcoming. Elimination of mandatory jurisdiction would provide substantial relief to the Court's present workload. Support for this bill gives it a strong chance of becoming law, barring other unforeseen problems. This elimination of mandatory jurisdiction would solve part of the workload problem and is relatively unopposed.

The need for the Court of Appeals is clear. With the majority of the Supreme Court and a substantial number of legislators calling for some type of reform, it is very likely that Congress will pass the Court of Appeals for the Federal Circuit Act of 1981, along with Supreme Court Jurisdiction Act of 1981.

John Vincent Smith II*

81. *Id.*
82. Kurland, *Jurisdiction of the United States Supreme Court: Time for a Change?*, 59 CORNELL L. REV. 616, 631 (1974). Philip B. Kurland is the William R. Kenan, Jr., Distinguished Service Professor at the University of Chicago. He founded and edits THE SUPREME COURT REVIEW, an annual volume published by the University of Chicago Press.
83. *Id.*
84. *Id.*

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