Cornell Law Review

Volume 45
Issue 3 *Spring 1960*

Article 1

Supreme Court and Its Case Load

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CORNELL
LAW QUARTERLY

VOLUME 45 SPRING, 1960 NUMBER 3

THE SUPREME COURT AND ITS CASE LOAD*

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Myths grow up around our institutions. Some about the Supreme Court have slender roots in facts. Others are products of fantasy. Justices, as everyone knows, are assigned to Circuits of which there are eleven. The legend persists, even in legal circles, that all petitions for certiorari go only to the Justice in whose Circuit the litigation arises, with him reporting the case to the full Court. Yet there never has been—nor is there now—any division of work in the Court until the opinion is assigned for writing after the case has been argued, discussed at Conference and voted upon.

For years it was the practice of the Court on Mondays to commence the session by reading or announcing opinions. The next item of business was the admission of attorneys. Sometimes the announcement of opinions took several hours; at times it ran over into the next day. Sponsors of attorneys were kept waiting. Some of them were busy practitioners; others were Senators and Congressmen who wanted to pay this courtesy to an important constituent but to do so often were forced to miss important roll calls. Why the announcement of opinions came first was lost in mists of history. Myths grew up about it. The myth that opinions must come first was part of the great ceremonials attached to the Court. Those who tinkered with ceremonials were sometimes charged with undermining the institution itself. To his eternal credit Chief Justice Fred Vinson, without prior authorization of the Conference, opened the 1948 Term on October 4, 1948, by first admitting the attorneys. That has continued to this day; and in time new myths may grow up concerning it.

There is the myth that has received great impetus since *Brown v. Board of Education*.[1] It is that the Court made an exception in those school segregation cases and picked them out as the occasion to rely

* This article was delivered as the forty-third Frank Irvine Lecture at the Cornell Law School on April 8, 1960.

† See Contributors' Section, Masthead, p. 558, for biographical data.

1 347 U.S. 483 (1954).

on "sociological" data, not on law or precedents. Yet those who work in constitutional law know that business facts, economic data, institutional practices, and social materials often are relevant to enlightened decisions on constitutional issues. The Brandeis brief, filed in 1908 in *Muller v. Oregon*,[2] and containing vast citations to economic and social data bearing on the hours of work by women, is the classical example.

I mention these myths in passing. It is about another that I wish to say a few words—the idea that the Court is overworked, that if the Court were only relieved by statute or by voluntary action of some of the cases it would make "better" decisions.

Critics of the Court put the problem in various lights. For example the December 14, 1959, issue of the New York *Times*, in commenting on the workload of the Supreme Court, said:

> The Supreme Court has already taken on all the cases it will have time to hear and decide by the end of its term next June. Any cases on which the court grants review from now on . . . will not be argued until next fall. The only exception would be for an emergency. . . . As a practical matter, then, a lawyer who brings a case to the court during the rest of this term and succeeds in getting full review can expect as much as a year to pass before final decision. . . . This time schedule is not a new development. It has become a normal state of affairs in the Supreme Court. The underlying reason is, of course, the volume of work. The number of cases brought to the court is extremely large, and it is steadily growing.

It is surprising to find the reliable *Times*—so long a faithful reporter of the Court's work—making these assertions.

What the *Times* overlooked are the changes we made in our Rules, effective July 1, 1954. Under the old Rules a petition for certiorari had to be accompanied by a printed record. The records in certiorari cases from most federal courts were printed for use of the court below and it was necessary for our Clerk's office to print only the appellate court proceedings before certiorari was granted. That was also true of a few state court cases. If certiorari was granted it was, however, generally necessary to reprint additional copies to comply with the Rules. Yet in spite of these facts in many instances a case on certiorari could be readied for argument after granting the petition merely by preparing and filing the briefs. Under the new Rules, neither in certiorari nor in appeals is a printed record necessary until certiorari is granted or the appeal noted. Hence, except where printed records are available from the lower court, the printing must take place after the Court agrees to hear the case. Moreover, under the new Rules it now takes a long time to prepare a case for argument.

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[2] 208 U.S. 412 (1908).

The parties now have a total of thirty days to designate the parts of the record to be printed.[3]

The Clerk has numerous duties to perform concerning the record, as provided in Rule 36. The time required for performance of those duties plus the printing of the record varies with the length and complexity of the record. It will run from ten days to ninety days or more. If printed copies of the record are available from the lower court, they may be used and the time is accordingly saved as indicated by Rule 41. The average time for performance of the functions of the Clerk under Rule 36 and for printing of the record is thirty days.

Counsel for appellant or petitioner has thirty days after receipt of the printed record from the Clerk to file his printed brief on the merits.[4]

Counsel for appellee or respondent has thirty days to file his brief after receipt by him of the brief filed by appellant or petitioner.[5]

Cases are "normally" not called for argument less than fourteen days after the brief of appellee or respondent has been filed.[6] Thus the petitioner or appellant has time to familiarize himself with the opposing brief and file a reply if he desires.

Thus 134 days, or four and a half months, usually elapse before a case which we have agreed to hear is ready for argument.[7] Therefore, petitions granted or appeals noted in early January would not normally be ready for argument until mid-May. And by that time we are usually preoccupied with clearing opinions in cases already argued. We sometimes, however, hear cases argued in May; and usually we have two weeks of argument in April. Of the twenty-five cases argued in April 1959, thirteen had been granted or noted the previous December. Of the ten cases argued in May 1959, three had been granted or noted in December, four had been granted or noted in January, and one even later.

In our February 1960 session we heard one case in which the petition had been filed late in the previous month. Our March 1960 session included two cases where the petitions had been granted in December 1959; scheduled for argument during April 1960 are two cases which we agreed to hear the previous December and one in which certiorari was

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[3] See U.S. Sup. Ct. Rules 17 and 26.
[4] U.S. Sup. Ct. Rule 41(1).
[5] U.S. Sup. Ct. Rule 42(2).
[6] U.S. Sup. Ct. Rule 43(1).
[7] There is no comparable figure for the pre-1954 cases because no statistics were kept as to when they were ready for argument. But a complete check of the cases argued in the 1950 and 1951 terms shows that petitions for certiorari and appeals were argued, on the average, within 70 days after the grant, or the noting of jurisdiction respectively.

granted in January; and our May 1960 session will include five cases granted review in December.

It is, however, the liberal time allowance and the change in the requirement for printing records provided by our revised Rules for the benefit of the parties, not any increase in our work, that is mostly responsible for putting over to another term most certioraris granted and appeals noted from January on.

Some say we spend too much time on cases involving the jury's function under the Federal Employers' Liability Act. The relevant statistics are reviewed in *Harris v. Pennsylvania R. Co.*[8]

Of the 110 petitions for certiorari filed during the last decade, seventy-three were filed by employees and thirty-seven were filed by employers. Of these, thirty-three were granted, each at the instance of an employee who complained of the lower court's withholding the case from the jury or overturning a jury verdict in his favor. Thirty cases were reversed for usurpation of the jury function; and in each of three the lower court's decision was sustained.

Of the seventy-seven petitions denied, thirty-two were by employees who sought reversal of a lower court's decision to withhold the case from the jury or to upset a jury's verdict. Eight more employees wanted the Court to overturn jury verdicts rendered in the employers' favor.

Of the petitions filed by employers, thirty-five asked the Court to reverse a lower court decision upholding a jury verdict or holding that the case should have been submitted to a jury. Employers in two other petitions complained of the lower court's action in setting aside a jury verdict and granting a new trial.

As to the thirty-three cases in which the Court granted certiorari during this ten-year period, sixteen were summarily reversed without oral argument and without full opinions. Only seventeen cases were argued during this period and of these five were disposed of by brief *per curiam* opinions. Only twelve cases in over ten years were argued, briefed and disposed of with full opinions by the Court. The Court granted certiorari in these cases on an average of less than three per year and has given plenary consideration to slightly more than one per year.

Some long-range statistics will help put the over-all problem of the case load of the Court in perspective. During the last two decades there has been a marked decline in the number of opinions written each term.

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[8] 361 U.S. 15, 20-25 (1959) (concurring opinion).

Year	Opinions of Court	Cases disposed of by opinion	Cases disposed of by per curiams*
1938	139	174	65
1939	137	151	97
1940	165	195	86
1941	151	175	63
1942	147	196	63
1943	130	154	56
1944	156	199	75
1945	136	173	45
1946	142	190	66
1947	110	143	65
1948	114	147	91
1949	87	108	94
1950	91	114	77
1951	83	96	101
1952	104	123	71
1953	65	84	86
1954	78	86	102
1955	82	103	127
1956	100	112	135
1957	104	125	188
1958	99	116	135

If the number of signed petitions and *per curiams* (not including mere orders of dismissal, affirmance, etc.) are counted (irrespective of the number of cases they dispose of) the following is the result:

Term	Number of Opinions	Term	Number of Opinions
1927	175	1943	136
1928	129	1944	162
1929	137	1945	136
1930	167	1946	143
1931	150	1947	118
1932	169	1948	123
1933	164	1949	100
1934	169	1950	100
1935	158	1951	95
1936	162	1952	112
1937	171	1953	78
1938	150	1954	82
1939	143	1955	95
1940	169	1956	115
1941	162	1957	118
1942	170	1958	116

Until recently we heard arguments five days a week, holding our conferences on Saturday. Since the 1955 Term we have heard argument four days a week and had our conferences on Friday. The five-day week

* Orders of dismissal, affirmance, etc., as well as per curiam opinions.

is symbolic of a slower pace. Now we have two days a week off rather than one and make up for that lost time by scheduling extra weeks of argument when necessary and prolonging the duration of the term.

The slower pace of the Court is reflected in the following table showing the number of hours of argument in each term since 1938 and the date of adjournment.

Term	*Number of hours of argument*	*Date of adjournment*
1938	296	June 5, 1939
1939	300	June 3, 1940
1940	296	June 2, 1941
1941	316	June 8, 1942
1942	304	June 21, 1943
1943	284	June 12, 1944
1944	304	June 18, 1945
1945	280	June 10, 1946
1946	304	June 23, 1947
1947	260	June 21, 1948
1948	264	June 27, 1949
1949	204	June 5, 1950
1950	205	June 4, 1951
1951	212	June 9, 1952
1952	228	June 15, 1953
1953	176	June 7, 1954
1954	190	June 6, 1955
1955	192	June 11, 1956
1956	216	July 11, 1957
1957	216	June 30, 1958
1958	220	June 29, 1959

To be sure the total number of cases filed rose from 942 in the 1938 Term, to 1,510 in the 1946 Term, to 1,816 in the 1958 Term. But these totals are not too revealing. The increase has been due almost entirely to the flood of *in forma pauperis* cases[9] which have been filed in increasing numbers since 1938. From an almost insignificant position in the Court's business these cases have grown to constitute more than half of all cases filed.[10] Illustrative is the number of petitions for certiorari *in forma pauperis* filed each term:

[9] These cases today appear on the Miscellaneous Docket. They are not the only items on that docket, as other cases—which are paid for by the parties—also appear there. Illustrative of the latter are motions for extraordinary writs. See In re Yamashita, 327 U.S. 1 (1946); Deen v. Hickman, 358 U.S. 57 (1958). But the paid-for cases on the Miscellaneous Docket average only about 7 a year.

The Miscellaneous Docket was created in 1945. Beginning in 1947 petitions for certiorari in forma pauperis were transferred to that docket; and the appeals were added in 1954. Prior to 1938 the number of these cases had been quite small. After the creation of the Miscellaneous Docket a case, which was on it, was transferred to the Appellate Docket once the petition for certiorari was granted or the appeal noted.

[10] Indigent litigants usually seek review by petition for certiorari but relief is also pursued by appeal and by motions for extraordinary relief. In the 1958 Term there were filed, in forma pauperis, 25 appeals, 116 motions for various forms of relief, and 772 peti-

1938	85	1949	441
1939	117	1950	404
1940	120	1951	413
1941	178	1952	434
1942	147	1953	528
1943	214	1954	543
1944	339	1955	583
1945	393	1956	639
1946	528	1957	680
1947	426	1958	772
1948	447		

The great increase in the number of these cases since 1938 is partly due to *Johnson v. Zerbst*,[11] which was decided on May 23 of that year. Prior to then the concept of "jurisdiction" of a court which could be challenged by habeas corpus was quite narrow. *Johnson v. Zerbst* held, quite properly I think, that a court could not deprive an accused of a constitutional right in a trial and have "jurisdiction" to deprive him of life or liberty. Observance of all constitutional guarantees was a "jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty."[12] And so, the "jailhouse lawyers" who seem to be always present in every prison combed case after case to see if some inmate had not been deprived of a constitutional right.

The claims made are often fantastic, surpassing credulity. They are for the most part frivolous. The number of petitions for certiorari *in forma pauperis* which were granted during each of the past twenty-one terms is as follows:

1938	7	1949	7
1939	18	1950	17
1940	19	1951	19
1941	16	1952	11
1942	8	1953	10
1943	12	1954	12
1944	10	1955	16
1945	15	1956	38
1946	8	1957	34
1947	17	1958	24
1948	18		

The rate over the twenty-one year period at which petitions *in forma pauperis* have been granted is less than 4%.

These *in forma pauperis* cases have produced a great variety of problems.

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tions for certiorari, bringing the grand total of cases filed in forma pauperis during the term to 913. During the same period there were 903 cases filed by nonindigents. Comparable figures are not available for the years prior to 1945, because until then motions for extraordinary relief did not receive a docket number unless the motions were granted.

[11] 304 U.S. 458 (1938).

[12] 304 U.S. at 467.

The remedy by habeas corpus has at times been used to test old and stale claims. *Redenbaugh v. Rigg*,[13] where relief was denied, reached back into a state trial held forty-three years earlier. Review by certiorari of cases filed on the Miscellaneous Docket under the head of habeas corpus[14] and other post-convictions remedies[15] has produced numerous important cases. Other significant criminal cases coming by the certiorari route have also reached the Court by this docket.[16] It has produced cases posing critical procedural problems touching on state-federal relations in the criminal field.[17] One of the most important functions performed by this docket has been to furnish hearings or other relief in lower courts to petitioners clamoring for adjudication of their constitutional rights.[18] These cases have at times resulted in resentencing.[19] Issues of citizenship have been resolved.[20] And a wide variety of litigation on the civil side has resulted.[21] After working with the *in forma pauperis*[22] cases on the Miscellaneous Docket over a period of years, I am confident that the manner in which the Court manages them dispenses justice at a level long neglected in the nation. Moreover, cases like *Moore v. Dempsey*,[23] from Arkansas (on the Appellate Docket) and *Leyra v. Denno*[24] (an *in forma pauperis* case), from New York are eloquent witnesses of the high function performed by federal habeas corpus in state criminal proceedings.

Mr. Justice Stone wrote in 1928 that "by the end of another term the Court may be able to hear cases on their merits as soon after they are docketed as counsel are prepared to present them."[25] And he saw hope in the fact that cases carried over from that term had dropped to 125. But as the volume of cases filed mounted, the number carried over increased, as the following table shows:

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13 362 U.S. — (1960).

14 Leyra v. Denno, 347 U.S. 556 (1954); Massey v. Moore, 348 U.S. 105 (1954); Breithaupt v. Abram, 352 U.S. 432 (1957); Cicenia v. Lagay, 357 U.S. 504 (1958); Lee v. Madigan, 358 U.S. 228 (1959).

15 Williams v. Georgia, 349 U.S. 375 (1955); Griffin v. Illinois, 351 U.S. 12 (1956).

16 See, e.g., Chambers v. Florida, 309 U.S. 227 (1940); Stein v. New York, 346 U.S. 156 (1953); Kawakita v. United States, 343 U.S. 717 (1952); Stroble v. California, 343 U.S. 181 (1952); Rochin v. California, 342 U.S. 165 (1952).

17 Brown v. Allen, 344 U.S. 443 (1953).

18 Walker v. Johnston, 312 U.S. 275 (1941); Herman v. Claudy, 350 U.S. 116 (1956); Noto v. United States, 351 U.S. 902 (1956); Edwards v. United States, 355 U.S. 36 (1957); Howard v. United States, 356 U.S. 25 (1958); McGann v. United States, 352 U.S. 904 (1956); Hoffman v. Circuit Court, 343 U.S. 972 (1952); Poret v. Sigler, 361 U.S. 375 (1960).

19 See Christoffel v. United States, 345 U.S. 947 (1953).

20 See Roberts v. United States District Court, 339 U.S. 844 (1950).

21 Aaron v. Cooper, 358 U.S. 27 (1958); Williams v. Simmons, 355 U.S. 49; Far Eastern Conference v. United States, 342 U.S. 570 (1952); Dice v. Akron, C. & Y. R. Co., 342 U.S. 359 (1952).

22 See Douglas, "In Forma Pauperis Practice in the United States," 2 N.H.B.J. 5 (1959).

23 261 U.S. 86 (1923).

24 347 U.S. 556 (1954).

25 Stone, "Fifty Years' Work of the U.S. Supreme Court," 14 A.B.A.J. 428, 435 (1928).

Term	*Cases*	*Term*	*Cases*
1925	438	1942	111
1926	283	1943	147
1927	175	1944	133
1928	125	1945	156
1929	172	1946	146
1930	123	1947	119
1931	120	1948	158
1932	110	1949	127
1933	88	1950	111
1934	96	1951	137
1935	90	1952	140
1936	98	1953	149
1937	65	1954	194
1938	85	1955	208
1939	121	1956	340*
1940	115	1957	213
1941	124	1958	269

Yet the reduction in obligatory jurisdiction as a result of the 1925 Act[26] made it possible for the Court to hear on the regular calendar—for the first time in 100 years—cases docketed during the term. Today petitions for certiorari granted or appeals noted during the first three months of a term are generally heard during that term.

The Appellate Docket which comprises about 90% of the meritorious cases has not increased greatly in size. The number of cases filed in the 1958 Term was only a few more than the number filed in the 1938 Term. There has in fact been no upward trend in these cases during the past two decades. The number of cases filed on the Appellate Docket (excluding *in forma pauperis*) is as follows:

1938	857	1949	718
1939	861	1950	659
1940	853	1951	716
1941	997	1952	742
1942	832	1953	684
1943	782	1954	713
1944	896	1955	891
1945	791	1956	974
1946	828	1957	826
1947	716	1958	886
1948	773		

* This large number is explained by the fact that this term was extended to July 11, 1957, in order to hear Wilson v. Girard, 354 U.S. 524. All cases filed until July 11, 1957, were therefore included in the number carried over.

[26] 43 Stat. 936 (1925). For accounts of the Court's work and case load immediately prior to the 1925 Act see Frankfurter & Landis, "The Business of the Supreme Court of the United States—A Study in the Federal Judicial System," 40 Harv. L. Rev. 431, 834, 1110 (1927); Shelton, "The Danger of the Increased Burden Upon the Federal Supreme Court from Its Continually Expanding Docket," 92 Cent. L.J. 279, 280 (1921).

Our certiorari jurisdiction is invoked quite sparingly. In no term since the 1925 Act has the Court granted more than 22% of the petitions for certiorari. The percentages for the last six terms (if the *in forma pauperis* cases are included are):

Term	*Percent granted*	*Term*	*Percent granted*
1953	7.9	1956	12.4
1954	10.5	1957	9.8
1955	10.2	1958	8.9

If cases on the Appellate Docket are alone considered, the percentages are as follows:

Term	*Percent granted*	*Term*	*Percent granted*
1953	13.0	1956	17.3
1954	16.9	1957	14.1
1955	16.1	1958	14.4

Moreover, the practice of the Court has been to dispose of more and more appeals on motions to dismiss or affirm. A review of the disposition of appeals reported in volumes 350 through 360 of the United States Reports shows the following:

Appeals from Court of Appeals (28 U.S.C. § 1254 (2)):	
Summary disposition	15
Argued	0
Appeals from state courts (28 U.S.C. § 1257(1), (2)):	
Summary disposition	272
Argued	41
Appeals from District Courts:	
Three-judge courts (28 U.S.C. § 1253):	
Summary disposition	80
Argued	52
Civil actions brought by U.S. (15 U.S.C. § 29):	
Sunmary disposition	10
Argued	8
Appeal by U.S. in criminal actions (18 U.S.C. § 3731):	
Summary disposition	7
Argued	10
Where Act of Congress held unconstitutional (28 U.S.C. § 1252):	
Summary disposition	1
Argued	1

Miscellaneous:	
Summary disposition	9
Argued	0

This is made possible by reason of several facts. The bulk of these cases, as noted, are appeals from state courts and appeals from three-judge District Courts. The appeals from state courts—where a state statute has been upheld against a claim of unconstitutionality—quite frequently involve no substantial question in light of the broad discretion which legislatures have since the end of the regime which produced such products as *Tyson & Brother v. Banton*,[27] and in light of the more settled pattern of constitutional law in other fields. And the three-judge court cases—at least so far as they involve ICC orders—frequently are plowing fields which have been pretty well marked by earlier decisions.

The fact that about three-fourths of the appeals are now disposed of on motions to dismiss or affirm does not mean that the Court has converted an obligatory jurisdiction into a discretionary one. It means merely that the fields involved in these appeals do not need the delineation that was once necessary.

The upshot of these statistics is that we have fewer oral arguments than we once had, fewer opinions to write, and shorter weeks to work. I do not recall any time in my twenty years or more of service on the Court when we had more time for research, deliberation, debate, and meditation.

This does not mean that the load is necessarily less onerous today than it was twenty years ago. Cases are not fungible. Fewer cases in one term may indeed make for more work than a larger number in another one. We have not had in recent years many involved and lengthy records such as those in *Ecker v. Western Pac. R. Corp.*,[28] *Group of Investors v. Milwaukee R. Co.*,[29] *Nebraska v. Wyoming*,[30] *R.F.C. v. Denver & R.G.W.R. Co.*,[31] *New York v. United States*,[32] *Dalehite v. United States*,[33] and *Hartford-Empire Co. v. United States*.[34]

We use the summary calendar frequently,[35] as shown by the following table:

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[27] 273 U.S. 418 (1927).
[28] 318 U.S. 448 (1943).
[29] 318 U.S. 523 (1943).
[30] 325 U.S. 589 (1945).
[31] 328 U.S. 495 (1946).
[32] 331 U.S. 284 (1947).
[33] 346 U.S. 15 (1953).
[34] 323 U.S. 386 (1945). But see United States v. du Pont & Co., 351 U.S. 377 (1956).
[35] This first appeared in the Rules promulgated December 22, 1911. See 222 U.S. App. p. 11. It is presently covered by our Rule 44, par. 3. Cases on the summary calendar are argued in one hour, which is half the time ordinarily allotted other cases.

Term	Cases	Term	Cases
1938	0	1949	46
1939	0	1950	37
1940	0	1951	64
1941	11	1952	70
1942	31	1953	29
1943	32	1954	36
1944	66	1955	58
1945	43	1956	74
1946	41	1957	46
1947	21	1958	58
1948	33		

These cases commonly present a "small sirloin of law" divorced from complicated facts.

Yet small records often present tangled skeins as difficult to unravel as the multiplicity of facts in a lengthy record. Chief Justice Stone, shortly before his death in 1946, expressed the view that the difficulty of the cases had increased since his arrival on the bench in 1925. Certainly when old fields are being plowed there is less complexity than when new ones are opened. Since World War II the Court has had to explore many new areas. The war power is one. The reach of the First and Fifth Amendments is another. The mounting legislation by the States and the National Government leads to conflicts and collisions at an increasing rate. Working out these delicate state-federal relationships is often a difficult task. The intrusion of government into the privacy of individual lives—what a person thinks, what he reads, how he casts his vote, with whom he associates—has raised monumental problems. The reconciliation of the legislative power to investigate with the civil rights of citizens has presented issues more delicate and more profound than any other like questions ever tendered the Court. The position of minorities—which may be uncomplicated in theory—often presents troublesome questions because of the muddy and unclear records which have been made below.

Each age brings the Court its own special worries, anxieties, and concerns. The main outlines of the life of the nation are mirrored in the cases filed with us. What we are often asked to decide are questions in which important blocs of opinion in the nation have fixed and set opinions that no amount of argument would change. The Court sits in a maelstrom which has increased in intensity with the growth of blocs and pressure groups. Key, in *Politics, Parties and Pressure Groups*,[36] shows how our pluralistic society has multiplied the pressure groups, making them more and more vocal.

[36] (4th ed. 1958).

Economic forces, social groups, racial and religious minorities press their claims. The individual has rights against all governments. There are limits beyond which no branch of government may go; there are procedures which each must follow. The States have prerogatives; yet they also live under a federal regime that sets limits to their actions and by reason of the Supremacy Clause subordinates their laws if they are in conflict with the federal rule. States also have claims against other States which may be resolved under the original jurisdiction of the Court. Here too the United States and one or more of the States may litigate their differences. These make up the grist in the Court's mill.

Those who have worked long with legal problems know that not all "law" is to be found in books. There is much of it to be found in experience, seasoned contacts with practical affairs, insight into the whole of society, appraisal of political realities. One who reads a statute often needs more than a dictionary if he is to have understanding. He needs insight into the nature of the organism with which the statute deals. The problem is different only in degree when one construes a Constitution written in general terms for an indefinite future.

The problems with which the Court deals are largely unfamiliar to common-law courts. They cover a range and have a complexity for which there is no adequate prior training. Certainly the practice of law never touches the wide variety of problems with which the Court deals. Most offices never have any question under the Bill of Rights. Fields such as patents, admiralty, bankruptcy, taxation tend to become specialized. Lawyers from the largest or smallest firms in the country who reach the Court work for years in unfamiliar fields. So do judges from lower courts. It takes a decade or more to run the length of the course and become familiar with its various features.

There is the myth that somehow experience on other courts give the "judicial" attitude necessary for the Court's work. We have had great Justices from state and lower federal courts. Apart from present membership, Cardozo, Holmes, White, Rutledge, Vinson, and Taft are among them. Apart also from present membership, we would never have had Marshall, Taney, Miller, Waite, Brandeis, Stone, Jackson, or even Hughes for his first term of service, if prior judicial experience were a requirement.

No formula will, I think, produce the men and women we need for the smooth workings of our federalism. All fields of experience make distinct contributions to the problems which our federalism generates. The work of Justice Murphy is an excellent example.[37] Judges, like

[37] The unique contributions of Justice Murphy (who had spent most of his life

the cases with which they deal, are more than statistics. The electronics industry—resourceful as it is—will never produce a machine to handle these problems. They are delicate and imponderable, complex and tangled. They require at times the economist's understanding, the poet's insight, the executive's experience, the political scientist's understanding, the historian's perspective. As respecting the Court's adjudication of these varied issues, I make the same observations that Lord Haldane made in 1921 when he spoke about the work of the Judicial Committee of the Privy Council: ". . . you cannot study it sufficiently merely in text-books or documents. The only way to study it is to watch it."[38]

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in various branches of the public service after some early years as practitioner, prosecutor, and law teacher) are appraised in Gressman, "Mr. Justice Murphy—A Preliminary Appraisal," 50 Colum. L. Rev. 29 (1950); Marshall, "Mr. Justice Murphy and Civil Rights," 9 Nat'l B.J. 1 (1951); Frank, "Justice Murphy: The Goals Attempted," 59 Yale L.J. 1 (1949); Man, "Mr. Justice Murphy and the Supreme Court," 36 Va. L. Rev. 889 (1950).

[38] Haldane, "The Judicial Committee of the Privy Council," 1 Camb. L.J. 143, 155 (1922).