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REPORT
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REVIEW OF CASES BY THE SUPREME COURT

MAY 26, 1988.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. KASTENMEIER, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 952]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (S. 952) to improve the administration of justice by providing greater discretion to the Supreme Court in selecting the cases it will review, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

CONTENTS

I. PURPOSE OF THE LEGISLATION

This bill substantially eliminates the mandatory or obligatory jurisdiction of the Supreme Court. Under current law, certain cases

may be appealed directly to the Supreme Court and the Court is obligated to hear and decide those cases. In most instances, these cases do not involve important issues of Federal constitutional law. The net effect of the bill is to convert the method of Supreme Court review to a discretionary, certiorari approach.

This change in appellate review has been supported by all Justices of the Supreme Court in recent years. As stated in a letter of June 17, 1982 to Congressman Kastenmeier, a unanimous Court clearly states:

> * * * we write to express our complete support for the proposals * * * substantially to eliminate the Supreme Court's mandatory jurisdiction.[1]

As to the reasons for their conclusion, the nine Justices observe that mandatory cases permit litigants to require cases to be decided by the Supreme Court regardless of the importance of the issue presented or its impact on the general public. Further, with limited time and resources at its disposal, it

> * * * is impossible for the Court to give plenary consideration to all the mandatory appeals it receives. * * * To handle the volume of appeals presently being received, the Court must dispose of many cases summarily, often without written opinion.[2]

Moreover, even though the summary dispositions of the Court are binding on the lower Federal courts and State courts, such decisions, according to the Court, "sometimes create more confusion than they seek to resolve." [3]

II. Statement of Legislative History

This report essentially updates the report filed by the Committee on similar legislation during the 98th Congress.[4]

One of the modern philosophical antecedents to the elimination of direct appeals to the Supreme Court can be found in American Law Institute's seminal "Study of the Division of Jurisdiction Be-

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[1] Letter from Justices of the Supreme Court to Robert W. Kastenmeier, June 17, 1982. Reprinted as Appendix A. Several of the Justices have spoken out individually on the need to eliminate the Court's obligatory jurisdiction, Former Chief Justice Burger has been a long-standing supporter of the measure. See, e.g., Letter from Warren E. Burger to Senator Roman Hruska (May 25, 1975) reprinted in "Commission on Revision of the Federal Court Appellate System—Structure and Internal Procedure: Recommendations for Change" (June 1975) at A 222. Justice Brennan has written his support: "Congress could afford the Court substantial assistance by repealing to the maximum extent possible the Court's mandatory appellate jurisdiction and shifting these cases to the discretionary certiorari docket. A bill to this end is pending in the Congress and every member of the Court devoutly hopes it will be adopted." Brennan, Some Thoughts on the Supreme Court's Workload, 66 Judicature 230, 232 (1983). Justice Rehnquist endorsed the idea in Remarks to the Jurists in Residence Program, St. Louis University (April 6–8, 1983). And Justice O'Connor has asked that legislation to eliminate the Court's mandatory jurisdiction "be passed without delay." Comments on Supreme Court's Case Load to the Joint Meeting of the Fellows of the American Bar Foundation and the National Conference of Bar Presidents, New Orleans, La. (Feb. 6, 1983). See also letter from Chief Justice William Rehnquist to Hon. Howell Heflin Nov. 17, 1987.

[2] Id. Appendix A. See also Hearings on the Court Reform and Access to Justice Act of 1987 Before the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice, 100th Cong., 1st and 2d Sess. (1987–88) [hereinafter referred to as House hearings on the Court Reform and Access to Justice Act of 1997] (statement of Honorable Elmo B. Hunter on behalf of the Judicial Conference of the United States).

[3] Id.

[4] See H. Rep. No. 98-986, 98th Cong., 2d Sess. (1984)

tween State and Federal Courts." The ALI was concerned primarily with the proper division of jurisdiction between the State and Federal court systems, not the Supreme Court. The ALI noted that substantial jurisdictional problems arose in the interpretation of the three-judge court statutes and when a direct appeal would lie to the Supreme Court.[5] Some of the recommendations of the ALI in this particular area were enacted in 1976; substantial relief, beyond that recommended by the ALI, was provided to the Supreme Court in the elimination of three-judge courts to consider injunctions against enforcement of Federal and State laws on the grounds of their unconstitutionality. The "Report of the Study Group on the Caseload of the Supreme Court," commonly called the Freund Committee, studied the mandatory appellate jurisdiction question in detail and was explicit in its recommendations for

> The elimination 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.[6]

In 1977 the United States Department of Justice released a "Report on the Needs of the Federal Courts." Issued by the Department's Committee on revision of the Federal Judicial System (chaired by then Solicitor General Robert H. Bork), the report concludes that "obligatory Supreme Court review of appeals from state courts and federal courts of appeals should be eliminated. * * *" [7] This view has been subscribed to by the last two Administrations. Insofar as possible, legislation that has been introduced attempts to implement the important recommendations of the ALI, the Freund Committee, and the Department of Justice during the Ford, Carter and Reagan Administrations.

This legislation has its Congressional roots in this Committee's extensive and wide-ranging inquiry into the State of the Judiciary and Access to Justice that occurred during the 95th Congress.[8] In

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[5] American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts, 282–335 (1969).

[6] Report of the Study Group on the Caseload of the Supreme Court 47 (1972), The Study Group Report is reprinted at Hearings on the State of the Judiciary and Access to Justice Before the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice, 95th Cong. 1st Sess. (1977) at 620 [hereinafter referred to as House Hearings on the State of the Judiciary and Access to Justice (1977)]. In addition to Supreme Court justices, many influential scholars and jurists have expressed agreement with the Freund Committee in this regard. See H. Friendly, Federal Jurisdiction—A General View (1973) at 50; Hearings on Supreme Court Workload Before the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice, 98th Cong., 1st Sess. (1983) [hereinafter referred to as House Hearings on Supreme Court Workload (1983)] (statements of A Leo Levin, Daniel J. Meador, Charles E. Wiggins, John P. Frank and Paul Carrington).

[7] The Department of Justice report is reprinted at House Hearings on the State of the Judiciary and Access to Justice (1977), supra note 6, at pp. 521–542.

[8] See House Hearings on the State of the Judiciary and Access to Justice (1977), supra note 6. During the 95th Congress, the subcommittee held seven days of oversight hearings on the state of the judiciary and access to justice. It received testimony from individuals who had participated in the seminal work of the Freund Group and the Hruska Commission (two significant study commissions that recommended creation of a National Court of Appeals). Testimony also was received from the policymaking arm of the Federal judiciary: the Judicial Conference of the United States. Because of the serious nature of the inquiry, the Chief Justice of the United States, Warren E. Burger, participated by submitting a written statement into the hearing record. In addition, the Attorney General of the United States (Griffin B. Bell) testified, as did former Solicitor General Robert Bork.

the Senate at that time, legislative proposals were advanced by Senator Bumpers (S. 83, 95th Congress) and Senator DeConcini (S. 3100, 95th Congress; S. 450, 96th Congress). The latter of these bills passed the Senate during the 96th Congress, only to expire because of the addition of a non-germane, controversial amendment.[9]

During the 97th Congress, the Committee—acting, as it had done during the State of the Judiciary hearings, through the Subcommittee on Courts, Civil Liberties and the Administration of Justice—heard further testimony on mandatory jurisdiction proposals from the Judicial Conference of the United States, the United States Department of Justice and the American Bar Association, among others.[10] The Subcommittee reported a clean bill, entitled the Federal Court Reform Act of 1982, to the Committee on July 27, 1982, in the form of H.R. 6872. The Committee reported H.R. 6872 on September 16, 1982, with House Report 97-824. The House passed H.R. 6872 unanimously by voice vote on September 20, 1982.

During the 98th Congress, four days of hearings were held (April 27, May 18, September 22, and November 10, 1983) on the general issue of Supreme Court workload and solutions thereto. Two bills were on the table: H.R. 1968 (a bill to eliminate the mandatory jurisdiction of the Supreme Court) and H.R. 1970 (a bill to create a temporary Intercircuit Tribunal of the U.S. Courts of Appeals). Testimony was received from various groups and individuals: Professor Daniel Meador (University of Virginia Law School); Professor A. Leo Levin (Director, Federal Judicial Center); Charles E. Wiggins, Esq. (former Member of Congress); Lloyd Cutler, Esq. (former Counsel to President Jimmy Carter); John P. Frank, Esq. (Phoenix, Arizona); Chief Judge Collins Seitz (3rd Circuit Court of Appeals); Chief Judge Wilfred Fleinberg (2nd Circuit Court of Appeals); Chief Judge John C. Godbold (11th Circuit Court of Appeals); Chief Judge Donald P. Lay (8th Circuit Court of Appeals); Hon. Jonathan Rose (on behalf of the U.S. Department of Justice); Dean Paul Carrington (Duke University School of Law); Louis Craco, Esq. (on behalf of the Association of the Bar of the City of New York); and Noel Anketell Kramer (on behalf of the Division IV of the District of Columbia Bar).[11]

On April 11, 1984, the Subcommittee on Courts, Civil Liberties and the Administration of Justice marked up H.R. 1968. The bill was amended by a technical amendment and then reported favorably to the full Committee in the form of a clean bill (H.R. 5644). On July 31, 1984, the Committee considered the bill and, a quorum of Members being present, reported it favorably by voice vote, no objection being heard.[12] On September 11, 1984, H.R. 5644 passed the House under suspension of the rules.

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[9] The amendment to S. 450 related to school prayer. See also S. Rep. 96-35 (1979); Hearings on the Supreme Court Jurisdiction Act of 1978. Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 95th Cong., 2d Sess. (1981) [hereinafter Senate Hearings on Supreme Court Jurisdiction (1981)].

[10] See Hearings on Mandatory Appellate Jurisdiction of the Supreme Court—Abolition of Civil Priorities—Jurors Rights Before the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice, 97th Cong., 1st Sess. (1982) [hereinafter referred to as House Hearings on Mandatory Jurisdiction (1982)].

[11] See House Hearings on Supreme Court Workload (1983), supra note 6.

[12] *See* H. Rep. No. 98-986, 98th Cong., 2d Sess. (1984).

Building on an extensive hearing record compiled during previous Congresses, the Subcommittee continued its inquiry into the Supreme Court and its workload crisis. On February 27, 1986 an oversight and legislative hearing was conducted on two bills relating to the High Court: H.R. 4149 (to eliminate the Court's mandatory jurisdiction) and H.R. 4328 (to create a temporary and experimental Intercircuit Tribunal). Testimony was received by two former Solicitors General (Dean Erwin N. Griswold and Judge Robert H. Bork); two professors of law (John Sexton and Sam Estreicher), and a practicing trial attorney and past President of the Pennsylvania Bar Association (Robert M. Landis). Written materials were submitted by three Justices of the Supreme Court: Chief Justice Warren E. Burger and Associate Justices Byron White and John Paul Stevens.[13] No action was taken on either of the bills pending in the Subcommittee.

During the 100th Congress, the subcommittee again devoted time to the issue of Supreme Court workload, but this time through the legislative vehicle of an omnibus bill to improve the administration of justice. H.R. 3152—the Court Reform and Access to Justice Act of 1987—is a nine title bill containing a potpourri of court reform proposals. Title I of the bill substantially eliminates the mandatory appellate jurisdiction of the Supreme Court.

The subcommittee held three days of hearings on H.R. 3152. On September 23, 1987, the subcommittee received testimony from the Honorable Elmo Hunter (on behalf of the Judicial Conference of the United States) and Robert MacCrate (President, American Bar Association). On October 14, 1987, the subcommittee heard from the Honorable Stephen J. Markman (Assistant Attorney General, Office of Legal Policy, U.S. Department of Justice); Professor Thomas D. Rowe, Jr. (Duke University School of Law); and L. Richardson Preyer (President of the Private Adjudiciation Center, Duke University School of Law). On February 24, 1988, the subcommittee concluded its hearing inquiry by receiving testimony from three witnesses: The Honorable Abner J. Mikva (Circuit Judge, D.C. Circuit Court of Appeals); the Honorable Patrick Higginbotham (Circuit Judge, 5th Circuit Court of Appeals); and Professor Laura Macklin (Georgetown University Law Center).[14]

III. Background

The general effect of the bill is to convert the mandatory or obligatory jurisdiction of the Supreme Court to jurisdiction for review by certiorari, except for a narrow range of cases involving decisions by three judge district courts.

A. STATUTORY PARAMETERS

From the time of the very first Congress the Supreme Court has had appellate authority over state court cases.[15] The Judiciary Act

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[13] *See* Hearings on the Supreme Court and its Workload Crisis Before the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice, 99th Cong., 2d Sess. (1986).

[14] See Hearings on the Court Reform and Access to Justice Act of 1987, supra note 2.

[15] For a review of the history of Supreme Court appellate jurisdiction, *see* Frankfurther and Landis. The Business of the Supreme Court (1928); Simpson, Turning Over the Reins: The Aboli-

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of 1789, section 25, 1 Stat. 73, 85–87, provided that specified types of Federal and state cases could be reviewed only "upon a writ of error." This "writ of error" procedure made virtually all cases subject to the possibility of obligatory appellate review by the Supreme Court.[16] Thus, for the first century the Supreme Court docket was largely made up of cases within the court's obligatory jurisdiction.

The first erosion of the practice of mandatory appellate jurisdiction by the Supreme Court took place in 1891 with the passage of the Evarts, or Circuit Court of Appeals, Act. 26 Stat. 826. This Act provided for the first time in Federal law that the Supreme Court would have control over its docket to the extent that it had discretion to decide whether to hear certain cases (relating to diversity, revenue laws, patent laws, Federal criminal laws, and admiralty) decided by the newly created circuit courts of appeal.[17]

Many proponents of the 1891 Act felt that the creation of a new tier of Federal appellate courts would eliminate the caseload pressures on the Supreme Court. Yet despite this ameliorative action the growth of the Supreme Court caseload continued unabated. Finally, in 1925, Congress responded. In the Judges Act of 1925, 43 Stat. 936, the scope of mandatory appellate review was narrowed and the role of certiorari or discretionary review expanded. By virtue of this legislation, for the vast majority of cases, the Court obtained the authority to select for review and disposition those cases it considers of national importance.

Unfortunately a significant set of categories of cases requiring the exercise of mandatory appellate jurisdiction remained after 1925. Some of the types of cases that provided for mandatory appellate review have been changed to discretionary review within the last fifteen years.

In 1970 Congress provided for certiorari-type review of criminal cases under 18 U.S.C. 3731. In 1974 Congress abolished virtually all direct appeals to the Supreme Court from district court determinations in civil actions brought to enforce the antitrust laws and the Interstate Commerce Act. 88 Stat. 1706. In 1975 Congress transferred from the Supreme Court to various Courts of Appeals appellate jurisdiction over certain cases involving orders of the Interstate Commerce Commission.

Finally, and most importantly, in 1976 Congress repealed most of the requirements for convening three-judge district courts, including injunctions to prohibit the enforcement of State and Federal laws on the basis of unconstitutionality, thereby eliminating the need for direct mandatory appellate review of this category of cases. 90 Stat. 1119. These cases are now heard by the regional courts of appeal and many of these cases are finally decided by those courts.[18]

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tion of the Mandatory Appellate Jurisdiction of the Supreme Court,[6] Hastings L. Q. 297 (1978) (hereinafter Simpson); Weschler, The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and Logistics of Direct Review, 34 Wash. and Lee L. Rev. 1043 (1977); Tushnet, The Mandatory Jurisdiction of the Supreme Court—Some Recent Developments, 46 U. Cin. L. Rev. 347, 359 (1977).

[16] See Simpson supra note 15, at 301–307.

[17] P. Bator, P. Mishkin, D. Shapiro, and H. Weschler, Hart and Weschler's The Federal Courts and the Federal System at 40–41 (2d ed. 1973).

[18] Statistics confirm this proposition. See Annual Report of the Director of the Administrative Office of U.S. Courts, Table B–1A and Table C4 (1983).

Continued

B. CURRENT LAW

However, several significant categores of cases remain subject to mandatory appellate review. This bill serves to convert these types of cases to review by certiorari. The four major categories of cases are set forth below:

28 U.S.C. 1257 (1)-(2) and 28 U.S.C. 1258 (1)-(2).—Subsection (1) of section 1257, United States Code, mandates review by the Supreme Court of a decision of the highest State court in which a decision could be had where the validity of a Federal law is drawn into question and the decision is against its validity. Subsection (2) similarly provides for review of State court decisions where the validity of "a statute of any state" is drawn in question on Federal grounds and the decision is in favor of its validity.

The apparent reason for authorizing such appeals is to assure supremacy and uniformity of Federal law. Perpetuation of a mandated system of appellate review represents an unfortunate and erroneous view of the sensitivity of State courts to constitutional issues. To the extent that issues of paramount Federal importance are raised by State court decisions the Supreme Court is capable of picking these cases through the discretionary or certiorari review mechanism. As a Department of Justice study committee aptly observed: "This residue of implicit distrust has no place in our federal system." [19]

The categories defined by section 1257 do not restrict appeal to cases of general import or unusual significance. The term "statute of any state," as used in section 1257(2), is not confined to laws of statewide applicability, but has been constructed to include municipal ordinances see, e.g., *Coates* v. *City of Cincinnati,* 402 U.S. 611 (1971); *Jamison* v. *Texas,* 318 U.S. 413 (1943), and all administrative rules and orders of a "legislative" character see *Lathrop* v. *Donohue,* 367 U.S. 820, 824-27 (1961). In light of the doctrine of *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U.S. 282 (1921), qualification for appeal under this provision does not require that a challenge be rejected to the general validity of a State law. It is sufficient if a claim was rejected that the application of the State law under the facts of the particular case was barred on Federal grounds.

The net result, as described by a witness for the Department of Justice during the 97th Congress, is:

> The availability of appeal may depend simply on an attorney's description of the outcome of a case as a rejection of a challenge to the validity of a state law as applied, rather than on any real difference between the case presented and those falling under the certiorari jurisdiction described in section 1237(3).[20]

Congressional oversight of the Three-Judge Court Act of 1976 has revealed that the Act successfully reduced burdens on the Supreme Court without deleteriously affecting the rights of litigants. See House Hearings on the State of the Judiciary and Access to Justice (1977), supra note 6, at 3. See generally House Hearings on Supreme Court Workload (1983), supra note 6.

[19] Department of Justice Committee on Revision of the Federal Judicial System, supra note 7, at 13.

[20] See House Hearings on Mandatory Jurisdiction (1982), supra note 10 at 119-120 (statement of Timothy Finn); see also Hart and Weschler, The Federal Courts and the Federal System (2d ed. 1973) at 631-640; House Hearings on the Court Reform and access to Justice Act of 1987, supra note 2, (statement of Hon. Stephen J. Markman).

Subsections (1) and (2) of section 1258, United States Code, require review by the Supreme Court of final judgments or decrees rendered by the Supreme Court of the Commonwealth of Puerto Rico which (1) draw into question the validity of a treaty or statute of the United States and the decision is against its validity, and (2) which draw into question the validity of a statute of the Commonwealth of Puerto Rico on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity.

As is the case with 28 U.S.C. § 1257, the purpose of these provisions apparently is to ensure the supremacy of Federal law. This purpose can be achieved, however, as well through the discretionary review mechanism as by mandatory review. Therefore, subsections (1) and (2) of section 1258 are no longer needed.

The issue of Supreme Court review of decisions of a State or territorial court is tempered by the creation in case law of jurisdictional limitations. For example, under current practice, the Supreme Court will not hear cases in which the decision of the State court rests on independent and adequate State grounds. The Court has carefully focused the independent and adequate State grounds doctrine to avoid expending limited time on cases that are outside its constitutional jurisdiction and that it can not decide. In addition, the Federal question must have been properly presented in the State courts.[21] Similarly, the conversion of mandatory appeals from State courts to discretionary petitions for certiorari underscores the need for the Court to exercise great care in selecting only those cases which merit its time.

The "appeal" in these cases is an artificial process. The Court is required to consider whether a petition for certiorari should be granted if the appeal was improvidently taken by 28 U.S.C. § 2103. In light of the complexity of the jurisdiction created by the appeal, it is not surprising that many cases are improperly pled. The translation or deciphering of such improper pleadings takes up the Court's finite time.

28 U.S.C. 1254(2).—This section authorizes appeal by a party relying on a State statute held to be invalid on Federal grounds by a Federal court of appeals. The category of causes specified in this provision does not define a class of cases of unique importance either to individual States or to the nation. Just as with 28 U.S.C. § 1257, this provision has been broadly construed to include within the ambit of the term "statute" municipal ordinances, *City of New Orleans* v. *Dukes,* 427 U.S. 297, 301 (1976), and administrative orders, *Public Service Comm'n of Indiana* v. *Batesville,* 284 U.S. 6 (1931). In addition, the term "statute" as used in this section has been held to include a State statute, as applied, rather than a holding with respect to the mere facial validity of the statute. *Dutton* v. *Evans,* 400 U.S. 74, 76 n.6 (1970).

Similarly, as with 28 U.S.C. § 1257(1) and (2) there is no rational basis for an assumption that the Supreme Court will not be sensi-

[21] For further discussion, see Beck, "Mandatory Appellate Jurisdiction of the Supreme Court of the United States" (American Law Division, 1981), reprinted at House Hearings on Mandatory Jurisdiction (1982), supra note 10, at 197, 215–217.

tive to the need to preserve the delicate balance between the Federal and State govenment in selecting which cases to review.

The provisions of 28 U.S.C. § 1254(2) inappropriately force the Supreme Court to hear cases of less constitutional importance merely because of tangential involvement of a State statute. The interests of justice and judicial efficiency will be far better served by giving the Supreme Court the discretion to decide when and whether to give plenary consideration to the types of cases that arise under this section.

Unlike 28 U.S.C. § 1257, however, section 1254 has an additional artificial barrier to review that exacerbates the lack of control of the Court's docket. Section 1254(2) includes a limitation that "such appeal shall preclude review by writ of certiorari at the instance of such appellant." Accordingly, the improvident filing of an appeal, whether for lack of understanding of the complex jurisdiction of the Court or the mistaken belief that the filing of an appeal is some magical incantation, may eliminate the possibility that a case having important questions will actually receive the review by the Court that it deserves.

28 U.S.C. 1252.—This section provides for direct appeal to the Supreme Court of decisions of the lower courts holding acts of Congress unconstitutional in proceedings in which the United States or its agencies, officers, or employees are parties. Under usual circumstances any lower Federal court decision invalidating an act of Congress presents issues of great public importance warranting Supreme Court review. However, most of these cases arise in the district courts and may not produce a record that is useful for review by the Supreme Court. The Court is nonetheless required to hear and determine these cases without the benefit of an intermediate appellate court's review and the resultant refinement of the issues. On numerous occasions, the Court, rather than making a summary disposition that, in itself, is not helpful to the Congress or the courts in the clarification of legislation under the Constitution, has required plenary briefing and oral argument in cases of no real constitutional or statutory import.

Here, too, there is substantial time expended in the interpretation of the jurisdictional statute that could be better spent determining the merits of cases. Recently, in *Heckler* v. *Edwards,* 465 U.S. 870 (1984), the Supreme Court held that a party does not have a right to appeal under section 1252 unless the district court finds that a Federal statute's unconstitutionality is in issue.[22] The court of appeals had dismissed the appeal of the Secretary of Health and Human Services under 28 U.S.C. § 1291 because it believed that only the Supreme Court had jurisdiction over the appeal. However, because the Secretary was only challenging the remedy ordered by the district court, not the declaration of unconstitutionality, the Supreme Court vacated the judgment and remanded the case to the court of appeals for reinstatement of the Secretary's appeal. As Justice Marshall noted for the Court,

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[22] The *Heckler* opinion contains an excellent analysis of the structure, history and purpose of section 1252 of title 28, United States Code.

> When a party has a right to pursue a direct appeal to this Court under § 1252, the normal route for appellate review is blocked, and a court of appeals is without jurisdiction. *Donovan* v. *Richland County Assn. for Retarded Citizens,* supra, at 389–390. Thus, the consequence of an erroneous choice of forum can be to preclude any court's review, because by the time a party discovers its error, appeal to the correct forum may be untimely. To avoid that consequence, litigants ought to be able to apply a clear test to determine whether, as an exception to the general rule of appellate review, they must perfect an appeal directly to the Supreme Court. Such a test, of course, must be crafted "with precision and with fidelity to the terms by which Congress has expressed its wishes" in the jurisdictional statute. *Cheng Fan Kwok* v. *INS,* 392 U.S. 206, 212 (1968).[23]

The *Heckler* Court was forced to determine in some detail the contours of its jurisdiction over an appeal, and ultimately did not decide the issue of constitutionality of the statute or the proper remedy.

The Court was required to further explicate the distinction enunciated in *Heckler* v. *Edwards* almost immediately. In *EEOC* v. *Allstate Insurance Co.,* 467 U.S. 1232 (1984), the Court dismissed an appeal for want of jurisdiction, without stating any reasons or analysis of the jurisdictional issue. However, Chief Justice Burger further noted the debilitating nature of mandatory appeals by complaining in dissent that the Court's holding—that it lacks jurisdiction under 28 U.S.C. § 1252 as long as the party seeking review challenges only the remedy ordered by the district court, even though the remedy sought on appeal would necessarily require a reversal of the lower court's holding of unconstitutionality—has the practical effect of allowing a challenge only to the district court's remedy, thereby frustrating a direct appeal to the Supreme Court:

> Notwithstanding the burdens on the Court—which have more than doubled in three decades—I am unwilling to say on the basis of the scant information before us that Congress intended our appellate jurisdiction under § 1252 to be easily circumvented.

EEOC, supra, 467 U.S. at 1232–33. Absent a change in the law, such jurisdictional arguments are likely to continue in the future, thereby consuming the Court's finite time.

It is unlikely that if a discretionary type of review mechanism is substituted for this unwieldly and confusing direct review that the Supreme Court will deny review to important constitutional questions that merit its immediate attention. Further, in cases in which expedited review is warranted, a party can file an appeal in the court of appeals and immediately petition the Court for a writ of certiorari before judgment under 28 U.S.C. § 2101(3). See Supreme Court Rule 18; *Dames & Moore* v. *Regan,* 453 U.S. 654 (1981). In

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[23] *Heckler,* supra, 465 U.S. at 877.

short, the removal of direct appeal authority should not create an obstacle to the expeditious review of cases of great importance and should, therefore, not negatively impact on the relative separation of powers between the legislative and judicial branches of government.[24]

C. CONCLUSION

The Committee continues to believe that the Supreme Court should be granted greater authority to determine its docket. The existing provisions of law that mandate Supreme Court review are outmoded and unnecessary. As the American Bar Association concluded in testimony several years ago before the Committee:

> The Court should be able to control its own docket and in its discretion provide further review, by certiorari when appropriate, for such cases in which there has already been an appeal in another court. The public generally, as well as legal professionals, has learned to accept the proposition that our Supreme Court must pick and choose those cases it considers appropriate for the highest court in our land to review. No current public policy or public interest suggests that the present congressional mandates for appellate review by the Court should be preserved, except in those few instances involving three-judge federal district courts, whose decisions may not be otherwise reviewable by appeal in any other appellate court.[25]

There are multiple reasons for eliminating the vast majority of mandatory appellate jurisdiction in the Supreme Court. First, the Court is required to spend inordinate amounts of time considering arcane and technical provisions of its jurisdiction, either in summarily disposing of cases, or setting cases for oral argument, or, as illustrated above, attempting to guide the bench and bar through the maze of doctrinal questions that will arise only infrequently. Second, the Court must frequently dispose of appeals without plenary brieing and oral argument. These summary dispositions are of murky precedential value at best[26] and sometime result in what

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[24] Prompt correction or confirmation of lower court decisions invalidating acts of Congress is generally desirable for reasons of separation of powers, avoiding unwarranted interference with the government's administration of the law and protection of the public interest. See *Heckler* v. *Edwards*, 104 S.Ct. 1532, 1539–40 (1984). Removal of the direct review mechanism of 28 U.S.C. 1252 increases the importance of the authorization of 28 U.S.C. § 1254(1) for certiorari before final judgment in the court of appeals as a means of securing an expeditious and definitive resolution of questions of statutory unconstitutionality by the Supreme Court. The Committee contemplates that the Court will give appropriate weight to the elimination of the direct review route under 28 U.S.C. § 1252 in deciding on applications for certiorari before final judgment, where the application challenges a lower court's invalidation of an act of Congress and the United States Government or an official is a party.

[25] See House Hearing on Mandatory Jurisdiction (1982), supra note 10, at 71–72 (statement of Benjamin Zelenko).

[26] For example, in *Edelman* v. *Jordan*, 415 U.S. 651 (1974), the Court held that a summary disposition carries less precendential weight than a full opinion on the merits. The very next year in *Hicks* v. *Miranda*, 422 U.S. 332 (1975), the Court held that the dismissal case for lack of a substantial Federal question that was before the Court because of mandated appellate jurisdiction is a decision on the merits whose precedential value is unclear. Then in *Mandel* v. *Bradley*, 432 U.S. 173 (1977), the Court held that a summary affirmance of a case before the Court because of an obligatory appeal provision merely rejects the arguments for reversal but is not binding beyond those points necessarily rejected. The net effect of the *Mandel*-type approach is to require lower courts and the parties to examine, in infinite detail, the papers filed with the Supreme Court in order to determine the precedential effect of a summary disposition. This lack of clarity is not a desirable state of the law. See *Simpson*, supra note 15, at 320–328.

has been described by one Justice as "cavalier treatment of the rights and interests of the parties involved in such cases." [27] Third, the Supreme Court has necessarily come to treat cases that require review as the functional equivalent of, and under the same standards as, cases that are reviewed on a discretionary basis.[28] Finally, many cases that now require the Supreme Court's attention can better be considered by the courts of appeals with plenary briefing and argument. This is particularly true in light of the new burdens recently placed on the Supreme Court by legislation authorizing a writ of certiorari to the Court of Military Appeals, 97 Stat. 1393, and other expected increases in Supreme Court's workload.

The former Director of the Federal Judicial Center (Professor A. Leo Levin), in testimony during House Hearings, repeated Chairman Kastenmeier's statement of the basic message of this legislation:

> We rely on the Supreme Court to resolve cases on the merits: we certainly can rely on the Court to determine which cases it can hear.[29]

Finally, the adoption of legislation to eliminate mandatory appeals will not deprive litigants of access to justice.[30] In fact, the Supreme Court will be given a greater opportunity to consider the truly significant and worthy cases and provide more meaningful access to justice.

Section-by-Section Analysis

SECTION 1

Section 1 repeals 28 U.S.C. § 1252. Currently section 1252 provides that any party may appeal directly to the Supreme Court from any decision of any court of the United States declaring an Act of Congress unconstitutional if the United States is a party to the suit. The repeal of this section would implement the normal course of litigation by allowing appeals to be taken to the regional courts of appeals under 28 U.S.C. § 1291, unless the Supreme Court determines that the action is of sufficient import that certiorari should be granted before judgment of the court of appeals and heard immediately by the Supreme Court.

SECTION 2

Section 2 converts appeals from judgments of the United States Courts of Appeals, currently brought to the Supreme Court under 28 U.S.C. § 1254(2), to discretionary petitions for certiorari. Only cases in which a court of appeals has declared a State statute to be

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[27] Remarks of Justice Thurgood Marshall to the Second Judicial Conference (Sept. 9, 1982). Justice Stevens also has raised the question of misuse of the Court's summary procedure (dissenting from a decision to reset for argument), *New Jersey* v. *T.L.O.*, 4691 U.S. 355 (1984) (52 L.W.

[28] Ohio *ex rel. Eaton* v. *Price*, 364 U.S. 263 (1976); *Simpson*, supra note 15, at 315–320 (authorities cited therein); *Hogge* v. *Johnson*, 526 F.2d 833, 836 (4th Cir 1975) (Clark, J. concurring).

[29] *See* House Hearings on Supreme Court Workload (1983), *supra* note 6, at 25; Chairman Kastenmeier made his statement upon introduction of the bill early in the 98th Congress. See 129 Cong. Rec. H 1193 (daily ed., March 15, 1983).

[30] *See* House hearings on the Court Reform and Access to Justice Act of 1987, supra note 2 (statement of Robert MacCrate, president, American Bar Association).

repugnant to the Constitution, laws or treaties of the United States are subject to an appeal by the party relying on that State statute under section 1254(2). Appeals improperly brought under section 1254(2) cannot be considered as petitions for certiorari. Accordingly, this section replaces a highly technical, mandatory jurisdiction with a simplified discretionary jurisdiction.

SECTION 3

Section 3 converts appeals from the highest State court in which a decision could be had, including the District of Columbia, in certain limited circumstances under 28 U.S.C. § 1257 (1) and (2), to petitions for certiorari. Under present law, an appeal can be taken only from decisions of the highest State court that (1) a statute or treaty of the United States is invalid or (2) a State statute is valid as against a claim of its repugnance to the Constitution, statutes or treaties of the United States. At present, cases improperly appealed are also considered as petitions for certiorari. Section 1257 has accordingly been rewritten to accommodate all cases that can be brought before the Supreme Court from a State court under any provision of current section 1257, whether by appeal or by writ of certiorari, under the certiorari jurisdiction.

SECTION 4

Section 4 amends 28 U.S.C. § 1258 to parallel the changes made in section 1257 as applicable to the Supreme Court of Puerto Rico.

SECTION 5

Section 5 makes technical and conforming amendments to title 28 of the United States Code. Subsection (a) corrects the sectional analysis at the beginning of Chapter 81 of title 28, United States Code, to reflect the changes made in section 1 through 4 of the bill. Subsection (b) corrects a cross reference in 28 U.S.C. § 210(1)(a) relating to the time for filing appeals, to reflect the effect of section 1 of the bill. Subsection (c) repeals 28 U.S.C. § 2103 as no longer necessary. Subsection (d) amends 28 U.S.C. § 2104 to conform with the purposes of the bill. This amendment is not intended to alter the Supreme Court's power to treat cases differently in its rules, e.g. time for filing, where it deems such differences to be appropriate. Subsection (e) conforms a cross reference in 28 U.S.C. § 2350.

SECTION 6

Section 6 makes technical and conforming amendments to provisions of law outside title 28, United States Code, as follows: (a) The Federal Election Campaign Act; (b) the Act of May 18, 1928 (25 U.S.C. 652) (relating to suits by California Indians against the United States); (c) the Trans-Alaska Pipeline Authorization Act; (d) and (e) the Regional Rail Reorganization Act of 1973; (f) the Omnibus Budget Reconciliation Act of 1981; (g) the International Claims Settlement Act of 1949; (h) the act commonly known as the Saint Lawrence Seaway Act; (i) and the Federal Insecticide, Fungicide and Rodenticide Act. Except for the Act of May 18, 1928, each of these Acts provided for direct appeals to the Supreme Court in certain circumstances. The amendment to the Act of May 18, 1928,

strikes superfluous language referring to the United States Court of Appeals for the Federal Circuit.

SECTION 7

Section 7 provides that this Act shall become effective ninety days after enactment, but that the Act shall not affect cases then pending in the Court or judgments or decrees subject to appeal that have been issued prior to the effective date of the Act.

V. Oversight Findings

Oversight of the Federal judicial system and the administration of justice is the responsibility of the Committee on the Judiciary. During the past six Congresses, the Committee—acting through the Subcommittee on Courts, Civil Liberties and the Administration of Justice—has held numerous hearings on the general issue of appellate court congestion, including matters affecting the Supreme Court of the United States.

Pursuant to House Rule 2(l) (3) and (4) of rule XI of the Rules of the House of Representatives, the Committee issues the following findings:

It is the view of the Committee that one of the principal functions of the United States Supreme Court is to resolve cases involving principles the application of which are of wide public importance or governmental interest, and which should be authoritatively decided by the final court. Another function is to ensure uniformity and consistency in the law by resolving conflicts in decisions between or among trial courts or lower appellate courts.

The Supreme Court—which of course sits at the apex of the Federal judicial system—can devote plenary consideration only to about 150 cases a year. During the past several terms, a substantial percentage of the Court's workload has been devoted to mandatory cases that do not have significant public importance. Elimination of these cases from the Court's docket will not preclude High Court consideration of cases of significant import to the nation, will not have a deleterious impact on litigants, and will not adversely affect separation of powers or federalism. Many other petitions from the circuit courts have to be left unsettled. Some of these appeals are of high national priority or identify serious conflicts between circuits. Some of the neglected cases concern individual rights guaranteed by the Constitution and some relate to the delicate balance of powers in our Federal Union.

Furthermore, the Committee agrees with the proposition that the Court's workload is at the saturation point. Elimination of the Court's mandatory jurisdiction, although not a panacea to the Court's problems, is a necessary step to relieving the Court's calendar crisis.

VI. Statement of the Committee on Government Operations

No statement has been received on the legislation from the House Committee on Government Operations.

VII. New Budget Authority

In regard to clause 2(l)(3)(B) of rule XI of the Rules of the House of Representatives, the bill creates no new budget authority or increased tax expenditures for the Federal judiciary.

VIII. Inflationary Impact Statement

Pursuant to clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the committee feels that the bill will have no foreseeable inflationary impact on prices or costs in the operation of the national economy.

IX. Federal Advisory Committee Act of 1972

The Committee finds that this legislation does not create any new advisory committees within the meaning of the Federal Advisory Committee Act of 1972.

X. Cost Estimate

In compliance with clause 7 of rule XIII of the Rules of the House of Representatives, the committee estimates that no costs will be incurred in carrying out the provisions of the reported bill.

XI. Statement of the Congressional Budget Office

Pursuant to clause 2(l)(3)(C) of rule XI of the Rules of the House of Representatives, and section 403 of the Congressional Budget Act of 1974, the following is the cost estimate on H.R. 5644 prepared by the Congressional Budget Office.

U.S. Congress,
Congressional Budget Office,
Washington, DC, May 5, 1988.

Hon. Peter W. Rodino, Jr.,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed S. 952, a bill to improve the administration of justice by providing greater discretion to the Supreme Court in selecting the cases it will review, and for other purposes, as ordered reported by the House Committee on the Judiciary, May 3, 1988. We estimate that no cost to the federal government or to state or local governments would result from enactment of this bill.

S. 952 would give the Supreme Court greater discretion in selecting the cases it will review by eliminating the mandatory review of cases that the Supreme Court currently must decide on the merits. Review of such cases would be by writ of certiorari rather than by appeal. Based on information from the Administrative Office of the U.S. Courts, CBO estimates that enactment of this bill would result in no cost to the federal government.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

JAMES L. BLUM,
Acting Director.

XII. COMMITTEE VOTE

S. 952 was reported favorably by voice vote, a quorum of Members being present.

XIII. CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, S. 952 as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

* * * * * * *

PART IV—JURISDICTION AND VENUE

CHAPTER 81—SUPREME COURT

Sec.
1251. Original jurisdiction.
[1252. Direct appeals from decisions invalidating Acts of Congress.]
1253. Direct appeals from decisions of three-judge courts.
1254. Courts of appeals; ceriorari; [appeal;] certified questions.
1257. State courts; [appeal;] certiorari.
1258. Supreme Court of Puerto Rico; [appeal;] certiorari.
1259. Court of Military Appeals; certiorari.

* * * * * * *

[§ 1252. Direct appeals from decisions invalidating Acts of Congress

[Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands and any court of record of Puerto Rico, holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.

[A party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court. All appeals or cross appeals taken to other courts prior to

such notice shall be treated as taken directly to the Supreme Court.]

* * * * * * *

§ 1254. Courts of appeals; certiorari; [appeal;] certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods;

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

[(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;]

[(3)] *(2)* By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

* * * * * * *

[§ 1257. State courts; appeal; certiorari

[Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

[(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

[(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

[(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

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

§ 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of

its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

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

[§ 1258. Supreme Court of Puerto Rico; appeal; certiorari

[Final judgments or decrees rendered by the Supreme Court of the Commonwealth of Puerto Rico may be reviewed by the Supreme Court as follows:

[(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

[(2) By appeal, where is drawn in question the validity of a statute of the Commonwealth of Puerto Rico on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity.

[(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of the Commonwealth of Puerto Rico is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under, the United States.]

§ 1258. Supreme Court of Puerto Rico; certiorari

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

* * * * * * *

PART V—PROCEDURE

* * * * * * *

CHAPTER 133—REVIEW—MISCELLANEOUS PROVISIONS

§ 2101. Supreme Court; time for appeal or certiorari; docketing; stay

(a) A direct appeal to the Supreme Court from any decision under [sections 1252, 1253 and 2282] *section 1253* of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

* * * * * * *

[§ 2103. Appeal from State court or from a United States court of appeals improvidently taken regarded as petition for writ of certiorari

[If an appeal to the Supreme Court is improvidently taken from the decision of the highest court of a State, or of a United States court of appeals, in a case where the proper mode of a review is by petition for certiorari, this alone shall not be ground for dismissal; but the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken. Where in such a case there appears to be no reasonable ground for granting a petition for writ of certiorari it shall be competent for the Supreme Court to adjudge to the respondent reasonable damages for his delay, and single or double costs.]

[§ 2104. Appeals from State courts

[An appeal to the Supreme Court from a State court shall be taken in the same manner and under the same regulations, and shall have the same effect, as if the judgment or decree appealed from had been rendered in a court of the United States.]

§ 2104. Reviews of State court decisions

A review by the Supreme Court of a judgment or decree of a State court shall be conducted in the same manner and under the same regulations, and shall have the same effect, as if the judgment or decree reviewed had been rendered in a court of the United States.

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PART VI—PARTICULAR PROCEEDINGS

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CHAPTER 158—ORDERS OF FEDERAL AGENCIES: REVIEW

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§ 2350. Review in Supreme Court on certiorari or certification

(a) An order granting or denying an interlocutory injunction under section 2349(b) of this title and a final judgment of the court of appeals in a proceeding to review under this chapter are subject to review by the Supreme Court on a writ of certiorari as provided by section 1254(1) of this title. Application for the writ shall be made within 45 days after entry of the order and within 90 days after entry of the judgment, as the case may be. The United States, the agency, or an aggrieved party may file a petition for a writ of certiorari.

(b) The provisions of section [1254(3)] *1254(2)* of this title, regarding certification, and of section 2101(f) of this title, regarding stays, also apply to proceedings under this chapter.

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SECTION 310 OF THE FEDERAL ELECTION CAMPAIGN ACT OF 1971

JUDICIAL REVIEW

SEC. 310. [(a)] The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

[(b) Notwithstanding any other provision of law, any decision on a matter certified under subsection (a) shall be reviewable by appeal directly to the Supreme Court of the United States. Such appeal shall be brought no later than 20 days after the decision of the court of appeals.]

* * * * * * *

ACT OF MAY 18, 1928

AN ACT Authorizing the attorney general of the State of California to bring suit in the Court of Claims on behalf of the Indians of California.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purposes of this Act the Indians of California shall be defined to be all Indians who were residing in the State of California on June 1, 1852, and their descendants now living in said State.

SEC. 2. All claims of whatsoever nature the Indians of California as defined in section 1 of this Act may have against the United States by reason of lands taken from them in the State of California by the United States without compensation, or for the failure or refusal of the United States to compensate them for their interest in lands in said State which the United States appropriated to its own purposes without the consent of said Indians, may be sub-

mitted to the United States Claims Court by the attorney general of the State of California acting for and on behalf of said Indians for determination of the equitable amount due said Indians from the United States; and jurisdiction is hereby conferred upon the United States Claims Court[, with the right of either party to appeal to the United States Court of Appeals for the Federal Circuit] to hear and determine all such equitable claims of said Indians against the United States and to render final decree thereon.

It is hereby declared that the loss to the said Indians on account of their failure to secure the lands and compensation provided for in the eighteen unratified treaties is sufficient ground for equitable relief.

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SECTION 203 OF THE TRANS-ALASKA PIPELINE AUTHORIZATION ACT

CONGRESSIONAL AUTHORIZATION

SEC. 203. (a). * * *

* * * * * * *

(d) The actions taken pursuant to this title which relate to the construction and completion of the pipeline system, and to the applications filed in connection therewith necessary to the pipeline's operation at full capacity, as described in the Final Environmental Impact Statement of the Department of the Interior, shall be taken without further action under the National Environmental Policy Act of 1969; and the actions of the Federal officers concerning the issuance of the necessary rights-of-way, permits, leases, and other authorizations for construction and initial operation at full capacity of said pipeline system shall not be subject to judicial review under any law except that claims alleging the invalidity of this section may be brought within sixty days following its enactment, and claims alleging that an action will deny rights under the Constitution of the United States, or that the action is beyond the scope of authority conferred by this title, may be brought within sixty days following the date of such action. A claim shall be barred unless a complaint is filed within the time specified. Any such complaint shall be filed in a United States district court, and such court shall have exclusive jurisdiction to determine such proceeding in accordance with the procedures hereinafter provided, and no other court of the United States, of any State, territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any such claim whether in a proceeding instituted prior to or on or after the date of the enactment of this Act. Any such proceeding shall be assigned for hearing at the earliest possible date, shall take precedence over all other matters pending on the docket of the district court at that time, and shall be expedited in every way by such court. Such court shall not have jurisdiction to grant any injunctive relief against the issuance of any right-of-way, permit, lease, or other authorization pursuant to this section except in conjunction with a final judgment entered in a case involving a claim filed pursuant to this section. [Any review of an interlocuto-

ry or final judgment, decree, or order of such district court may be had only upon direct appeal to the Supreme Court of the United States.] *An interlocutory or final judgment, decree, or order of such district court may be reviewed only upon petition for a writ of certiorari to the Supreme Court of the United States.*

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SECTION 1152 OF THE OMNIBUS BUDGET RECONCILIATION ACT OF 1981

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JUDICIAL REVIEW

SEC. 1152. (a) * * *

(b) A judgment of the special court in any action referred to in this section shall be reviewable only upon petition for a writ of certiorari to the Supreme Court of the United States[, except that any order or judgment enjoining the enforcement, or declaring or determining the unconstitutionality or invalidity, of any provision of this subtitle shall be reviewable by direct appeal to the Supreme Court of the United States.]. Such review is exclusive and any [petition or appeal shall be filed] *such petition shall be filed in the Supreme Court* not more than 20 days after entry of such order or judgment.

* * * * * * *

SECTION 206 OF THE INTERNATIONAL CLAIMS SETTLEMENT ACT OF 1949

SEC. 206. The district courts of the United States are given jurisdiction to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this title, with a right of appeal from the final order or decree of such court as provided in [sections 1252, 1254, 1291, and 1292] *chapter 83* of title 28, United States Code.

* * * * * * *

ACT OF MAY 13, 1954

AN ACT Providing for creation of the Saint Lawrence Seaway Development Corporation to construct part of the Saint Lawrence Seaway in United States territory in the interest of national security; authorizing the Corporation to consummate certain arrangements with the Saint Lawrence Seaway Authority of Canada relative to construction and operation of the seaway; empowering the Corporation to finance the United States share of the seaway cost on a self-liquidating basis; to establish cooperation with Canada in the control and operation of the Saint Lawrence Seaway; to authorize negotiations with Canada of an agreement on tolls; and for other purposes.

* * * * * * *

RATES OF CHARGES OR TOLLS

SEC. 12. (a) The Corporation is further authorized and directed to negotiate with the Saint Lawrence Seaway Authority of Canada, or such other agency as may be designated by the Government of Canada, an agreement as to the rules of vessels and cargoes and the rates of charges or tolls to be levied for the use of the Saint Lawrence Seaway, and for an equitable division of the revenues of the seaway between the Corporation and the Saint Lawrence Seaway Authority of Canada. Such rules for the measurement of vessels and cargoes and rates of charges or tolls shall, to the extent practicable, be established or changed only after fiving due notice and holding a public hearing. In the event that such negotiations shall not result in agreement, the Corporation is authorized and directed to establish unilaterally such rules of measurement and rates of charges or tolls for the use of the works under its administration: *Provided, however,* That the Corporation shall give three months' notice, by publication in the Federal Register, of any proposals to establish or change unilaterally the basic rules of measurement and of any proposals to establish or change unilaterally the rates of charges or tolls, during which period a public hearing shall be conducted. Any such establishment of or changes in basic rules of measurement or rates of charges or tolls shall be subject to and shall take effect thirty days following the date of approval thereof by the President, and shall be final and conclusive, subject to review as hereinafter provided. Any person aggrieved by an order of the Corporation establishing or changing such rules or rates may, within such thirty-day period, apply to the Corporation for a rehearing of the matter upon the basis of which the order was entered. The Corporation shall have power to grant or deny the application for rehearing and upon such rehearing or without further hearing to abrogate or modify its order. The action of the Corporation in denying an application for rehearing or in abrogating or modifying its order shall be final and conclusive thirty days after its approval by the President unless within such thirty-day period a petition for review is filed by a person aggrieved by such action in the United States Court of Appeals for the circuit in which the works to which the order applies are located or in the United States Court of Appeals for the District of Columbia. The court in which such petition is filed shall have the same jurisdiction and powers as in the case of petitions to review orders of the Federal Power Commission filed under section 313(b) of the Federal Power Act (16 U.S.C. 825l). The judgment of the court shall be final subject to review by the Supreme Court upon certiorari or certification as provided in sections 1254(1) and [1254(3)] *1254(2)* of title 28 of the United States Code. The filing of an application for rehearing shall not, unless specifically ordered by the Corporation, operate as a stay of the Corporation's order. The filing of a petition for review shall not, unless specifically ordered by the court, operate as a stay of the Corporation's order.

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SECTION 25 OF THE FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT

SEC. 25. AUTHORITY OF ADMINISTRATOR.

(a)(1) REGULATIONS.—The Administrator is authorized in accordance with the procedure described in paragraph (2), to prescribe regulations to carry out the provisions of this Act. Such regulations shall take into account the difference in concept and usage between various classes of pesticides and differences in environmental risk and the appropriate data for evaluating such risk between agricultural and nonagricultural pesticides.

* * * * * * *

(4) RULE AND REGULATION REVIEW.—

(A) CONGRESSIONAL REVIEW.—Notwithstanding any other provision of this Act, simultaneously with promulgation of any rule or regulation under this Act, the Administrator shall transmit a copy thereof to the Secretary of the Senate and the Clerk of the House of Representatives. Except as provided in subparagraph (B), the rule or regulation shall not become effective, if within 90 calendar days of continuous session of Congress after the date of promulgation, both Houses of Congress adopt a concurrent resolution, the matter after the resolving clause of which is as follows: "That Congress disapproves the rule or regulation promulgated by the Administrator of the Environmental Protection Agency dealing with the matter of , which rule or regulation was transmitted to Congress on ", the blank spaces therein being appropriately filled.

(B) EFFECTIVE DATE.—If at the end of 60 calendar days of continuous session of Congress after the date of promulgation of a rule or regulation, no committee of either House of Congress has reported or been discharged from further consideration of a concurrent resolution disapproving the rule or regulation, and neither House has adopted such a resolution, the rule or regulation may go into effect immediately. If, within such 60 calendar days, such a committee has reported or been discharged from further consideration of such a resolution, or either House has adopted such a resolution, the rule or regulation may go into effect not sooner than 90 calendar days of continuous session of Congress after its promulgation unless disapproved as provided in subparagraph (A).

(C) For the purposes of subparagraphs (A) and (B) of this paragraph—

(i) continuity of session is broken only by an adjournment of Congress sine die; and

(ii) the days on which either House is not in session because of an adjournment of more than 3 days to a day certain are excluded in the computation of 60 and 90 calendar days of continuous session of Congress.

(D) EFFECT OF CONGRESSIONAL INACTION.—Congressional inaction on or rejection of a solution of disapproval shall not be deemed an expression of approval of such rule.

(E) JUDICIAL REVIEW.—

(i) Any interested party, including any person who participated in the rulemaking involved, may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this paragraph. The district court immediately shall certify all questions of the constitutionality of this paragraph to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

[(ii) Notwithstanding any other provision of law, any decision on a matter certified under clause (i) of this subparagraph shall be reviewable by appeal directly to the Supreme court of the United States. Such appeal shall be brought not later than 20 days after the decision of the court of appeals.]

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REGIONAL RAIL REORGANIZATION ACT OF 1973

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TITLE II—UNITED STATES RAILWAY ASSOCIATION

* * * * * * *

JUDICIAL REVIEW

SEC. 209. (a) * * *

* * * * * * *

(e) ORIGINAL AND EXCLUSIVE JURISDICTION.—(1) * * *

* * * * * * *

(3) A final order or judgment of the special court in any action referred to in this section shall be reviewable only upon petition for a writ of certiorari to the Supreme Court of the United States[, except that any order or judgment enjoining the enforcement, or declaring or determining the unconstitutionality or invalidity, of this Act, in whole or in part, or of any action taken under this Act, shall be reviewable by direct appeal to the Supreme Court of the United States in the same manner that an injunctive order may be appealed under section 1253 of title 28, United States Code]. Such review is exclusive and any [petition or appeal shall be filed] *such petition shall be filed in the Supreme Court* not more than 20 days after entry of such order or judgment.

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TITLE III—CONSOLIDATED RAIL CORPORATION

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VALUATION AND CONVEYANCE OF RAIL PROPERTIES

SEC. 303. (a) * * *

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[(d) APPEAL.—A finding or determination entered by the special court pursuant to subsection (c) of this section or section 306 of this title may be appealed directly to the Supreme Court of the United States in the same manner that an injunction order may be appealed under section 1253 of title 28, United States Code: *Provided,* That such appeal is exclusive and shall be filed in the Supreme Court not more than 20 days after such finding or determination is entered by the special court. The Supreme Court shall dismiss any such appeal with 7 days after the entry of such an appeal if it determines that such an appeal would not be in the interest of an expeditious conclusion of the proceedings and shall grant the highest priority to the determination of any such appeals which it determines not to dismiss.]

(d) REVIEW.—A finding or determination entered by the special court pursuant to subsection (c) of this section or section 306 of this title shall be reviewable only upon petition for a writ of certiorari to the Supreme Court of the United States. Such review is exclusive and any such petition shall be filed in the Supreme Court not more than 20 days after entry of such finding or determination.

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APPENDIX

SUPREME COURT OF THE UNITED STATES,
Washington, DC, June 17, 1982.

Re H.R. 2406.

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

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

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

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

Attached in the appendix is a table showing the recent growth of filings at the Supreme Court. Also attached are statistical tables covering the October 1986 and 1980 Terms. These tables reveal that during the 1980 Term, thirty-six percent of the cases decided by the Court were cases arising out of mandatory jurisdiction. The percentage of mandatory jurisdiction cases has decreased since 1976, chiefly because of the action taken by Congress to confine the jurisdiction of three-judge federal district courts. Further decline in the percentage of mandatory jurisdiction cases is not expected however, since the curtailment of three-judge court cases has by now been reflected in the Court's caseload. The remaining burdens posed by the mandatory jurisdiction provisions still on the books are nevertheless substantial and continue to cause the Court to expend its limited resources on cases that are better left to other courts.

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

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

Cordially and respectfully,

WARREN E. BURGER.
WILLIAM J. BRENNAN.
BYRON R. WHITE.
HARRY A. BLACKMUN.
WILLIAM H. REHNQUIST.
THURGOOD MARSHALL.
LEWIS F. POWELL.
JOHN P. STEVENS.
SANDRA D. O'CONNOR.

Supreme Court Filings

	Cases
October term 1981	[1] 4,400
October term 1980	4,174
October term 1979	3,985

[1] Estimated as of June 15, 1982 the actual figure was 4,209, which is 5 percent higher than last Term at the same time.

CASES DISPOSED OF IN OCTOBER 1976 AND 1980 TERMS

	October term 1976	October term 1980
(1) Cases brought as appeals:		
Properly brought as appeals	211	126
Improperly brought as appeals	94	91
Dismissed under rule 60	6	1
Total	311	218
(2) Cases properly brought as appeals:		
Decided with opinion after oral argument	56	27
Decided with opinion without oral argument	10	1
Decided with opinion	145	102
Affirmed	54	.....
Reversed	0	16
Vacated and remanded	26	.....
Dismissed for want of a substantial Federal question	65	86
Total	211	130
(3) Cases decided on the merits:		
Decided on appeal	211	130
Decided on ceriorari	234	229
Total	445	[1] 359
Percentage decided on appeal (percent)	47.4	36.2
Percentage decided on certiorari (percent)	52.6	63.8

[1] Total does not include the one original case decided in October term 1980.

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