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THE MAKING OF THE MODERN COURT SYSTEM

by

Dorothy Christine Hankins Schultz

A Dissertation Submitted to the Faculty of the
DEPARTMENT OF POLITICAL SCIENCE
In Partial Fulfillment of the Requirements
For the Degree of
DOCTOR OF PHILOSOPHY
In the Graduate College
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1978

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I hereby recommend that this dissertation prepared under my direction by Dorothy Christine Hankins Schultz entitled The Making of the Modern Court System be accepted as fulfilling the dissertation requirement for the degree of Doctor of Philosophy.

Richard C. Cutner
Dissertation Director

As members of the Final Examination Committee, we certify that we have read this dissertation and agree that it may be presented for final defense.

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ABSTRACT

The Judiciary Act of 1925 with supplemental legislation in 1928 gave the United States Supreme Court the authority to manage its docket via discretionary jurisdiction. The Judiciary Act of 1925 climaxed a major era of judicial reform which introduced and gradually expanded the concept of discretionary jurisdiction. The United States circuit courts of appeals were created and gradually became the federal courts of last resort for most federal litigation.

"The Making of the Modern Court System" is a case study of the Judiciary Act of 1925 within the context of American judicial reform movements. The study includes an historical overview of major judicial reform proposals since 1789. Reform proposals have either been function-oriented or policy-oriented. Both types of proposals have been responses to stresses upon the system which exceed "normal" limits.

Excessive stress can result from either overloads of demands or from internal structural defects. Functional reformers seek to alleviate stress in a manner allowing the system to adapt to the demands of the environment. The major advocates of such reforms have been the actors most
directly affected by the stress, the judges and attorneys. Throughout the history of functional court reforms, judges have recommended legislation and on occasion have drafted bills which sympathetic congressmen sponsored. Since 1922, the role of judges as court reformers has had an institutional framework in the United States Judicial Conference. The Judiciary Act of 1925 was unique only in that the United States Supreme Court publicly acknowledged authorship of the bill and lobbied for its passage.

When the excessive stress occurs because of unpopular judicial decisions, the condition reflects the political struggle occurring in the environment. Policy-oriented reformers seeking to alter the effects of such decisions may either focus their reforms upon the policy issue through legislation and constitutional amendments or attack the courts via court curbing reform legislation and amendments, court packing, or non-compliance with court mandates. Court curbing legislation has been an unsuccessful tactic because of the opposition of the judiciary, the bar, and institutional litigants who are satisfied with the content of the court decisions. The output stress has been relieved naturally because of the political evolution of the courts to reflect the policy positions of the dominant political majority. The major impact that court curbing reformers have had upon the court appears to have been the stimulation
of their adversaries to support function-oriented reforms designed to strengthen the judicial system.

Judicial reform eras have followed major changes in the environment. Reforms in the United States have been incremental rather than revolutionary in part due to the charisma and traditions of the Anglo-American legal systems. Reforms must harmonize with those traditions and charisma as well as other major norms of the political culture.

From the study several tentative prerequisites for the adoption of judicial reform legislation emerged. First, the major actors of the judicial system must agree that a problem exists, and concur as to the identification of the problem, the causes, and the possible solutions. Second, reform proposals must be complementary to the political system and be in harmony with the prevailing political culture. Third, if the reforms require congressional action, then several members of the judicial committees of both houses of Congress must be committed to the reforms. Controversial subject matter must be kept at a minimum, and indifference converted to an asset through the legislative skill and strategy of the bill's floor leaders.
CHAPTER 1

INTRODUCTION

The Judiciary Act of 1925 has had a major impact upon the role of the United States Supreme Court in the American political system. Throughout its history, the Court has assumed the role of a major policy maker in the context of its judicial function. Prior to the passage of the Judiciary Act of 1925, the Court had no alternative but to review inconsequential cases as well as significant ones which were classified as obligatory jurisdiction. Obligatory jurisdiction was comprised of classes of litigation for which the right of review was guaranteed by the laws governing the jurisdiction of the United States Supreme Court. The Act of 1925 restricted the mandatory reviews to a few classes of litigation and expanded the discretionary jurisdiction. Under discretionary jurisdiction, litigants could petition the United States Supreme Court for a writ of certiorari. If the Court granted the writ, then review of the case would proceed through the remaining stages of Court review. Discretionary jurisdiction has enabled the Court to select from its docket those cases which four justices agreed raised questions of great public importance. Thus, the Court has been transformed from a court of last
resort to a major law making institution, whose decisions have sometimes eclipsed the Congress and President in making major changes in the law.¹

Legal and Political Foundations of the Supreme Court

The federal judicial system is the product of the compromises and exigencies of the nation's growth and development and the tide of political issues. The Constitution and the Judiciary Act of 1789 established the federal court system. Avoiding direct confrontation over the issue of whether to have a dual court system or allow the state courts to serve as the lower federal courts, the framers of the Constitution created a Supreme Court and delegated to the United States Congress the power to establish inferior courts. The judges of all federal courts had tenure based on "good behavior" and the guarantee that their compensation could not be reduced during their tenure in office.

The First Congress enacted the Judiciary Act of 1789 which established the district and circuit courts and the offices of district judges, five associate Supreme Court justices, and the chief justice. The three circuit courts were composed of district judges and the Supreme Court justices, who were to ride circuit twice a year. The circuit

¹. Examples of such policy innovations include: the nationalization of the Bill of Rights, reapportionment, integration, etc.
concept rested upon the belief that circuit duty would enable the justices to become better acquainted with the court practices and the laws of the different states and would contribute to the grassroot support and prestige of the national government (Frankfurter and Landis, 1928, pp. 14-24).²

Article III, section 2 of the Constitution established the jurisdiction of the federal courts in the following broad terms:

The Judicial power shall extend to all cases, law and equity, arising under this Constitution, the Laws of the United States and the Treaties made, or which shall be made, under their Authority; to all cases affecting Ambassadors, and other Public Ministers, and Consuls; --to all Cases of Admiralty and maritime jurisdiction; --to controversies between two or more States; --between a State and a Citizen of another state; --between Citizens of different States claiming lands or grants of different States, and between a State or a Citizen thereof, and Foreign States, Citizens, or Subjects.³

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

². Edmund Randolph, Washington's first attorney general, reported on workings of the judiciary system on December 27, 1790. Frankfurter and Landis (1928) discuss his criticism of the circuit court system and recommendations for separate judges for those courts. The first rationale noted above for the system, he ignored; the latter, he discounted.

³. Altered by the Eleventh Amendment to the United States Constitution.
The grant of judicial power by itself was very broad, but subsequent legislation and court interpretations limited the original jurisdiction of the Supreme Court to the cases specifically designated. In all other cases, the Court should have appellate jurisdiction both as to "law and fact" with such exceptions and regulations as Congress provided (Article III, section 2 of the United States Constitution). Congress provided that jurisdiction with the Judiciary Act of 1789 and has altered it with subsequent laws. As a result of the Act of 1789, district and circuit courts were in practice *nisi prius* courts dealing with different items of litigation—originally district courts with cases of admiralty and circuit courts with cases of diversity of citizenship (Frankfurter and Landis, 1928, p. 12).

Congress' power over the courts has major significance for the study of court reform. It has the power, legitimized by the Constitution, to change both the structure and the jurisdiction of the judicial system. Therefore, both functional and policy-oriented reformers had to direct their efforts toward the Congress. The political issue which contributed in large measure to the delegation of this power to the Congress was the division and scope of authority between the individual states and national governments. Initially, "States' Righters" wanted the state court systems to function as the lower federal court system,
while the "Nationalists" wanted a separate and independent federal judiciary at all levels of litigation. Gaining control of the First Congress and the executive, the "Nationalists" (Federalist party) created the federal court system. From the outset, there was dissatisfaction with the circuit courts; but, after the aborted Judiciary Act of 1801, the efforts for structural and procedural changes became enmired in partisan politics. After the Civil War, some reforms were implemented; but another obstacle—tradition—prompted many to oppose efforts to replace the circuit courts with intermediate appellate courts. The repeal of the Judiciary Act of 1801 and the failure of other early efforts to create separate judges for the circuit courts inevitably linked the size of the Supreme Court to the number of circuits. Ever since 1789, the creation of new judicial offices has involved partisan politics in varying degrees of importance (Frankfurter and Landis, 1928). 4

In 1891, both houses of Congress finally agreed to create the circuit courts of appeal as intermediate appellate courts to relieve the Supreme Court's overburdened docket. During the first hundred years, federal litigation had increased steadily and finally exceeded the capabilities of the U.S. Supreme Court to keep current with its

4. Chapters I and II and the footnotes are especially important for the partisan aspects of reform efforts.
docket. By the 1890's the Court's docket was several years in arrears. In the pre-Civil War period, justices had gradually ceased attending sessions of the circuit courts. By the 1890's, district judges held both district and circuit court in their districts. After the Circuit Court of Appeals Act of 1891, the jurisdiction of the two courts was basically the same. From 1891 to 1911, the circuit courts remained a vestigial part of the federal court system sustained only by tradition. With the passage of the Judicial Code of 1911, the circuit courts were absorbed completely by the district courts and disappeared from the system.

Justification of a Case Study

The Judiciary Act of 1925 climaxed a judicial reform era unequaled in the history of the United States in terms of major legislation. The period began with the passage of the Circuit Court of Appeals Act of 1891. In 1921, the role of judges as court reformers was institutionalized with the creation of the Annual Conference of Senior Circuit Courts of Appeals Judges. The law specified that the conference would recommend legislation to meet the needs of the federal courts.

Demands for judicial reform have been numerous and recurrent throughout the history of the United States. The reformers have been either policy-oriented or function-oriented. Policy-oriented reformers are persons who seek to
alter the U.S. Supreme Court's authority, structure, or composition, because of their disapproval of particular decisions by the Court. Policy-oriented reformers seek changes that they believe will stabilize, perhaps even augment, their influence in the political system. Functional reformers are those who are concerned with the mechanical problems of the Court. They focus upon the capability to render decisions, rather than the content of particular decisions. Their goal is efficiency through codification, simplification, and flexibility of the laws regulating procedure, jurisdiction, and administration of the federal court system. The underlying motivation of the functional reformers may also be their policy orientations; however, such policy orientations are often supportive of the status quo in terms of the Court's decisions. On the surface, at least, functional court reforms are neutral regarding policy outputs.

During reform eras, both types of reformers are active. Often public attention first focuses upon the policy-oriented reformers. Later, with less fanfare, the functional reformer emerges advocating legislation to professional audiences, the Department of Justice, and the Committees on the Judiciary of the House and Senate. Certain patterns tend to recur in each reform era.

The rhetoric of Court reform from one era to another has been repetitious. The literature and speeches of the
1950's and the 1960's that criticised the United States Supreme Court and proposed restrictive legislation were duplications of past polemics. Critics of the Court's decisions on integration, reapportionment, and nationalization of the Bill of Rights repeated arguments of earlier critics of previous controversial decisions. Various techniques suggested to alter the Court's policy outputs had all been utilized in the past.

While the policy critics concentrated on impeachment billboards, political campaign rhetoric, and resolutions to amend the U.S. Constitution, functional reformers increased efforts to improve the machinery of the judicial system with such reforms as the creation of the Federal Judicial Center. In 1969, Warren Burger became Chief Justice of the United States Supreme Court and actively assumed the role of chief judicial reformer. Like Chief Justice William Howard Taft, Burger has brought his proposals before the public. In numerous articles and speeches advocating legislation to relieve the burden of the Supreme Court's massive case load, Chief Justice Burger has echoed the analysis of past justices.

The Judiciary Act of 1925 has been selected for a case study of judicial reform because of its importance and because of the analogous problems of the 1920's and the 1970's. In the 1920's, justices sought to relive an over
load of cases through the expansion of discretionary jurisdiction and the restriction of obligatory jurisdiction. In the 1970's, Chief Justice Burger seeks relief from an overload of litigation which the Court must screen in determining which cases to accept for review. The problem of excessive work loads has been a reoccurring problem throughout the Court's history.

The period between 1891 and 1925 is particularly well suited for a case study of Court reform. Prior to the passing of the Circuit Court of Appeals Act of 1891, most functional reform efforts had failed or had been of the too little, too late variety. The major functional problems of the federal court system had been generally ignored for a hundred years. After 1891, with the restructuring of the system, functional reformers encountered less opposition and had more pressure group support. The functional legislation of this period that culminated with the passage of the Judiciary Act of 1925 constituted the making of the modern court system.

Judicial activism characterized the period and stimulated opposition from labor, progressive groups, and others who were disenchanted by Court decisions relating to the income tax, trusts, and various social-economic issues. It was the era which began in the wake of judicial recall movements, the income tax amendment, and Theodore Roosevelt's
plan for "recall of judicial decisions" and climaxed by the defeats of LaFollette's, Borah's, and Frear's proposals to curb the Court's power of judicial review. Such proposals were not unique for the period, but were preceded by similar proposals as early as the Marshall Court.

The case study approach has been a useful technique for generating hypotheses. The advantage of focusing upon the Judiciary Act of 1925 is that it can be investigated in depth. Although a single study cannot constitute the basis for either valid generalizations or for disproving an established generalization, indirectly it can make an important contribution to the establishment of general propositions, and thus contribute also to theory building in political science (Lijphart, 1971, p. 691).

Numerous questions regarding judicial reform exist that have not been systematically researched by other scholars. Why do some needed reforms languish, while others, such as the Judiciary Act of 1925, are passed within a short time after they are initially proposed? What conditions are prerequisites for judicial reform? The Judiciary Act of 1925 had been passed at the conclusion of a Court curbing era. During that period, the policy-oriented reformers had not been successful at the federal level; but the functional reformers had made considerable progress. What impact does one group of reformers have upon the other? As noted above,
the answers to these questions are beyond the scope of this study. The objective of the study is to generate some hypotheses regarding these questions for further testing in future studies.

**Scope and Methods**

The methodology selected for this study is based on several premises. First, reform legislation occurs in a political environment and a historical context. Second, the reformers come from the ranks of the major actors in the judicial process: judges, lawyers, and litigants. Third, these actors must recruit the support from the executive and legislative branches in order to transform their proposals into law. Therefore, an examination of the Judiciary Act of 1925 as a major Court reform must include descriptions of: (1) the federal judicial system—past and present; (2) the various proposed reforms—both adopted and rejected; (3) the political environment that is relevant to the reform era; (4) the major actors concerned with judicial reform; and (5) the process of transforming the proposed bill into the Judiciary Act of 1925.

The judiciary system has been conceptualized as a subsystem of the political system. With some modification, the researcher has utilized the concepts from David Easton's (1965) *A Framework for Political Analysis*. In this book (p. 74), Easton defines the political system as "a set of
social interactions on the part of individuals and groups predominantly oriented toward the authoritative allocation of values." The political system has two essential variables: (1) the making and execution of decisions for a society; and, (2) the relative frequency of acceptance of decisions as authoritative or binding by the bulk of society.

Easton's concepts of "persistence" and "stress" are particularly useful in analyzing judicial reform. Persistence is the capacity of the system to survive. Stress refers to those conditions that may lead to the destruction or transformation of the system. Easton notes that historically where vast economic and social changes have occurred, the political system has been quickly transformed into almost unrecognizable new entities. The members of a political system must be able to modify their systems as circumstances dictate, or they must be able to manipulate their environment so as to relieve the stress upon the system (Easton, 1965, p. 87).

"Member" is Easton's generic concept to identify the role of a person who is part of the political system. In this study the term "actor" is utilized to distinguish a person or group actively or passively involved in the decision making process. The actor is either the performer or the recipient of political action. Litigation is considered a specific type of political action that takes place within
the judicial system. It is the struggle between two opposing sides regarding questions of law and fact, which are resolved by the judiciary.

In this study, the researcher utilizes the concepts of maintenance and adaptation. Maintenance is the function of making necessary repairs and modifications to the system in order to keep it in operational order. Adaptation is the function of revising and adjusting the system to the changing demands of the environment. These two functions must be performed if the system is to survive in a dynamic environment.

Easton (1965) notes that the inability to cope with stress will cause the system to collapse. The sources of stress may be from within the system or from the political environment. Authorities may be unable or unwilling to meet the demands of some members. Easton refers to this type of stress as "output failure." In relation to this study, policy-oriented reforms are responses to perceived output failures. Easton's second type of stress is caused by an excessive volume and variety of demands. He notes that the problem might be strictly volume or it might be due to the variety and content of the demands. The conflict that they stimulate requires an excessive amount of time to resolve. This type of stress he labeled as "demand input overload."
Function-oriented reforms are designed to relieve this type of stress.

Easton's analytical linkages of the political system with the environment are outputs, feedback, and inputs. The outputs are the system's decisions regarding the authoritative allocation of values. They are communications from the system to the environment. Feedback and inputs are communications from the environment to the system. Feedback relays to the system information regarding the condition of the environment, the supportive state of mind, and the effects of outputs. Inputs are conceptually divided into demands and supports. Demands are those requests to the system for policy outputs. These requests are numerous and often conflicting. Politics involves the competition among various interests to have their demands converted by the system into policies. In the judicial system, demands involve the claims of the two opposing litigants regarding questions of law and fact.

Supports are communications which reinforce the system and help it maintain its viability. An important source of supports is the political culture. For purposes of this study, political culture will be regarded as an aggregate of opinions, attitudes, and beliefs regarding the political system and the political environment. It includes the members' conceptions of legitimacy. Legitimacy is the psychological acceptance of and compliance with the system's
Authoritative allocations of values, and the recognition of the authority of the system to make decisions binding upon the members.

Utilizing this framework, reform proposals are regarded as responses to perceived stress. Proposals may originate within the system as it performs its maintenance and adaptation functions, or they may originate outside the system as reactions to output failure. In analyzing reforms, the researcher will attempt to ascertain if certain patterns exist which distinguish conditions of stress which result in actual reforms from those conditions which only stimulate proposals.

In pursuing this task, variables which constitute obstacles to reform need to be identified, examined, and analyzed. The legal foundations of the Supreme Court determine what decision-makers within the system are responsible for adopting a specific reform. Some changes might require amending the Constitution, in which case both Congress and state legislatures would be the involved decision-making authorities. Other changes would fall within the powers delegated to Congress by the Constitution, while other reforms could be instituted solely by the U.S. Supreme Court. The decision-making authority would be a significant factor in the types of obstacles which might occur.
Reformers and their opponents develop strategies to maximize their objectives. The interrelationship of the sources of stress, the obstacles, and the decision-making authorities to the reformer's decisions to pursue a given strategy needs to be identified. Although this study is limited to the strategies affecting the passage of the Judiciary Act of 1925, from that information, hypotheses can be formulated for further testing.

Chapters 2 through 5 are historical synopses of some major reform proposals and the political and social issues affecting judicial reform, particularly the Judiciary Act of 1925. Excluded from consideration have been other major reform innovations, such as the development of specialized legislative courts, because of their remote relationship to the Judiciary Act of 1925. Chapter 2 will focus upon policy oriented court reform tactics. The chapter is organized around the means available to alter the decisions of the Supreme Court. In the course of describing these tactics, the various court curbing proposals which have reoccurred since the Marshall Court will be described. Chapter 3 describes the major functional problems which have confronted the federal courts, particularly the United States Supreme Court, and their various remedies which have been proposed as solutions. Chapter 4 focuses upon the political and environmental factors which produced the policy- and
function-oriented reform proposals of the first three decades of the twentieth century. A major contention of the proponents of the Judiciary Act of 1925 was that the laws governing federal appellate jurisdiction were confusing and in a chaotic state.

Chapters 5, 6, and 7 focus directly upon the Judiciary Act of 1925. Chapter 5 examines the role of the major actors in the legislative process. These actors are identified as judges, lawyers, litigants, the executive branch, and the Congress. Chapter 6 is a narrative of the congressional hearings, and Chapter 7, a narrative of the action of the Congress. The final chapter will be a summary and analysis of the study.
CHAPTER 2

POLICY-ORIENTED COURT CURBING TACTICS

Policy-oriented reformers react to what they perceive as output failures. Their reforms either are directed at the Court or at the law that was promulgated by the Court which they find objectionable. When policy-oriented reformers propose to limit the Court's authority, they are often labeled "court curbers." During the first three decades of the nineteenth century, policy-oriented reformers reacted to decisions which supported broad interpretations of the national government's delegated powers and limitations upon the states' reserved powers. The Court assumed the major responsibility for interpreting the Constitution on questions of division of powers resulting from the federal relationship.

Individuals and groups sought to promote their own interests by raising constitutional questions regarding the validity of state or federal laws. Much of this litigation came within the jurisdiction of the federal courts and resulted in the United States Supreme Court establishing important policies. As the Court rendered decisions on particular controversies, its jurisdiction over such questions became a political issue. By the end of John
Marshall's thirty-four years as Chief Justice, policy-oriented reformers had attempted in various forms all the major means to restrict the Court that have been reintroduced since that period. The following discussion will focus upon each of the major tactics proposed or used to circumvent or curb the United States Supreme Court's policy-making authority.

**Constitutional Amendment Tactics**

Constitutional amendment proposals have either been directed at changing the Court's structure, procedure, and jurisdiction or at altering the constitutional requirement upon which a particular statute was nullified. Amending the Constitution was the first technique used successfully to alter a Court decision. Article III, section 2 of the Constitution conferred upon the Court jurisdiction to hear suits involving a citizen of another state or foreign country brought against a state government. Acting under that provision, two South Carolinians sued the State of Georgia in federal court on behalf of their client, a British creditor. Georgia denied the Court's jurisdiction and refused to appear. The subsequent decision by the U.S. Supreme Court was in favor of the plaintiffs (*Chisholm v Georgia*, 1793). Proclaiming state sovereignty, Georgia refused to comply. Other states joined the protest against federal jurisdiction. Congress proposed the Eleventh Amendment, which the
states quickly ratified in 1798. It specified that the judicial power should not "extend to suits in law or equity, commenced or prosecuted against one of the United States by a citizen of another state, or by citizens or subjects of any foreign state (Eleventh Amendment, U.S. Constitution)."

All other successful attempts to utilize the amendment process have focused upon the particular issue rather than upon the Court directly. The Civil War amendments (Thirteenth, Fourteenth, and Fifteenth Amendments, U.S. Constitution) successfully overturned the *Dred Scott* decision. Although more issues were involved than the Court's *Dred Scott* decision, the Thirteenth, Fourteenth, and Fifteenth Amendments settled the constitutional questions raised by slavery.

The Sixteenth Amendment is unique in terms of the decision it overturned. *Pollack v Farmer's Loan and Trust* (1895) had, by a five to four vote, overturned a previous decision which had upheld the Civil War income tax as a valid "indirect" tax. The legitimacy of the Court's interpretation of the Constitution was severely questioned. Congress considered passing another income tax law, but the bill's opponents, including some who favored the income tax, defeated the bill; subsequently an amendment was proposed. A major factor in selecting the alternative approach was the opposition of President William Howard Taft and numerous
Senators to any legislation which might undermine the Court's authority (Bowman, 1912, pp. 20-34).

The adoption of the Twenty-sixth Amendment arose not so much from the popular support for the eighteen year old vote, but from the prospect of a dual registration system being required in most states to comply with Arizona v U.S. (1970). In June 1970, Congress had enacted a bill enfranchising for all elections—national and state—all citizens eighteen years and over. At the time, members of Congress and the President voiced doubts as to its constitutionality. In several states, in November 1970 and in earlier elections, the voters had defeated state constitutional amendments providing for the eighteen-year-old vote. When the Court, in December 1970, ruled that the law was valid for national elections but invalid for state and local ones, most states were confronted with the confusing and expensive requirement of administering dual election rules. In January 1971, Congress passed a proposed constitutional amendment extending the suffrage to eighteen-year-olds for all elections by a vote of 94 to 0 in the Senate and 400 to 19 in the House. Within three months and seven days, three-fourths of the states had ratified the amendment—the shortest time any amendment has been proposed and ratified (Roth, 1971, p. 34).
Resolutions proposing constitutional amendments to restrict the Court's power have been numerous and varied; but, with the exception of the Eleventh Amendment, Congress has rejected all of them. President Thomas Jefferson advocated numerous amendments. He had inherited Federalist judges, whom he sought to replace with Republicans. After the effort to impeach Justice Samuel Chase failed, Jefferson threw his support behind proposed constitutional amendments which would facilitate the removal of judges. A political ally, John Randolph, proposed amendments in 1805, 1806, 1811, and 1816, providing for the removal of judges by a majority vote of Congress, but Congress took no action upon them (Murphy, 1962, p. 14). Jefferson also supported efforts to limit the tenure of judges from four to six years, with the President having the power to reappoint them with Senate confirmation. To increase accountability of the judges for their decisions, he advocated requirements that their opinions be rendered seriatim. Prior to Marshall, opinions had usually been rendered seriatim, but the practice had declined during the Ellsworth Court. Marshall had adopted a policy of not only discouraging dissent, but of presenting a unified opinion which he usually wrote himself (Schmidhauser, 1964, pp. 108-111).

5. Seriatim refers to the practice of each judge writing a separate opinion (Murphy, 1962, p. 14).
Jefferson supported, and Congress considered various amendments to give the Senate final review of Court decisions and to require an extraordinary majority on decisions of constitutional validity. Ironically, John Marshall first suggested the possibility of congressional review of Court decisions such as existed in the case of presidential vetoes. During the Samuel Chase impeachment trial, he speculated in private as to such a compromise with the Jeffersonians as an alternative to personal attacks upon the justices and the independent judiciary (Murphy, 1962, p. 13).

The proposal for congressional review has been revived during every court-curbing period. However, unlike Marshall, advocates perceive it as a balancing of power between the political branches and the judiciary. The cause of the stress, which they seek to alleviate, is the power of five of the nine Supreme Court justices to overrule a majority of the elected members of Congress and the President on questions of constitutionality. For example, Congressman James Frear proposed a constitutional amendment which contained a provision empowering Congress to "review and set aside" Court decisions by a two-thirds vote of each House (Congressional Digest, June 1923, p. 271). His twelve point argument asserted:

6. The entire June 1923 issue of Congressional Digest is devoted to court curbing proposals and the pro and con arguments on each one.
First, the Constitution placed all legislative power in Congress.

Second, the only check lay in the Executive's veto.

Third, the people retained the right to control both branches of government at the polls.

Fourth, the Supreme Court is given no power to set aside any state or federal law.

Fifth, such power has occurred by usurpation of jurisdiction.

Sixth, Supreme Court judges may be chosen by a fallible Executive.

Seventh, they are the only officers in the land selected for office for life.

Eighth, under existing practice one justice may exercise more power than all the remainder of the Government combined.

Ninth, the Court may ignore the will of the people expressed by constitutional amendment.

Tenth, the Court, instead of the people, Congress, and the Executive, is now the supreme law of the land.

Eleventh, this situation is contrary to the Constitution and our form of government.

Twelfth, Congress and the states can correct the wrong by proper legislation that will rightly interpret the meaning of the Constitution (Congressional Digest, June 1923, p. 275).

Frear's argument was essentially the one that had existed throughout the Court's history. Judges are not infallible.

Non-compliance Tactics

Court critics have attempted to undermine the Court's authority by refusing either to obey or to enforce
particular decisions. States have resisted unpopular decisions by refusing to comply with them. *Chisholm v Georgia* (1793) provides an example of such resistance. Although the ratification of the Eleventh Amendment provided a remedy to that specific situation, other states have followed Georgia's example in defying Court orders. Such defiance has been unsuccessful when the executive branch of the federal government supported the Court. For example, federal marshals enforced a decision of the Marshall Court in 1809 when Pennsylvania attempted to prevent compliance with a Court decision (Murphy, 1962, p. 19). When such executive support is lacking, non-compliance may succeed. President Andrew Jackson reputedly remarked when Georgia defied the Court's order in *Worchester v Georgia* (1832), "Well John Marshall has made his decision, now let him enforce it." Although many scholars accept Charles Warren's (1925 II, p. 219) view that Jackson probably did not make the statement, the episode does illustrate the dependence of the Court upon executive support to enforce decisions when states defy them.

The federal courts have been confronted with compliance problems from state judges as well as other state officials. After the *Fairfax's Devisee v Hunter's Lessee* (1813) decision, the Virginia Court of Appeals attempted to overturn

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7. See, for examples, Jackson (1941, p. 11) and Scigliano (1971, pp. 36-39).
the decision by declaring section 25 of the Judiciary Act of 1789 unconstitutional. It denied that the Constitution gave the Supreme Court the authority to review state court decisions. In the subsequent litigation, *Martin v Hunter's Lessee* (1816), the Court reaffirmed its jurisdiction and overturned the decision of the Virginia court. Avoiding another direct clash with that court, Marshall discreetly remanded the case to the trial court (Murphy, 1962, pp. 19-20).

Although traditional theory has assumed lower court compliance with the Supreme Court's interpretations, recent studies have supported the view that the ambiguity of the decisions, the proximity of lower courts to strong community pressures, and the local judges' personal attitudes influence the execution of Supreme Court mandates (Murphy, 1959, pp. 1017-1031; Becker, 1969, p. 63; Warren, 1930, p. 345). Because decisions are often remanded to the lower courts for further action, critics of those decisions on the bench have an opportunity, which they sometimes exercise, to circumvent the decision. The action of the Virginia Court of Appeals serves as one early example among many of the lower courts' resistance to a Supreme Court decision.

Presidents have resisted decisions with which they disagreed. Jefferson, Jackson, and Lincoln, among others, tacitly, if not overtly, acknowledged that the Court had the
power to rule upon questions of constitutionality, but con-
tended that the Executive and Legislature had an equal au-
thority to interpret the Constitution (Jackson, 1941, pp.
28-29; Warren, 1925 I, pp. 264, 266; Scigliano, 1971, Chap-
ter II).

An excellent example of the overt presidential non-
compliance occurred when Lincoln refused to honor a writ of
habeas corpus issued by Chief Justice Roger Taney from a
circuit court. When the Civil War erupted, Lincoln issued
an executive order suspending the writ of habeas corpus in
several border states, including Maryland. John Merryman, a
Baltimore businessman who was a secessionist, was arrested
and held at Fort McHenry pending military trial. His attor-
ney petitioned the circuit court upon which Chief Justice
Taney was sitting for a writ of habeas corpus. Taney re-
garded Lincoln's suspension of habeas corpus without con-
gressional action as unconstitutional and issued the writ.
When the military commander refused to produce the prisoner,
Taney cited him for contempt of court. Without presidential
compliance, however, he was unable to enforce these court
orders. After months of silence during which Taney was
severely criticized by several northern newspapers, Lincoln
issued his famous response:

... are all the laws, but one, to go unexecuted
and the government itself go to pieces, lest that
one be violated? Even in such a case, would not the
official oath be broken, if the government should be
overthrown, when it was believed that disregarding the single law would tend to preserve it? (Murphy, 1962, pp. 32-33).  

Fred Rodell (1955, p. 138) writes in reference to Lincoln's appointment of three justices soon after the Merryman (Ex Parte Merryman, 1861) case that it was in fact a face saving for the Court, "which otherwise would have seen its solemn decree ignored, its last word superiority brushed aside, and its very existence as a governmental force seriously threatened."

Although Rodell's evaluation is speculative and reflects his own attitudes regarding the Court, non-compliance has the potential of greatly limiting the Court's power. Its occurrence is dependent upon two major factors. First, the court mandate must be dependent upon an enforcing group. Second, the group responsible for enforcement must assert an equal authority to determine questions of constitutionality regarding their actions. If they assert this power and if they disagree with the Court's decision, they may refuse to enforce it openly, but more probably will circumvent it in a more discreet manner (Becker, 1969).  

The Court may respond to litigation which poses problems of compliance by


9. This is an excellent anthology and bibliographical source for studies on compliance to Court decisions.
refusing jurisdiction either by using the doctrine of political questions or by utilizing its discretionary power over the docket. In such cases, court-curbers succeed in causing the Court to impose ad hoc limitations upon its jurisdiction.

Court Packing and Impeachment

The Constitution gives the President the power to appoint the federal judges, and Congress the responsibility for confirming appointments and determining the size of the United States Supreme Court. Many proposed constitutional amendments, especially during the Jefferson administration, have focused upon the justices of the Court. When the President and a majority of Congress are policy-oriented court reformers, they have utilized tactics designed to alter the composition of the Court. The creation of additional seats, the elimination of seats, and the impeachment of justices are tactics which have been used to alter policy outputs.

The political views of prospective justices are considered both in the appointment and the confirmation processes. Robert Dahl (1958) has noted that, on an average, a new justice has been appointed every twenty-two months. The dominant policy views on the Court have differed from the dominant lawmaking majority when a different political majority has replaced the one responsible for the appointment of a majority of the justices. During the political transition periods, court critics have advocated various
court packing schemes. Court packing refers to presiden
tial attempts to change the direction of the Court by plac­ing enough of his own appointees on it to form a majority whose constitutional interpretations are in harmony with his own. In the twentieth century, the term has had a connota­tion of impropriety and of transgressing the principles of separation of powers.

Some presidential critics accused President Ulysses Grant of packing the Court by having prospective justices commit themselves to a given position on a specific case. Although there is no evidence that he actually secured such a commitment from Joseph Bradley and William Strong in 1870, he probably was aware of their views on the "legal tender" issue. The Court's subsequent rehearing and reversal of its decision the previous year prompted and lent credibility to the court packing charges (Jackson, 1941, pp. 41-44; Hughes, 1928, pp. 52-53; Warren, 1925 III, pp. 339, 244, 247; Murphy, 1962, pp. 41-42; and Cushman, 1923, pp. 291-293).

The manipulation of the Court's size either to place more judges with certain judicial attitudes on the Court or to prevent the appointment of judges who might hold particu­lar views falls within a broader concept of court packing. In the late 1860's, the Radical Republican Congress engaged in negative court packing. In 1866, Congress reduced the size of the Court from ten to seven by specifying that the
next three vacancies would not be filled. The practical effect of the legislation was to eliminate the probability of President Andrew Johnson's appointing any justices who shared his political views. Three years later, after Grant became President, Congress added two associate justice positions. Although Robert Scigliano (1971, p. 52) asserted that there is no convincing evidence that Congress' action was intended to affect Court decisions, this researcher disagrees. Had the opportunity been available, President Johnson would have attempted to place on the Court men who shared his views. The disagreements on questions of the constitutionality of legislation between him and Congress were ample and evidenced by his numerous vetoes. Of Andrew Johnson, Edwin Corwin (1957, p. 25) wrote, "he took his constitutional beliefs with fearful seriousness and points that his predecessor would have yielded with little compunction for a workable plan, he defended as though they had been transmitted from Sinai." These circumstances support the contention that Congress' action was a negative type of court packing, for it denied the President the

10. The Tenure of Office Act of 1867 provides an excellent example. After Congress had passed it over his veto, he continued to assert that it was unconstitutional and violated it when he attempted to replace Secretary of War Edwin Stanton with General Lorenzo Thomas. This action precipitated the impeachment procedures against him.
appointment of justices to replace John Catron and James Wayne.

The most obvious court-packing proposal occurred in 1937. Franklin D. Roosevelt's court reform plan revived the struggle between policy-oriented reformers and the Supreme Court justices. From 1890 to 1937, the Supreme Court had endowed laissez faire economics with constitutional protections. Frustrated by recent Court decisions invalidating major New Deal legislation, President Roosevelt proposed a bill increasing the number of justices on the U.S. Supreme Court and the number of judges on the lower federal courts. The President's stated purpose was to provide the aging justices with help from younger justices in managing their overburdened docket. The legislation that he recommended created an additional judge for every federal judge who had served ten years and had not resigned within six months after his seventieth birthday. The ceiling on the number of additional judges was placed at fifty for the lower federal courts and at six for the Supreme Court.

The facts did not support the alleged need. Court docket records revealed fewer cases in arrears than in any other recent decade. Functional reforms, especially the Judiciary Act of 1925, had given the Court the power to manage its docket. The docket was in much better order than it had been when McReynolds, Van Devanter, Sutherland,
Brandeis, and Butler—the oldest of the justices—had been appointed. Chief Justice Hughes was quick to refute Roosevelt's rationale with the Court's records. The plan was quickly labeled "court packing." It failed to receive the support of many of the Court's most outspoken congressional critics. Some policy-oriented reform advocates of the 1920's, such as Senators William Borah and Burton Wheeler, regarded the measure as unconstitutional. Roosevelt's actual purpose as opposed to his stated purpose conflicted with ideals regarding separation of powers, checks and balances, and an apolitical judiciary. If court packing is to succeed, it must be more subtle than Roosevelt's plan and strategy was.

One constitutional tool, impeachment, places the individual judges on the defensive, rather than the Court directly. Although it has never been successfully used, Thomas Jefferson held the view that: "the Congress should formally denounce such judicial views as it disagreed with and that if the Judges failed to adopt the conclusions reached by Congress, impeachment should follow (Warren, 1925 I, p. 115)." Under Jefferson's presidential leadership, impeachment proceedings were instituted against Justice Samuel Chase. The motivation behind the action was partisan

11. Robert Jackson's (1941) The Struggle for Judicial Supremacy is an excellent study of Roosevelt's plan and its defeat.
politics, reinforced by the view of some Jeffersonians that impeachment was an "inquiry by the two houses of Congress as to whether the office of any public man might be better filled by another (Murphy, 1962, p. 13)." Although the Republicans held twenty-five of the thirty-five Senate seats, their leadership failed to gain a two-thirds majority on any of the charges. On each issue, at least six Republicans broke ranks and voted with the nine Federalists. The reasons for the failure of the effort to remove Chase were as varied as the states and the people comprising the Union. Chase was an elderly man who had signed the Declaration of Independence. His attorney, Luther Martin, had presented better legal arguments than John Randolph, the prosecutor. Moreover, Randolph had alienated some Republicans. Differences within the party on regional and economic issues caused some senators to distrust Randolph's extreme state's rights position. There was also an intangible respect for the Court and the ideal of an independent judiciary which has been a recurrent support for the Court when it has come under partisan attack (Murphy, 1962, pp. 13-14; Jackson, 1941, pp. 27-28; and Cushman, 1923, pp. 297-298).

Thereafter, as previously discussed, Jefferson sought amendments to facilitate the removal of judges from the bench. Since Jefferson's time, policy-oriented reformers have from time to time advocated impeaching certain
justices. The most recent examples are found in the Nixon administration. During the 1968 campaign, Nixon promised to place "strict constructionist," "law and order" judges upon the Court.

During the summer of 1968, Chief Justice Earl Warren announced his intention to retire from the Court as soon as the President appointed a successor. President Lyndon Johnson nominated Associate Justice Abe Fortas. The confirmation vote came up in the Senate in the fall prior to the presidential elections. At the time Richard Nixon was running significantly ahead of Democratic candidate Hubert Humphrey in the polls. A coalition of Republicans and Southern Democrats began filibustering the Fortas appointment. A cloture vote failed to get the necessary two-thirds majority to end debate. President Johnson withdrew the nomination, and the Chief Justice decided to remain on the Court through the 1968 term. The sole intent of the filibuster was to insure that the new President would have the opportunity of appointing the next chief justice.

The Nixon administration launched a Jeffersonian strategy of removing associate justices and replacing them with appointees whose political views were in harmony with the President's. The first target was Abe Fortas.

12. The opposition argued that a vacancy did not exist since Warren had only announced his intention to resign as soon as his successor was confirmed.
William Lambert (1969) reported that Fortas had accepted $20,000 from the Wolfson Family Foundation after he had been appointed to the Supreme Court. At the time he accepted the retainer, Fortas was aware of a Securities Exchange Commission investigation into the stock transactions of Louis Wolfson and several of his companies. Prior to the Fortas appointment, Wolfson had retained Fortas' law firm to represent him in regard to the SEC investigation. A Justice Department investigation revealed that the contractual agreement between Fortas and the Wolfson Family Foundation provided that Fortas would receive $20,000 annually from the Foundation for consultant services as long as he and his wife lived. Fortas had severed his ties with the Foundation in June 1966, after a visit to the Wolfson family estate in Florida. Fortas did not return the retainer of $20,000 until December 1966—after Louis Wolfson's indictment for illegal transfers of stock. Although technically Fortas had violated no law, this impropriety became the basis for attacking his character and integrity. After several weeks of criticism, he resigned (Shogan, 1972).

William O. Douglas became the next target of the administration. He also was charged with similar improprieties and conduct unbecoming as associate justice. Congressman Gerald Ford, House Minority Leader, led the efforts to institute impeachment proceedings against Douglas. Justice
Douglas refused to be intimidated, and Ford's efforts failed for lack of support and lack of substantial content to the charges.

The Nixon strategy proved an embarrassment when the Senate rejected his first two appointees to replace Associate Justice Fortas. Both Clement Hayworth and Harrold Carswell had "improprieties" in their backgrounds. Carswell was labeled a very mediocre federal judge. After the Fortas vacancy, Nixon did have two more appointments, due to the deaths of Hugo Black and John Harlan; but there were no further attempts to force resignations.

The Senate has refused confirmation of Supreme Court justices less during the twentieth century than during the nineteenth. Opposition to the nominee on political and personal grounds was more manifest during the first hundred years. Twentieth century confirmation fights have also been motivated by opposition to the candidate's known or suspected political, economic, and social views. For instance, corporate interest groups opposed to government regulation and socio-economic reform legislation of the progressives fought bitterly to defeat the appointment of Louis Brandeis. Their strategy focused upon alleged misconduct in his law practice, however, rather than his political views (Todd, 1964).
Other interest groups have vigorously opposed appointments on the grounds that the nominee would not be impartial in cases relating to their interests. Coalitions of such groups have influenced the defeat of Judges John Parker, Harrold Carswell, and Clement Haynsworth. All three of these twentieth century rejections were specifically policy-oriented.

During the Court's first hundred and five years, the Senate rejected twenty presidential appointments.\textsuperscript{13} While many of these were policy-oriented in a general sense, an even larger issue often was partisan politics— intra-party as well as between the parties. President Tyler's problems came from opposition in his own Whig party stemming from strife between himself and such powerful party leaders as Henry Clay and Daniel Webster. Cleveland had two appointments blocked due to a dispute between himself and Senator David Hill of New York, who invoked senatorial courtesy to prevent confirmation.

Lincoln's appointment of five justices usually would not be described as court packing, but the environment in which the appointments arose was not normal. Prior to the vacancies on the Court, various suggestions had been made in response to the \textit{Dred Scott} (1857) decision and \textit{Ex Parte}

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13. Cushman (1923, pp. 300-302) lists the appointments, the year, the President, and the action or non-action taken on appointments.
\end{flushright}
Merryman (1861). The Chicago Tribune had recommended "dropping off a few justices to make room for men of sounder views," and the New York Tribune had advocated increasing the size of the Court to thirteen (Murphy, 1962, p. 31). Senator John Parker Hale of New Hampshire had proposed first that the Judiciary Committee study the possibility of abolishing the Court and establishing a new one. Receiving little support, he revised his proposal to include the entire federal judicial system and pushed a resolution through the Senate. Five days after receiving the proposal, the Committee on the Judiciary asked to be discharged from further consideration of it (Murphy, 1962, p. 32; Warren, 1925 III, pp. 29-32; and Cushman, 1923, pp. 297-298).

Lincoln ignored these suggestions. With secession, he had three vacancies on the Court to fill. Three of the remaining six justices were staunch unionists. Chief Justice Roger Taney was eighty-five years old. Lincoln had no reason to use means of questionable legitimacy to pack the Court or to alter it. The means to do so were already his. Moreover, Congress had increased the size of the Court to ten, giving him an additional appointment.

Court packing and impeachment tactics are very limited and available only to policy-oriented reformers who

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14. This is a discussion of earlier talk of "packing the court" in order to bring about a reversal of Dred Scott.
happen to comprise the dominant political majority. Richard Nixon learned the President's appointment power is limited by the confirmation process. President Roosevelt and others learned proposals must be perceived as legitimate. Through natural occurrence of vacancies upon the Court, it gradually comes to reflect the dominant political views.

**Congressional Control Over Appellate Jurisdiction**

Court reformers have utilized the constitutional provision which gives Congress the power to place limitations upon the Court's appellate jurisdiction. Critics of various policies have attempted to remove particular issues from the Court's jurisdiction. During the Marshall era, Jeffersonians attempted to remove the Court's jurisdiction to issue writs of habeas corpus, after the Court had issued several in the Aaron Burr conspiracy cases. Although the bill had Jefferson's tacit support, Congress refused to pass it (Murphy, 1962, p. 15). The most numerous bills of this type in the pre-Civil War era provided for the repeal of section 25 of the Judiciary Act of 1789.\(^\text{15}\) This section conferred upon the Court jurisdiction to review state

\(^{15}\) Bills were introduced in 1822, 1824, and 1825 mainly in protest to *Cohens v Virginia* (1821) and *Green v Biddle* (1823) in 1831 during the controversy with Georgia over Cherokee lands; and in 1858 during congressional discussions of the *Dred Scott* and *Booth* cases (Murphy, 1962, pp. 21-23).
decisions which had declared a federal statute unconstitutional or had upheld the constitutionality of a state act.\textsuperscript{16}

During the four years immediately following the Civil War, Congress had fewer inhibitions regarding the principle of separation of powers than during any other period of American history. It discussed proposals to abolish the Court, to impeach the justices, to pack the Court, to require unanimity in constitutional cases, to reorganize the judiciary, and to remove all appellate jurisdiction from the Court (Murphy, 1962, p. 37; Pfeffer, 1965, p. 174). The discussions, proposed bills, and suggested amendments grew out of fears that the Court would declare the reconstruction acts unconstitutional.

Congress had passed the Habeas Corpus Act of February 5, 1867. It had provided for appeals from federal circuit courts to the Supreme Court by means of habeas corpus when a person was imprisoned in violation of the Constitution or any law or treaty of the United States. The Congress intended the act to be used to enforce reconstruction, but opponents of reconstruction utilized it as a means to test reconstruction's validity.

In February 1868, the Court agreed to hear arguments in \textit{Ex parte McCardle} (1869) which had been appealed on

\textsuperscript{16} Congress altered this provision in 1914 to provide review of state court decisions holding state laws unconstitutional.
the Habeas Corpus Act of 1867. McCardle, a southern newspaper editor, had been arrested, tried, and convicted by a federal military commission in Mississippi for sedition. Two years earlier, the Court had denounced the use of military commissions to try civilians where civilian courts were available in *Ex parte Milligan* (1866). Congress feared that the Court might hold the Reconstruction Acts unconstitutional because of their establishing military government throughout the South. Before the Court rendered a decision in the *McCardle* case, Congress passed, over the President's veto, a bill removing the Court's habeas corpus jurisdiction that it had provided in the 1867 act (Murphy, 1962, p. 40; Warren, 1925 III, p. 187). At the time the Court had already heard arguments in *Ex parte McCardle* (1869) that had been appealed on the basis of the 1867 law. Over the dissents of Greer and Field, the majority scheduled that *McCardle* case for re-argument. Twelve months later a unanimous Court dismissed the case on the grounds that Congress had removed its jurisdiction.  

Although the Radical Republicans provided the only example where Congress actually removed the Court's jurisdiction, the tactic remains a viable threat. During the

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17. The Court still acknowledged habeas corpus jurisdiction as provided by the Judiciary Act of 1789. When the Court granted a petition in the *Yerger* (1869) case, Senator Charles Sumner introduced a bill to remove all appellate jurisdiction, but it failed (Murphy, 1962, p. 42).
late 1950's, groups including the American Legion, the Veterans of Foreign Wars, the Daughters of the American Revolution, the American Bar Association's Committee on Communist Tactics, Strategy, and Objectives joined in an assault on the Court. The assault was further dignified by a "Declaration" signed by thirty-six state court chief justices at their annual conference in August 1958. In Congress various members complained that the Supreme Court had been endangering the nation's defenses against communist internal subversion and espionage. Senator William Jenner introduced a bill in 1957 which would have barred appeal to the Court in five types of cases: (1) those involving acts of congressional committees (e.g., Watkins v U.S., 1957); (2) the federal employee's loyalty program (e.g., Cole v Young, 1946); (3) state anti-subversion laws (e.g., Pennsylvania v Nelson, 1956); (4) action by a state school board relating to subversive activities (e.g., Slochower v Board of Higher Education, 1956); and (5) action by a state denying admission to the bar (e.g., Konisberg v State Bar of California, 1957). The Jenner bill failed to receive the support of many Court critics who objected to the direct attack on the Court's power and jurisdiction. An alternate approach utilized by such critics was proposing bills which expressly nullified specific decisions rather than limiting the Court's jurisdiction. All these bills, however, failed
to pass either House of Congress. Since then bills and resolutions to amend the Constitution have aimed at altering the reapportionment, school prayer and abortion decisions. Despite much publicity, they have found little support.

While the Constitution clearly delegates to the Congress control of the U.S. Supreme Court's appellate jurisdiction, the power of judicial review is derived from non-congressional sources. The issue of whether Congress has an implied power to stipulate the type of majority the Court must have to nullify a statute has been raised during every court curbing period. Both bills and amendment resolutions have been introduced to require an extraordinary majority vote by the Court when it invalidates a statute.

For example, during the Marshall Court era, many Court critics held the belief that such unpopular cases as Fairfax's Devisee v Hunter's Lessee (1813) and Biddle v Green (1823) had been decided by less than a majority of the Court. In reaction, the Senate Judiciary Committee considered a bill increasing the size of the Court to ten and requiring the concurrence of seven judges, and seriatim opinions, in order to invalidate statutes. A year later, the committee reported a bill requiring a majority of five of the seven judges to invalidate state laws and seriatim opinions (Murphy, 1962, p. 22). The bill was recommitted.
to the committee and the following year the Senate defeated a similar bill.

Among the repertoire of court curbing proposals of the reconstruction era was one requiring a two-thirds majority to nullify an act of Congress. The House passed such a bill in the aftermath of *Ex parte Milligan* (1866), but the Senate did not vote on it. The Senate leadership feared that even with a two-thirds requirement, the Court might invalidate the reconstruction acts (Murphy, 1962, p. 38).

During the laissez faire era (1890-1937), the critics questioned with greater frequency the legitimacy of decisions which turned on the "vote of one judge." The income tax decision (*Pollack v Farmer's Loan and Trust Company*, 1895) overturned a previous court decision (*Springer v U.S.*, 1881) that had held the Civil War income tax valid. The five-four decision rendered after the case had been reargued was attacked in the popular press, the legal journals, and the Congress. Progressive critics challenged the legitimacy of a majority margin of one overruling the judgment of a majority of Congress and the President regarding the constitutionality of a statute. Such attacks upon the Supreme Court's power of judicial review continued intermittently through the 1924 presidential campaign. The progressive platform of that year included the court curbing planks advocated by Congressman James Frear, Senator Robert
LaFollette, and other policy-oriented reformers of the 1920's.

**Summary and Analysis**

Policy-oriented reformers' tactics are predetermined by the United States Constitution. The Constitution delegates to Congress the authority to establish the lower federal courts and their jurisdiction. Congress controls the size and appellate jurisdiction of the United States Supreme Court. The President has the responsibility for appointing federal judges with the consent of the Senate. The Court has the responsibility for interpreting the Constitution, but in many cases it is dependent upon the political branches for enforcement of those decisions. Consequently, the possible approaches to reform open to policy-oriented reformers are the amendment process, legislative process, and appointment process. Indirectly, Court critics may effect changes through non-compliance. For any of these tactics to succeed, the Court critics must include the dominant political majority.

Nagel (1965) has suggested that the use of judicial review has been a major provocation of policy oriented court reformers. Using data through 1964, he found that fifty of a total of eighty instances of judicial nullification of federal statutes have occurred during or within three years prior to what he designated as the seven court-curbing
periods. He found that nullification of state statutes was a lesser provocation. Only in the 1920's was invalidation of state statutes a primary issue. Both Nagel's (1965) and Dahl's (1958) studies reveal that court curbing periods occur when the political majority has serious policy differences with the Court. These differences are manifest by an increase in judicial activism and by the realignment and change of the dominant political party, such as occurred in 1800, 1860, and 1932.

From the political culture, the Court receives the support of the prevalent concepts of legitimacy—charismatic, traditional, and legal ones. Policy-oriented Court reformers have failed to maintain the necessary political majority to pass legislation which appears in conflict with basic political values. Jefferson's attempt to make the Court more responsive and accountable to political branches failed because it conflicted with the dominant values of an apolitical, impartial, independent judiciary.

The amendment process has been utilized only once to alter the authority of the Court. Both the time and the content of *Chisholm v Georgia* (1793) account for the successful ratification of the Eleventh Amendment. In the first decade under the Constitution, state sovereignty was

more firmly embedded in the American political culture than nationalism. The United States was in its first stage of nation-building. The prospect of a foreigner or a citizen of another state suing a sovereign state conflicted with the prevailing political norms. In the 1790's, Americans' loyalty and identification was greater to their own states than to the new Constitution and the national government. Other proposed amendments which have been discussed conflicted with these concepts of an impartial, independent judiciary, separation of powers, and checks and balances.

Non-compliance has been overtly successful only when the enforcement authority has been opposed to the decision and asserted an authority equal to that of the Court to interpret the Constitution. The possibility of a non-compliance situation probably has been a major factor influencing the Court to refuse jurisdiction in some cases. Successful use of non-compliance could undermine the prestige of the judiciary, hence the prospect of such a situation may yield the desired results.

The manipulation of the Court's size for political purposes has attained the connotation of impropriety since 1869. During the first seven decades of the nineteenth century, Congress had increased the size of the Court periodically to meet the needs of the expanding nation. However, the increase to ten in 1863, followed by the decrease to
seven in 1866 and the increase to nine in 1869, was politically motivated. The change of 1869 may have been the last time the Court's size could be altered for political reasons. Franklin Roosevelt's court packing plan failed because it was perceived as unconstitutional, even by some Court critics. Although it did not violate the written Constitution, an unwritten constitutional tradition had fixed the size of the Court at nine. Manipulation of that size for political reasons violated not only that tradition, but the concepts of separation of powers, checks and balances, and an apolitical, independent judiciary.

The impeachment process has never been accepted as a legitimate means to alter the Court's policy outputs. The cultural supports that make policy-oriented reforms difficult to implement also create high standards of personal integrity for the judges. The Fortas resignation demonstrates that justices are vulnerable to personal attack. Any evidence that casts doubt upon one's ethics or professional standards can be utilized in an attempt to force resignation or to institute impeachment proceedings. As Nixon learned, appointments to replace such judges must be carefully screened and meet high professional standards.

Withdrawal of jurisdiction to prevent a Court decision has occurred only once. The Congress that withdrew the jurisdiction was the same Congress that had granted it.
Other attempts have failed. However, the major attempt in 1958 by Senator William Jenner to utilize this tactic, perhaps, is an indication that it still has viability as a court curbing device.

In conclusion, policy oriented Court reform tactics will succeed only if they are perceived as legitimate and supported by the dominant political majority. Through the appointment process, the Supreme Court evolves politically to reflect the views of the dominant political elite. However, during the lag period, after a major political transition, a court curbing period may occur. When the Court engages in an above normal degree of judicial activism, policy-oriented reformers will also be stimulated into action. However, either the public may come to accept the new laws, or the Court may retreat from the unpopular positions. A third alternative remedy is to alter the constitutional requirements through the amendment process.

Functional court reformers have sought to gain passage of legislation implementing their solutions to relieve stress within the judicial system in the same political environment in which the policy-oriented reformers have made their demands. The following chapter will present an overview of functional reform proposals during the two hundred year history of the United States Supreme Court. The focus will extend to the lower federal courts in so far as the
reforms affect the operation of the United States Supreme Court. Hence many of the functional reforms affecting the lower federal courts have been omitted as beyond the scope of this study.
CHAPTER 3

FUNCTION-ORIENTED REFORMS

Function-oriented reformers seek to alleviate internal sources of stress and stress caused by input overloads. Their reform proposals have the objective of facilitating the maintenance of the judicial system and its adaptation to changes in the environment. The initial sources of stress in the system were caused by structural problems inherent in the circuit court system. Partisan politics of the early nineteenth century prevented the restructuring of the system to eliminate the cause of the stress. Congress passed ad hoc remedies to relieve the Court; and the Court promulgated through its rules some function-oriented procedures.

After 1807, stress caused by input overloads became a chronic problem, which has plagued the federal court system henceforth. Until the passage of the Circuit Court of Appeals Act of 1891, these problems were intertwined with the structural problem of the circuit court system. The passage of the Act of 1891 began an era of function-oriented court reform, and a transition period for the federal courts.

This chapter will present an overview of the major problems which have besieged the United States Supreme
Court and the types of reforms which have been proposed as remedies.¹⁹

Circuit Court System, 1789 to 1911

The first source of stress which functional reformers attempted to eliminate was the responsibilities of Supreme Court justices attendant to the circuit courts. The Judiciary Act of 1789 created three circuit courts but no circuit judges. The Act of 1789 specified that two Supreme Court justices and a district judge would preside over the circuit courts twice a year in the various judicial districts (states). The circuit courts were nisi prius courts with jurisdiction primarily over cases involving diversity of citizenship.

Problems

As noted in the first chapter, the major rationale for assigning Supreme Court justices circuit court duties was to acquaint them with the court practices and the laws of the various states. A secondary goal was to promote the development of grass root support for the federal government and enhance the prestige of the federal courts. Congress had designated in the Act of 1789 that the rules of procedure for the lower federal courts would be those used in the

¹⁹. For a more comprehensive history of function-oriented court reform legislation, the reader should refer to Frankfurter and Landis (1928) and Fish (1973).
state courts wherein they were located. Each circuit included several states. The law required the convening of the circuit courts in each state twice a year. The initial stipulation that two Supreme Court justices and a district judge would preside over each circuit court session placed a great demand upon the physical and mental abilities of the justices. They had to become familiar with the rules of procedure governing the courts of several states. Transportation in the 1790's and the first half of the nineteenth century was almost entirely dependent upon horses. It was primitive, time consuming, and arduous.

The dual roles of trial judge and appellate judge created the problem of justices reviewing their own circuit court decisions. Litigants appealing circuit court decisions to the Supreme Court would naturally question whether a justice could unbiasedly review his own decision (Frankfurter and Landis, 1928, pp. 14-20).

The law also failed to make provisions for new states. As the country grew, new circuits would have to be added and the size of the Supreme Court increased, or the old circuits enlarged; otherwise, new states would remain outside the circuit system. All three of these alternatives occurred. For example, Kentucky, Tennessee, and Ohio (admitted to the Union in 1792, 1796, and 1802, respectively) did not come within the circuit system until the creation of
the seventh circuit in 1807. At that time, the United States Supreme Court also gained a sixth associate justice (Frankfurter and Landis, 1928, p. 33).

After 1807, the continual increase of federal litigation became an apparent by-product of the nation's growth in size, population, and commerce. The stresses caused by the structural deficiencies were accentuated by input overloads on the federal docket. Under the system of dual responsibilities, the justices were inevitably confronted with the dilemma of neglecting one duty, or the other, or both.

Suggested Reforms and Sources of Opposition

In the first Report of the Attorney General in 1790, Edmund Randolph pointed out the above problems, which he considered inherent in the federal circuit court system (Frankfurter and Landis, 1928, pp. 14-24). The Supreme Court justices reinforced Randolph's criticisms and demanded relief. In 1793, Congress amended the law to allow the six justices to divide the three circuits into six areas. Both Randolph and the justices had advocated the abolition of circuit duties and the creation of separate circuit judges. Congress, however, continued to insist that the benefits of interaction between the Supreme Court and the local communities of the several states would outweigh the disadvantages (Frankfurter and Landis, 1928, pp. 22-32). The
 justices continued to protest circuit riding duties, which no doubt contributed to the high turnover on the Supreme Court of the 1790's.

In 1799, President John Adams recommended to Congress the creation of circuit judges and the elimination of all circuit court responsibilities held by the other federal judges. Following the presidential election of 1800, a "lame duck" Federalist Congress incorporated President Adams' reform proposals into the Judiciary Act of 1801. The Act of 1801 created sixteen new circuit judges and eliminated the circuit duties of the other federal judges. In addition, the outgoing Federalists created a number of minor federal courts and judicial positions. The law expanded the jurisdiction of the federal courts to "the full limit of Constitutional power (Frankfurter and Landis, 1928, pp. 24-30)."

This broad, vague expansion of federal jurisdiction and the appointment of numerous Federalists to life tenured judicial posts during the waning days of the Adams administration particularly incensed the incoming Jeffersonian Republicans, for Supreme Court justices' and other federal judges' conduct on the bench had been on occasion very partisan—not only in terms of their decisions, but also their

20. "Lame duck" is a term used to refer to elected officials and offices during the period of service after an election but before the newly elected officials replace them.
charges to the juries and general courtroom conduct. Many of the victims of such indiscretions had been Republicans (Frankfurter and Landis, 1928, pp. 26-30).

Through the elections of 1800, the Republicans gained control of the presidency and both houses of Congress, with impressive majorities. They were essentially "state righters" opposed to the expansion of federal powers. Their role as policy-oriented court reformers has been utilized as examples in the previous chapter. Their first policy-oriented reform effort, however, was to repeal the Judiciary Act of 1801. The Judiciary Act of 1802 accomplished that goal and restored essentially the status quo, including the circuit riding duties of the Supreme Court justices. One important change in the law, however, did permit a single judge to preside over circuit courts. Indeed, justices were specifically required to hold court each session within the circuits (Frankfurter and Landis, 1928, pp. 30-33).

Function-oriented court reformers continued their efforts to relieve the justices of the circuit court duties and to create separate circuit court judges (Frankfurter and Landis, 1928, pp. 33ff, 70). The problems of input overloads became particularly acute during the decade of the 1820's. Since the Act of 1807, numerous new states had been added to the Union (Indiana, Illinois, Mississippi, Alabama,
Maine, and Missouri). The circuit system needed some revision if the western states were to have access to it. In his State of the Union Message (December 7, 1824), President James Monroe urged corrective legislation which included exemptions of justices from circuit duties. The 1820's, however, were also a period of court curbing proposals. Partisan politics and the policy-orientations of the "states' righters" and those of the "nationalists" adversely affected all functional judicial reforms. Although the problems were self-evident, neither faction was willing to compromise (Frankfurter and Landis, 1928, pp. 37ff).21 One group had control of the Senate and the other, the House; consequently, each killed the other's proposals.22

Confronted with the necessity to provide some type of relief to the Supreme Court, Congress finally agreed upon a compromise solution in 1826. The Act of May 4, 1826

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21. The 1880's was another period when function and policy-oriented reformers killed each other's legislation. The grangers and other groups favored state laws regulating railroads. Some corporations sought laws limiting state courts' jurisdiction and removal of cases from state court into federal courts. Much of the court legislation passed by the House of Representatives reflected the regulator' views, but died in the Senate. In contrast, the Senate favored enlarging the federal jurisdiction and streamlining the procedure so as to maximize efficiency, but often these bills died in the House Judiciary Committee (Frankfurter and Landis, 1928, pp. 90ff).

22. For a detailed discussion, see Frankfurter and Landis, 1928, pp. 36ff).
added a month to the session of the Supreme Court. Congress found this a convenient stopgap method to relieve the input overload stress, when partisan politics prevented the adoption of other remedies. By lengthening the Court's term, more time was provided per session, and all political factions avoided alterations of the balance of political power. Such measures, however, did not address the major structural problems of the system caused by the dual judicial duties.

As litigation continued to grow, district judges assumed more of the circuit duties, and justices presided in fewer districts of a circuit each session. The Act of March 3, 1837, provided some relief for the stress caused by the structural deficiencies. The Act of 1837 created two additional circuits for the new states, and two more associate justices of the Supreme Court. However, by expanding and maintaining the defective system, Congress continued to ignore the major problems inherent in the system (Frankfurter and Landis, 1928, Chapter 1). Some justices, such as Joseph Story, however, reflected that the increase in the size of the Court had resulted in more time consumed in deliberation. Story's observation would be cited in the 1870's and 1880's when Congress considered proposals to increase the size of the Court to various numbers from eighteen to twenty-four. The input of such opinions by a judge influenced the decision not to increase the size again when the Tenth Circuit
was created in 1854. Although a tenth justice was added in 1864, when the Tenth Circuit was expanded to include Oregon, as noted in Chapter 2, that addition to the Court had policy implications as well as functional ones.

In the pre-Civil War years, the United States Supreme Court was often the setting for legal oratory by such lawyers as Daniel Webster. When Webster or other well known attorneys argued a case before the Court, a crowd was on hand to behold the occasion. As the dockets became more crowded, such elaborate and illustrious arguments were a luxury no longer feasible. In 1849, the Court restricted arguments to two hours per side (Frankfurter and Landis, 1928, p. 52). Today the Court generally limits arguments to one hour, but may allow more or less time to a case depending upon the issues to be decided (Abraham, 1977, p. 37). Thus, the Court itself has some self-generating adaptive capability to alleviate stress.

The attempts to change the court structure and to relieve the Supreme Court of circuit court duties continued each decade. The idea of justices maintaining personal contact with the various states through their circuit responsibilities had numerous supporters in Congress.

23. A graphic description of the style of arguments before the Supreme Court prior to the limitation on debate (8 Howard v, 1849) may be found in James (1923).
Traditionalists rejected any proposal which would sever that legal requirement.

In the decade prior to the Civil War, proposals began to appear that contemplated a shift of the major circuit court jurisdiction from that of a trial court to an appellate court. In 1849, Senator Stephen Douglas, for example, introduced a bill to create a circuit court of appeals and confer upon the district courts the jurisdiction that then resided in the circuit courts. According to his plan, the district judges would have met once a year with the Supreme Court justice assigned to their circuit and hear all appeals from the trial courts within the circuit. Among the goals which he visualized was uniformity of thought and practice within each circuit. To further this goal, the judges would, while meeting, prescribe the rules of practice for the district courts. Both proposals were rejected.24

Increasing Federal Jurisdiction

Indirectly, the expansion of federal jurisdiction brought about the long sought for reforms. Prior to the Civil War, the bulk of federal cases involved disputes between citizens of different states. From the beginning, as

24. Douglas' proposals are significant in that uniform procedure was to become a major goal of the twentieth century reformers who would place responsibility for procedural rules with the Supreme Court rather than Congress (Frankfurter and Landis, 1928, p. 70).
evidenced by the Judiciary Act of 1801, there had been efforts to expand the federal court jurisdiction to the "full scope of the Constitution." During and following the Civil War, "nationalists" passed legislation enabling the removal of cases from state to federal courts. An Act of March 3, 1863, permitted the removal of cases brought against the officials of the U.S. government for acts committed during the rebellion which had been authorized by Congress or the President. The National Bank Act of 1862 and the Fourteenth Amendment further expanded the jurisdiction of the federal courts to oversee legal controversies arising within a single state (Frankfurter and Landis, 1928, pp. 56ff).

The trend culminated with the passage of the Removal Act of 1875. It provided for the removal of cases from state to federal courts which involved rights guaranteed by the Constitution, statutes, or treaties of the United States. The Act of 1875 gave the litigant the option of using federal courts if a federal question was raised. The law enabled a litigant to assert a federal right to remove his case from a state court to a federal court, which he did if an advantage were to be gained. With the federal courts' dockets already overloaded, removal provided a means of delaying litigation. The Removal Act of 1875 counteracted any relief to the docket of the United States Supreme Court which an
Act of February 16, 1875, and earlier legislation had provided. 25

Decisions of the Court also expanded federal jurisdiction. For example, in *Ex parte Schollenberger* (1877), the Court ruled that corporations came within the provisions of the removal statutes. Corporation litigation soon clogged the dockets of federal courts.

The expansion of federal jurisdiction proved dysfunctional. The structure had not been sufficiently expanded to cope with the increased volume of litigation. Each year more and more cases fell into arrears. By 1890, the Supreme Court alone had more than 1,800 cases carried over from the previous session. Removal Acts had provided a means of delaying and of increasing the cost of litigation rather than assuring impartial justice.

**Post-Civil War Reform Proposals**

Even prior to the passage of the Removal Act of 1875, Justice Miller and others had suggested that docket relief be found in limiting the jurisdiction of the Supreme Court. Numerous bills were introduced during the years between 1875 and 1895 to reduce the jurisdiction of the federal courts. Although such legislation was passed in the

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25. The Act of February 16, 1875, limited the review of admiralty and patent cases and increased the monetary limitations on jurisdiction from $2,000 to $5,000.
House in 1878, 1883, and 1884, it was buried in the Senate Judiciary Committee. The passage of these bills would have removed much corporate litigation from the federal docket and placed it in state courts. However, corporations successfully utilized their influence in the Senate to defeat the proposals.

George W. McCrary revived the older proposals to alter the structure of the system. He proposed to give district and circuit courts concurrent jurisdiction and to eliminate the appellate jurisdiction of the circuit courts. His bill would have established an appellate court in each of the circuits. The appellate jurisdiction of the Supreme Court would have been limited to cases involving more than ten thousand dollars and to questions of interpreting the Constitution, statutes, and treaties of the United States. Rather than create new appellate judgeships, he suggested that justices and district and circuit judges preside over their circuit's appellate courts, with any three constituting a quorum. Thus, McCrary ignored the inherent problem of judges having dual court responsibilities and of a judge in his appellate role reviewing his own decisions as a trial judge. He also advocated that the appellate court be located in a single city within each circuit rather than

26. Proposals to increase monetary levels were popular remedies after the Civil War.
convening in each district. That provision would have reduced the amount of time spent traveling.

McCrary's bill passed the House in February, 1876, with the above provisions, but died in the Senate Judiciary Committee. Although McCrary left the House in March, 1877, he continued advocating these reforms in law journals such as the Central Law Journal; and Senator David Davis continued introducing similar bills.

Other proposals for an intermediate appellate court involved increasing the size of the Supreme Court. One suggestion involved increasing the court to twenty-one members, who would be divided into three groups but would sit en banc on all questions involving interpretation of the Constitution. Another proposal advocated increasing the size of the Supreme Court to eighteen and drawing a single panel from the membership to serve as an intermediate court of appeals (Frankfurter and Landis, 1928, pp. 78ff). Such proposals drew some support from the various bar associations, as did the Davis and McCrary bills.

It is important to note that during the post-Civil War period, major groups emerged advocating in articles, speeches, and face-to-face with decision makers various policy positions on labor issues, government regulatory roles, and other social-economic programs. Because such issues often involved the courts as well as the political branches,
court reform became a side interest of all. In terms of functional reform, bar associations were particularly vocal on the needs of the courts but were in disagreement as to the solution. As had earlier justices, Chief Justices Waite and Fuller and Associate Justices Miller, Harlan, and Field all spoke out on the need for change and had their views published in the legal periodicals. Like earlier attorneys general, contemporary ones such as Agustus Garland and William Miller urged Congress to pass legislation relieving the courts (Annual Report of the United States Attorney General, 1889 and 1890).

In 1887, Congress passes a compromise bill removing national banks from federal litigation by deeming them citizens of the states in which they were located. However, the Senate persisted in safeguarding the privileges of foreign corporations to remove their litigation from state to federal courts (Frankfurter and Landis, 1928, p. 96). As a result, the act removed only a small amount of litigation from the Supreme Court, and demands for relief continued.

The Court of Appeals Act of 1891

In 1890, the Supreme Court docket peaked with 1,800 cases in arrears. The plight of the Court could no longer

27. Examples of such publications include: "Remarks of Chief Justice Waite" (1890), Harlan (1890), and Field (1890).
be ignored nor alleviated by counter-productive measures. The members of the Court vocalized their dilemma and the need for an intermediate court of appeals. With the Court's formal endorsement and the support of the organized bar and other groups that supported broad federal jurisdiction, the Court of Appeals Act became law in 1891. Although the act retained the circuit courts, due to the efforts of Senator William Evarts, the jurisdiction of the circuit and district courts became almost identical. Two decades later the circuit courts would disappear almost unnoticed with the enactment of the Judicial Code of 1911. The Act of 1891 removed all appellate jurisdiction from the circuit courts and created nine appellate tribunals with clearly defined jurisdiction and their own judges. They had final review of cases which based federal jurisdiction upon diversity of citizenship, as well as a number of other types of litigation. To attain a Supreme Court review of decisions by the circuit courts of appeal in these classes of litigation, the litigant could petition the Supreme Court for a writ of certiorari. Thus the act introduced the principle of discretionary jurisdiction.

28. Frankfurter and Landis (1928, pp. 125ff) discuss the problems and legislative attempt to correct jurisdictional problems which arose pertaining to criminal cases, the government's right to appeal adverse decisions, and the District of Columbia Courts.
The act marks the beginning of the modern court system and the transition period of functional demands. In the nineteenth century, demands had focused upon relief for the justices from the congested dockets, the arduous circuit duties, and the need to provide federal courts in newly settled regions. Only congested dockets would continue to be a reoccurring problem in the twentieth century. The act marked the beginning of a new approach to docket management.

Twentieth Century Function-oriented Reforms

With the creation of the intermediate appellate courts in the nine circuits, the focus of functional reform shifted to cumbersome procedures and defective judicial administration. Roscoe Pound (1906, p. 727), in reference to these two problem areas, labeled them the "most efficient causes of dissatisfaction with the present administration of justice in America." William Howard Taft considered the most obvious symptom of these two defects delayed justice. Justice delayed benefited the litigant with the "longest purse (Taft, 1908, p. 35)." Taft, Pound, and other functional reformers stressed such goals as economy, efficiency, flexibility, effectiveness, simplicity, integration, and coordination.

29. The District of Columbia Circuit Court of Appeals was added in 1893 and the Tenth Circuit in 1929.
Judicial Code of 1911

The Act of 1891 voided much previous legislation and solved many old problems. However, the political branches, courts, and organized bar all concurred in the belief that the multitude of legislation passed during the nineteenth century needed organizing into a comprehensive form. In 1897, Congress established a Commission for the Revision and Codification of Penal Laws. In 1899 Congress designated the commission to revise and codify the laws pertaining to the jurisdiction and practice of the federal courts. The commission's duties were expanded in 1901 to include the revision of all the permanent laws of the United States (Frankfurter and Landis, 1928, p. 131).

Both function and policy-oriented reformers attempted to influence the commission. The bar associations, especially the American Bar Association, took an active interest in the work of the commission. Among the numerous members of the judiciary that made suggestions to the commission were future Supreme Court Justices Taft, Lurton, and Day, who at the time were judges on the Sixth Circuit Court of Appeals (Congressional Record, 1911, p. 1544). Later, as President, Taft would urge the passage of the commission's proposed judicial code in 1910. The American Bar Association, however, would take a more neutral position on the
code due to opposition of some more tradition bound members, such as Joseph Choate (Congressional Record, 1911), to the abolition of circuit courts.

Some commissioners sought to include in the code reforms which they had previously been unsuccessful in sponsoring in the Congress. David Culbertson had left the House of Representatives in 1897 to accept a position on the commission. There he endeavored, unsuccessfully, to include a provision eliminating corporations' standing in federal court on the basis of diversity of citizenship. Likewise, a provision to prohibit the issuance of injunctions unless necessary to prevent irreparable damage failed.

The code became law in 1911 with only minor changes in the law. It consummated the efforts begun in the mid-nineteenth century to place all nisi prius work in a single court of original jurisdiction and to abolish the circuit courts. It also simplified procedure, offered a systematic statement of structural principles, and achieved a substantial degree of unification of the law.

The code failed, however, to bring together all legislation pertaining to the jurisdiction of the federal courts. In 1924, Justice Van Devanter would testify that determination of jurisdiction involved searching the statutes. Confusion existed among litigants as to whether a case went to the courts of appeals or the Supreme Court. In
addition to the legislation passed after 1911, some earlier statutes still governed jurisdictional questions. The codification of almost all jurisdictional laws into a single statute was not accomplished until the Judiciary Act of 1925 (House of Representatives, December 18, 1924).

Perhaps of even greater importance than its content, the Judicial Code of 1911 aroused interest in other functional reforms. The American Bar Association would create in 1913 its Committee on Uniform Judicial Procedure to advocate further simplification of procedure and the transferring of procedural rule-making from Congress to the Supreme Court. The passage of the Court of Appeals Act of 1891 had marked the first major success of function-oriented reformers. The Code of 1911 had effectuated many of their initial demands which had focused primarily upon structural and jurisdictional problems. With the circuit court gone, attention shifted to combating policy-oriented reforms, such as the renewals of the old Culbertson proposals and new ones such as judicial recall and recall of judicial decisions. They countered such reforms with measures to simplify procedure, integrate and unify the administration of the federal courts, and increase the flexibility in managing the federal dockets. However, the federal courts continued to have clogged dockets, which caused judgments to be delayed. Decentralization and cumbersome, outmoded procedures,
including automatic appeals to the Supreme Court, plagued the federal courts. Frankfurter and Landis (1928, p. 200) describe the situation as follows:

The system was without direction and without responsibility. Each judge was left to himself, guided in the administration of his business by his conscience and his temperament. The bases for informed public judgment and self-criticism were wanting since accurate judicial statistics were unknown.

Functional judicial reformers advocated a number of changes as remedies for these conditions.

Uniform Procedure

The Judiciary Act of 1789 required procedures of the circuit and district courts to conform to those prevailing in the state courts where they were located. The Conformity Act of 1872 required federal courts to adhere to the state procedures in all civil cases at common law. Consequently, the procedure in federal courts varied from state to state, with the result that almost 100 different systems plagued the federal courts (Mason, 1964, p. 114).

In 1912, the American Bar Association established its Committee on Uniform Judicial Procedure. Thomas Shelton, the ABA's congressional lobbyist, served as chairman of the committee. Supported by such notables as William Howard Taft and Roscoe Pound, Shelton launched the movement for a uniform system of law pleadings. In 1922, the
proposal was expanded to include the merger of law and equity procedures in one form of civil action (Report of the Committee on Judicial Administration and Remedial Procedures, 1912; Report of the Committee on Uniform Judicial Procedures, 1922).

Senator Thomas Walsh of Montana led the opposition and thwarted the reformers' efforts. His principal arguments which found support in the Congress were that the reform would require the average lawyer to learn two sets of procedures--state and federal--to accommodate a few attorneys employed by large corporations who practiced in several states. For the Supreme Court to formulate such rules as the ABA proposed, he also argued, would be an unwise delegation of rule-making power (Report of the Committee on Judicial Procedures, 1933).

In 1933, after twenty years without success, and having lost the dedicated leadership of Thomas Shelton, the ABA terminated all organized efforts on behalf of uniform judicial procedure. However, the following year, 1934, at the urging of Attorney General Homer Cummings, Chief Justice Charles Evans Hughes, and others, Congress authorized the Court to formulate rules of procedure in the federal courts. In 1938, having received the Court's proposed rules, Congress passed the Federal Rules of Procedure Act.
Mobility of Judges

The problem of overburdened dockets has been discussed in terms of the Supreme Court. Yet, lower federal courts also had numerous cases in arrears. The usual approach to the problem was ad hoc legislation adding a judge at a time. Such measures often failed when both or one house of Congress was controlled by a party other than the President's.

In 1850, Congress authorized a judge to sit in another district within his circuit or in a contiguous circuit for the purpose of assisting a sick or disabled judge (Act of July 29, 1850). In 1907, Congress empowered the chief justice to assign a judge from another circuit to a circuit having a disabled judge. First, however, the receiving circuit had to determine actual disability of the judge, the impracticability of designating another judge within his own circuit and then issue a certificate of disability.

The second circuit had an extremely large docket problem. Its senior circuit judge and the attorney general sought a law permitting overworked circuits to have the assistance of district judges from other circuits with light dockets. Congress responded in 1913 with a law giving relief only to the second circuit. The chief justice could assign a consenting judge from another circuit on certification of need from the senior circuit judge in New York.
Chief Justice Edward White opposed efforts to expand the assignment power to the other circuits and to broadly construe the existing legislation.

In contrast to White's views, his successor, William Howard Taft, had long espoused judicial mobility as an inherent part of his concept of administrative integration of the judiciary. As President, he had supported the creation of the commerce court which was composed of judges who, when not serving on that court, were subject to assignment by the chief justice to the district courts. With the demise of the commerce court, the remaining judges served as circuit judges at large.

During the interim period between his presidency and chief justiceship, Taft vigorously advocated among other reforms mobilizing federal judges. He visualized judges-at-large who would be distributed to dispose of the mass of judicial business promptly (Taft, 1924, p. 384).

As chief justice, he continued to campaign vigorously for his reforms. He found a willing lieutenant in Attorney General Daugherty, who was receptive to Taft's views and willing to follow his lead. At Taft's suggestion, the Attorney General appointed a five man committee composed of judges and U.S. attorneys who listened to Taft's ideas and echoed his reforms. The committee recommended the appointment of two judges-at-large in each of the nine circuits.
With the advice of the attorney general and the senior circuit judges, the chief justice would have the power to assign these floating judges to other circuits where serious problems of cases in arrears existed. The proposal aroused the opposition of the traditionalists who favored the decentralized, independent nature of the district courts. Dissenting members of the bar and bench found sympathetic ears and allies on the Judiciary Committees of both houses of Congress.

In lieu of the judge-at-large proposal, Congress created several new judgeships and expanded the temporary inter-circuit assignment authority of the chief justice, which already existed in the second circuit, to the other circuits as well (Act of September 14, 1922).

Judicial Conference

An inherent part of Taft's legislative program was the judicial conference. He believed that management of dockets and simplicity of procedure were two of the judicial system's greatest needs. Characterized by both simplicity and elasticity, the British system provided the model to emulate.  

30. Taft, in his numerous articles and speeches, utilizes the British court system as a model. Thomas Shelton and Roscoe Pound also refer to the British courts as a model for reform.
The British empowered a council of judges with executive controls over their court systems. The council not only made judicial assignments, but also molded the courts' rules of procedure as well. Taft credited these powers with the "ease and quickness" with which the British disposed of cases. He advocated that the chief justice or a council of judges appointed by him, or the Supreme Court, should have the authority to review yearly pending federal judicial business. The council, then, would assign judges to the various districts and intermediate appellate courts which had overloaded dockets. Taft argued that by assigning the judicial force yearly, according to existing problems of cases in arrears, the federal courts would be able to manage their dockets more efficiently (Mason, 1964, p. 61).

A provision for the less powerful judicial conference did survive vigorous opposition in the Senate Judiciary Committee by the narrow margin of one vote. The statute provided for yearly conferences of the senior circuit judges and the chief justice and mandated that the conference make a comprehensive survey of the condition of business in the courts. Hence, a formal structure for communication among the circuits became a reality (Act of September 14, 1922).

With this rudimentary foundation, the conference proved the first step toward more centralized management and administration of the judicial system. In 1939, Congress
would establish the Administrative Office of the United States Courts. Its director would be responsible for gathering statistics on the work loads and for preparing the judicial budget for approval by the conference. The Administrative Office Act also renamed the Conference of Senior Circuit Judges, the Judicial Conference of the United States. Later the conference representation would be expanded to include representation from the district courts. Also, the Administrative Office would expand to include the Divisions of Probation (1940) and Bankruptcy (1942).

During the Warren Court era (1953-69), the need for trained court administrators would become increasingly apparent. The Act of 1939 had also created councils in each of the circuits, which met annually to discuss improvement of judicial administration, gather statistics from the courts in the circuit, and make budget recommendations. These circuit councils had only the administrative assistance of the clerk of the court of appeals, the judges' law clerks, and their secretaries until the 1970's. With the support of the American Bar Foundation, Chief Justice Warren Burger, and Senator Joseph Tydings, Chairman of the Senate Subcommittee on Improvement of the Judicial Machinvers, the Circuit Executive Act of 1971 was enacted. Over

31 Discussion of the act in detail is found in Martineau (1974, pp. 348ff).
thirty-five years after Chief Justice Charles Evans Hughes had recommended full-time administrative officers, this legislation provided the circuit courts of appeals with administrators. In 1967, Congress also created the Federal Judicial Center as the research arm of the federal judiciary. Here the courts have at their disposal modern data gathering techniques to ascertain such information as docket conditions and as time requirements of various types of cases in the various courts.

In 1969, newly appointed Chief Justice Warren Burger challenged the ABA, the Institute of Judicial Administration, and the American Judicature Society to establish a school to train court administrators. The following year, 1970, through a cooperative effort, these organizations established the Institute of Court Management. Universities also began offering courses in court administration and management. Over fifty years after William Howard Taft, Roscoe Pound, and Herbert Hawley and other functional reformers began focusing attention upon the need for modern administration of the judicial system, the profession of court administrator was gaining status within the judicial system.
Discretionary Jurisdiction and Docket Relief

The concept of discretionary jurisdiction has been fundamental in the making of the modern court system. The Circuit Court of Appeals Act of 1891 defined certain classes of cases which would continue to be appealable directly from the district courts to the Supreme Court. The remaining cases, including diversity of citizenship cases, would be routed to the circuit courts of appeal. Although some classes of this litigation also could be reviewed by the Supreme Court, others were finalized in the court of appeals unless a petition for certiorari was granted by the Supreme Court. The new system was credited with the steady decline of cases in arrears on the Court's docket from 1891 to 1899. Beginning in 1907, however, the cases in arrears before the Supreme Court again began to increase yearly. In his Annual Report (1910), Attorney General George Wickersham called attention to the problem and noted that the use of discretionary appellate jurisdiction had effectively ameliorated a similar problem in the 1890's. He advocated that the Court's discretionary jurisdiction be expanded. The Supreme Court, at the time, had obligatory jurisdiction to review on writ of error decisions of the Circuit Court of Appeals for the District of Columbia, including classes of litigation which were reviewable only by certiorari from the other circuit courts. The attorney general recommended that the same
laws governing appellate jurisdiction from the other circuit courts of appeals be applied to the litigation from the Circuit Court of the District of Columbia. He estimated that such a revision would eliminate fifty to sixty cases a year (Annual Report of the United States Attorney General, 1910). Although strong opposition to this proposal from the Bas Association of the District of Columbia contributed to its defeat, compromise legislation did transfer some obligatory jurisdiction to the discretionary category.

Until 1914, no case from a state court could be reviewed except those falling within the Court's obligatory jurisdiction—only those in which a federal claim or right had been asserted and denied by the state's highest court. There was no review of decisions in which federal claims were sustained. As a result, state laws and actions ruled unconstitutional by a state court had no review before the Supreme Court. In 1914, Congress empowered the Court to grant writs of certiorari in such cases (Act of December 23, 1914).

Further revision of the law in 1916 limited the Supreme Court's obligatory jurisdiction of state cases to those in which a U.S. statute, treaty, or authority had been ruled unconstitutional and those in which a state law or action had been ruled constitutional. The Court could exercise discretionary jurisdiction in other cases which raised
a federal question if it determined some public interest or diversity of decision existed (Act of September 6, 1916). As a result, about half the state cases shifted to discretionary jurisdiction.

The 1914 and 1916 acts were credited with enabling the Court to keep abreast of its docket and produced some temporary relief. When the arrears began to increase again in the early 'twenties, expansion of the discretionary jurisdiction was posited as a solution. Justice Willis Van Devanter, testifying before the House Judiciary Committee on behalf of the "Judges' Bill," reviewed the previously mentioned legislation and noted that it had previously relieved the Court. With increased litigation due to defense contracts being cancelled after the war, prohibition, and the vast amount of new legislation, the Court was over a year behind on its docket.

The "Judges' Bill"—the Judiciary Act of 1925—codified the jurisdiction of the U.S. Circuit Courts of Appeal and the U.S. Supreme Court. It compiled, correlated, and harmonized all statutes relating to appellate jurisdiction. It simplified the modes of obtaining review and clarified controlling statutes. Although not removing any cases from the Supreme Court's jurisdiction, the bill reduced the obligatory jurisdiction to matters involving constitutional issues and placed all other classes of litigation under
discretionary jurisdiction. The courts of appeals became the courts of final review for many matters previously under the Supreme Court's obligatory jurisdiction. Direct review from district courts was limited to cases brought under anti-trust and interstate commerce laws, injunction suits to suspend the enforcement of specified state statutes, and cases covered by the Criminal Appeals Act of March 2, 1907.

In effect, the Act of 1925 transformed the Supreme Court into a public law court. In 1928, Congress empowered the Court to use its own judgment as to whether a case raising a valid question under its obligatory jurisdiction raised an issue of a "substantial federal nature." Since that time, for all practical purposes, the Court has been able to pick the cases it will review beyond the preliminary examination. The majority of cases brought before it on writ of appeal are dismissed for want of a substantial federal question and the majority of petitions for the writ of certiorari are denied.

**Summary and Analysis**

For the first hundred years, the federal judicial system had to cope with problems inherent in the circuit court system. The major cause of the problem was the dual judicial responsibilities of federal judges. Congress could have eradicated the problems by creating separate circuit
judges, and abolishing the circuit riding responsibilities of the other federal judges. However, the ideal of Supreme Court justices keeping in touch with the people through circuit duty proved extremely tenacious throughout the nineteenth century.

The Judiciary Act of 1801 provided the solution, but intense partisan politics led to its repeal. The passage of both the Judiciary Act of 1801 and the Judiciary Act of 1802 illustrates the partisan influence upon the judicial system. The Act of 1801 might have survived if the Federalists had left the new judicial appointments for the incoming Republicans to make. However, the motivation for passing the Act of 1801, no doubt, was as intense to place Federalist judges with life tenure in the federal judicial system as it was to alleviate the functional problems of the Court. From 1801 forward to the present day, the appointment of federal judges and the creation of federal courts has been subjected to the exigencies of partisan politics. As illustrated by both the legislation proposed in the 1820's and the 1880's, reforms that might alter the political balance of power have little opportunity of becoming law unless one political faction has control of both houses of Congress and the presidency.32

32. The term political faction is used rather than political party, because it is more comprehensive and includes factions within a party, as well as between parties.
Functional reforms tend to be evolutionary rather than sudden changes in the system. For example, some reform proposals, such as those calling for intermediate appellate courts, were renewed for several generations before their final adoption. In the interim period between the 1840's and 1891, however, some incremental legislation conferred upon the circuit courts limited appellate jurisdiction.

Innovative reforms are adopted on limited experimental bases. As they prove effective and the political environment accepts their viability, Congress tends to expand their use. For example, the Circuit Court of Appeals Act of 1891 introduced the use of discretionary jurisdiction on a limited scale. The Court and the Department of Justice found it to be an effective and flexible device for docket management. Through incremental legislation, Congress expanded the Court's discretionary jurisdiction gradually for thirty-five years, until with the enactment of the Judiciary Act of 1925 most classes of litigation came under it rather than the Court's obligatory jurisdiction.

Likewise the principles of administrative management of the federal courts began on a limited basis with the Annual Conference of Senior Circuit Courts of Appeal Judges. The creation of the Administrative Office of the United States Courts was not politically possible in 1922, but it was in 1939, because of the public's acceptance of the
Judicial Conference of the United States and its recognition of the need for better administrative machinery for the federal courts. In the 1970's, court management and administration had become an accepted and desirable part of the judicial system. From 1790 to the present day, judges have assumed a major role as judicial reformers. The Supreme Court justices of the 1790's began advocating reforms of the system immediately after the first term, in 1790. They and subsequent judges have voiced their complaints through the Attorney General of the United States. Major legislation attributed to judicial sources includes the Judiciary Act of 1801, the Circuit Courts of Appeals Act of 1891, the Acts of 1914 and 1916 which expanded the Court's discretionary jurisdiction, and the Judiciary Act of 1925.

The law creating the Conference of Senior Circuit Court Judges formalized the judge's role as a judicial reformer. It provided the formal institutional framework through which to channel their demands to Congress. As a result, much subsequent function-oriented reform legislation has been generated through its channels of communication and subsequent administrative offices which have been created.

Until the passage of the Court of Appeals Act of 1891, functional court reformers had little success. Their success appears to be dependent upon leadership coming from the Supreme Court. It would appear the united support and
lobbying of justices on behalf of legislation has been a factor in its passage. Likewise, opposition from the bench, such as Chief Justice White's opposition to judges-at-large, has been equally effective in defeating legislation.

From this brief overview, the era of Chief Justice William Howard Taft appears to merit the title, "the Golden Age of Functional Reform." The proposals which Taft advocated outlived him and many, particularly in the area of court administration, became laws long after his death.
CHAPTER 4

THE ENVIRONMENT OF THE TRANSITION ERA, 1890 TO 1925

The major transition from an agrarian to an industrial nation occurred during the years 1860 to 1890. The American political culture also began a slower transition from a relatively simple agrarian society with established values, belief systems, and patterns of life to a complex culture with a multitude of different interests, belief systems, and life styles. The conflicts of competing interest groups and the increase of business activities, particularly interstate transactions, placed new demands upon the political system. The old structures of political institutions were not capable of coping with the increased workload. In the case of the United States Supreme Court, the structures proved dysfunctional as illustrated by the 1,800 cases in arrears in 1890.

From 1890 to 1925, Congress enacted major legislation adapting the federal court system to the demands of the industrial era. The politics of court reform during the period were linked to the dominant political issues and attitudes. After 1890, the U.S. Supreme Court delineated the boundaries of the authority of the state and federal
governments to regulate labor conditions and commercial activities. The legal profession complemented the Court's development of laissez faire doctrines. Groups politically disadvantaged by the Court's decisions challenged the legitimacy of the power of judicial review and proposed court curbing legislation. Supporters of the judiciary responded not only with legalistic arguments, but actively embraced the "cult of the robe." Policy defenders of the status quo endorsed functional court reform legislation which would enhance the administrative power of judges over the judicial system and enable the courts to function more efficiently.

The United States Supreme Court and the Doctrine of Laissez Faire

Most of the constitutional development following Reconstruction involved directly or indirectly the impact of the new socio-economic order upon government. Responding to the demands of farmers and other economically disadvantaged groups, legislatures enacted laws to prevent the abuse of economic power. These laws were challenged in state and federal courts. The Removal Act of 1875 enabled interstate corporations to transfer litigation from state to federal courts on the grounds of diversity of citizenship. The Supreme Court accommodated corporations further by ruling that they did have standing to sue as legal persons in ex parte Schollenberger (1877).
According to a provision of the Judiciary Act of 1789, there was no review of state court decisions by the U.S. Supreme Court if the state court found a state law contrary to the U.S. Constitution. State court decisions holding state laws in violation of the U.S. Constitution were not reviewed by the U.S. Supreme Court until after 1914. Therefore, the development of laissez faire constitutional law occurred at both the state level and at the federal level.

Beginning in 1886, several state courts developed the concept of "liberty of contract" as a right protected by the Fourteenth Amendment. The origins of the concept of the right to pursue a lawful calling came from the arguments of John A. Campbell on behalf of New Orleans meatpackers and the dissenting opinions of Justices Joseph Bradley and Stephan J. Field in the Slaughterhouse Cases (1873). The concept fused the right of property and of liberty in the Fourteenth Amendment. The right to acquire and possess property included the right to contract regarding one's own labor or another's labor. The Court assumed "legal equality of all adults or 'persons' in their contractual relations, despite the difference in economic power which might exist between employer and employee or the fact that one of the 'persons' contracting might be a corporation (Cortner, 1964,
Some state courts ruled that laws regulating conditions of labor were in violation of the Fourteenth Amendment because they infringed upon "liberty of contract." As the U.S. Supreme Court had no review of these state court decisions until 1915 (Act of December 14, 1914), the concept prevailed in those states where the courts enunciated it.

The U.S. Supreme Court had rejected the argument that the Fourteenth Amendment protected the right to pursue a lawful calling in the Slaughterhouse Cases (1873). Munn v Illinois (1877), the Court had rejected substantive due process arguments and upheld the power of the states to regulate business "clothed with a public interest." However, as time passed, the justices of the Court changed, and the new appointees were more receptive to the substantive due process arguments. In Allgeyer v Louisiana (1897) and Lochner v New York (1905) and subsequent decisions, the Court utilized the liberty of contract concept to invalidate state statutes.

Prior to 1890, the Court had generally limited its interpretation of the due process clauses of the Fifth and Fourteenth Amendments to procedural questions. If authorities had used proper procedures and methods, the Court upheld their actions. However, substantive due process

33. In Wagner Act Cases, Cortner (1964) discusses these state cases and the adoption of liberty of contract by the United States Supreme Court (Chapter 1).
necessitates a judgment by the Court on the content of the law. The question raised was: Did the purpose of the law properly come within the scope of the government's authority? Substantive due process, hence, directly involves questions of public policy. After 1890, the Court interpreted the due process clauses as a substantive limitation upon the power of the state and federal governments to regulate private property in the interest of the public welfare. Substantive due process endowed the courts with a quasi-legislative power--hence a greater policy-making role.

Kelly and Harbison (1970, p. 525) note that "the content of due process underwent constant change," and it was impossible "at any one time to define absolutely the limits of substantive due process." Rather than enunciate a precise definition, the Court proceeded to "develop a complex new law of substantive due process by inclusion and exclusion." During the period from 1890 to the late 1930's, legislative and administrative acts restricting private property rights or free contract were often challenged on due process grounds. Hence, what constituted a valid exercise of police power became a judicial question. The Court's test of "reasonableness" was general and all inclusive. It allowed the justices to impose their judgment upon that of the legislative and executive branches at both the state and federal levels.
State regulations had been based upon their police powers. In contrast, federal regulations were based upon the commerce clause (Article I, section 8, of the U.S. Constitution). Prior to the 1890's, most Court interpretations of the commerce clause had involved the scope of state police power over commerce. The Court had developed the "direct-indirect" effects formula and the doctrine of dual federalism. If a state law had only an indirect effect upon commerce, then the law was sustained (Cortner, 1970, pp. 6-7). If the effect were found to be direct, the Court held such an activity could only be regulated by Congress. Dual federalism was based on the premise that the power to regulate certain activities was reserved to the states by the Tenth Amendment. This amendment imposed limitations upon the powers of the federal government. Hence, the federal regulations having only an indirect effect upon commerce would be in violation of the Tenth Amendment. Manufacturing, mining, farming, and other forms of production were considered to have only an indirect effect upon commerce (Cortner, 1970, p. 7).

With the passage of the Interstate Commerce Act of 1887, the Sherman Anti-Trust Act of 1890, and other federal legislation, Congress began to exercise its powers under the commerce clause. This legislation was challenged in the
courts. The Supreme Court began applying these two formulas to federal statutes. In *United States v E. C. Knight* (1895), the Court applied the direct-indirect effects test, and the doctrine of dual federalism. Narrowly defining commerce, the Court ruled that the Sherman Anti-Trust Act could not be applied to combinations resulting in the control of sugar refining. However, the Court did not take the same restrictive view of commerce when dealing with labor disturbances. The application of the Sherman Anti-Trust Act against such union activities as strikes and boycotts was found to be a valid exercise of the commerce power. Strikes and boycotts were regarded as activities intended to reduce the flow of particular goods in interstate commerce (Cortner, 1970, p. 13).

After the *E. C. Knight* case, the Court restricted commerce to a narrow definition involving primarily interstate transportation and transactions. All activities "local" in nature appeared to be beyond the reach of federal regulation. In 1905, however, the Court upheld the congressional power to regulate local activities which affected the "stream of commerce." The *Swift* case (*Swift Company v United States*, 1905) involved the government prosecuting a group of meatpackers under the Sherman Anti-Trust Act. These packers had agreed upon the prices they would pay for livestock at the stockyards. They had made agreements with
the railroad to obtain rates below those established by law, and had fixed the price of fresh meat on the market. The parties to the agreement controlled approximately sixty percent of the supply of fresh meat in the country.

The meatpackers argued that these activities were local in nature and beyond the scope of federal regulation. The Court rejected the argument. Justice Oliver Wendell Holmes for a unanimous Court pointed out that commerce "was not a technical legal concept, but a practical one drawn from the course of business." Holmes pointed out that the cattle were shipped from one state to another where they were sold and shipped on to markets. Such transactions were part of the "current of commerce among the states (Swift Company v United States, 1905).

With these various doctrines and tests, the Supreme Court assumed a major policy-making role. Decisions voiding or placing narrow limits upon statutes resulted in the charge that the Court was usurping the power of the legislative branch of government. The exercise of judicial power, particularly when it involved five to four decisions of the Court, provoked considerable criticism and inspired numerous court curbing proposals.

34. Reasonableness, liberty of contract, direct-indirect effects, and dual federalism.
Labor, particularly, perceived the Court as hostile and biased. Unions had found the Sherman Anti-Trust law utilized to enjoin them from striking and boycotting companies. The "liberty of contract" doctrine had been used to thwart their organizational efforts by legitimizing yellow dog contracts (Adair v U.S., 1908; Coppage v Kansas, 1915). At the same time laws to improve conditions of labor had often been nullified by the application of liberty of contract, e.g., minimum wages and maximum hour legislation.³⁵

Functional court reformers attributed the reoccurring problem of input overloads to the increased volume of legislation at both the state and federal levels. However, they failed to mention that the Court had accentuated the problems by assuming a quasi legislative role and by establishing guidelines which were often vague, e.g., the test of reasonableness. Although attributing no responsibility for the problem to the Court, functional reformers sought to transfer various classes of litigation involving federal and constitutional questions to the Court's discretionary jurisdiction from its obligatory jurisdiction. Hence, retaining the power to review, the Court would determine which cases were significant enough to merit review.

³⁵ The attacks upon the Court and court curbing proposals will be discussed later in this chapter.
Various interpretations and explanations have been offered for the reversal of the Court's initial position in the regulatory cases such as *Munn v Illinois* (1877) and the *Slaughterhouse Cases* (1873). The only justices remaining on the Court in the 1890's who served in the 1870's were ironically the two dissenting justices whose position the later Court adopted—Joseph P. Bradley (1870-1892) and Stephan J. Field (1863-1897). The judges who served on the federal courts and the various state courts during the 1890's and the years that followed in large measure were products of the industrial revolution and the vast growth and change which had occurred during the maturing years of their early professional lives. Many had had successful practices as railroad and/or corporate attorneys prior to becoming judges.

**The Legal Profession: Environmental Inputs**

Supreme Court justices have always been lawyers. With the exception of the litigants, the major actors in the judicial process have also been lawyers. The professional training and the dominant points of view and theories of jurisprudence, therefore, are major inputs from the environment.

According to studies by Benjamin Twiss (1942), Arnold Paul (1960), and Clyde Jacobs (1954), the writings of Thomas M. Cooley and Christopher G. Tiedeman were widely
accepted as the authoritative treatises on the limitations of police powers, particularly in regard to regulation of private property rights. Cooley's *A Treatise on Constitutional Limitations which Rest upon the Legislative Power of the States of the American Union* (1868) was the first major definitive study of the states' constitutional laws. In the treatise, Cooley asserted his own normative views, placing his stress upon limitation of power. In like manner, Tiedeman's *A Treatise on the Limitations of Police Power in the United States* (1886) and *The Unwritten Constitution of the United States* (1890) stressed that governmental powers are limited and put forth the legal rationale upon which laissez faire economic philosophy was interpreted into the United States Constitution. Cooley's influence spanned the last half of the nineteenth century in his roles as law professor at the University of Michigan law school, as judge, as publicist, and popular lecturer at law schools and meetings of bar associations. The influence of these two men may be summed up in the words of Benjamin Twiss (1942, p. 257), "Professors Cooley and Tiedeman were largely successful in making the Supreme Court an economic Court." In his book, Twiss details their influence and that of other leading corporate attorneys in the development of constitutional formulas and devices limiting the scope of government authority over the economy.
Lawyers promoted laissez faire doctrines to the Court in briefs and oral arguments and to the public in speeches, articles, and books. The United States Supreme Court accepted many of these doctrines. Thus, the Court placed constitutional restrictions upon the states through the Fourteenth Amendment and the interstate commerce clause. The Court limited the federal government's regulatory powers through the doctrine of dual federalism and through narrow definitions of commerce and taxation powers.

Lawyers also interacted with judges and sought to increase their influence through professional bar associations. From the 1870's forward, various professions had begun to form formal organizations to promote professional interests. Among those which would become significant interest groups in the arena of court reform were the American Bar Association (1878), the New York City Bar Association (1870), the Chicago Bar Association (1873), and numerous other state and city bar associations. The American Judicature Society was founded in July 1913, with the stated purpose of promoting the efficient administration of justice. Unlike the other groups, its prime concern and focus was functional court reform at local, state and federal levels. The membership of all these groups was comprised of successful attorneys. Politically these groups reflected a conservative and business oriented point of view. They were
appreciative of political power and the role of the courts in the decision-making structure. Although within the mem-
bership ranks of these groups were critics of the laissez
faire doctrines, such as Chief Justice of North Carolina
Walter Clark, most members viewed the U.S. Supreme Court as
the defender of the Constitution and private property
against the "socialist" pressures to which the political
branches sometimes succumbed. On the whole they opposed
policy-oriented reform proposals such as recall, and sup-
ported function-oriented reforms, such as those advocated
before them by William Howard Taft.

Within the pages of the bar journals and reviews, terms such as "socialist" were often applied as derogatory
labels to most attempts to place government regulations and
restrictions upon private property, business, and labor re-
lations. Union movements and efforts to protect the work-
ers' rights to organize, to belong to a union, and to
collectively bargain with employers were seemingly inter-
changeably labeled "anarchist" or "socialistic." In terms
of social philosophy, lawyers apparently leaned more toward
the views of Herbert Spencer and William Graham Sumner than
toward those of Henry George, Edward Bellamy, or Henry
Demarest Lloyd. In fact, one may safely assert that they
perceived the latter group's publications and the "social-
ist" philosophies of the time as a definite threat to the
"American way of life." Much of the conservative literature exhibits an almost paranoid aversion to any social experimentation or legislation that might resemble, however remotely, socialist thought.

The attorneys who served the state and federal government in positions such as attorney general and solicitor general belonged to some of these professional groups, and often adhered to laissez faire doctrines. In defending legislation against the challenges of vested interests, several of them have been depicted as putting forth arguments which aided their opponents more than the government's case. Richard Olney, for example, was opposed to the Sherman Anti-Trust Act and resisted implementing it. Several years after passage, he had to defend the act against the sugar trust in the E. C. Knight case. The resulting decision severely limited the act's application to trusts. Yet government attorneys vigorously and successfully pushed the application of the act against unions as a device to use the injunction against strikers.

Another example which stands out is Bailey v Drexel Furniture Company (1922). James M. Beck had on several occasions prior to becoming solicitor general voiced strong opposition to government involvement in labor relationships such as minimum wages, maximum hours, and workman's compensation. He espoused "liberty of contract" as an inherent
right protected by the Fourteenth Amendment. In the position of solicitor general, however, he had the responsibility to defend the child labor tax law. The day following the Supreme Court's decision nullifying that law, Beck wrote Chief Justice William Howard Taft that "none who may have heard you deliver the opinion may have welcomed the decision more than I." Beck proclaimed if the Court had upheld the child labor law "our form of government would have sustained a serious injury (Murphy, 1962, p. 49)."

In summary, judges, and lawyers appearing before them, generally accepted the views of Cooley and Tiedeman that governmental powers were severely limited by the Constitution. The U.S. Supreme Court and other state and federal courts bestowed constitutional status upon various laissez faire doctrines. The Court assumed the role of overseer of the political branches. Richard Cortner (1964, p. 9) has observed that "This expansion of constitutional protection for property rights signalled the resurgence of judicial power in the United States to a height greater than that it had occupied before the Civil War."

With its ever increasing role as a major policy maker came the charges that the Court had exceeded the

36. Twiss (1942, pp. 237ff) discusses Beck's arguments before the Court and concludes that Beck used arguments that he felt the Court would reject.
limits of its judicial powers and had become a super legislature. Federal judges holding office for life by virtue of appointment by the President were not subject to the will of the people. The charges that the courts were functioning as lawmakers were countered by an emphasis upon a natural law theory of judicial process and the theory that the Constitution embodied the supreme will of the people. According to the prevailing theory, judges "discovered" by use of reason the law which applied to a given dispute. The Constitution was fundamental, absolute, and immutable. Any issue could be resolved by applying the proper provision of the Constitution. If previous courts had erred in their endeavor to "discover and apply the law," then the judges were obliged to correct the error by overturning the previous decision rather than continuing the error via the doctrine of stare decisis.

The United States legal system had a strong common law tradition. The common law had evolved from England as a system of judicial decisions which grew out of courtroom controversies. Initially, judges had resolved disputes by referring to local customs, rules developed in similar previous decisions, and their own judgment of the particular conflict. Common law was judge-made law. Murphy and Pritchett (1974, p. 5) note that "it was not until well into the nineteenth century that either the British Parliament or
the American Congress began to pass many statutes dealing with everyday affairs of private citizens." Judges had formulated most of the rules regarding torts, trespass, property, wills, contracts, and obligations between employers and employees. Although no specific verification has been found, it may be true that the sentiment existed among some jurists that legislatures had in fact usurped traditional powers of the courts. Certainly the United States Supreme Court through "substantive due process" and the "rule of reason" zealously maintained its decision-making prerogatives.

The semantics of traditional American jurisprudence in conjunction with the common law tradition reflects the influence of William Blackstone (1723-1780). In his Commentaries on the Laws of England (1871), Blackstone had asserted that the function of judges was to "declare the law." Judges were "depositories of the law; the living oracles who were bound by an oath to decide according to the law of the land." They were not delegated to pronounce new law, but to maintain and expound the old one (Murphy and Fritchett, 1974, p. 6). Alexander Hamilton, in the 1788 Federalist Paper No. 78 (1961), applied Blackstone's concept of declaratory theory to the judicial role in constitutional interpretation. John Marshall pursued the same free-wheeling creativity that common law judges had historically exercised while
proclaiming the doctrine of Hamilton and Blackstone that judges had neither force nor will. Hence, in establishing the Court's power to declare congressional statutes unconstitutional in *Marbury v Madison* (1803), he maintained the appearance of merely performing a "ministerial act" (Murphy and Pritchett, 1974, p. 7).

During the period of 1890 to 1925, different theories of jurisprudence were being developed in the United States. Oliver Wendell Holmes Jr., whom President Theodore Roosevelt would appoint to the Supreme Court in 1902, readily acknowledged the fact of judicial law making. In his treatise, *The Common Law* (1881), he wrote:

The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges shared with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed (Murphy and Pritchett, 1974, p. 8).

As a justice, Holmes became noted for his dissenting opinions. In *Lochner v New York* (1905), Holmes charged that the decision was based on Spencer's economic theories rather than law. Although a critic of numerous Court decisions in which he believed the Court should not have substituted its judgment for that of the legislative branch, Holmes defended the necessity for judicial review. He especially stressed the necessity of the power in regard to state legislation.
Another contemporary legal scholar, Roscoe Pound, developed sociological jurisprudence. His principal focus was the relationship between the legal system and the society of which it was a part. Pound explained legal development as "the result of a series of adjustments made necessary by the function of law as a controlling and stabilizing force in a constantly changing society (Murphy and Pritchett, 1974, p. 9)." Law could not control society without satisfying basic social needs. Awareness of these needs was dependent upon sociological knowledge and analysis. Pound regarded judicial activity as the creative element in law, for historically legislation had failed to meet the requirements of change. Judges were in a much better position to achieve the continual adjustment needed in the legal system (Murphy and Pritchett, 1974, p. 9; Pound, 1943).

The third major challenge to the traditionalist position came from Benjamin Cardozo, who would succeed Holmes on the United States Supreme Court in 1932. Cardozo agreed with Pound on the sociological view of law and the creative task of the judge. Cardozo acknowledged that a great many legal principles were well established and gave law its predictable quality. However, where law was less definite, the judge had to create his own rules. In his exposition of how judges made these creative choices, Cardozo (1921) outlined four methods. The first method,
philosophy, emphasized the element of logic. The method of history sought developmental explanations, and the method of custom accepted guidance from past and present practices of the community. The method of sociology developed conceptions of "social welfare" or "social justice." When these methods conflicted, Cardozo believed that the fourth must ultimately prevail (Murphy and Pritchett, 1974, pp. 5-10). 37

Holmes, Pound, and Cardozo portrayed judges as important creative decision makers who performed a necessary role in the legal process. Of the three, Pound took an active part in the discussion of both policy-oriented and function-oriented court reforms. He opposed the former, and was among the first to advocate the latter. Addressing the American Bar Association in 1906, he examined the causes of popular dissatisfaction with the administration of justice and prescribed simplification and streamlining of judicial procedures (Pound, 1906). As federal judges, Holmes and Cardozo were less vocal advocates of reform. They defended the courts and the judges, yet advocated judicial restraint. Particularly in dissenting opinions, Holmes questioned the wisdom of the Court's substitution of its judgment for that of Congress.

37. This is an excellent, succinct summary of Blackstone, Holmes, Pound, and Cardozo.
Regardless of which theory of jurisprudence a particular judge or attorney accepted, his theory supported the legitimacy of the judiciary's policy making role. The laissez faire doctrines enunciated by the U.S. Supreme Court reflected the dominant constitutional theories espoused by law schools and professional groups. The emergence of professional associations such as the American Bar Association in the late nineteenth century augmented the resources and influence of the legal profession as an interest group. The organized bar associations opposed policy oriented court curbing reforms which were perceived as attempts to undermine the Constitution. On the other hand, bar associations proposed functional reform legislation and endorsed other reform legislation that the judges advocated such as the Judiciary Act of 1925.

Legitimacy of Power: Debates Regarding Judicial Review

In contrast to the strong support the courts received from the organized bar, supporters of legislation which the U.S. Supreme Court had nullified or placed restrictive interpretations upon attacked its right to so legislate. These critics depicted the justices as "tools of trusts," "stooges of entrenched corporate interests," and "enemies of the working men." The content of articles by Roscoe Pound, William Howard Taft, and other reform
oriented court defenders reveals their concern that the public might believe the charges that the U.S. Supreme Court was usurping power.

The arguments used against judicial review were both theoretical and historical. The arguments had been found in the writings of earlier policy-oriented court critics such as Jefferson, Jackson, and Lincoln (discussed in Chapter 2). Kelly and Harbison (1970, p. 633) summarize them very succinctly. The first, essentially Jackson's old argument, asserted that given the doctrine of separation of powers, the judiciary should have no more of a final right of constitutional interpretation than the President or Congress. The second group of arguments put forth by progressives focused upon the fact that challenged legislation seldom specifically violated a provision of the written Constitution, but rather some precept of a social or economic philosophy held by the justices.

The third line of criticism centered upon the five to four decisions of the Court. According to the principle of judicial restraint elaborated upon by justices such as Charles Evans Hughes (1928), laws were not declared invalid unless they are unconstitutional beyond a reasonable doubt. To the critics, a five to four division of the Court served as sufficient evidence that four justices believed a statute to be constitutional. Consequently, how could the
other five assert that it was unconstitutional beyond a reasonable doubt?

The fourth group of arguments asserted that judicial review was "an undemocratic method of settling constitutional questions." Judges were appointed, not elected. They were removed from popular control through their life tenure and salary security. As few as five men, by virtue of their appointment to the Supreme Court, had the power to overturn the judgment of a majority of both houses of Congress or some state legislature and the President or a state governor, all of whom had been duly elected by and were responsible to the people. For such power to rest in the U.S. Supreme Court was considered indefensible in a democracy.

The fifth group of arguments questioned the qualifications of the justices to rule upon social and economic needs of the nation. Theodore Roosevelt and a future Supreme Court justice, Louis Brandeis (appointed by Woodrow Wilson in 1916), were among the critics who stressed that the training of judges was legal and that they tended to settle questions by legal precedents formulated in the light of seventeenth and eighteenth century social conditions rather than those of an industrial nation (Kelly and Harbison, 1970, p. 633). In contrast, it was argued, the two political branches were responding to the present problems and attempting to resolve them.
The most lengthy arguments against judicial review were those based upon the intent of the "founding fathers." Critics such as Louis Boudin, a New York lawyer, asserted that there were no state cases involving the use of judicial review prior to 1787. Boudin argued that the members of the Constitutional Convention had never intended to sanction the practice. Therefore, Marshall's argument for judicial review as presented in Marbury v Madison (1803) was historically and logically unwarranted (Kelly and Harbison, 1970, p. 633; Boudin, 1911, pp. 238-270). Boudin's and others' historical arguments were refuted by a number of eminent scholars such as Edwin S. Corwin and Charles A. Beard. From their examination of the same details of the Constitutional Convention and other data, they all concluded that most of the members of the convention apparently had taken judicial review for granted. Therefore, the action of the federal judiciary in assuming the function was natural rather than a usurpation of power (Kelly and Harbison, 1970, p. 633; Corwin, 1910; and Beard, 1912a).

The U.S. Supreme Court emerged from the debate over judicial review with the legitimacy of its authority strengthened. Numerous distinguished lawyers and scholars had refuted the charge that the courts were usurping the powers of the legislature. In their treatises, these writers established the legal and traditional justifications
for the quasi-legislative powers of the courts. Furthermore, in both the literature and the speeches defending judicial review, judges, particularly U.S. Supreme Court justices, were endowed with charismatic qualities. This charisma is referred to as "the cult of the robe."

The Cult of the Robe

In all the articles regarding judicial review, the one common characteristic was the veneration of the "founding fathers," almost to the extent of bestowing upon them an infallible wisdom. Various writers considered and interpreted the same data to fit their particular position. This veneration extended as well to the Constitution and, on the part of some, to the United States Supreme Court.

Court defenders and many function-oriented reformers portrayed the Court as the "guardian of the Constitution" and the protector of individual liberties. During the period under study, probably no one surpassed William Howard Taft in the rhetoric which has become associated with the "cult of the robe." The following statement expresses the sentiment found in most of his speeches and articles; it illustrates an attitude which has been held and encouraged by many, particularly during the period under study. Taft (1908, pp. 63-64) wrote:

It is well that judges should be clothed in robes, not only, that those who witness the administration of justice should be properly advised that the
function performed is one different from, and higher, than that which a man discharges as a citizen in the ordinary walks of life; but also, in order to impress the judge himself with the constant consciousness that he is a high-priest in the temple of justice and is surrounded with obligations of a sacred character that he cannot escape.

Jerome Frank (1949, p. 254) is very critical of "Robe-ism" and the judicial and court house ritual which "symbolizes the notion that courts must always preserve the ancient ways; that the past is sacred, and change impious." According to Frank, when the "cult of the robe" has prevailed, the courts have tended to frown upon the work of legislatures. In innumerable decisions, the judges have whittled down new statutes, which they have considered "as alien to the common law and presumptively wrong." He continues:

The judge's vestments are historically connected with the desire to thwart democracy by means of the courts. Characteristically it was democratic Thomas Jefferson who opposed any distinctive judicial raiment for federal judges, while it was aristocratic Alexander Hamilton, his eye on the eighteenth century English mode, who advocated both robes and wigs. ... In most state courts, however, judges did not deck themselves out in the atavistic robe until the last decades of the nineteenth century--at a time, when significantly, conservative lawyers were hoping to utilize the courts as a bulwark against the rising populist movement.

The judges were oracles of an impersonal "higher law," a body of "law" absolute and infallible--so believed many who sponsored the judge's gown. ... A "priestly tribe" some lawyers have called judges. One legal writer has described them as persons into "whose hands are confided the ark of the covenant of our fathers." ... The robe ... gives the impression of uniformity in the decisions of the priestly tribe. Says the uniform black garment to
the public mind: Judges have attained their wisdom from a single, super-human source; their individual attitudes must never have any effect on what they decide.

Evidence supporting Frank's analysis is abundant in the literature of the "progressive era," particularly that found in the bar journals and reviews. The legal profession, particularly members active in the professional associations, reflected the interests of their clientele, which was predominately business oriented. The cult of the robe constituted a powerful psychological-symbolic support for the courts, which extended beyond the legal profession to the general public. That support had its greatest strength in the United States Supreme Court. Policy-oriented court reformers who sought to limit the Court's power of judicial review for the purpose of altering its policy outputs found this mystique a major obstacle. Many officials and politicians and voters adhered to the cult of the robe. On the other hand, the veneration of the U.S. Supreme Court enhanced support for any legislation which the justices of the Supreme Court sought, particularly if they drafted the bill as in the case of the Judiciary Act of 1925.

The Recall Movement

At the state level, the court mystique was not as viable an obstacle as at the federal level. Several factors
perhaps account for this distinction. First, during the Jacksonian era, a number of states had instituted the popular election of judges. By the twentieth century, the electoral tradition was firmly entrenched in most of these states. The dialogue as to whether appointment or election of judges resulted in better judges began then and continues to the present day. The contemporary dialogue has added consideration of compromise innovations such as the Missouri Plan, but the issue remains basically the same: What selection method provides the courts with the most qualified, capable judges?

Both populists and progressives supported the popular election of federal judges. The Progressive party platform of 1924 specifically called for a constitutional amendment which included the election of federal judges for a term not greater than ten years. While supporters expounded upon democratic theory, opponents depicted the proposal as subversive to impartial justice. They cautioned that it would subject the judges to political pressures, forcing them to consider political vicissitudes and to rule according to political expediency rather than the law. Such proposals found no more support in the electorate in 1924 than they had in the United States Congress, where they had died in committees.
At the state level, progressive reformers were much more successful, particularly in the midwest and western states. One progressive innovation which disciples of the court mystique found particularly threatening was recall. In the first decade of the twentieth century, under the leadership of such progressive governors as Robert LaFollette of Wisconsin, several states adopted initiative and referendum procedures. Some states included provisions for recalling elected officials. To many laissez faire conservatives, the courts stood guard protecting their property rights against legislative encroachments. Recall of judges threatened to subject the judiciary to the same "demogoguey" and pressures from "socialist" and "communist" agitators as the political branches.

Former President Theodore Roosevelt, as an editor of Outlook, supported recall of judges and of judicial decisions at the state level. That support was evidence of sheer demogoguey to Roosevelt's principal opponent for the Republican nomination in 1912, incumbent President William Howard Taft. As a major proselytizer of the judicial mystique, Taft considered recall a threat to the Constitution and individual freedom, as well as to the administration of impartial justice. As President, he vetoed a bill which would have granted statehood to Arizona because its proposed constitution contained a provision for recalling judges.
Thereafter, Arizona submitted a revised constitution to comply with his objections. He signed the enabling act, and Arizona became a state in February 1912 (van Patten, 1956, pp. 33-35). However, the essential independence of states from the federal government in such matters was well illustrated when, to the President's dismay, the voters in the new state adopted a constitutional amendment reinstating the recall provision in their first general election--November 5, 1912.

Recall of judicial decisions, which Theodore Roosevelt had championed as editor of Outlook and as a candidate, failed to gain comparable support. Only the State of Colorado amended its constitution allowing the voters to overturn a decision of their state supreme court which had declared a state statute unconstitutional.

Woodrow Wilson, the Democratic candidate, defeated both Roosevelt and Taft in 1912. Thereafter, the public dialogue on recall subsided and further discussion occurred mainly within the legal profession. Colorado's recall of judicial decisions law was ruled unconstitutional by its supreme court and died quietly.

Aside from the adoption of recall of judges in several states, the major impact of the recall movement was to stimulate the legal profession's interest in strengthening the court systems through functional reforms. The American
Bar Association established its Committee for Uniform Procedure in 1913. The American Judicature Society was founded on July 15, 1913, for the stated purpose of promoting effective administration of justice.

**Progressives: Court Curbers Versus Establishment Functional Reformers**

The group which led the recall movement and the attacks upon judicial review were associated with a larger political movement within the Republican party known as Progressivism. Prior to World War I, progressive court critics concentrated their efforts at the state level upon the recall movement. At the national level, progressives advocated legislation and constitutional amendments designed to alter adverse court decisions. The Webb Kenyon Act of 1913 permitted states to forbid the importation of liquor, contrary to the *Leisy v Hardin* (1890) decision. Through the passage of the Elkins Act in 1903, the Hepburn Act in 1906, and the Mann-Elkins Act in 1910, they restored much authority of the Interstate Commerce Commission which decisions of the 1890's had removed. The Clayton Act in 1914 was designed to negate effects of the Danbury Hatters case (*Loewe v Lawlor*, 1908). The act exempted "legitimate" activities of labor unions from anti-trust laws and forbade use of injunctions against peaceful strikers and primary boycotts "unless necessary to prevent irreparable injury to property
or to a property right." Moreover, progressives succeeded in passing legislation requiring that special three-judge tribunals hear suits to enjoin state officials from enforcing state laws (Murphy, 1962, p. 47).

Four amendments were added to the United States Constitution, all of which to a degree were associated with the progressive movement. However, only the Sixteenth Amendment specifically reversed a Court decision, *Pollack v Farmers' Loan and Trust Co.* (1895).

The progressive-led recall movement and attacks upon judicial review stimulated their opponents' interest in defending the courts. Lawyers led the counter-attack against the recall movement and sought to redirect the public's attention to the functional problems of the Court. Functional reformers charged that recall and the abolition of judicial review would undermine the independence and impartiality of judges. They emphasized that the role of the courts was to uphold the law and the supreme law was the U.S. Constitution.

William Howard Taft and other function-oriented reformers noted that the present judicial system often resulted in justice to the litigant with the longest purse, and injustice to less affluent litigants. The problem was not insensitivity or biases of the judges, but with the rules of procedures and the laws governing jurisdiction. The procedural rules governing the U.S. district courts were
those of the states in which they were located with such excep­
tions as deemed necessary (Uniformity Act of 1872, section 914 of the Revised Statutes). The result was a complex variety of rules, differing from state to state. Federal procedure constituted a procedural trap of technicalities for counsel and client (Senate Report 892, January 2, 1917).

Numerous appeals also wrought an injustice upon litigants whose opponents could delay the final disposition of a case through numerous appeals. Such needless appeals, in turn, clogged the courts’ dockets and caused serious problems of arrears and delayed review of cases for months, even years. The functional reformers argued that reforms should be designed to correct these problems and should introduce sound principles of administration and management which the decentralized federal court system lacked.

The leading advocate of reforms centralizing and nationalizing the administration of the federal courts was William Howard Taft. After losing the presidential election of 1912, Taft served as president of the American Bar Association in 1913. Under his leadership the ABA created the judicial section, composed of appellate judges of the various state and federal courts. The major function of the judicial section was to provide a forum for judges to discuss the various problems of their courts and to suggest remedial reforms. Under Taft's leadership, the ABA also
established the Committee on Uniform Procedure. The committee drafted a bill which delegated to the U.S. Supreme Court the power and responsibility to formulate the rules of procedure to govern federal practice. From 1913 to 1933 the committee lobbied Congress on behalf of the bill, but never gained the approval of the U.S. Senate.

In the years following 1912, William Howard Taft not only became the leading advocate of judicial reform but also the most vituperative critic of the progressive court curbers. In 1912, progressives had split from the Republican Party to support the third party candidacy of Theodore Roosevelt. Incumbent President Taft lost the election. In 1913, progressives formed a coalition with the Democrats in Congress and succeeded in abolishing the commerce court, a specialized federal court that had been created during the Taft administration. The re-adoption of judicial recall in Arizona after admission to the Union further aggravated Taft's fears of progressive "radicalism."

Many progressives had come to regard Taft with suspicion, dislike, or contempt during the Taft presidency and the years that followed. The appointment of William Howard Taft as chief justice of the U.S. Supreme Court revived the court curbing proposals of many of his progressive political adversaries. The two child labor decisions (Hammer v Dagenhart, 1918, and Bailey v Drexel Furniture, 1922) and
Adkins v Children's Hospital (1923) revived progressive fears that under Taft's leadership the Supreme Court would return to an extreme laissez faire, anti-labor position. President Warren Harding's subsequent appointments of conservative lawyers George Sutherland in 1922 and Pierce Butler in 1922 seemed to confirm their fears.

The aging and ailing progressive Senator Robert LaFollette of Wisconsin launched the new attack upon the U.S. Supreme Court and the power of judicial review from the platform of the American Federation of Labor convention on July 14, 1922. He called for the adoption of a constitutional amendment which would bestow upon the Congress the power to override a U.S. Supreme Court decision by two-thirds vote of each House. The convention overwhelmingly adopted a resolution endorsing his proposal.

LaFollette's proposal was included in Wisconsin Congressman James Frear's House Joint Resolution 436 (February 6, 1923). Frear proposed "to amend the Constitution to empower Congress to determine the number of justices required to declare unconstitutional, set aside, or otherwise limit the effects of any federal or state law (Congressional Digest, June, 1923, p. 271). The resolution revived the recall issue by delegating to Congress the power to provide
by law for recall without impeachment proceedings against any judge. 38

Congressman Carl Hayden, in 1921, and Congressman John J. McSwain, in 1922, had introduced bills requiring a vote of at least seven justices to declare a state or federal statute unconstitutional (Congressional Digest, June 1923, p. 271). 39 In the United States Senate, Senator William Borah introduced Senate Bill 4483 which likewise required the concurrence of at least seven members of the Court before ruling a statute unconstitutional (Congressional Digest, June 1923, p. 271). Borah's proposal received considerable attention in the popular press. He was the only member of the Judiciary Committee of either house to propose such legislation. The large amount of publicity that he and LaFollette received, particularly in professional journals and reviews, may in part be attributed to the third party movement.

38. A lengthy extension of Congressman Frear's position on judicial review is found in the Congressional Record (January 27, 1923, pp. 2607-2615).

39. Upon discovering the Hayden resolution, this researcher wrote Senator Hayden in 1971. Hayden (August 20, 1971) responded that he had never served on the Judiciary Committee and could not comment upon the legislation. It would be pure speculation as to the reasons for the Hayden resolution of 1921, but at age 93, having just retired from an illustrious career, he recalled no knowledge of the judicial legislation of the 1920's which had been proposed or enacted—even his own resolution.
During 1923 and early 1924, The Nation contained numerous editorials calling for a third party headed by Robert LaFollette or, if his health did not permit, Senator William Borah or Senator George Norris. The Nation noted the impressive showings of third party and progressive candidates in the 1922 and 1923 elections in the "northwestern states." Its editorials focused upon the need for progressive leadership and reform and viewed the Democratic Party as dead and the Republican Party as dying. Conditions appeared conducive for a third party to gain momentum.40

The anti-court rhetoric of the progressives provoked equally vicious responses from both Democratic and Republican court defenders. In his American Federation of Labor speech in 1922, LaFollette had set the tone by naming and attacking several federal district judges who had handed down anti-labor decisions as petty tyrants and arrogant despots. He had asserted the old accusations that sovereignty had been wrested from the people and usurped by the courts. "The actual ruler of the American people is the Supreme Court of the United States. The law is what they say it is, 40. The following articles from the April 2, 1924 Nation are typical of the editorial line followed by the periodical: Benjamin Stolberg, "Third Party Chances" (p. 364); William Hard, "Third Party Facts" (p. 363); "LaFollette, Dictator" (p. 360); Henrik Shipstead, "Old Parties, or New?" (p. 369); and "The Call for Borah and LaFollette" (p. 194).
not what the people through Congress enacts (Jackson, 1941, p. 50)."

The organized bar associations led the counter-attack upon the court curbers. The cult of the robe rhetoric permeated their defense of the American courts and judges. To a larger extent than might have been expected, Chief Justice Taft allowed others to occupy the public spotlight in the counterattack while coaching from the sidelines, especially through private correspondence. In his numerous letters to family, friends, and professional associates, his contempt for progressive Republicans is amply documented, as is his strategy to attain the passage of the judges' bill. He was a political realist and knew he needed the support or at least neutrality of progressives such as Borah and Norris, who served on the Senate Judiciary Committee, if the judges' bill was to be enacted.

The Borah bill had little chance of getting out of committee or of passage and would certainly have been vetoed if it was passed by both houses of Congress. In contrast, Taft felt that his legislation had an excellent chance of becoming law. Another factor, and probably a very important one in his low profile of 1924, was his health. In February 1924 he had suffered a heart attack, which subsequently limited his public activities.
The chief justice was pleased and felt secure with the nomination of President Calvin Coolidge to carry the Republican banner in 1924. Coolidge had been to that date very responsive to the chief justice's recommendations concerning appointments to the lower federal courts. Equally encouraging to Taft, the Democratic party nominated John W. Davis. Davis, a New York City attorney, had served as president of the conservative American Bar Association of which Taft was also a past president and active member.

The presidential campaign of 1924 has been described as dull. Both major candidates focused their attack upon the Progressive party's plank which endorsed the LaFollette amendment and called for the election of federal judges for ten-year terms. They visualized the contest against LaFollette as "Americanism versus radicalism, communism, and socialism." Both candidates denounced "those who would loosen and weaken the fabric of our government by taking away some of the prerogatives of the Supreme Court." Davis stressed the protection of fundamental rights and asserted, "There must be in this country some power to which the American citizen can appeal when these rights of his are invaded ("Our Supreme Court—Tyrant or Protector?" 1924, p. 13). President Coolidge in one of his strongest statements of the campaign warned:

If the authority now vested in the Supreme Court were transferred to Congress, any majority, no
matter what their motive, could vote away any of these most precious rights. . . . Every minority body that may be weak in resources or unpopular in public estimation, also nearly every race and religious belief would find themselves practically without protection if the authority of the Supreme Court should be broken down and its power lodged with Congress ("Our Supreme Court--Tyrant or Protector?" 1924).

A few scholars pointed out the excessiveness of the charges on both sides, but these critical treatises were rare and were addressed to smaller academic audiences.

LaFollette carried only his home state of Wisconsin. Coolidge was re-elected, and Davis resumed his Wall Street law practice. Criticism of the Supreme Court diminished until the New Deal legislation came under attack in the courts in the 1930's. John W. Davis, as a counsel of the Liberty League, would have an important role in that group's attack upon New Deal legislation in the courts.

The judges' bill awaited Senate and House action during the 1924 presidential campaign. After the election, the power of the progressives in Congress languished; the voters had overwhelmingly rejected them and their court curbing proposals. Coolidge and Davis had concentrated their campaign upon attacking the progressive court curbing reforms. Hence, the results of the 1924 election served also as an overwhelming vote of confidence in the U.S. Supreme Court. The political position of the Supreme Court justices and their congressional supporters, hence, was
strengthened by the election. As a result of the election, the probability of the Congress passing the judges' bill improved considerably.

**Summary and Analysis**

Transitions of political institutions occur after social and economic changes of great magnitude. The manner of change may be abrupt as in the case of revolutionary overthrow of an existing government; or change may be more gradual, incremental in nature. If the institutions have lost their legitimacy and public confidence, the change is more likely to be revolutionary and radical. However, if the institution in question has a power base within the culture of established and widely acknowledged legitimacy, then radical changes are unlikely, particularly if they are perceived to undermine the institution's legitimate functions.

The United States Supreme Court began the transition period with a strong power base. Its legitimacy had authority from the U.S. Constitution, congressional statutes, a hundred-year tradition of decision making, and a mystique—"the cult of the robe"—which many Americans, including judges, accepted unquestioningly.

Federal judges come from the legal profession. Prior to appointment, they have usually been involved in politics as well as having established a reputation as an attorney. Their political positions are as much a factor in
their appointment to the bench as their professional reputations. The training of the legal profession during the last half of the nineteenth century had been greatly influenced by Thomas Cooley and Christopher Tiedeman. Their emphasis had been upon constitutional limitations of government.

The laissez faire doctrines which the courts developed reflected a prevalent, popular view within the legal and business communities. These communities must be regarded as constituting a major political elite within the environment. The group most disadvantaged by the laissez faire doctrines was labor, which was in the organizing stage. Organized labor represented a threat to the political elite. Hence, when progressive court curbers launched their various reform proposals, they encountered strong opposition from the business and legal elites. Progressives stimulated these groups' interest in functional court reform. The courts' ability to function efficiently assumed greater importance.

With the passage of numerous statutes and the litigation resulting from their enforcement, plus the growth of private litigation reflecting the increased business activity, the courts' dockets became overloaded. Cases in arrears began to accumulate. To continue to "defend the Constitution" and individual rights, the courts, especially the U.S. Supreme Court, had to be able to hear and decide the
important cases within a reasonable time. Congress enacted legislation simplifying procedure, codifying and clarifying the laws, coordinating and managing the dockets and personnel of the federal courts through the use of a judicial council headed by the chief justice. The number of federal district judges was increased.

The right to review by the United States Supreme Court had never been extended to all litigants. It had over the years been expanded to include almost all federal questions. The Circuit Court of Appeals Act of 1891 had introduced discretionary jurisdiction as a device to limit jurisdiction and yet permit review of cases on important cases by writ of certiorari. During the next three decades, the use of certiorari became an acceptable means of docket management. Confronted in the 1920's with numerous federal cases arising from new legislation, the war, and increased business activity, the Court's docket again needed relief from obligatory jurisdiction.

In the following chapter, the major actors involved in the decision-making process of court reform will be examined. The focus will be upon these actors' role in the passage of the judges' bill, which was designed to provide relief to the U.S. Supreme Court.
Judicial reformers have been conceptually divided into those overtly motivated by policy positions and those motivated by functional concerns. The focus of policy-oriented reformers has been upon controversial court decisions and ideological considerations. In contrast, functional reformers have focused upon the system's capacity to process demands and adapt to the environmental stresses. Implicit in the functional reformer's goals of maintenance and efficiency are often conservative policy orientations.

Like policy-oriented reformers, functional reformers are political actors with an interest in the system and its policy outputs. They cannot divorce themselves from the political environment and their self-interests any more than the policy-oriented reformers. Nor are the two groups mutually exclusive. Policy-oriented reformers may also, as individuals, be functional reformers, particularly those persons whose policy reforms are directed at the policy rather than at the institution. Those who would "curb the powers" of the courts are not as likely to be functional reformers, though as legislators they may vote for such legislation.
Five distinct groups are involved in the political processes surrounding court reform: (1) the judiciary, (2) the legal profession, (3) the litigants, (4) the executive branch of government, and (5) the Congress. As a group, litigants include not only the actual parties involved directly in litigation but all interested third parties.

The Judiciary

As evidenced in the discussion in previous chapters, court reform proposals of a functional nature often originate within the judiciary. Throughout the Supreme Court's history, judges have assumed the role of judicial reformers. The first justices appointed to the U.S. Supreme Court were responsible for the recommendations of Attorney General Randolph in his report of 1790. Chief Justice Oliver Ellsworth (1796-1800) has been credited with drafting the Judiciary Acts of 1798 and 1801. Sensitive to the constitutional responsibility of Congress, justices have discreetly channeled their legislative proposals through friendly congressmen, senators, and attorneys general.

As Congress came to expect a legislative program from the President, the Judiciary Committees of the House

41. Frankfurter and Landis (1928) have numerous references to judges drafting reform legislation throughout the Court's history. Murphy (1962, pp. 135-137) discusses bill drafting activities of

42. Discussed in Chapter 3.
and the Senate came to rely on the recommendations of the judiciary for legislative proposals affecting their courts. The Act of 1922 creating the Council of Senior Circuit Judges made explicit that expectation. The act specified that the chief justice would communicate the council's legislative recommendations to the Congress.

The Judiciary Act of 1925 has been called "the judges' bill" because the Court acknowledged drafting the bill. Sources conflict regarding the origin of the Committee of Judges. Van Devanter testified that the committee was appointed to draft a bill at the suggestions of several members of the House and Senate Committees on the Judiciary (U.S. Senate, Hearing, February 2, 1924, p. 25). Chief Justice Taft implied in a letter to Senator Albert Cummins on November 25, 1921, that the bill had originated within the Supreme Court (Mason, 1964, p. 109).

Before the House Committee on the Judiciary in 1924, Taft stated that he appointed the committee at the suggestion of Senator Albert Cummins (Mason, 1964, p. 109). At hearings of the House Committee on the Judiciary, Frankfurter and Landis (1928, p. 260) report, members of the Court brought the matter to the attention of the committee, which then suggested that the Court prepare a bill. Senator Cummins stated in the committee report that the suggestion came from the American Bar Association (U.S. Senate, Rept.
362, April 7, 1924, p. 1). Later he stated that he introduced the bill at the suggestion of some members of the Supreme Court (Congressional Record, 1925, p. 2754). Walter Murphy (1962, p. 138) suggests that "either Taft maneuvered Cummins into tendering the invitation; or Taft interpreted some general comments which Cummins had made as a specific invitation and so informed his colleagues." Murphy believes that "with or without an invitation, Taft would have pressed for such legislative process."

However, sources also conflict as to when the Committee of Judges was organized—before or after Taft's appointment. Taft testified before the House hearings on March 30, 1922 (p. 1) that the committee already existed when he arrived on the Court (Frankfurter and Landis, 1928, p. 260). According to Taft's testimony, the committee originally consisted of Justice William Day, as chairman, Justice James McReynolds, and perhaps the chief justice as an ex-officio member (House of Representatives, Hearings, March 30, 1922, p. 1; Frankfurter and Landis, 1928, p. 260). Van Devanter reported, however, that Taft had appointed the committee shortly after his appointment to the Court. Van Devanter noted that the late Chief Justice Edward White was totally opposed to such legislative activities of the justices (Mason, 1964, pp. 108-109). Frankfurter and Taft both agree that the original committee included Day and
McReynolds and that Taft appointed Van Devanter when he assumed the chief justiceship in the fall of 1921.

Because of his intense lobbying for the judges bill, Taft is usually given credit for its inception. In all probability, however, the legislative initiative began before Taft became the chief justice. His testimony in 1922 before the House Judiciary Committee indicates that Day and McReynolds were already involved with the project prior to Taft's assuming office. Chief Justice Edward White's aversion to such activities was well known because of the earlier legislative activities of Van Devanter, Day, and McReynolds. Justice Willis Van Devanter had drafted the Judiciary Act of 1915. Justice James McReynolds had drafted, and Justices William Day and Van Devanter had revised, the Judiciary Act of 1916 (Murphy, 1962, p. 230; Mason, 1964, pp. 108-109). Both these acts provided relief to the Supreme Court docket by removing classes of litigation from the obligatory jurisdiction and placing it in the discretionary jurisdiction of the Court. That solution to the problem of input overload was the one embodied in the "judges' bill."

If the idea of the judges' bill did originate with the justices, then in order to avoid any appearances of impropriety or "usurping the role of Congress," the justices needed to receive a "proper" request from a congressional
source. Moreover, such a request would have a strategic function as well. The task of drafting a technically detailed bill which codified and clarified the federal appellate jurisdiction was a major undertaking for already overworked justices. If such a request came from Congress, and the justices responded in good faith and produced a bill without policy orientations or controversial matters, then the Congress had a responsibility to act upon it.

In 1921, the American Bar Association's Committee on Jurisprudence and Law Reform recommended to the association that the size of the Supreme Court be increased to eleven. The committee believed that the addition of two justices would enable the Court to handle the increase in its caseload (Report of the Committee on Jurisprudence and Law Reform, 1921). The justices opposed this recommendation and advocated further limiting of its mandatory jurisdiction (Murphy, 1962, p. 139).

Given the confusion as to where the proposal for the Court to draft a bill originated—the Court, the Congress, or the ABA—one can only speculate as to what actually occurred. Consider the following scenario: The American Bar Association has recommended to Congress that the number of associate justices on the U.S. Supreme Court be increased to eleven to manage the larger dockets. The justices communicate their opinion that expansion of the Court personnel
would be counter-productive. One or more justices discuss the Court's problems with one or more prominent leaders of the ABA with whom they are close friends, such as William Howard Taft, Thomas Shelton, Senator Frank B. Kellogg, Senator Albert Cummins, or Congressman Joseph Walsh. The suggestion is made that the Congress should request the Court to draft remedial legislation. The ABA connection, whomever they might be, assumes the responsibility for the association making a recommendation to certain members of the two Judiciary Committees who would be most receptive to the idea.

Considering William Howard Taft's long record as an advocate of functional judicial reform, one might posit that he engineered the request. His history as a reformer had begun while on the Sixth Circuit Court of Appeals. As President, he had pushed efforts to codify the laws relating to the judiciary, a project begun prior to his term in office and completed during it. He had also championed the establishment of specialized courts such as the Court of Customs Appeals and the short-lived Commerce Court. Following his presidency of the United States (1908-1913), he served as President of the American Bar Association (1913-1914). He utilized that organization, law schools, and state bar associations as a platform from which to advocate his various reform proposals.
This researcher believes that the idea of the judges' bill originated within the Court, and that the most likely source was either Willis Van Devanter, James McReynolds, or William Day. In 1921, at age sixty-two, Van Devanter was still in his prime. According to Chief Justice Taft, Van Devanter was the most brilliant man on the Court. Taft's assessment was biased, reflecting his own basic conservative agreement with Van Devanter on matters of policy. Whether Van Devanter was the most brilliant member of the Court, he was talented. He had the ability to master details, to organize, and to define issues and points of law in summarizing cases. David Danielski (1961, pp. 497-508) has described Van Devanter as the "task leader" in the conference during Taft's chief justiceship.\footnote{Also see, Murphy (1962, pp. 41-42).}

Van Devanter was regarded as the foremost expert on the Court regarding questions of jurisdiction. During the hearings before the House and Senate Committees on the Judiciary, McReynolds, Sutherland, and Taft let Van Devanter assume the burden of explaining the bill, fielding the questions, and responding to most of the comments. He skillfully guided the discussion in a well organized, detailed manner, and did not allow the discussion to be diverted to non-relevant issues.
Next to Van Devanter, the most probable candidate for originating the idea of the judges' bill would be Justice James McReynolds. He had drafted the Act of September 6, 1916, expanding certiorari and removing a large number of cases from the obligatory jurisdiction of the Court. At the time he had drafted the act, he was the most recent appointee, having just served as Woodrow Wilson's attorney general. Whether he had already begun drafting the legislation in the Department of Justice or did so after his appointment is unknown. As an associate justice, he became aware of the large number of unimportant cases which the Court had to review dealing with recent regulatory laws such as the Safety Appliances Act. Many of these cases had involved questions of fact, not law, and had already had one appellate review. The Act of September 6, 1916 resulted in a great reduction in the workload of the U.S. Supreme Court.

In 1920, litigation increased as a result of the war, prohibition, and the growth of business activity. The Court needed additional restrictions upon its appellate jurisdiction. McReynolds could have logically been the first to initiate the project, enlisting Day's and Van Devanter's assistance.

Justice William Day's role on the Committee of Justices is obscure. He and Van Devanter had assisted McReynolds on the Act of 1916. However, Day's health had
been poor during his entire tenure in office. He had written fewer opinions for the Court than his fellow justices and his health has been given as the reason. During the 1921-1922 term, he was ill, and he retired in 1922. It is doubtful that he assumed a very active or major role in the drafting of the bill. However, like Van Devanter, he had a long professional friendship with Taft. Both Day and Taft were products of the Ohio Republican party and had established their legal and judicial careers in the state simultaneously. Taft had recommended Day's appointment to the Court in 1903 to Theodore Roosevelt. Justice Day's major contribution may have been the initial enlisting of Taft's support for the bill.

The appointment of William Howard Taft assured support for Van Devanter, Day, and McReynolds in their legislative endeavors from the chief justice. Even prior to his installation, Taft assumed the role of a vigorous lobbyist. He cultivated the support of Attorney General Daughterty for a judicial council and the eighteen district judges-at-large to be assigned by the chief justice. His strategy included suggesting to Daughterty that he appoint a commission to study the problems of the lower federal courts and recommend legislation. Taft then influenced the selection of that commission.
Taft brought to the reform effort a great amount of political influence and numerous connections which he had accumulated throughout his long career. Likewise, he brought his political liabilities, which included political estrangement from "progressive Republicans," some of whom served on the Committee of the Judiciary of the U.S. Senate. The problems which Taft feared from those individuals, however, did not materialize.

The role of the other justices in drafting the judges' bill is vague. According to the hearings of the House and Senate Committees on the Judiciary, several drafts of the judges' bill were circulated to the other members of the Court for comments. The justices discussed them in conferences. The committee then revised the bill in response to the criticisms of the other justices. Justice Brandeis expressed doubts concerning the project, and it is he that Taft refers to in the House hearings. He told the chief justice that he could tell the committee that the "bill had the backing of the Court (House of Representatives, Hearing on H. 8206, December 18, 1924; Murphy, 1962, pp. 141, 144).

Justice John H. Clarke resigned from the Court in September 1922. On numerous occasions thereafter, he spoke and wrote on the bill's behalf. He noted that the first impression as a new justice that he had was a great number of
cases on the docket "of entirely negligible importance." The result had been a great "waste of the time of Supreme Court Judges and much unnecessary fruitless labor (Clarke, 1922, pp. 263-267)." Justice Clarke's resignation, while still in good health, probably gave additional weight to his own statements. Of the justices actively supporting the bill, he was the only one of the liberal bloc.

Former Justice Charles Evans Hughes had doubts about the constitutionality of the judges' bill and never endorsed it, but he did not actively oppose it either (Mason, 1964, p. 111). Ironically, the Judiciary Act of 1925 would enable him as chief justice in 1937 to refute Franklin Roosevelt's charges that the Court was behind in its docket. Hughes compared the docket data to prove that it was in much better condition in the 1930's than it had been in the 1920's. The "nine old men" were doing the job. He thus refuted Roosevelt's major contention as to the need for his court packing proposal (Mason, 1964, p. 111).

The Bar: Organized and Unorganized

In the 1920's, less than half of the nation's attorneys belonged to a bar association. The members of the American Bar Association (ABA) were successful, politically oriented lawyers, many of whom had corporate practices. The legal profession was in a transition stage. Whereas in the nineteenth century, most attorneys had studied in private
law offices, at the turn of the century law schools were becoming the major means of attaining legal education. The bar associations assumed leadership in advocating higher standards for legal training and state bar examinations to qualify individuals to practice law. They advocated that the state bar associations should control the admission to the bar, and association membership be made a requirement to practice. Many attorneys felt threatened by such proposals.

The ABA spoke for a small elite of the profession. However, the political resources of that elite far exceeded those of the profession as a whole for several reasons. The ABA was a well organized, basically homogeneous group. As a political action group, it was comprised of Democrats and Republicans who were active in their state party organizations. Within the active membership were a former U.S. President, many federal judges, many U.S. senators and congressmen, numerous persons holding positions in the executive branch of the national government, and numerous state office holders. The association, via its membership, had the expertise and the channels of access available to influence government policy. As a group, it also enjoyed great prestige. It spoke for the profession, although it was not representative of the profession.

Since its founding, the ABA had a major interest in judicial reform. While its support did not insure passage
of a bill, it was a valuable endorsement at the national level. The association served as a vehicle through which proposals could be initiated. According to congressional committee reports, the ABA initiated action on both the Act of December 23, 1914 and the Judiciary Act of 1925. Although sources conflict regarding the judges' bill, Senator Cummins did indicate that the association served as an intermediary between the justices and congressmen. The channels of communication, however, must have been limited to a few individuals. During the House hearings on the judges' bill in 1922, the bill's sponsor, Congressman Joseph Walsh, asked Solicitor General James Beck if the ABA had considered the reforms. Beck responded that he did not know. He then expressed doubts that the bar would support the bill, because lawyers were "attached to theories, not conditions (U.S. House of Representatives, Hearings, April 27, 1922, p. 17)."

Contrary to the solicitor general's prediction, the ABA did formally endorse the judges' bill. It and other bar associations provided an audience and a platform for proponents of the judges' bill to discuss the problems which the bill would remedy and to educate the public, or at least the profession, as to its content. More important, the association provided a source of manpower to lobby on the bill's behalf. The justices, particularly Taft, would
recruit friends in the association to contact senators and congressmen whom they knew well and urge them to support the bill. Congressmen in the association were urged to pressure the leadership to move the bill forward to a vote.

Unlike the uniform procedure bill, there is no indication of a well organized massive effort to flood congressional mail with letters on the bill's behalf. Such an effort was not necessary. The opposition, which developed against the former bill from attorneys, did not develop against the judges' bill. The major obstacle to overcome was indifference.

In recruiting support for the judges' bill, Chief Justice Taft took advantage of his close association with the organized bar associations. In a speech to the Chicago Bar Association in 1922, Taft (1922b) pp. 35-36) discussed the problems confronting the Court. He diagnosed the two major ones as: (1) the statutes were so complex and scattered as to constitute a "trap to catch the unwary," and (2) the Court was forced to take more trivial cases than it could possibly decide intelligently. He then stressed the need for codification and informed the group that some of the justices were drafting a bill to remedy the situation. 44

Taft delivered essentially the same speech to numerous bar association meetings. The problem and solution

44. Also see Murphy (1962, p. 139).
remained the same. On February 18, 1922, the day after the bill had been introduced in both houses of Congress, Taft described it and the rationale for it in great detail to the New York County Lawyer's Association (Taft Backs Bill to Speed Trials, 1922, p. 1). In August 1922, he addressed the national convention of the ABA and gave a similar speech (Report of the Committee on Jurisprudence and Law Reform, 1922, p. 336; Taft, 1922b, p. 601).

During that convention, Taft recommended that the Committee on Jurisprudence and Law Reform work for the passage of the judges' bill. His brother, Henry W. Taft, served on that committee (Report of the Committee on Jurisprudence and Law Reform, 1922, pp. 336, 362). The previous year the committee had reported to the association that the Supreme Court's overburdened docket necessitated either a limitation upon the right of review or an increase in the number of justices to eleven (Report of the Committee on Jurisprudence and Law Reform, 1921, pp. 384, 391). In 1923, the committee again endorsed the bill (Report of the Committee on Jurisprudence and Law Reform, 1923, pp. 325, 334). In his presidential address of 1924, ABA President R. E. L. Saner (1924b, pp. 142-146) advocated the bill's passage.

As already illustrated by the uniform procedure bill, ABA support did not guarantee passage of a bill. Nor did the association's neutrality prevent the passage of the
Judicial Code of 1911. The association's endorsement and support, however, was a definite asset because many of the members of Congress were also ABA members and the association had considerable prestige.

The unorganized bar must also be considered as an important group, though a relatively passive one in relation to the judges' bill. Senator Walsh had successfully blocked the uniform procedure bill. His strongest argument was on behalf of this group, but he received no support from the bar for his initial opposition to the judges' bill, and noted the fact in a speech explaining the reasons for his reservations and for his decision to support the bill (Congressional Record, 1925, p. 2928).

Proponents of the bill recognized the importance of the unorganized bar and emphasized that the bill simplified the lawyer's task. Current laws regarding federal appellate jurisdiction were scattered throughout the statutes. The laws conflicted, were ambiguous, and very confusing. Even prestigious lawyers who practiced frequently before the U.S. Supreme Court had embarrassingly lost cases because of errors regarding jurisdiction. The proposed law would remove the jurisdictional "trap" by codifying all laws regarding federal appellate jurisdiction into one act. It would allow the U.S. Supreme Court to proceed to the merits of cases even if they had been mistakenly appealed via a writ of
error when they should have been appealed via certiorari. Hence the act would eliminate the common precautionary prac­tice of attorneys filing both ways. Regardless of the na­ture of their practice, lawyers would substantially benefit from the enactment of the bill.

During the Senate debate, Senator John Harreld raised questions focusing upon the complaints that he had received from attorneys in Oklahoma. In addition to the problems already discussed, Harreld focused upon a miscon­ception concerning how the Court handled petitions for cer­tiorari. As a result, the legislative process through which the bill passed served to educate members of Congress and the public regarding the Court's method of handling certio­rari petitions. Once that process was understood and miscon­ceptions corrected, reservations regarding the expansion of the Court's certiorari jurisdiction, such as expressed by Senators Harreld and Walsh, disappeared.

**Litigants**

Resolution of conflicts between litigants is the Court's primary function. Most litigants must be considered part of an isolated type of group. Their role is an ad hoc one created by a particular legal dispute and is ended with the resolution of the conflict. Anyone may assume the role, either by choice or because another has taken action against him. Hence, the litigant group as a whole is in a sense the
general public, distinguished from it only by a particular, temporary role in litigation. The term "isolated litigant" described this ad hoc, transient group.

However, some litigants are involved in litigation on a regular basis. Such litigants often have institutionalized structures for the purpose of defending or promoting their interests. These structures are composed of lawyers, and hence link the group to the legal profession.

Some litigant groups, unable to obtain their policy goals through the political branches or who perceive the actions of the political branches to be contrary to their interest, seek to achieve their goals via the Court's policy-making function. Examples of institutionalized litigation groups include corporations and labor unions with legal staffs, the NAACP's Legal Defense Fund, and the American Civil Liberties Union.

Isolated litigation groups have passive roles in the arena of judicial reform. Many are unaware of reform proposals, particularly functional ones which usually have limited coverage in the mass media. Those isolated litigants who do hear of a proposal often do not perceive any relationship between the proposal and their interests. Despite their general apathy, they assume a role almost synonymous with the "public" in the legislative process. As a "passive public," they are "subject" of, not "participants" in the
reform debate. Their interests are considered by others, but they do not supply any direct input for the deliberation.

In contrast, institutional litigants assume a major active role in regard to policy-oriented reforms. Such reforms originate within litigation groups which perceive the status quo as giving an advantage to their opponents. To overcome their own disadvantage, they demand policy-oriented court reforms which they perceive will benefit their position. They provide a forum for sympathetic policy makers to introduce, advocate, and publicize these proposals. For example, Robert LaFollette announced his court curbing proposals before the national convention of the American Federation of Labor in 1922.

Because litigation involves a conflict between two parties—a "zero sum game"—inherent in the reform proposal of one group is the opposition of its legal adversary. For example, business groups, labor's adversary, fought LaFollette's proposals and similar ones. Because the American legislative process has institutionalized methods for an intense minority within the Congress to bloc legislation, policy-oriented reforms have a low probability of being adopted.

Institutional litigants have a vested interest in how the Court functions. If a stress overload causes
unnecessary delays, that condition adversely affects their interest, unless they derive some advantage from the delay. Complex, confusing laws regarding jurisdiction and procedure increase the probability of technical errors and losing a case by default. Delays and errors increase the cost of litigation.

Unlike isolated litigants, institutional litigants have more access to information regarding functional reform proposals via their linkages to the legal profession and the political system. Court curbing proposals appear to stimulate status quo policy-oriented groups to support functional reforms. They have a vested interest in strengthening the judicial system. Disadvantaged litigants also have an interest in any reform which will lessen the cost of litigation and reduce the probability of procedural errors.

Whether litigants remain passive or assume an active role lobbying for reform legislation, decision makers take into consideration the effect of the changes upon litigants. Although this researcher did not find any evidence of institutional litigation groups other than lawyers lobbying for or against the judges' bill, the proponents of the bill stressed its benefits to all litigants. During all of the hearings and the Senate debates, proponents pointed out that the bill contained a provision removing the danger of the litigant being deprived of his right to a hearing because
his attorney improperly filed a writ of error instead of a petition for certiorari. Proponents noted that to avoid such errors, many attorneys filed both ways. This common practice increased the cost of litigation and the workload of the Court.

Because petitions for writs of certiorari were ruled upon promptly, Senator Cummins and the justices pointed out that final disposition of many cases would be hastened. Even in cases in which the Court granted the petition, the elimination of unnecessary writs and unimportant cases would enable the Court to hear and decide the remaining cases more promptly.

A major litigant concern that was discussed in the hearings and debate was based on a faulty impression of how the Court processed certiorari petitions. Senators, attorneys, and litigants had the notion that individual judges reviewed the petitions from their circuits and had a quota which they could not exceed. The justices carefully explained to the Committees on the Judiciary of both houses of Congress that the petitions were circulated to all the justices, then they were discussed in the conference and voted upon. The Court followed set rules in determining whether to grant the petition. If four, sometimes even three, justices believed the petition should be granted, then the case was accepted. This explanation satisfied Senators Cummins,
Walsh, Harreld, and others, who had feared that the expanded use of certiorari might compromise the litigant's right to appellate review.

Generally the role of the litigant in the legislative processing of the judges' bill was that of an "affected group." From the origin of the bill until President Coolidge signed it, litigants remained subjects of discussion rather than active lobbyists in the debate.

The Executive Branch of Government

Traditionally the attorney general has been a major advocate of functional reforms. The first attorney general, Edmund Randolph, established the precedent of reporting to the Congress on the condition of the federal courts and recommending legislation on the courts' behalf. He consulted with the federal judges and made his recommendations based on their suggestions. Other attorneys general followed the same pattern. The Annual Report of the Attorney General was the most comprehensive source of data regarding the business of the federal courts.

The interest of the Department of Justice in court reform is a multi-faceted one. The government is the major litigant in the federal courts. In 1922, Solicitor General James Beck testified that the government was a party in one-third of the cases on the Supreme Court's docket (U.S. House of Representatives, Hearings, April 27, 1922, p. 7). The
solicitor general is in charge of government litigation before the Court. In cases in which the government is not party, he may decide to file an amicus curiae brief, if the government has an interest in the questions being litigated.

On December 4, 1921, Chief Justice William Howard Taft provided Solicitor General Beck with a rough draft of the judges' bill and requested his comments. In his response Beck stated his preference for increasing the size of the Court to eleven (Murphy, 1962, p. 139). The justices would rotate—nine would hear arguments, while two would be writing opinions. The ABA's Committee on Jurisprudence and Law Reform had made the proposal as a means to provide relief to the Court (Report of the Committee on Jurisprudence and Law Reform, 1921, pp. 390-392). Taft immediately began efforts to convince Beck that the judges' bill was a more practical remedy. As evidence of Taft's success, Beck discussed the major weakness of the ABA's recommendation. He noted that "two distinct tendencies" existed on the Court, referring to the liberal and conservative blocs revealed by split decisions. Beck argued that if the reform were implemented, it would provoke considerable efforts to manipulate the composition of the Court on particular issues (House of Representatives, Hearings, April 27, 1922, p. 16).

How committed Beck actually was to the judges' bill is difficult to ascertain. He accepted Chief Justice Taft's
position and testified on the bill's behalf on April 27, 1922. Beck had ambitions to become a member of the Court (Murphy, 1962, p. 139). In view of Taft's self-appointed role as presidential adviser on judicial selection (Mason, 1964, pp. 157-176), Beck may have considered it an expedient gesture on his part to advocate the passage of the judges' bill. His testimony before the House Judiciary Committee, however, probably contributed to the committee's inaction during the Sixty-seventh Congress. Inadvertently, Beck stated, "A lawyer who does not orally argue his case betrays his client." Congressman Fred Dominack of South Carolina quickly pointed out that Beck's argument was against the bill.

At first Beck did not understand Dominack's remark, and then he tried to rationalize the statement (House of Representatives, Hearings, April 27, 1922, p. 11). Joseph Walsh, the bill's sponsor, brought it up several times, however, in relation to his query regarding the possibility of counsel presenting brief oral arguments to one justice on behalf of his petition for certiorari.

Beck further damaged the bill's progress by expressing reservations regarding the lack of a right to appeal decisions of the Court of Claims. While maintaining that appeal should not lie with the U.S. Supreme Court, Beck suggested that Congress might establish a "provisional court of
appeals" or designate the Court of Patent Appeals with ap­
pellate jurisdiction over the decisions of the Court of
Claims (House of Representatives, Hearings, April 27,
1922, pp. 19-20). Judge Benjamin Salinger of Carroll, Iowa,
had made the same criticism to the committee earlier (U.S.
House of Representatives, Hearings, April 18, 1922, pp. 1,
16).

If Beck had hoped to win Chief Justice Taft's sup­
port for an appointment to the Supreme Court, he failed.
Taft had a low opinion of Beck and opposed the idea of his
being appointed to the Court. In a letter to Justice Willis
Van Devanter dated August 31, 1922, Taft described Beck as
a "light weight, who makes a fair solicitor general but has
no stamina to justify his appointment to the Bench (Murphy,
1962, p. 230)."

Following the precedent established by Randolph, the
Justice Department advises the President regarding not only
Court legislation but appointments to the Court as well.
Aware of the important role of the Department of Justice in
both respects, William Howard Taft cultivated the friendship
of President Harding's attorney general, Harry M. Daugherty.
Daugherty generally followed Taft's suggestions and endorsed
all legislation which the chief justice recommended. Both
Daugherty and President Harding were receptive to Taft's rec­
ommendations regarding federal court appointments.
President Harding died suddenly in 1923, and Calvin Coolidge became President. Taft began advising Coolidge as he had Harding. He persuaded the new President to include in his State of the Union message a plea to Congress to enact the judges' bill. Taft drafted a statement for President Coolidge, but noted that Coolidge had "cut it down some" but kept all of Taft's recommendations (Murphy, 1962, p. 141). Whereas Taft had a loquacious style of speech, Coolidge was noted for brevity.

In early 1924, Attorney General Daugherty had more important worries than the judges' bill. He had been implicated in the Teapot Dome scandal, was being investigated by a committee headed by Senator Thomas Walsh, and was finally forced to resign. Taft began pushing for President Coolidge to appoint George Carpenter as attorney general (Murphy, 1962, p. 145), but instead Coolidge named Harlan Fiske Stone, a law professor from Columbia University, who took office April 7, 1924.

The internal problems at the Department of Justice may account for the absence of the attorney general at the Senate hearings on the judges' bill in February 1924. Attorney General Stone and President Coolidge both endorsed the bill. A low profile endorsement by the President in the 1920's was the most that could be expected. President Harding had promised prior to his election that he would
not interfere with the legislative prerogatives of Congress. Coolidge was even more passive than Harding had been toward influencing Congress. After Roosevelt, Taft and Wilson had asserted a presidential role as chief legislator, Congress was in the mood to reassert its leadership role (Origins and Development of Congress, 1976, p. 224).

Congress

The U.S. Constitution delegated to Congress the responsibility for establishing the size of the U.S. Supreme Court, its appellate jurisdiction, lower federal courts, and their jurisdiction. The ultimate responsibility for court reform rested with the Congress. All the above groups, therefore, were constituents of the House and Senate Committees on the Judiciary. As constituents, they made their demands known to the members of these committees and other members of Congress. The advantage that at least some members of these groups had was access to the decision makers. Overlapping membership in several groups was common and facilitated informal communication. For example, a justice attending a bar association meeting might discuss the needs of the Court with a fellow member who happened to be a senator or congressman. An attorney for an institutional litigant might join the conversation. Such informal social conversations provided congenial occasions to lobby on behalf of pending legislation or to suggest legislation.
The justices, especially Chief Justice Taft, maintained official and unofficial communications with friendly members of Congress. On February 17, 1922, the chief justice sent copies of the judges' bill to Senator Albert Cummins and Representative Joseph Walsh (Murphy, 1962, p. 140). That same day, Cummins and Walsh introduced the bill, which was referred to the Committees on the Judiciary of each house (Congressional Record, February 17, 1922).

During what has been described as the "desultory hearings of 1922" (Murphy, 1962, p. 140; Frankfurter and Landis, 1928, p. 279), Congressman Walsh's questions to Chief Justice Taft, Judge Benjamin Salinger, and Solicitor General James Beck revealed the congressman's limited knowledge and understanding of the content of the judges' bill.

Taft actively lobbied for the bill's passage. In April, he went to the House of Representatives and discussed the importance of the judges' bill with "several influential legislators." He followed personal contact with correspondence in June to at least Speaker Frederick Gillet, Chairman of the Rules Committee Phillip Campbell, House Majority Leader Frank Mondale, and the bill's sponsor Joseph Walsh (Murphy, 1962, p. 140). He continued the personal visits and the correspondence until both houses passed the bill in 1925. Impatient, he attributed congressional
inaction to the opposition of Progressives and a few Demo-
crats who were hostile to him personally.

Among the others who lobbied for the passage of the
judges' bill, ABA lobbyist Thomas Shelton kept the chief jus-
tice informed as to obstacles and sources of opposition. He
reported to Taft that he had utilized a new approach. He
was suggesting that the bill was so complicated that the ABA
believed the best way to assess it would be for Congress to
pass it and observe how it worked. In other words, pass it
on an experimental basis (Mason, 1964, p. 113).

Republicans controlled both houses during the Sixty-
seventh (1921-1923) and Sixty-eighth (1923-1925) Congresses.
The judges, however, carefully cultivated bipartisan sup-
port. The progressive wing of the Republican party had
gained notoriety as proponents of court-curbing legislation.
Senators Robert LaFollette, George Norris, and William
Borah headed the chief justice's list of enemies of mean-
ingful court reform legislation. He considered almost as
despicable Democratic Senators Thomas Walsh and John
Shields, who had opposed other reforms which he had advo-
cated. Borah, Norris, Walsh, and Shields were members of
the Senate Committee on the Judiciary.45

45. Mason (1964, Chapters 4 and 5) discusses Taft's
role as a lobbyist and reformer and his opinions regarding
the Congress and individual members.
Although Taft's critical comments regarding members of the Judiciary Committee of the Senate reflected his personal bias and extreme dislike of "progressive Republicans," the committee was, in fact, a reflection of the whole Senate. The agricultural depression in the farm states had accentuated the old progressive-conservative split in the party. The Western Republicans tended toward the progressive wing of the party in varying degrees. They joined the Democrats to form the farm bloc on numerous issues. Since it is much easier to defeat legislation with a minority than to pass it with a majority, the resulting condition in the Senate was often one of deadlock.

Unlike in the Senate, progressive Republicans had never had much influence in the House of Representatives. During the peak of their strength (1909-1910), they had successfully led a bipartisan revolt against the dictatorial powers of Speaker of the House Joseph Cannon. From the thirty progressives involved in that revolt, their number diminished to seventeen in the Sixty-eighth Congress. Their leader of 1909-1910, George Norris, had shortly thereafter been elected to the Senate.

As a result of the revolt against Cannon, the power structure in the House became very decentralized. Committee chairmen emerged as very powerful individuals. During the period 1911-1923, the speaker remained a figurehead; real
leadership and power, though more decentralized, rested with the majority leader. In 1923, Nicholas Longworth became majority leader. An Ohio Republican, he had similar political roots as Chief Justice Taft. He had supported Taft in 1912 and shared the chief justice's disdain for progressive Republicans. Because of the Republican margin in the House being reduced to fifteen after the 1922 election, Longworth had to work with the seventeen progressive Republicans. After the 1925 elections and the LaFollette defeat, in the Sixty-ninth Congress Longworth led the movement to strip the "unfaithful" insurgent progressives of their committee rank and appointments. In Nicholas Longworth, Chief Justice Taft had access to the most influential member of the House in the Sixty-eighth Congress.

Joseph Walsh, who had sponsored the judges' bill in 1922, was elected to the U.S. Senate that year. He had been the fourth ranking member of the Judiciary Committee. The leadership of that committee also changed in 1923. The chairmanship passed from Andrew Volstead to George S. Graham. Graham had served on the committee since 1912, when he was elected from Philadelphia, Pennsylvania. Prior to his election, he had practiced law and taught criminal law and procedure at the University of Pennsylvania Law School. In the Sixty-eighth Congress, he introduced the judges' bill in the House and guided the bill through the legislative process,
working closely with Senator Albert Cummins and the justices. 46

The most prevalent killer of court reform legislation has been indifference. As long as a crisis does not exist, politically more pressing matters take priority. In fact, numerous sources attribute the inaction of the Sixty-seventh Congress to low priority. When no action appeared to be transpiring in the Sixty-eighth Congress after the Senate hearings and report, the chief justice intensified his lobbying campaign.

Indifference, while often a liability, can also be an asset. Congressmen cannot master every piece of legislation that they vote upon. In fact, they do not even have the time to read many of them. Therefore, they specialize and often follow the recommendations of the standing committees. Even members of a committee may not be informed on bills reported from the committee. If the bill has an avid

46. Other members of the House Judiciary Committee were: Republicans: Leonidas C. Dyer, Missouri; William Boies, Iowa; Charles A. Christopherson, South Dakota; Richard Yates, Illinois; Ira G. Hersey, Maine; Israel M. Foster, Ohio; Earl C. Michener, Michigan; Andrew J. Wickey, Indiana; Nathan D. Perlman, New York; Oscar J. Larson, Minnesota; J. Banks Kurts, Pennsylvania. Democrats: Robert Thomas, Jr., Kentucky; Jattom Sumners, Texas; Andrew J. Montague, Virginia; James Wise, Georgia; John N. Tillman, Arkansas; Fred H. Dominack, South Carolina; Samuel C. Major, Missouri; Royal H. Weller, New York; and Patrick B. O'Sullivan, Connecticut.
sponsor on the committee and does not create controversy, than it may pass through the system with relative ease.

The justices needed a senator who would maneuver the bill through the Senate. The third ranking member of the Judiciary Committee, Albert Cummins of Iowa, was the senator who performed that task. Cummins had numbered among the "insurgent Republicans" during his earlier years in the Senate, which coincided with Taft's presidency. However, Cummins and at least some of the more radical progressives had had a parting of the ways. In 1923, when the Sixty-eighth Congress met in its first session, the progressives challenged the regular Republicans. Robert LaFollette led an effort to remove Albert Cummins from the chairmanship of the Interstate Commerce Committee, and a month-long deadlock resulted. LaFollette was the second ranking member of the committee and next in line to become chairman. Determined not to let LaFollette succeed to the chairmanship, the regular Republicans finally threw their support to the committee's ranking Democrat, Ellison D. Smith.

Fifty years after the fact it is difficult to assess the effect that personal conflicts have upon a person's actions. However, Albert Cummins and the U.S. Supreme Court

47. At the time he introduced the bill and held the hearings, Cummins was third behind Brandegee, the chairman, and Borah. When he led the floor debate in 1925, he had become chairman of the committee.
justices shared one common experience. They had been the subject of attack by Robert LaFollette when he sought to advance his own political ambitions and power. In 1924 LaFollette would be soundly rejected by the American voters, but Albert Cummins would be guiding one of the most important laws in the nation's history through the Senate—giving the Court which LaFollette attacked the power to manage its own docket.

The following chapter will describe the movement of the bill through Congress. Summary and analysis of the role of the various actors will be deferred until the passage of the bill has been discussed.
CHAPTER 6

THE HEARINGS: JUSTICES AS ADVOCATES

Like many judicial reform bills the judges' bill died in the Committees on the Judiciary when it was introduced in the Sixty-seventh Congress (1921-1923). The only official record of deliberation on the bill during the Sixty-seventh Congress was recorded during the 1922 hearings of the House Committee on the Judiciary. During these hearings, Chief Justice William Howard Taft presented the U.S. Supreme Court's reasons for drafting the legislation while Judge Benjamin Salinger of the Iowa Supreme Court stated his reasons for opposing the bill. Solicitor General James Beck defended the bill, with some reservations regarding the U.S. Supreme Court's right to review court of claims' decisions.

In 1924, a delegation from the Supreme Court attested to the need for judicial reform and the judges' bill before the Senate and House Committees on the Judiciary. Associate Justices Willis Van Devanter, James McReynolds, and George Sutherland testified on behalf of the judges' bill—advocating passage. In addition, American Bar Association lobbyist Thomas Shelton appeared before the Senate committee, while Chief Justice William Howard Taft appeared
before the House committee. The content of the testimony presented before the Senate and House hearings of 1924 was essentially the same.

Associate Justice Willis Van Devanter assumed the major responsibility for explaining and arguing the content of the bill. Although the basic substance of Justice Van Devanter's testimony was an amplified version of Chief Justice Taft's 1922 testimony, there were a number of significant differences between Van Devanter's and Taft's approach and emphasis. Taft's abbreviated 1922 testimony will be compared with Van Devanter's 1924 testimony which will be narrated in detail, including the substantive description of the bill as the associate justices presented it to the subcommittee.

Hearings and Inaction in the Sixty-seventh Congress

Chief Justice William Howard Taft gave Senator Albert Cummins and Congressman Joseph Walsh copies of the judges' bill on February 17, 1922. Cummins and Walsh introduced the bill in their respective Houses of Congress the same day; each house referred the bill to its Committee on the Judiciary (Congressional Record, 1922, pp. 2686, 2737). During the Sixty-seventh Congress, the Senate committee took no action upon the bill. The House committee, however, conducted hearings March 30, April 18, and April 27, 1922.
The House committee first heard the testimony of Chief Justice William Howard Taft on March 30, 1922. Representative Leonidas C. Dyer, third ranking member of the majority party, presided until Committee Chairman Andrew Volstead arrived. Volstead missed most of the substantive content of the chief justice's testimony and heard only Taft's comments regarding territorial courts and remedial provisions. There is no indication in the hearings transcript that the second ranking committee member, George Graham, was present. As committee chairman in 1924, Graham would sponsor the judges' bill and guide it through the House to passage.

Taft focused upon the need to limit the workload of the Court and to correct misconceptions among the members of Congress and the bar regarding how the Court processed petitions for writs of certiorari. The chief justice dealt first and most extensively with these issues. He mentioned briefly the benefits which lawyers and litigants would receive from codification and clarification of the laws governing appellate jurisdiction but did not elaborate upon those advantages. In contrast, the 1924 testimony of Van Devanter would stress that the bill codified, simplified, and clarified the present law and would give secondary attention to the Court's need for relief. Van Devanter and
McReynolds would, like Taft, deal with misperceptions regarding certiorari, but in greater detail.

Taft briefly described the effect of the bill upon each of the six courts over which the Supreme Court had appellate jurisdiction. This court-by-court approach Van Devanter followed in 1924. But, unlike Taft, Van Devanter would explain concisely what the present jurisdiction from each court was and would present statistics showing the cases coming to the Supreme Court from each court under both obligatory and discretionary jurisdiction and the Court's final disposition of cases in each of these categories. He then would show how the judges' bill would affect this litigation and provide relief to the U.S. Supreme Court docket. Taft merely stated what changes, if any, the bill made in the present law.

Chief Justice Taft's testimony rambled. He became sidetracked with a discursive description of the English methods of limiting court jurisdiction and a story that former Attorney General Philander Knox had told him. In fact, he spent more time discussing this type of material than he did on the codification and simplification qualities of the bill—the major "selling points" of Van Devanter's 1924 statements. Taft devoted almost a fourth of his time before the committee to another bill dealing with the printing of the U.S. Reports.
On April 18, 1922, the House Committee of the Judiciary resumed hearings on the judges' bill. Judge Benjamin Salinger of Carrol, Iowa, a member of the Iowa Supreme Court, discussed his reasons for opposing the bill. He took exception to three provisions of the bill. First, he objected to the provision which made cases in which a constitutional right had been asserted and denied in state courts reviewable only by writ of certiorari. Second, he questioned the fairness of granting to the government by denying to defendants the right to appeal adverse decisions on motions to dismiss criminal indictments. Third, he denounced the elimination of appellate review of decisions of the court of claims except by petition for writs of certiorari (House Hearings, April 18, 1922, p. 1).

The bulk of his testimony focused upon his first objection. He argued that the Court already had the power to eliminate frivolous so-called federal questions on motions to dismiss. He emphasized that motions to dismiss consumed less time than the evaluations of applications for certiorari (House Hearings, April 18, 1922, p. 2).

He asserted that the cure for error was a writ of error. The judges' bill, in effect, abolished writs of error. In the past, the Court had denied practically every petition for writ of certiorari, without opinion. No standards had been established to guide attorneys. Few lawyers
ever had a case in the United States Supreme Court from state courts except on writs of error. If the judges' bill were passed, Salinger continued, only a few attorneys from Washington and four or five great port cities would ever have a case before the U.S. Supreme Court.

Judge Salinger utilized Chief Justice Taft's statement, "There will be no relief where question of fact and principles of law are well settled," to argue that lower court decisions contrary to established precedents of the U.S. Supreme Court would be denied review. He further observed that Taft's statement that the purpose of the Court should be to establish uniformity of federal law referred to decisions of the United States Courts of Appeals, not state courts (House Hearings, April 18, 1922, p. 5). Salinger asserted that no uniformity would exist among states and that constitutional protections, such as the guarantee of obligation of contracts, could very well have different meanings in each of the forty-eight states (House Hearings, April 18, 1922, pp. 4-5).

Judge Salinger dealt only briefly with his other objections. He argued that if the government had the right to review an indictment held bad, the defendant should have the right to review if his demurrer was overruled. Regarding the court of claims, Salinger pointed out that it was a trial court. The proposed law was radical in that it gave
the decisions of the court of claims finality in suits of first instances. He suggested the continuance of the present criteria of allowing the amount involved to govern whether the right of appeal would exist (House Hearings, April 18, 1922, p. 6).

In lieu of the expansion of discretionary jurisdiction, Salinger suggested possible alternative solutions. First, the U.S. Supreme Court could sit in two divisions like some state supreme courts did. Second, Congress could create court commissioners who would submit opinions on minor causes. Third, Congress could provide the Court with more law clerks.

He concluded his statement by noting that the American Bar Association would meet in San Francisco in August. He intended to bring the matter to the association's attention, and he hoped that the committee would delay final action until the ABA had expressed an opinion upon the bill.

Salinger's criticism could have been refuted; but in 1922, the Judiciary Committee heard no comprehensive refutation. Salinger had expressed opinions which were widely held. Many lawyers believed that the transfer of obligatory jurisdiction to discretionary jurisdiction would result in a de facto removal of jurisdiction. He had argued that substituting of petitions of certiorari for writs of error would result in a denial of review to litigants victimized
by lower court errors and such errors would go uncorrected. Litigants had a right to appeal and to have their attorney argue their case **orally** before the U.S. Supreme Court. The U.S. Supreme Court should review all federal questions, not just a select few. These beliefs were part of the political culture. Proponents of the bill had the major task ahead of them of educating and selling to the bar and the Congress the advantages of the expansion of discretionary jurisdiction and convincing them that the right to review was not being sacrificed for the convenience of the Supreme Court.

The subsequent testimony of Solicitor General James Beck before the committee on April 27, 1922, probably contributed significantly to the committee's subsequent inaction on the bill during the Sixty-seventh Congress. Although Beck argued on behalf of the passage of the judges' bill, he reinforced several of Salinger's arguments. In the midst of one of his discursive accounts of his conversations with the late Chief Justice Edward White, he quoted White as stating that "a lawyer who does not argue his case betrays his client." Congressman Fred Dominack quickly pointed out to Beck that the statement was an argument against the bill (House Hearings, April 27, 1922, p. 11).

The Court decided the disposition of petitions of certiorari without oral arguments to supplement the petition. Expansion of discretionary jurisdiction as provided
for in the judges' bill would result in the denial of the
right to argue the merits of a great number of cases brought
to the attention of the Court.

Beck maneuvered to reconcile his inept quotation to
his advocacy of the judges' bill. He discussed the tremen-
dous workload before the Court, describing in detail the
protracted size of case records which were submitted for re-
view. Some of these cases involved complicated, important
constitutional issues which the Court had to resolve. The
Court needed time to carefully deliberate these matters.
The U.S. Supreme Court was, according to Beck, a "quasi-
constitutional convention (House Hearings, April 27, 1922,
pp. 11-12)."

The problem of oral arguments, however, remained.
The bill's sponsor, Joseph Walsh, suggested the possibility
of a lawyer presenting oral arguments on behalf of a peti-
tion for certiorari before a single justice. Beck stated he
would need some time to give the suggestion careful consid-
eration, but his initial impulse was that such a provision
would be ill advised. He and the congressmen, however, dis-
cussed the idea and its potential problems at length. The
discussion sidetracked the committee from the considera-
tion of the bill's merits.

Other statements of Beck also diminished the proba-
bility of the committee acting favorably upon the bill in
the Sixty-seventh Congress. When asked if motions for dismis­

al could not be utilized to eliminate frivolous cases from the docket, Beck acknowledged that they could. He then proceeded to cite statistics showing the number of cases the Court had eliminated in the last two terms by that means. Rather than promoting the bill, Beck inadvertently substanti­
tiated Salinger's argument that the Court did not need to expand discretionary jurisdiction to eliminate trivial cases.

Salinger had told the committee that he would bring the bill to the attention of the American Bar Association at its San Francisco meeting in August 1922. When Congressman Walsh asked Beck if the ABA had taken a position on the bill, he responded: "Not to my knowledge." He then continued:

I did not hear it discussed at its last meeting in Cincinatti. In fact, I do not think the bill at that time had been submitted for consideration of the profession. If you took a referendum, I doubt very much whether the bar would favor this, because the bar is more attached to theory than the conditions that confront us. They do not see the difficulties of the situation as those of us who are close to Wash­

ington see them. The Court cannot keep the high standard of its work if the docket keeps on increasing unless they are content to decide things in a hasty, perfunctory way and sacrifice to speed in justice the soundness of decision (House Hearings, April 27, 1922, p. 17).

After that statement, the endorsement of the American Bar Association became of utmost importance for the proponents of the bill. Such an endorsement would serve as a counterbalance to Beck's contention that the majority of the profession would not favor the judges' bill. The justices'
strategy would have to shift the emphasis from the benefits of the bill to the Court to the benefits of the bill to the legal profession and litigants.

Beck directly faulted the bill as Salinger had done for the failure to provide for the appeal of decisions of the court of claims. Although he contended that such an appeal should not lie with the U.S. Supreme Court, he expressed the firm opinion that Congress should designate another court to review the decisions of the court of claims.

In spite of Beck's inefficacious statements, he did effectively refute Salinger's criticism that the bill denied defendants the right to appeal at the indictment stage of litigation, while preserving the government's right of appeal. In 1907, Congress had passed remedial legislation giving the government the power to appeal dismissals of criminal indictments. Before the Act of 1907, the government could not challenge a lower court decision which dismissed an indictment on the grounds that the law upon which the charges had been brought was unconstitutional.

If the government did not have the right to appeal adverse decisions at that stage of litigation, the lower court could render an act of Congress unconstitutional. Even if the decision were in error, there could be no review of that decision by a higher court. Once a case came
before a jury, the defendant was protected from government appeals by constitutional protections against double jeopardy. The defendants' right to appeal decisions of a court began at the trial stage of litigation; but at that stage, once the case was before a jury, the government had no right to appeal.

Beck argued that Salinger's suggestion to extend the same rights of appeal to defendants at the indictment stage of litigation as those guaranteed the government would paralyze the court system. There were 70,000 pending indictments in federal courts. Beck predicted that defendants, especially the guilty ones, would utilize motions challenging indictments and then appeal the lower court's denial of those motions to delay indefinitely their trials.

Such a provision would add so many cases to the appellate dockets that decisions would be delayed for years, and many cases would never be brought to trial. Rather than increase the fairness of the criminal justice system, Salinger's proposal would, in effect, render it dysfunctional (House Hearings, April 27, 1922, p. 13).

Frankfurter's and Landis' (1928, p. 279) single reference to the 1922 hearings as "desultory" aptly describes them. The hearings did, however, reveal the issues which the proponents needed to address and influenced their subsequent strategy. As noted in the previous chapter, the
American Bar Association formally endorsed the bill in 1922, 1923, and 1924. If Judge Benjamin Salinger actively opposed the judges' bill at the San Francisco ABA convention, there is no record of it in ABA publications reporting the proceedings of the convention. In fact, this researcher has not found any criticisms of the bill in any of the legal periodicals of 1922-1925. An extensive search reveals numerous endorsements but no opposing points of view. Professional publications may have systematically ignored the criticisms of the judges' bill as they did the criticisms of the uniform procedure bill. The 1922 hearings and the Senate debate of 1925 constitute the only major published criticism of the judges' bill.

The Sixty-eighth Congress and the Committee of Justices

In 1924, William Graham and Albert Cummins reintroduced the judges' bill in their respective Houses of Congress. Joseph Walsh, the 1922 sponsor of the judges' bill in the House of Representatives, had been elected to the Senate in 1922. In the Senate, however, he did not serve on the judiciary committee. Congresswoman Graham became chairman of the House Committee on the Judiciary in 1923.

48. Senator Joseph Walsh played no visible role in the Senate passage of the bill. He should not be confused with Senator Thomas Walsh (D-Montana) who served on the Senate judiciary committee and assumed an active role in the Senate debate.
As chairman, he scheduled the House hearings and managed the floor debate on the judges' bill. When Senator Cummins introduced the judges' bill, he ranked third in seniority on the Senate Committee on the Judiciary and served as chairman of the judiciary subcommittee.

Chief Justice Taft considered the deliberations of the Senate Committee on the Judiciary the most critical stage of the legislative process. Taft feared that eight of the fourteen committee members might oppose the judges' bill. Among the senators on the committee who, Taft anticipated, would stall the bill in committee were progressive Republicans William Borah, George Norris, Thomas Sterling, and Samuel Shortridge. Among the Democratic members, Thomas Walsh had already criticized the bill in a 1922 speech to the Virginia Bar Association. Taft anticipated that Democrats John K. Shields, James A. Reed, Henry F. Ashurst, and T. H. Caraway would critically scrutinize the judges' bill as they had previous judicial reform legislation which he had advocated. In the recent past, the Senate judiciary committee had either killed or drastically revised judicial reform legislation.

Senate Hearings on Senate Bill 2060

On Saturday, February 2, 1924, a Senate subcommittee on the judiciary convened in the office of Senator Albert Cummins, the chairman. The chairman of the full committee,
Frank Brandegee, had appointed Cummins, Seldon P. Spencer of Missouri, and Lee S. Overman of North Carolina to this subcommittee. Spencer, a former law professor and judge, had served in the Senate since 1918. Overman had served since 1903, ranking fourth in terms of seniority among the membership of the Senate.

Willis Van Devanter, James McReynolds and George Sutherland, a former member of the Senate Committee on the Judiciary, appeared on behalf of the U.S. Supreme Court. Thomas Sheldon represented the American Bar Association. In the informal, congenial setting of Cummins' office, the group considered both the judges' bill (Senate Bill 2060) and the uniform procedure bill (Senate Bill 2061). Justice Van Devanter and Justice McReynolds assumed the task of explaining the bill which they had drafted. Justice Sutherland concentrated most of his attention upon the uniform procedure bill and took no part in the discussion of the judges' bill, other than verifying that the ABA had endorsed it.

Van Devanter began his statement with a disclaimer that the Court had preempted the legislative role of Congress by drafting this particular bill. In contrast to Taft's testimony of 1922, which had implied that the bill originated in the Court, Van Devanter emphasized that the Court had responded to a request from "some members of the
judiciary committees of the Senate and the House" who had asked the Supreme Court justices "to present their observa-
tions and outline something that would better the existing situation (Senate Hearings, February 2, 1924, p. 25)." Unlike Taft's 1922 statement, Van Devanter did not go into the appointment of a committee to draft legislation but rather immediately stated the operational premise upon which the judges' bill had been drafted:

To operate justly, statutes dealing with appellate jurisdiction should be accessible, and also plain. Those whose action must conform to them should be able to find them and, finding them, to determine with relative confidence and safety what course of action to take (Senate Hearings, February 2, 1924, p. 25).

Van Devanter enumerated the defects of the present law. Although the Judiciary Code of 1911 had codified some statutes governing federal appellate jurisdiction which dated back to 1789, the code had failed to include all such statutes. The numerous amendments to the code and the new statutes which had been enacted since 1911 had further complicated questions of appellate jurisdiction. Attorneys had to search the Revised Statutes, the Judicial Code, and the Statutes at Large to ascertain the law governing jurisdiction in a specific case. Some laws conflicted which further complicated the initial task of determining what appellate relief was available.
Justice Van Devanter asserted, "Easily one-third of the cases that now come before the Supreme Court of the United States involve jurisdictional questions." He estimated that at least one-third of the Court's time was devoted to resolving issues of its own jurisdiction or that of the circuit courts of appeal. Not only would simplification, clarification and codification of the laws governing jurisdiction provide relief to the overburdened docket of the U.S. Supreme Court, but also to attorneys from all over the nation. Pointing out the advances in transportation and in the fields of practice, Van Devanter observed that the bar of the United States Supreme Court was no longer limited to a few Washington area lawyers (Senate Hearings, February 2, 1924, p. 25).

Concluding his opening statement, Van Devanter stated that the purpose of Senate Bill 2060 (the judges' bill) was "to relieve the jurisdictional problems by restating, modifying, and bringing together every section of the existing law dealing with appellate jurisdiction." He casually mentioned the transfer of cases from obligatory to discretionary jurisdiction. In a low key, he observed that the judges' bill would eliminate some cases now before the Court because they had already gone through at least two courts, sometimes more, and because their character is not such that they should find a place in the Supreme Court and crowd back or delay consideration
of cases belonging to the class where final decisions should come only from that Court (Senate Hearings, February 2, 1924, p. 26).

Only the above portion of the final sentence of his opening statement referred to what Chief Justice William Howard Taft had designated in 1922 as the major purpose of the bill—to limit the United State Supreme Court's obligatory jurisdiction to a very few classes of litigation and to give the Court control over which cases would be accepted for review. Van Devanter had not mentioned the Supreme Court's overburdened docket.

Van Devanter had revised Taft's approach. The new strategy emphasized the codification of existing statutes in order to simplify questions of jurisdiction for litigants and attorneys. In this opening statement, Van Devanter had refuted Judge Benjamin Salinger's charge that if passed the judges' bill would limit practice before the Supreme Court to a "few members of the Bar of Washington, D.C., and four or five great port cities (House Hearings, April 18, 1922, p. 3)." Van Devanter had characterized the bill as remedial legislation providing much needed relief from a chaotic situation in the law to a broad spectrum of attorneys, litigants and judges.

Van Devanter's strategy of emphasizing the advantages to attorneys and litigants succeeded. Later, in the Report of the Committee on the Judiciary to Accompany
Senate Bill 2060, Senator Cummins focused upon those advantages and stressed them throughout the three and one-half pages of the report. Recommending that his colleagues read the transcript of the hearings, Senator Cummins described the testimony of Justices Van Devanter and McReynolds as "so clear an exposition . . . that the subcommittee could not improve" upon it (Senate Report, April 7, 1924, p. 1). Cummins reiterated Van Devanter's description of the statutes governing federal appellate court jurisdiction as so scattered and numerous that an "ordinary lawyer" had extreme difficulty ascertaining "just what the legislation is, and . . . what the various statutes mean." Noting the current law's lack of logical development, Cummins accepted the position that "the time has come when the whole subject should be reviewed in the light of present conditions and the existing system of federal courts (Senate Report, April 7, 1924, p. 7)."

After several questions clarifying the purpose of the judges' bill, Senator Overman inquired whether the bill had been "prepared under the direction of the Supreme Court or at its suggestion (Senate Hearings, February 2, 1924, p. 27)." Justice Van Devanter explained that a committee composed of himself, the late Justice William Day, and Justice McReynolds had been assigned to study the problem and to
make recommendations to the conference. The committee had prepared a draft of the bill which was distributed to all the justices. The draft had been examined and criticized in the conference. Then the committee revised it to correct the deficiencies found by the other justices and re-submitted it to the conference for approval.

In the course of the discussion, Van Devanter introduced and requested that the subcommittee include in the record a description and analysis of the business of the U.S. Supreme Court for the past ten years. Van Devanter's style throughout the hearings was to answer a question in detail and move the discussion to his next topic. Although the senators posed questions, Van Devanter was, in fact, directing the hearings and not permitting any diversions to occur, such as had permeated the 1922 House hearings.

Having introduced the docket data for the previous ten years, Van Devanter substantiated the "upward trend" in cases coming before the Court. He attributed the increase of litigation to the great new variety of legislation enacted by Congress and the states. Eventually, the Court reviewed litigation challenging the interpretation, application, and validity of these new laws on constitutional grounds (Senate Hearings, February 2, 1924, p. 27).

49. Conference is the term applied to closed sessions of the Court, in which the justices discuss pending litigation and other Court business.
Senator Cummins asked if the data indicated the number of cases under obligatory jurisdiction which would be transferred to the discretionary jurisdiction of the Court. Van Devanter responded with a qualified no. He inferred, however, that the 1922 statistics indicated how the bill might affect litigation. For example, of the six questions certified to the U.S. Supreme Court from lower courts in 1922, the Court had jurisdiction in only five. Under the judges' bill, certification jurisdiction would be broadened to include all six cases. On the other hand, all of the eighty-six cases brought from the U.S. circuit courts of appeals under obligatory jurisdiction in 1922 would come under discretionary jurisdiction. Of those cases, there had been only eighteen reversals. In other words, the Court's review of sixty-eight of the eighty-six cases had only delayed the final disposition of the litigation (Senate Hearings, February 2, 1924, p. 28).

Justice James McReynolds added that the theory underlying the expansion of the Court's discretionary jurisdiction was that after two hearings in federal courts by right—one a trial in the district and the other an appeal in the circuit courts of appeals—litigation should be concluded unless there were some superior reason for review by the U.S. Supreme Court (Senate Hearings, February 2, 1924, p. 28). Taft had expressed this theory in 1922. McReynolds
and Van Devanter would restate it several times during the hearings. The subcommittee's acceptance of the theory was documented in its report to the Senate. Using words almost identical to those of McReynolds, Senator Cummins wrote:

> It is our belief that here ordinary litigation should end and cases should not go to the Supreme Court of the United States unless the questions involved are of grave public concern or unless serious uncertainty attends the decisions of the circuit courts of appeal by reason of conflict in rulings of these courts or the courts of the states (Senate Report, April 7, 1924, p. 3).

The preceding statement also reflected the committee's acceptance of Justice Van Devanter's explanation and defense of discretionary jurisdiction. The critics of the bill had focused upon their perception of the defects of review by certiorari. Van Devanter in both the Senate and House hearings of 1924 described in great detail the Court's procedure and traced a petition through the Court. The process began with the filing of the petition for a writ of certiorari and a case brief. Copies of both the petition and brief were then served upon the counsel for the other party, who responded by filing an opposing brief. Each justice would receive copies of the petition and briefs to review on certiorari. If the justice found the Court to have jurisdiction, he would then determine whether the case involved either a question of great public importance or one upon which the lower courts had rendered conflicting opinions. When the petition came before the conference, if four
justices agreed that a case met these conditions, the Court would grant a writ of certiorari (Senate Hearings, February 2, 1924, p. 29).

In response to a query by Senator Cummins, Van Devanter and McReynolds both emphasized that the monetary amount involved in a particular case was not a factor in the Court's decision. Van Devanter stressed again:

The chief question is whether the case is of such a character that the last word, the ultimate guiding rule, should be announced by the Supreme Court, so that there may be uniformity of decision in the several circuit courts of appeal, and also uniformity of decision in the State courts in so far as Federal matters are concerned (Senate Hearings, February 2, 1924, pp. 29-30).

Senator Cummins asked Justice Van Devanter to respond to the allegation by opponents of the judges' bill that the Court could not impartially judge cases on their merits which the Court had already reviewed as petitions for certiorari. Both Van Devanter and McReynolds stressed that the decision to grant certiorari only signified that a case should be heard on its merits. Probing the issue further, Cummins asked how many cases brought on certiorari had resulted in affirmances of the judgment of the circuit courts of appeals. Referring to the docket data, Van Devanter pointed out that during the October term of 1922, the Court had affirmed the lower court's decision in seventeen cases and reversed it in twenty-two cases which had been brought on writs of certiorari. In 1921, the number of
affirmances and reversals had been the same. Although these figures supported the contention that the Court heard certiorari cases without biases, Cummins rephrased his question:

Are you able to say, Mr. Justice Van Devanter, from your long experience and your observation of the other members of the Court, that the granting of a writ of certiorari does not prevent the justices from approaching the final decision with a free mind and entirely unprejudiced? (Senate Hearings, February 2, 1924, p. 31).

Responding in the affirmative, Van Devanter called upon Justice Sutherland, whom he noted was a new member of the Court, to give a "fresh observation." Whereupon Sutherland responded:

I do not think it makes the slightest difference that the matter has been considered upon application for certiorari. I think such a case is heard and considered in exactly the same light as the case that comes on appeals (Senate Hearings, February 2, 1924, p. 31).

The justices also corrected a widespread opinion that only one justice made the decision on granting a petition for a writ of certiorari. Van Devanter described the Court procedure of distributing copies of each petition and the briefs which the litigants had filed to all the justices. After each justice had reviewed these legal records, the petition would be discussed and voted upon in conference. If four justices, sometimes even fewer, believed that the case should be reviewed, the Court would grant the writ of certiorari.
The committee appeared satisfied with these explanations. Noting the broad range of review possible via certiorari, Senator Spencer suggested that some limitation upon the Court's certiorari jurisdiction, perhaps, should be added to the bill. Justice Van Devanter rejected the idea as both unnecessary and a potential source of confusion.

He proceeded to focus the attention of the senators upon the current ambiguity of the laws regarding appeals from the U.S. district courts. In some cases, attorneys had great difficulty determining whether review lay with the circuit courts of appeal or with the U.S. Supreme Court. Many litigants had lost their right to appellate relief because of an attorney error on that question. Although the law had been amended to enable the U.S. Supreme Court to transfer cases which were wrongly filed to the circuit courts of appeal, error still delayed litigation, increased expenses of the litigation, and consumed valuable Court time. Since the passing of that remedial legislation, the justices believed that many of the errors had been deliberate for the purpose of delaying the final disposition of a case. Van Devanter stressed that the judges' bill eliminated the problem by directing all appellate relief from the district courts to the circuit courts of appeal except for four clearly designated classes of litigation. Those cases, which were specified in section 238 amended, were before
three-judge district courts and would continue to be appealed directly to the Supreme Court. During the House hearing in December 1924, Van Devanter noted the addition of a fifth class of litigation and described the provision of section 28 as follows:

The first, fourth, and fifth classes include cases brought under designated anti-trust and interstate commerce laws where three judges, one of whom must be a circuit judge, are required to sit in district court. The third class comprises injunction suits to suspend the enforcement of State statutes, or of orders of administrative boards or commissions acting under State statutes, where the hearing is required to be before a like number of judges. The nature of the cases within these classes and the fact that the hearing in the District Court is before three judges are believed to make it appropriate that the existing right of direct review in the Supreme Court in such cases specially covered be preserved. The second class includes cases specially covered by the criminal appeals act of March 2, 1907 (Senate Hearings, February 2, 1924, p. 32).

Van Devanter observed that it was better to have "one plain route, than two confusing ones."

Having thus introduced the effect of the judges' bill upon the district courts and the circuit courts of appeal, Van Devanter directed the subcommittee's attention to the docket report. He noted that of the one hundred twenty-five cases from the U.S. district courts in 1922, the U.S. Supreme Court had reversed only twenty-one and had dismissed twelve for want of jurisdiction. Using these figures, Van Devanter predicted that the judges' bill would eliminate
over half the cases currently appealed directly from the district courts.

In regard to appeals from state courts of last resort, Van Devanter noted that the bill clarified the present law and introduced only one change in appellate jurisdiction. Although Van Devanter was asked in both the Senate and House hearings what the exact change was, he never clearly stated the change. During the Senate hearings, Senator Overman and Senator Cummins both asked him directly, but he asked to defer until he completed his discussion of the historical background of the docket data.

First, Van Devanter briefly reviewed the original provisions for U.S. Supreme Court review of state court decisions as set forth in the Judiciary Act of 1789. He pointed out that the Act of 1914 had expanded the jurisdiction by certiorari to include cases previously excluded from any form of review. The Judiciary Act of 1916 had removed some cases that had previously come under the Court's obligatory jurisdiction and placed them in the discretionary category except for two classes of litigation: (1) decisions invalidating a federal statute or treaty; and (2) decisions sustaining state statutes which had been challenged as contrary to the U.S. Constitution.

Van Devanter directed the committee's attention to the docket data. Although interrupted by questions
concerning how the bill specifically changed the existing law, he insisted on completing his discussion of the Court's statistics first. In 1922, the U.S. Supreme Court reviewed one hundred eleven cases on writ of error from state courts. The Court reversed the state court decision in twenty cases. In the remaining ninety-one cases, the appeal had produced no benefit to anyone, except whatever advantage the losing party might have derived from the delay of final disposition. Van Devanter never answered the questions regarding how the judges' bill would change the present law, nor did he indicate how the bill would affect these statistics, perhaps because Senator Spencer interrupted his presentation with another question.

Senator Spencer asked how many of those cases from state courts had been decided with a five to four vote by the justices. As discussed in Chapter 4, progressives were using controversial five to four Court decisions as a campaign issue in their efforts to capture the Republican nomination and their threats of a third party movement. Van Devanter immediately answered Spencer's question, stating that not more than three or four decisions from state courts had involved such a close vote. He then, again, emphasized that writs of error were used mainly for delaying the final disposition of a case and their only effect was to hurt the
prevailing litigant (Senate Hearings, February 2, 1924, p. 34).

Returning to his discussion of the docket data, Van Devanter took up the statistics of certiorari cases. In 1922, the Court denied eighty-eight petitions. Of the twenty-one writs of certiorari which had been granted, the Court had upheld the lower court in six cases, reversed the decision in ten, and dismissed three for want of prosecution or stipulation. In the dialogue which followed, Van Devan­ter and McReynolds both stressed repeatedly that because the petitions were acted upon at once, the litigants in about three fourths of all certiorari cases had their cases set­tled quickly (Senate Hearings, February 2, 1924, pp. 35-36).

Further stressing the benefits to the litigant, Van Devanter noted that the bill contained a provision for treating mistakenly filed writs of error as petitions for certiorari if that was the proper mode. Not only would this provision of the judges' bill eliminate a major cause for procedural mistakes, but would also eliminate the need for double filing (Senate Hearings, February 2, 1924, pp. 35-36).

Van Devanter's Senate testimony failed to clearly distinguish how the judges' bill would limit appeals on writs of error from state courts of last resort. His testi­mony before the House Committee on the Judiciary did not serve to clarify the matter very much either, perhaps
because of the confusion which existed as to what the Judiciary Act of 1916 had exactly meant. Originally review from state courts had been limited by section 25 of the Judiciary Act of 1789 to decisions of the state court of last resort which (1) ruled against the constitutionality of a federal treaty or law; (2) ruled in favor of the validity of a state act which had been challenged as contrary to the Constitution, treaties, or laws of the United States; or (3) ruled against the right or privilege claimed under the Constitution or federal law. In essence, the Judiciary Act of 1789 provided for appeal when the state judiciary ruled against the federal claim. As already discussed in Chapter 5, the Judiciary Act of 1914 expanded federal jurisdiction to include review by certiorari of cases in which the state court sustained the federal claim.

The Judiciary Act of 1916 had transferred the third group of litigation designated in the Judiciary Act of 1789 from obligatory to discretionary jurisdiction. The Act of 1916, however, had caused much confusion among attorneys as to whether jurisdiction lay with writ of error or with petition for a writ of certiorari. The confusion was augmented by the vast amount of legislation which had been enacted since 1789 expanding federal jurisdiction. Consequently, many attorneys double-filed cases with the Supreme Court's clerk—(1) as a writ of error; and (2) as a petition for
certiorari. Although the practice insured against error in judgment, double filing increased both the workload of the Court and the cost of litigation to the litigant.

The judges' bill retained the existing jurisdiction except that it specifically transferred to discretionary jurisdiction those "cases in which the authority under a state or under the United States" were challenged (House Hearings, March 30, 1922, p. 4). The only cases which continued to be reviewable from the state courts of last resort as of right were:

1. Where there is drawn into question the validity of a treaty or statute of the United States and the decision is against its validity.

2. Where there is drawn in question the validity of any statute 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 (William J. Hughes, 1925, p. 268).

In other words, the only cases from state courts of last resort to remain under the Supreme Court's obligatory jurisdiction were those which involved a direct challenge of a statute's validity under federal law, and the decision had been against a federal claim.

Following his discussion of appeals from state courts, Justice Van Devanter mentioned that the court of appeals for Washington, D.C. was treated in the same manner as the circuit courts of appeal (Senate Hearings, February 2, 1924, p. 36) and then began discussing the court of claims.
The statement, however, has great significance when viewed in its historical context. The judges' bill's application of the same laws to govern appellate jurisdiction resolved a long standing problem of jurisdictional inequality between litigants in Washington, D.C. and the rest of the nation.

The Circuit Court of Appeals Act of 1891 had not placed any restrictions upon the right to appeal decisions of the Supreme Court of the District of Columbia directly to the U.S. Supreme Court. Although the attorney general had promptly called the resulting disparity to the attention of Congress, Congress failed to pass remedial legislation placing in the Supreme Court's discretionary jurisdiction the classes of litigation which were so classified from the circuit courts of appeal. When, in 1893, Congress created the circuit court of appeal for the District of Columbia, the same comprehensive right to review by the U.S. Supreme Court as had existed for decisions of the Supreme Court of the District of Columbia had been transferred to the new court. Litigants in Washington, D.C., therefore, continued to have a right to appeal most adverse decisions to the U.S. Supreme Court even in classes of litigation that from other circuit courts of appeal could be reviewed only by certiorari.

Subsequent efforts to amend the statutes so that the same laws would govern the circuit court of appeals for the District of Columbia that governed the other circuit courts
of appeal had failed to get through Congress. The Washing-
ton, D.C. Bar Association had successfully blocked all ef-
forts to equate the jurisdiction, including proposed
resolutions endorsing such reforms by the American Bar
Association (Frankfurter and Landis, 1928, p. 121).

In contrast to his previous testimony regarding the
changes affecting the jurisdiction of cases from federal
district courts and the circuit courts of appeal and the
state courts of last resort, Van Devanter did not discuss
the present law nor the docket statistics in respect to
cases from the circuit court of appeals from the District
of Columbia. Furthermore, no one pointed out the signifi-
cance of the change in either the House or the Senate hear-
ings or debates. The one sentence reference without comment
probably was part of an overall strategy to minimize atten-
tion to any reform contained in the judges' bill which might
provoke criticisms from formidable groups such as the Wash-
ington, D.C. Bar Association.

Van Devanter, however, could not ignore the changes
respecting the court of claims. As discussed earlier in
this chapter, Judge Benjamin Salinger and Solicitor General
James Beck had faulted the judges' bill because of the elim-
ination of the right of appeal with respect to the deci-
sions of the court of claims. Because the court of claims
was a trial court, Van Devanter had to establish that
litigants' right to review via petitions for writ of certiorari would provide adequate appellate review for the litigant with a valid appeal.

Van Devanter immediately referred the subcommittee to the docket statistics. In 1922, the Supreme Court had affirmed twenty-seven of the thirty-three cases appealed from the court of claims. Again the implication was that these twenty-seven appeals had served only to delay the final disposition of the claim. Justice Van Devanter pointed out that under existing law the government had the right to appeal regardless of the amount, but the claimant had the right only if the amount involved exceeded $3,000. Under the proposed bill, Van Devanter emphasized that both sides of the litigation could petition for certiorari regardless of the amount and that the court of claims could certify questions.

Senator Spencer noted that the court of claims and the U.S. district courts had concurrent jurisdiction. Under the proposed bill, the court of claims could certify a question to the U.S. Supreme Court, but the U.S. district courts could not certify a similar question. Van Devanter explained that under the existing laws the decision of either court in cases where concurrent jurisdiction existed could be appealed directly to the U.S. Supreme Court. Under the proposed bill, appeals from the district courts would go to
the circuit courts of appeal, which could certify questions to the U.S. Supreme Court if necessary. From the circuit courts of appeal, litigants could petition the Supreme Court for a writ of certiorari.

As Beck had done in the 1922 House hearings (House Hearings, April 27, 1922, p. 20), Senator Spencer suggested directing appeals from the court of claims to the circuit courts of appeal. Justice Van Devanter pointed out that such a provision would have a three judge court reviewing the decision of a five judge court. Moreover, there would be a problem of determining which of the circuit courts would have jurisdiction over such an appeal (Senate Hearings, February 2, 1924, pp. 37-38).

After answering all the questions regarding the court of claims, Justice Van Devanter mentioned that the bill did not deal with the court of customs appeal. In their deliberations, the justices had agreed that Congress would probably prefer to leave the existing legislation intact. He noted that the court of customs appeal was a special court "with particular provisions respecting review that had some administrative features (Senate Hearings, February 2, 1924, p. 39)." As the discussion proceeded, McReynolds revealed that the only review allowed from the court of customs appeal was "by certiorari, upon certification, filed in advance of the hearing, that the case is of
special importance (Senate Hearings, February 2, 1924, p. 39)." Justice Van Devanter added that "such certification had to be presented to the U.S. Supreme Court by the Attorney General (Senate Hearings, February 2, 1924, p. 39)."

The omission of any provisions regarding the court of customs appeals appears to be contrary to the stated purpose of the act which was to bring together all legislation regarding the federal appellate jurisdiction. Two reasons for the omission may be implicit in the hearings. First, review from the court was already limited to certiorari. Second, the inclusion of the laws governing the jurisdiction from the court of customs appeals might have reopened the entire debate regarding the need for such a court. Three times during the discussion, subcommittee chairman and sponsor of the bill, Senator Albert Cummins, expressed emphatically his belief that the court of customs appeals should be abolished. Justice Van Devanter had tactfully overlooked all three of Senator Cummins' remarks. From the dialogue, one can easily conclude that the justices did not want the judges' bill to become enmeshed in a debate over the merits of specialized courts and infer that the omission of laws pertaining to the Supreme Court's jurisdiction over cases from the court of customs appeals was a tactical decision. 50

50. For a detailed discussion of the court of customs appeals' establishment and jurisdiction, see Frankfurter and Landis (1928, pp. 150-152).
Justice Van Devanter continued to summarize the judges' bill by moving the subcommittee's attention to the changes affecting the appellate review from the courts of Puerto Rico, Hawaii, the Virgin Islands, and the Canal Zone. He scanned but did not go into a detailed description of existing law with respect to each of these courts. He announced that the judges' bill in all cases had directed all appeals from these territories to the circuit courts: Puerto Rico to the first circuit, Hawaii to the ninth, the Virgin Island to the third, and the Canal Zone to the fifth. The existing law was a hodge podge of ad hoc statutes which would have been difficult to describe briefly. The judges' bill transferred all existing obligatory jurisdiction to the circuit courts of appeal. The change resulted in uniformity of the procedure and subject matter of cases from territorial courts (Senate Hearings, February 2, 1924, pp. 39-40). The committee raised no question respecting these provisions. Later, during the House debate, however, the question would arise as to how the bill changed the laws respecting litigation from Puerto Rico.

Van Devanter discussed briefly the changes with regard to habeas corpus cases. He characterized the new provisions in the judges' bill as clarifying and eliminating

51. For a description of prior legislation regarding territorial courts, see Frankfurter and Landis (1928, p. 267).
the present sources of confusion. The bill directed all habeas corpus appeals to the circuit courts of appeal. An appeal could reach the U.S. Supreme Court only by certiorari.

Van Devanter noted that Congress had eliminated federal jurisdiction with respect to railroads incorporated under the laws of the United States when jurisdiction was based solely upon diversity of citizenship. Section 12 of the judges' bill expanded that provision to any corporation fitting that description. There was no indication that the subcommittee would later add to the section prior to reporting it to the full Senate the following amendment:

Provided that this section shall not apply to any suit, action or proceeding brought by or against a corporation incorporated by or under an act of Congress wherein the government of the United States is owner of more than one half its capital stock (Senate Report 362, April 7, 1924, p. 1).

The amendment originated between the hearing of February 2, 1924, and the Senate Report of April 7, 1924. The Department of Justice, the Supreme Court, or the Senate Committee on the Judiciary may have drafted it to safeguard government corporations' standing to sue in federal court. Van Devanter and McReynolds had pointed out that section 12 eliminated a defendant corporation's ability to remove litigation from a state court into a federal court on diversity of citizenship grounds.
Van Devanter then directed the subcommittee's attention to section 11 which dealt with suits in federal courts against public officials relating to their office. The existing law provided that when a plaintiff sued a federal official, who vacated his office before the litigation had concluded, the successor to the public position could be substituted as the defendant in order that the suit could proceed. Section 11 consolidated the laws governing these substitutions and expanded the present law to include suits against territorial, insular, state, and county officials. The new provision stipulated that notice be given to the successor, who would have an opportunity to show cause why such a substitution should not be made. Van Devanter observed that during the present term five or six cases had been dismissed because the officials originally named in the suit had vacated the governmental position involved.

Following a few convivial remarks by Van Devanter indicating that he had concluded his formal presentation, Senator Overman expressed the subcommittee's appreciation to him for "coming and enlightening" them (Senate Hearings, February 2, 1924, p. 42). Senator Cummins added, "I tried to make it perfectly clear that you were here at the request of the Committee (Senate Hearings, February 2, 1924, p. 42)." Later, during the House hearings in December, Justice Sutherland would cite these remarks of Senator Cummins.
and credit him with requesting that the Court recommend remedial legislation to the Congress (House Hearings, December 18, 1924, p. 23).

Before hearing Justice James McReynolds' formal statement, Senator Cummins asked how much time usually elapsed between the filing of a case with the U.S. Supreme Court and the rendering of a decision. Van Devanter responded first by noting that several statutes required that the Supreme Court advance particular cases over others. The judges' bill did not alter those laws. During the 1922 term, the Court had advanced more than seventy-five such cases, and twenty-two additional cases which appeared to be of great public interest, for a total of ninety-seven cases advanced. Had no cases been advanced, Van Devanter speculated that a case could possibly be heard in eight to ten months after being placed on the docket. He then estimated that the cases on regular call were currently being reached within twelve to thirteen months (Senate Hearings, February 2, 1924, p. 42).

52. The analysis of S-2060 prepared by the Court and presented to the Senate subcommittee prior to the hearings indicated fifteen to eighteen months rather than twelve to thirteen (Senate Hearings, February 2, 1924, p. 6). Chief Justice Taft indicated in the House hearings of 1922 that it took eighteen months to two years to reach a case (House Hearings, March 30, 1922, p. 12). Van Devanter's lower estimate might have been due to his not taking into account the summer recess months. Van Devanter was clearly referring to the time from docketing to oral arguments; Taft's higher calculation might have been due to his
Justice McReynolds' formal statement followed Van Devanter's presentation. McReynolds summarized the major arguments substantiating the need for the judges' bill to be enacted. Emphasizing the Court's need to be relieved of the overload stress, he proclaimed, "It will not be possible to keep up with the docket unless some way is found to relieve the Court of relatively unimportant matters (Senate Hearings, February 2, 1924, p. 45)." He illustrated with case examples the trivial questions which had confronted the Court on its obligatory docket. His examples involved questions of fact which had already been ruled upon by at least two other courts. He stressed also that present controversies involving jurisdictional questions consumed too much of the Court's time and presented too many problems for litigants, lawyers, and judges. McReynolds reiterated Van Devanter's argument that the simplification and codification of the laws governing jurisdiction would save all concerned time, money, and work. That goal the Court had accomplished in the judges' bill.

considering the announcement of a final decision rather than oral arguments. On the other hand, in 1922 Taft had just been appointed to the Court the year before and the Court had been somewhat handicapped by the illness of several members. With several justices unable to perform at full capacity, the number of decisions per term declined from 1919 to 1922 in spite of a steady increase in cases docketed: 1918, 680; 1919, 609; 1920, 608; 1921, 603; and 1922, 765.
Throughout both the Senate and House hearings, McReynolds was very critical of "irresponsible lawyers." He alleged—and Sutherland, Taft, and Van Devanter echoed his charges—that since the Act of 1921 provided for the transferring of cases misfiled with the U.S. Supreme Court to the circuit courts of appeal, many attorneys deliberately committed filing errors to delay final disposition of their case. He further charged that many appeals were filed by unscrupulous attorneys who were cognizant when filing that the only effect would be to delay an adverse decision and increase the expenses to their clients.

Senator Overman asked how the costs of litigation could be lessened. The senator recalled having had a case before the Court in which his adversary had included in the record the charter of a railroad company, which had cost him $560 to have printed in the record. Acknowledging the problem, Van Devanter described the Court's efforts to curb such abusive practices. A new Court rule stipulated that if either party in a suit brought any matter not needed into the record, the unnecessary cost would be taxed to that litigant (Senate Hearings, February 2, 1924, p. 46).

McReynolds concluded his statement by reiterating that the chief responsibilities of the Supreme Court should be to decide questions of law so that lawyers would know how to advise their clients and trial courts could dispose of
their cases. The number of federal questions had increased beyond the limits of what the Court could manage. Entire freedom of review meant unfortunate delay and real injustice. The only solution was to eliminate cases from the Court's docket.

In his formal statement, Justice George Sutherland concurred with the testimony of his colleagues and briefly summarized their major points. During the Senate subcommittee hearings, he devoted most of his time to the uniform procedure bill. However, during the House hearings in December 1924, he introduced a new argument for passage. Noting the constant growth of litigation, Sutherland pointed out that Congress could create more lower federal courts, but could not create an additional Supreme Court, because the Constitution created one Supreme Court. The Supreme Court was unique and must perform its work alone (House Hearings, December 18, 1924, p. 24).

As the Senate subcommittee's attention turned to the uniform procedure bill, Justice Van Devanter interrupted Justice Sutherland to make one final observation. Van Devanter pointed out that several state supreme courts currently exercised total discretion over which cases they would review. Texas, Ohio, California, Virginia, and several other states had bestowed upon their supreme courts total discretionary jurisdiction. Although most of these
states had intermediate appellate court systems, some did not (Senate Hearings, February 2, 1924, p. 48).

Encore of the Justices before the House Committee on the Judiciary

The House judiciary committee chairman, William Graham, did not call hearings on the judges' bill--House bill 3206--until after the 1924 election. On December 18, 1924, a Saturday morning at ten o'clock, Van Devanter, Sutherland, McReynolds, and Taft met with the full committee. The chief justice had sent the committee members copies of the Senate hearings and report on the judges' bill, as well as a memorandum the justices had prepared explaining the bill's purpose and analyzing its content.

The testimony of the justices reiterated what they had told the Senate subcommittee. The style differed because the members of the House committee asked fewer questions. In their formal statements, the justices elaborated more upon the issues which the senators had raised during the February hearings. Van Devanter again assumed the major burden of explaining the bill. His statement reflected a careful study of the Senate hearings and the preparation of an even more detailed statement.

Van Devanter began as he had at the Senate hearings with an explanation as to the bill's origins and purpose. Although he again placed the major emphasis upon the
benefits to lawyers and litigants, he devoted more attention also to the overload of cases upon the Court's docket and the resulting stress upon the judicial system. For the most part, his presentation was identical in content to the earlier Senate one.

When he concluded his statement, he introduced to the committee seven amendments which had been suggested as the result of "friendly criticism" from the bar. The committee subsequently incorporated them into the House bill. These amendments would also be added to the Senate bill on February 3, 1925.

Charles Christopherson asked that the justices explain the difference between writs of error and writs of appeal, for the record. Van Devanter explained that a writ of error was the mode of reviewing actions at law. A writ of appeal was the mode of reviewing decrees in suits in equity. However, for their present purposes, they were equivalent. Graham added, "in equity the appeal brings up the entire record," whereas in law, "the writ of error brings up rulings shown in a bill of exceptions." Van Devanter agreed, noting that writs of error raised questions of fact, also. Questions of fact had usually already been determined by two lower courts, and the Court seldom "disturbed their concurring findings." In contrast, certiorari required the
affirmative showing of why the case should be reviewed by the Supreme Court (House Hearings, December 18, 1924, p. 18).

Justice McReynolds made a much more detailed statement to the House committee than he had to the Senate subcommittee. He elaborated upon five major points. First, that the chaotic state of the laws necessitated codification and simplification. Second, certiorari had proven an effective tool with which to eliminate unimportant cases. Third, unsuccessful litigants often appealed only for purposes of delaying final disposition. The successful litigant should have some right to end litigation. Fourth, the number of federal questions had expanded beyond the scope of the Court's ability to resolve them in a reasonable time. Entire freedom of appeal meant delay and real injustice. Fifth, the mission of the Court should be to decide questions of law so that lawyers would know how to advise clients, and lower courts could dispose of cases (House Hearings, December 18, 1924, pp. 19-22).

He elaborated upon the inevitable growth of the docket. Recently, in a single day, the justices had several cases on the obligatory docket that "upon mere statement of the case there was nothing to do but affirm" the lower court decision. But, counsel had the right to be heard. Therefore, the Court had to hear arguments, and write a "careful opinion (House Hearings, December 18, 1924, pp. 22-24)."
Chief Justice Taft added nothing new of substance. Using the same humorous anecdote he did in the 1922 House hearings, he discussed the misconceptions regarding certiorari and duplicated Van Devanter's description of the Court's procedure. Taft depicted flexibility as an attribute of discretionary jurisdiction, which, if expanded, would allow more time to consider really important cases. Taft covered the origins of the bill, the successful utilization of certiorari, and the adverse effect of prolonged litigation upon "poor litigants" to the advantage of wealthier opponents (House Hearings, December 18, 1924, pp. 25-58).

In contrast to the Senate, the justices received very few questions. Most of the committee members' comments were restatements of the justices' major contentions. McReynolds and Sutherland assumed a greater role in the discussion than they had in the earlier Senate hearing. Chief Justice Taft added to the congenial atmosphere with his humorous anecdotes and materials that he had prepared for the convenience of the committee.

Summary and Analysis

Justice Van Devanter had carried the major burden of explaining the judges' bill, with some support from McReynolds. Sutherland had been mainly a moral support. According to Murphy (1962, p. 142), William Howard Taft had mapped out the strategy for the justices to follow. Evidence
abounds that Taft projected himself into the role of chief crusader for judicial reform. He wrote chatty letters to friends and family discussing that role. He advocated the various reform proposals in every speech and article that he wrote.

However, Taft's role in the passage of the Judiciary Act of 1925 may be overstated, particularly by Taft himself. In the 1920's, Taft appears obsessed with a concept of "enemies" in Congress, particularly in the Senate. These "enemies," he believed, wanted to discredit him personally. Taft lacked patience with and appreciation of the legislative process. He failed to appreciate opposing views. He was a politician, but he idealized the Court as independent of politics. In his private correspondence, he berated members of the Senate, particularly those who disagreed with him and had opposed him on issues. Sometimes his views ceased to be private (Mason, 1964, pp. 88-137). Senator Cummins suggested that in view of the friction between Taft and some Senators, Taft should appoint several other justices to testify before the committee rather than appearing himself (Murphy, 1962, p. 142; Mason, 1964, p. 110).

The judges' bill had been the product of Van Devanter's, McReynolds', and William Day's labor. Justice Day's exact contribution remains unknown. Van Devanter and McReynolds had drafted the bill and understood the subject
matter thoroughly. George Sutherland had been strategically placed on the committee of justices because he had served on the Senate Committee on the Judiciary with many of the current members in the recent past. In contrast to the very political Chief Justice William Howard Taft, these three men had maintained a low political profile. In the previous decade, both McReynolds and Van Devanter had drafted similar legislation, and Congress had passed it. Justice Sutherland had been a member of the Senate judiciary committee when it had endorsed Van Devanter's Act of 1915 and McReynolds' Act of 1916. Sutherland contributed to the committee of justices first-hand knowledge of the Senate.

Although Taft's private correspondence (Murphy, 1962, p. 142; Mason, 1964, p. 110) indicates that the chief justice planned the group's strategy and coached them before the Senate hearings, the strategy probably developed as a group effort. Not Taft, but Van Devanter appears to be the real leader of the group. As already noted in Chapter 5, Van Devanter was considered the "task leader" of the conference during the Taft Court. Before the Senate and the House Committees on the Judiciary, he was the undisputed task leader in regard to the judges' bill.

When the associate justices planned their strategy, they probably listed their major goals. From the detailed account of the congressional hearings of 1922 and 1924, one
can visualize the items on the list. The first item may very well have been to shift the identity of the major beneficiary of the judges' bill from the Supreme Court to litigants and their counsels. Salinger's charge that the bill would limit Supreme Court review to the Washington, D.C. Bar and that of four or five great port cities, no doubt gave the justices cause for concern. A similar charge had been made against the uniform procedure bill, which had been stalled in the Congress since 1913. Endorsements of the various bar associations were important but would not stand alone as a refutation of Salinger's charge. The uniform procedure bill had already proved that such endorsement alone could not overcome that criticism.

Throughout the testimony before the House and Senate committees, the justices stressed how the bill benefitted the litigants and attorneys. "Unscrupulous attorneys" were attacked for irresponsible appeals that increased the cost of litigation to their clients, delayed justice, and clogged the Supreme Court's docket. The implication was very clear that such attorneys were in part responsible for the input overload which the Supreme Court was encountering.

A second item on the strategy list probably was to clearly identify Congress' responsibility to the Court. First, the justices identified congressional sources as requesting that the Court recommend legislation to the
Congress to alleviate the input overload. Second, Congress was designated as a contributor to the problem. The condition of the laws governing the appellate jurisdiction of the federal courts was chaotic. Even the best attorney had difficulty ascertaining what laws governed a given situation and often erred in judgment. About a third of the Court's time had been consumed with jurisdictional questions because of the lack of coherence in the federal laws. Moreover, the numerous congressional statutes expanding the role of the federal government had begat litigation challenging these new laws, their application, and their meaning. Third, the Constitution clearly bestowed upon the Congress the responsibility to designate the appellate jurisdiction of the federal courts.

The third item on the strategy list might have been to allay misgivings regarding the expansion of discretionary jurisdiction. From the 1922 hearings had emerged the need of the justices to convince Congress and the public that the use of certiorari rather than writ of error or appeal would deny no litigant with a legitimate cause review of a lower court decision by the U.S. Supreme Court. Of all the criticisms of the judges' bill that charge of Judge Benjamin Salinger appeared to be the most tenacious. The justices and other proponents of the bill would have to overcome the fears and misconceptions of certiorari in order for the
judges' bill to pass the U.S. Senate. As evidenced in this chapter, Van Devanter, McReynolds, Sutherland, and Taft all sought to educate the members of the congressional Committees on the Judiciary. If issues regarding the use of certiorari arose during the floor debates in either House, those members would have to assume the burden of salesman-ship. The justices wanted them to be well informed for the task.

Judge Benjamin Salinger's charge that trivial cases could be removed on motions to dismiss had been particularly effective during the 1922 House hearings in refuting the need to expand discretionary jurisdiction. Solicitor General Beck had given credence to the Salinger assertion. The justices, therefore, had to respond if the need for expansion of discretionary jurisdiction were to be substantiated. Van Devanter addressed the charge directly and indirectly. First, he noted that motions to dismiss had to be made by the opposing counsel. However, lawyers appeared to be reluctant to move for dismissal. The Court, therefore, was bound to hear oral arguments and write opinions even on cases which, from initial reading of the briefs and record, all agreed that the lower court action should be affirmed. Second, throughout his discussion of the appellate
jurisdiction from the different lower courts, he utilized the court statistics to illustrate the number of needless appeals.

After allaying the fears, and refuting Salinger's charge that no real need existed, the justices needed to establish their case that discretionary jurisdiction was the most positive workable solution to relieve overload stress. They emphasized that the use of certiorari eliminated unnecessary delay and gave the Court more flexibility to cope with input overloads.

The fourth item on the strategy list probably was to describe the content of the bill in a manner to minimize opposition and emphasize its qualities as a codification, simplification, and clarification of the laws governing appellate jurisdiction. Consequently, the changes regarding the appellate jurisdiction from the circuit courts of appeals for Washington, D.C. were ignored. In contrast, Van Devanter had carefully explained and defended the changes regarding the court of claims, because of the criticisms that had already been voiced by Salinger, Beck, and others.

The effectiveness of the justices' strategy will be evident in the next chapter. With the conclusion of the committee hearing stage of the legislative process, the fate of the judges' bill rested with the U.S. Congress.
CHAPTER 7

CONGRESS DELIBERATES AND DECIDES

In Congress, the fate of the judges' bill depended upon the ability, influence, and commitment of the bill's sponsors, William Graham and Albert Cummins. In contrast to the Sixty-seventh Congress, Graham and Cummins held positions in the Sixty-eighth Congress which enabled them to schedule hearings on the judges' bill and to invite the participants who would testify. In 1924, only the justices received invitations to appear before Graham's committee and Cummin's subcommittee. Hence, the records of both hearings contained only the proponents' point of view.

As Chairman of the House Judiciary Committee, Graham had considerable power in the House of Representatives to move the bill through the committee. Once the Rules Committee placed the judges' bill on the calendar, the House would probably approve it.

In 1924, however, Senator Frank Brandegee, not Albert Cummins, chaired the Senate Judiciary Committee. Cummins' subcommittee hearings had allowed the justices to present a strong case for the judges' bill, but the Senate Judiciary Committee Committee had a reputation for
critically dissecting legislation. Nor did a favorable committee report in the Senate virtually assure passage as it did in the House of Representatives.

**Senate Committee on the Judiciary**

After the Senate hearing, Thomas Shelton sent Chief Justice Taft the results of an informal poll indicating the disposition of the members of the Senate Committee on the Judiciary toward the judges' bill. According to Shelton's list, six senators were for the bill: Brandegee, Cummins, Colt, Ernst, Overman, and Spencer. All of these senators were "establishment" Republicans, except for Democratic Senator Overman. The four remaining Democratic senators were opposed to the judges' bill: Caraway, Shields, Walsh, and Reed. The uncommitted senators were Borah, Norris, Stanley, Sterling, Ashurst, and Shortridge. If Sheldon's information was accurate, then the judges' bill was in trouble (Murphy, 1962, p. 144).

In spite of this pessimistic report of Thomas Shelton's, the judges' bill was reported from the Judiciary Committee to the Senate on April 8, 1924. What actually took place when Cummins' subcommittee brought the bill before the full committee is unknown. The Senate debate of January 31, 1925, however, gives some indication of the maneuvering that occurred in the committee. Senator Claude Swanson asked how the Judiciary Committee had stood on the
bill. Senator Cummins noted that although not all members of the committee had been present when the committee voted upon the judges' bill, there had been no dissenting votes.

Senator Thomas Walsh, a member of the judiciary committee who had been on Sheldon's list of opponents, asked Cummins what members had been present. Senator Cummins responded that he could not remember, but there had been a quorum present. Senator Thomas Walsh asked how long the committee had considered the bill. Senator Cummins recalled that he had introduced the bill at the suggestion of the Supreme Court and that the bill had been referred to his subcommittee. He had requested the Supreme Court to send representatives to explain the bill's purpose. Three justices had testified explaining the bill. The members of the committee had then met in executive session and considered the bill "with very great care." They reported their recommendations to the full committee in writing with all three members signing the report.

Senator James Reed of Missouri recalled that the committee had considered the bill briefly one day and that opposition had at once appeared. There had been no attempt to analyze the legislation because there had not been sufficient time and the bill had been passed over. Reed noted

53. The Sixty-eighth Congress had two senators named Reed. James Reed, Missouri Democrat, and David Reed, a Pennsylvania Republican.
that he had not been present when the committee discussed
the bill again, nor when the bill had been reported out of
committee. Reed then protested that he had no idea that the
judges' bill was on the calendar (Congressional Record,
January 31, 1925, p. 2753).

Evidently, Senator Cummins, with the cooperation of
the late committee chairman, Frank Brandegee, had scheduled
the Judiciary Committee to reconsider the judges' bill when
at least two of the opponents on Shelton's list were not
present. According to the Congressional Directory for Jan­
uary 1924, the Committee on the Judiciary met regularly on
Mondays. From the debate one can deduce that the opposition
asserted itself during the initial consideration of the bill
in the full committee. The discussion which occurred during
that meeting very probably became the source of Shelton's
informal poll. The Judiciary Committee considered the
judges' bill again when the opponents were absent. The com­
mittee members present approved the subcommittee's report
and voted to recommend passage. Thus by strategic timing,
Senator Cummins moved the bill through the Judiciary
Committee.

Between April 1924 and January 1925, the judges'.bill remained dormant in the Senate. Congress, in fact, was
not in session from April to December 1925. Members concen­
trated upon the 1924 elections. The presidential campaigns
of that year focused the nation's attention upon the role of the U.S. Supreme Court in the American political system. As discussed in Chapter 4, incumbent Republican candidate Calvin Coolidge and Democratic candidate John W. Davis subscribed to the "cult of the robe." They both depicted the U.S. Supreme Court as the champion and defender of the Constitution and individual rights. When the votes were counted, Coolidge had 382 electoral votes; Davis had 136; and Progressive Robert LaFollette received only 13 from his native Wisconsin. The political viability of the progressive court curbers languished; while functional court reformers took advantage of the public's overwhelming rejection of court critics. Immediately after the November election, Chief Justice Taft began expressing his impatience and concern that the House of Representatives had taken no action on the judges' bill and the Senate had been dormant since April.

During the interim between the first and second sessions of the Sixty-eighth Congress, Frank Brandegee, the Chairman of the Judiciary Committee, and LeBaron Colt died, leaving the Senate Judiciary Committee with two Republican vacancies. In terms of seniority on the committee, William Borah, a leading progressive court curber was next in line for the committee chairmanship. Borah also had the most seniority on the Senate Foreign Relations Committee,
whose chairman, Henry Cabot Lodge, had died in November 1924. At the time of Brandegee's and Lodge's deaths, Borah held the chairmanship of the Education and Labor Committee. Senator Borah relinquished that chairmanship and passed up the Judiciary Committee for the Foreign Relations position.

Senator Albert Cummins was next in line of seniority on the Judiciary Committee. In January 1925, he was elected chairman of the committee. Consequently, he occupied a greater position of power and influence from which to bargain than he had held as a subcommittee chairman. The delay from April 1924 to January 1925 increased the probability of Senate passage of the judges' bill during the Sixty-eighth Congress.

**Senate Debate**

The judges' bill came up on the consent calendar on January 26, 1925. President Pro Tem Albert Cummins presided over the Senate while Senator Lee Overman managed the bill on the floor. Before Overman would move that the bill be passed over, Senator William H. King commented upon the bill's apparent importance and asked if the bill had been approved by the Judiciary Committee. Overman agreed that the legislation was of great importance. The Judiciary Committee had recommended passage; however, some Senators not
present in the chamber had expressed opposition. Responding to Overman's suggestion that the bill be passed over, Senator Duncan Fletcher asserted:

> It is a very important measure, and would provide relief to the Supreme Court which is much needed. They are behind in their docket, and it is impossible for them to catch up without some relief like this being granted. I certainly hope the bill will be acted upon this session (Congressional Record, January 26, 1925, p. 2447).

Senator Overman agreed, but repeated that there had been considerable opposition. The Senate then agreed to pass over the judges' bill.

Duncan Upshaw Fletcher, a Florida Democrat, had served in the Senate since 1909. He was not a member of the Senate Committee on the Judiciary. Evidently, the chief justice or some other proponent of the legislation had discussed the judges' bill with Fletcher and recruited his support. Since November 1924, Chief Justice Taft had been vigorously lobbying members of the House and Senate. Although Fletcher's name does not appear on Murphy's (1962, pp. 144, 230) list of senators to whom the chief justice wrote letters, Fletcher's remarks reflected his support for the judges' bill. Furthermore, proponents of the judges' bill could refer to this dialogue between Fletcher and Overman as a strong argument.

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54. Senator Thomas Walsh's speech before the Virginia Bar Association in 1922 is the only public record of Senate opposition prior to the Senate debates (Congressional Record, February 3, 1925, pp. 2925-2926).
against delay the next time the judges' bill came up on the calendar.

The following Saturday, the Senate again reached the judges' bill on the unanimous consent calendar. After an initial discussion as to whether the bill should be passed over, the Senate adopted a motion to consider the bill at that time.

The discussion that followed between Cummins and Senator John Harreld, Republican of Oklahoma, may have been a carefully rehearsed discussion of the complaints of the legal profession regarding appellate jurisdiction and writs of certiorari. First, Harreld asked if the judges' bill simplified the law so that attorneys did not have to file both writs of error and petitions for certiorari. He noted that attorneys in his state had complained to him that the present law was so confusing that they had to file both ways in order to protect their clients' rights to appellate relief. Harreld's comments reinforced the previous testimony of Van Devanter and McReynolds during the hearings. Senator Cummins reiterated the earlier statements of the justices on the problem (Congressional Record, January 31, 1925, p. 2752).

Senator Harreld then brought up the widespread misconception that only one justice reviewed petitions for certiorari. Thereupon, Cummins described in detail the
procedure and rules of the Court in regard to petitions of certiorari in the same manner that the justices had explained them to the subcommittee. He concluded by referring his colleagues to the explanation of Justice Van Devanter in the Senate Hearings (Congressional Record, January 31, 1925, p. 2752).

Senator Harreld then continued to raise questions focusing upon the common fears which had been vocalized regarding certiorari. "Will the Court want to go too far in putting cases in discretionary jurisdiction because it is less trouble to handle?" With certiorari the litigant has no chance to argue his case orally before the Court. "Will not some men's rights be prejudiced (Congressional Record, January 31, 1925, p. 2752)?" Senator Cummins recapitulated Justice Van Devanter's response to similar questions that he, Overman, and Spencer had raised during the hearings (Senate Hearings, February 2, 1924, pp. 27-35).

Senator George Wharton Pepper, an Ohio Republican and friend of Chief Justice Taft, joined the discussion. Supporting Senator Cummins' explanation, Pepper informed the Senate that Ohio had a system in operation similar to the one proposed in the judges' bill. The Ohio system was working "quite well" (Congressional Record, January 31, 1925, p. 2752). As discussed earlier, Van Devanter had pointed out
as an afterthought that several states were already using similar systems (Senate Hearings, February 2, 1924, p. 48).

Another Senator on Chief Justice Taft's correspondence list, Royal Copeland of New York, began questioning Senator Cummins regarding criticisms which he had received from members of the bar in his state. First, Copeland brought up the charge that the judges' bill transformed the circuit courts of appeal into federal courts of last resort. Senator Duncan Fletcher suggested that the criticism stemmed from the idea that the U.S. Supreme Court should have final review of all constitutional questions (Congressional Record, January 31, 1925, p. 2753).

Responding to Fletcher's observation and Copeland's allegation, Cummins expounded upon the origins, purposes, and theories which had led to the drafting of the bill by the Supreme Court. Cummins reminded the senators that the circuit courts of appeal had been courts of last resort since their creation in 1891. Congress had expanded that role repeatedly with subsequent legislation to enable the U.S. Supreme Court to keep abreast with its docket. Cummins proceeded to duplicate the arguments that the justices had presented to his subcommittee. Cases brought to the U.S. Supreme Court from the circuit courts of appeals had already had one appeal. Litigation should not be allowed to continue
indefinitely through the appellate process. Endless appeals delayed justice and hence denied justice.

Cummins concluded that the continual growth of federal litigation necessitated that Congress further reduce the obligatory jurisdiction of the Supreme Court. In proposing this bill, the Court was seeking to limit its workload to cases which raised questions of great public importance and to federal questions upon which there had been conflicting opinions rendered by the lower courts. Cummins declared, "We have to depend upon their (the justices) intelligence and judgment to decide which cases need to be reviewed from the circuit courts of appeal (Congressional Record, January 31, 1925, p. 2753)."

Copeland then reported a second criticism that he had received alleging that the judges' bill would lower the status of the state courts of last resort in relation to the circuit courts of appeal. His legal advisers had argued that classes of litigation which remained subject to the Supreme Court's obligatory jurisdiction from state courts could, under the proposed bill, reach the U.S. Supreme Court only by writ of certiorari from the federal courts. From the discussion that followed on January 31, 1925, neither Cummins nor Copeland appeared to understand the exact rationale of the criticism. Cummins argued that the
provisions for review from state courts were basically the same as provided by the present law.

The following Tuesday, February 3, 1925, Copeland would request that his correspondence with Chief Justice Taft be printed in the Congressional Record. Thus, Taft's response to this unforeseen criticism would, in effect, become part of the record. Taft had argued that the criticism was basically invalid. First, the classes of litigation referred to in the criticism were not under present law reviewable from the circuit courts of appeal as a matter of right. Taft delineated the two classes of litigation involved and detailed the provisions of the Acts of January 28, 1915 and September 6, 1916. The classes of litigation listed by these two acts could reach the U.S. Supreme Court only by certiorari from the circuit courts of appeal regardless of the constitutional questions involved.

Second, Taft reminded Senator Copeland that state and federal courts were intrinsically different because they were creations of two distinct governments. The Supreme Court reviewed only the federal questions involved in cases from state courts; whereas, the Supreme Court could be asked to review every issue presented in a case from a lower federal court. Consequently, Taft argued there existed an even greater need to limit appellate review from lower federal courts than from state courts. Congress had already
acknowledged this need and utilized discretionary jurisdiction as a remedy in the Circuit Court of Appeals Act of 1891, the Judicial Code of 1911, and the Acts of January 28, 1915 and September 6, 1916.

Taft had then suggested that if, in fact, a status problem did exist, the preferable solution would be to transfer the two classes of state litigation from obligatory jurisdiction to the discretionary jurisdiction. He justified that suggestion with a succinct summary of the arguments which the justices had already made before the Senate subcommittee for the expansion of discretionary jurisdiction (Congressional Record, February 3, 1925, p. 2921).

Copeland's legal adviser had then revised his criticism from a general allegation to a specific recommendation for the retention of section 238 of the Judicial Code in its present form.

Thereupon, Taft summarized the bar's criticism of the judges' bill for allowing a case involving a constitutional challenge being appealed to the circuit courts of appeals from which the only method of appeal to the U.S. Supreme Court would be certiorari. Taft then argued that a federal court would be more likely than a state court to "preserve the federal view of the issue . . . at least to an extent to justify making review of its decision by our Court
conditional upon our approval (Congressional Record, February 3, 1925, p. 2922)."

Although the dialogue between Copeland and Cummins seemingly discounts the issue of court status, Peter Fish (1974) has found merit in the criticism. He attributes to Chief Justice Taft a "quest to elevate the status of the federal courts (p. 10)." Fish begins with the premise that behind the facade of efficiency, economy, unification, and simplification were the policy oriented goals of the reformers (p. 1); then establishes Taft's well documented disdain for state governments, concluding that "Taft entertained no illusions as to the source of threats to federal institutions and property. It was the states. They could be trusted neither to protect individual rights nor even guarantee basic order (p. 8)." Fish (p. 10) posits that "at the heart of Chief Justice Taft's thinking lay the recognition that the federal constitutional protections were safer in the hands" of federal than state judges. To support that contention, Fish quotes from Taft's letter to Copeland, and cites articles and speeches in which Taft expressed unequivocally his disdain for the election of judges, recall laws, and progressive state legislation. Having firmly established Taft's anti-state policy orientations, Fish asserts that the judges' bill was designed "to elude or erode state judicial power by enhancing that of the federal system (pp. 10-11)."
Fish's major premise has much merit. Any reform proposal will complement the policy orientations of the reformer whether the reform is policy-oriented or function-oriented. Logically, Supreme Court justices, like other reformers, would propose remedies that harmonized rather than conflicted with their policy orientations. However, functional problems are also a reality. The input overload—too many cases on the obligatory docket—had been thoroughly substantiated by the docket statistics. Discretionary jurisdiction had proven an effective solution, and the docket data demonstrated that effectiveness. Unlike the other reform proposals that Fish attributes to Taft, the chief justice did not design the judges' bill. All evidence indicates that Van Devanter and McReynolds, assisted by the entire Court, drafted the proposed legislation. Moreover, justices such as John Clarke, who held distinctly different policy orientations from Chief Justice Taft, lobbied for the bill's passage.

At one point in the discussion between Copeland and Cummins, Senator Charles McNary raised a point of order regarding the five minute rule. The bill had come before the Senate on the unanimous consent calendar. Senate Rule VIII placed a five minute limitation upon each Senator discussing a bill considered on that calendar. As noted earlier, however, consideration of the judges' bill had proceeded on a
motion. Ruling upon McNary's point of order, the presiding officer read the last paragraph of Senate Rule VIII which suspended all time limitations upon debate of any bill brought before the Senate on a motion (Congressional Record, January 31, 1925, p. 2753).

Senator McNary had raised the point of order, not as an opponent but as a rather disinterested senator anxious to reach legislation on the calendar of importance to himself. Senator Charles Curtis of Kansas would attempt to have the bill set aside for the same reason (Congressional Record, January 31, 1925, p. 2755). The opponents from whom one might anticipate such delaying maneuvers had initially been caught off guard. As noted earlier, Senator James Reed had complained that he did not know that the judges' bill was on the calendar. Evidently, McNary, Curtis, Reed, and Thomas Walsh had not been present on the floor when the Senate agreed unanimously to consider the bill on motion.

Senator Thomas Walsh, identified by Taft on numerous occasions as an opponent, gained the floor. Walsh acknowledged the need for codification and agreed that the right of appeal should end with the circuit courts of appeal—except in-so-far as federal questions were concerned.

Cummins argued that to permit review of federal questions on writs of appeal would be counter-productive. The purpose of the bill was to relieve the overburdened
docket of the Supreme Court by reducing its obligatory jurisdic­tion. Cummins reiterated the justices' reasons for elimination of all obligatory jurisdiction from the circuit courts of appeal. Whereupon, Walsh acknowledged that he had great difficulty accepting the principle that the Supreme Court should select which cases it would review (Congressional Record, January 31, 1925, p. 2756).

Walsh then suggested that the bill should be referred back to the judiciary committee. He called attention to paragraphs "a" and "b" of section 237, noting that "a" seemed to be the old statute provision of 1789 and "b" the one passed "five or six years ago." As written, these laws continued to be confusing. Cummins acknowledged that the judges' bill ought to simplify and not leave conflict, but Cummins emphatically opposed recommital (Congressional Record, January 31, 1925, p. 2756).

Senator Claude Swanson then suggested that the bill could pass if it could be amended to definitely provide that where a state law or a federal law had been found contrary to the U.S. Constitution there would be an appeal to the U.S. Supreme Court. Cummins noted that the judges' bill already made such a provision. Cummins, Walsh, and Swanson then discussed in what instances the Supreme Court had obligatory jurisdiction and in which ones it had discretionary jurisdiction. Swanson wanted to make all constitutional
questions obligatory. Cummins argued that such a provision would negate the bill's usefulness. Rather than eliminating obligatory jurisdiction it would increase it and hence accentuate the existing problem. A major purpose of the bill was to provide relief to the U.S. Supreme Court not to increase its case load (*Congressional Record*, January 31, 1925, p. 2757).

Several senators desiring to consider other bills in the calendar again requested that the discussion of the judges' bill be resumed at another time. Senator Charles Curtis suggested that the debate could be resumed at the close of routine business Monday morning. Senator William C. Bruce objected that Monday was a regular calendar day. Senator Walsh again suggested that Chairman Cummins allow the bill to be recommitted to the Judiciary Committee. Senator Swanson agreed, suggesting that the committee could report back within a week. Cummins adamantly refused, arguing that the House of Representatives should have the opportunity to act upon the bill before the March adjournment. Senator Bruce suggested that the bill could be taken up again Tuesday, but Swanson objected because "it would interfere with unfinished business." Expressing his deep interest in the next bill on the calendar, Bruce argued for the Tuesday scheduling of the judges' bill. Senator Swanson, finally, also agreed to the Tuesday scheduling but insisted that the
debate be terminated at two o'clock in order that the Senate could take up its unfinished business. That two o'clock deadline could prove a decisive factor if the opponents could extend the debate and prevent a vote before the time expired (Congressional Record, January 31, 1925, pp. 2757-2758).

A casual reader of the Congressional Record might consider the Senate debate a congenial discussion of the judges' bill by sympathetic senators who had been interrupted by other senators who were anxious to discuss other bills. Assuming that Cummins, Overman, Taft, and Sheldon were correct in their assessment that there was "considerable opposition" to the bill, then the strategies of both the opponents and the supporters should be evident in the initial debate.

At least, the subcommittee members and Senator Thomas Walsh were very conversant on the judges' bill. However, the bill's technical nature probably discouraged many senators from carefully reading and studying it. Those who did probably relied heavily on Justice Van Devanter's testimony in the hearings, Taft's brief synopsis, and the report of the Senate Committee on the Judiciary to understand how the bill altered the present law. Referring to the existing statutes would have been so mammoth a task as to quickly convince a senator who was not well versed in federal appellate jurisdiction that the bill was needed. Indeed,
most senators probably did not study the bill closely because of their greater concern with other legislative matters.

The recent presidential campaign of 1924 had demonstrated that numerous Republicans, Democrats, and the general public subscribed to the "cult of the robe." In contrast to court critics, such as progressives Borah and LaFollette, a great number of senators held the Supreme Court in high esteem. The Court's having drafted the bill at the request of several senators would therefore be a major factor in its favor.

Assuming the above analysis of the Senate environment is correct, then the following scenario appears plausible in terms of the strategy which the advocates of the judges' bill pursued. Prior to the Senate debate, several senators met with several members of the Supreme Court and perhaps other supporters of the judges' bill. The group identifies the major arguments that the opposition might utilize. The justices have already held at least one such meeting prior to the Senate subcommittee hearings. The group then recruits friendly non-members of the Judiciary Committee from the Democratic and Republican parties who have both prestige and seniority to raise the controversial issues. Senator Cummins, the floor manager of the bill, would gain the floor of the Senate and maintain control of
the debate. Having that control, they could avert the opposition's procedural tactics of seeking to have the bill passed over or recommitted to the Judiciary Committee.

The first critical stage of the strategy would be to get the bill considered upon motion from the unanimous consent calendar, hence setting aside Rule VIII's five minute limitation upon senators' statements. Observe the manner in which the advocates accomplished this goal:

Senator Cummins: Mr. President, I have no intention of asking for consideration of this bill under Rule VIII, but I rise for the purpose of directing the attention of the Senators to it and asking them to become familiar with it, for it is a bill of very great importance. I shall endeavor at some appropriate time in the very near future to ask the Senate to take it up for consideration, and I am hoping that Senators who are interested in the administration of the law in the circuit courts of appeal and in the Supreme Court of the United States will become as familiar with it in the meantime as their convenience will permit. I hope to be able to secure the passage of the bill at this session of congress (Congressional Record, January 31, 1925, p. 2750).

Thereupon, Senator David Reed of Pennsylvania asked Senator Cummins if he would yield for a question.

Reed then argues:

I think the attention of every lawyer in the Senate has been called to this bill long ago by members of the committee which prepared the original bill. Most of us have read it over carefully and studied

55. David Reed should not be confused with James Reed of Missouri, an opponent of the judges' bill who takes part in the debate.
it as far as time permits; and it was my impression, when the bill was last reached on the call of the calendar, that it would have been passed under the five-minute rule if the Senator himself had not asked it go over. I think we are all familiar with it, and I do not see why the Senator does not permit it to be passed and go to the House (Congressional Record, January 21, 1925, p. 2750).

Senator Copeland then informed the chair that there was opposition to the bill. Whereupon, the presiding officer noted the objection and ruled that the bill would be passed over. Immediately, Senator Duncan Fletcher noted that Rule VIII permitted the bill to be taken up on motion. Senator Cummins then moved to take up consideration of the bill, and the Senate unanimously consented (Congressional Record, January 31, 1925, p. 2750).

From the discussion that followed and Senator Cummins' staunch resistance to efforts to end consideration of the bill on January 31, once the motion had passed, one might conclude that he had, indeed, planned the scenario with David Reed, Duncan Fletcher, and, perhaps, Royal Copeland.

Planned or not, the maneuver had taken the opposition by surprise. Senator James Reed of Missouri had complained that he did not know that the judges' bill had been scheduled. He was not prepared for a substantive discussion, and his initial comments reflected his confusion. The opponents sought to have the bill recommitted to the Judiciary Committee. With less than six weeks left in the
Sixty-eighth Congress, a recommittal would have probably killed the bill.

The judges' bill had been passed over on January 26 to give the opposition the opportunity to participate in the debate. Their failure to be prepared when it came up a second time strengthened the proponents' position to proceed with the consideration of the bill. Senator Cummins exercised his authority as chairman of the Judiciary Committee and as floor manager in a decisive manner which undermined any strategy which the opponents had developed. Apparently, Cummins was totally committed to the passage of the bill. During the debate, he adamantly rejected all efforts to recommit the judges' bill to his committee and denounced amendments which would have increased the Court's obligatory jurisdiction.

However, Cummins had ultimately succumbed to the pressures of his colleagues to discontinue the debate until the following Tuesday. Senator Swanson's insistence that the debate not continue past two o'clock posed a major obstacle to the bill's coming to a vote February 3. One manner in which debate could be curtailed on Tuesday would be to work out a compromise with the opposition. Therefore, Cummins met with Senator Thomas Walsh and, over the weekend, Walsh, Cummins, and the justices drafted two amendments (Murphy, 1962, p. 145; Congressional Record, February 3,
1925, p. 2919). When the Senate took up the debate again, Tuesday morning, February 3, 1925, Senator Cummins had an able ally assisting him in the floor debate, former opponent Senator Thomas Walsh of Montana.

When the discussion resumed, Senator Cummins announced the House of Representatives had passed the judges' bill yesterday with several amendments which he "had on the table for some weeks." These amendments were the seven which the chief justice had presented to the House Judiciary Committee during the hearing on December 18, 1924. In addition, Cummins introduced Senator Walsh's "two minor, clarifying amendments (Murphy, 1962, p. 145)." The House amendments consisted of inserting or deleting words from the text of the bill to clarify its meaning but did not alter the content. These amendments were routinely adopted without comments other than Cummins' statement.

Senator Walsh's first amendment added to the section designating the scope of review over the state courts of last resort the provision:

Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph, nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting review on certiorari under this paragraph (Congressional Record, February 3, 1925, p. 2919).
Cummins explained that this amendment was intended to eliminate the confusion which Senator Walsh had anticipated during the Saturday discussion of section 237. Walsh feared that the section on certiorari might be construed to override the preceding section regarding review as a matter of right. With this brief explanation, the Senate adopted the amendment.

Senator Walsh's second amendment was intended to reconcile the objections expressed Saturday regarding review from the circuit courts of appeal. The amendment was twofold. First, the word "unrestricted" as added to section 240 (a) to make the section read as follows:

(a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal (House Hearings, December 18, 1924, p. 32).

Second, the following paragraph was added to follow section (a):

(b) Any case in a circuit court of appeals whereas 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 against its validity, may, at the election of the party relying on such State statute, be taken to the Supreme Court for review on writ of error or appeal; but in that
event a review on certiorari shall not be allowed at
the instance of such party, and the review on such
writ of error or appeal shall be restricted to an
examination and decision of the Federal questions
presented in the case (Congressional Record, Febru­
ary 3, 1925, p. 2919).

Senator Cummins explained that the amendment permit­
ted cases brought from the circuit courts of appeal to the
Supreme Court on certiorari to be reviewed with respect to
the entire merits of the controversy as well as the federal
question. A case in which the circuit courts of appeals had
invalidated a state statute could be brought to the court on
the obligatory docket, but the consideration of such a case
on a writ of error or appeal would be limited to the federal
question. Once the litigant exercised the option of writ of
appeal or error, he could not also file a petition for a
writ of certiorari.

At this point, Senator Copeland asked Senator
Cummins if the amendment satisfied the criticism which had
been made by his correspondent. Regarding court status,
Senator Cummins did not think the amendment would satisfy
the critics because it placed the circuit courts of appeal
and the state courts on the same plane with respect to only
one phase of obligatory jurisdiction from the state courts.
Senators Walsh and Copeland then became involved in a dis­
cussion of whether the critic had asserted that the judges'
bill gave higher status to the state or federal courts.
Senator Copeland then had his correspondence with Taft
entered into the record. Senator Cummins assured Copeland that Walsh's amendment had entirely corrected the problem of the court of appeals being a court of last resort on constitutional questions (Congressional Record, February 3, 1925, p. 2922).

Senator James Reed then made an extensive argument against the amendment. According to Reed, it perpetuated the inequality among litigants in cases involving a constitutional challenge to a statute. Both the amendments and the existing law placed an unfair bias in favor of the validity of a statute.

Reed argued that the mode of review should be the same regardless of the decision of the lower court. Review should fall either under the Court's obligatory jurisdiction for both litigants or should be left to the Court's discretion (Congressional Record, February 3, 1925, pp. 2922-2924).

Ultimately, Senator James Reed succumbed to the arguments of Senators Thomas Walsh, Walter George, and Albert Cummins. The bias of which Reed complained had originated with the Judiciary Act of 1789. The defeat of the judges' bill or Walsh's amendment to the judges' bill would not eliminate the problem. Subjecting all constitutional challenges of statutes to the Supreme Court's obligatory jurisdiction would greatly increase the Court's caseload and defeat the purpose of the judges' bill. Perhaps, all
appellate review by the Supreme Court should be made discretionary which would eliminate the inequity of appellate relief, but the issue should be taken up separately. Reluctantly, James Reed consented to yield the floor; Walsh's second amendment was adopted thereupon (Congressional Record, February 3, 1925, p. 2924).

Senator Cummins requested the presiding officer to lay House Bill 8206, the judges' bill, before the Senate. After the bill's title had been read twice, the Senate adopted a motion to consider the bill. Thereupon, Senator Cummins moved to amend the House version of the judges' bill by striking all matter after the enacting clause and substituting the Senate version, as amended. The motion was adopted.

Senator Walsh had just obtained the floor when the presiding officer announced that it was two o'clock and laid before the Senate the unfinished business. The clerk then read House Bill 4971. Noting the prospect of finishing the judges' bill in a short time, Senator Thomas Sterling moved that the unfinished business be temporarily set aside for that purpose. The Senate concurred.

The chair then recognized Senator Thomas Walsh. Throughout the morning, Senator Walsh had assisted Senator Cummins in defending the judges' bill as amended. Now, in a rather dramatic statement, the leader of the opposition
explained his reservations regarding the expansion of discretionary jurisdiction. Walsh reviewed the provisions of the Judiciary Acts of 1789, 1914, 1915, and 1916. He noted the confusion and inconsistencies that the latter two acts had caused, and his basic disagreement with their provisions, particularly those removing the construction of federal statutes, treaties, and the U.S. Constitution with a few exceptions from the obligatory jurisdiction of the Supreme Court. He discussed the important federal questions unique to the western states, particularly the need for the Supreme Court to rule upon the construction of statutes involving mining and land use.

Although he believed that the U.S. Supreme Court should have final jurisdiction upon the construction of the U.S. Constitution, treaties, and statutes, he recognized the functional problems of the present laws. The judges' bill would provide relief to the overloaded Supreme Court docket, and would eliminate the inconsistencies of the Acts of 1915 and 1916 by placing all questions regarding the construction of federal laws whether coming from state or federal courts under the discretionary jurisdiction of the U.S. Supreme Court. He then expressed the belief that the right to review had been preserved in a functional manner, and that the Court could be persuaded to "review any case which it ought to review."
Concluding what, in effect, was his concession speech, Senator Walsh noted the lack of support which he had received from the professional bar. In view of the strong involvement of the justices of the Supreme Court, he did not feel disposed to continue his opposition. With an undertone of defeat, he conceded, "I have been accused of standing in the way of a good many of these proposed statutes that are asked for by the Supreme Court of the United States, and I do not feel like standing alone on the matter (Congressional Record, February 3, 1925, pp. 2925-2926)."

Alone, indeed, would stand Senator James Thomas Heflin of Alabama. Quoting the Bible, Senator Heflin gave an impassioned speech upon the American ideal—that every American ought to have a right to appeal his case to the United States Supreme Court. Heflin either did not know or ignored the fact that such a right had never existed throughout the history of the United States Supreme Court.

As the judges' bill came to a vote, Senator Heflin requested a roll call vote. Nineteen senators did not vote. Of those present, only Senator Davis Elkins, who was paired with Senator Robert Owen of Oklahoma, refrained from voting. The results were seventy-six yeas, one nay—Senator Heflin.

The opponents of the bill had asserted that review of constitutional questions and federal questions should be placed under the U.S. Supreme Court's obligatory
jurisdiction. Their position was tenuous because federal laws had never provided for the appeal of all federal questions nor all constitutional questions to the U.S. Supreme Court. To place such a provision in the judges' bill would have expanded the present obligatory jurisdiction of the Supreme Court, hence augmenting the stress which the bill had been drafted to relieve. With the defection of Walsh, the opposition was without a leader.

The Walsh amendments constituted no major change in the content of the bill. In terms of strategy, however, the amendments had great significance as a modus vivendi, which enabled Walsh to gracefully shift his position from an opponent to a supporter. The actual reasons for the change are stated in Walsh's concession speech. The bill had sufficient support to pass. There was no reason for Walsh to fight for a losing cause. Walsh demonstrated his own expertise on the development and content of laws governing federal appellate jurisdiction. Acknowledging the chaotic state of the laws, he sympathized with the goals of simplification, clarification, and codification. He had difficulty accepting the premise that the Supreme Court should have the power to select its own docket. As an idealist, he believed strongly that the Court should review federal questions, particularly if they involved the construction of the federal law or the constitutionality of statutes.
As a pragmatist, he recognized the functional problems which made that position untenable. He had also noted the lack of support from the professional bar. In fact, Walsh had been subjected to a campaign masterminded by Thomas Sheldon, the ABA lobbyist, to discredit him in his home state. These efforts had resulted in the Montana Bar Association passing a resolution censoring Walsh (Mason, 1964, p. 112).

**Action in the House of Representatives**

The House of Representatives passed the judges' bill almost without comment. The House Judiciary Committee had voted unanimously to recommend passage and reported the bill with the amendments that the justices had recommended during the December 18, 1924, hearings. The Rules Committee scheduled the bill on the calendar shortly thereafter. On February 2, 1925, the bill came up on the House calendar. Judiciary Committee Chairman William Graham very briefly explained the purpose of the bill without going into a detailed description of its content.

Congressman Tom D. McKeown of Oklahoma introduced an amendment which would have included as obligatory jurisdiction the lower court decisions against Indian land claims which were based upon an allotment by a treaty or an Act of Congress. Thereupon, Judiciary Committee member Leonidas Dyer asked that no material be added to the bill which the
Judiciary Committee had not examined. Chairman Graham recommended that McKeown's amendment be rejected. The amendment failed. The House then passed the judges' bill by a voice vote (Congressional Record, February 2, 1925, p. 2876).

Later that day, Congressman Edward Denison of Illinois brought up a motion to reconsider the judges' bill. Denison wanted to be sure that the bill did not alter the appellate jurisdiction of the Canal Zone. When the motion to reconsider came before the House, however, Denison was not in the chamber. Congressman Thomas Blanton suggested the absence of a quorum. Before Denison could gain recognition from the chair, Speaker Nicholas Longworth recognized Chairman Graham who moved that Denison's motion be tabled. Graham's motion eliminated any opportunity to debate. Denison requested to address the House for one moment but was ruled out of order. The motion to reconsider was tabled.

Graham immediately invited Denison to meet with him, the committee of judges, and Senator Cummins to discuss Denison's objections. If an amendment were then deemed advisable, Cummins could offer one in the Senate. Denison, thereupon, withdrew his motion to reconsider (Congressional Record, February 2, 1925, p. 2902), freeing the House bill to go to the Senate.
Denison, Graham, and Cummins met later in the day with the committee of judges. They agreed to Denison's suggestion that the provisions affecting the Canal Zone be eliminated from the bill so as to leave the present law intact (Congressional Record, February 4, 1925, p. 3005). The following day, when the Senate took up consideration of the judges' bill again, Senator Cummins included with the House amendments, amendments to strike from the bill all references to the Canal Zone.

Upon passage in the Senate, the judges' bill was returned to the House of Representatives as House bill 8206 amended by the Senate. Graham succinctly described the amendments as those requested by Congressman Denison and Senator Thomas Walsh. He explained "they" 56 had met with the committee of judges and that "all" had agreed to the amendments. The House then passed the bill again as amended. On the following day, President Calvin Coolidge signed the bill which has become known as the Judiciary Act of 1925 (Congressional Record, February 5, 1925, p. 3748).

Summary and Analysis

Senator Cummins had skillfully moved the judges' bill through the Senate. The most crucial stage of the

56. Graham's "they" implies that one meeting occurred with Walsh also present rather than two meetings—one with Walsh and one with Denison.
legislative process was gaining the approval of the Committee on the Judiciary. When the "considerable opposition" surfaced during the first discussion of the judges' bill by the full committee, consideration was delayed due to the lateness of the hour. Assisted, no doubt, by Committee Chairman Frank Brandegee, Cummins was able to schedule the next discussion when the opposition was absent from the committee.57

Having outmaneuvered the opposition in the Judiciary Committee, Senator Cummins then delayed Senate consideration of the judges' bill ostensibly to give the opposition an opportunity to discuss their criticisms of the bill. In the meantime, as both David Reed's and Duncan Fletcher's arguments against delay implied, supporters of the bill had been intensively lobbying senators and impressing upon them the importances of the proposed legislation to the Supreme Court, litigants, and lawyers. When Cummins finally consented to Senate consideration of the bill, he caught the opposition unprepared. Cummins probably also had the votes necessary for passage at that time.

Taft's letters to numerous senators listed the major opponents as Thomas Walsh and John K. Shields. Senator

57. The opposition's leader, Senator Thomas Walsh, had been involved heading a select committee which was investigating the administration's involvement in the Teapot Dome Scandal—an investigation that led to the resignation of Attorney General Daugherty.
Shields neither participated in the Senate discussion nor did he vote. Walsh focused his initial questioning of Cummins upon the action of the Senate Judiciary Committee. From both his and James Reed's questions, one can ascertain how Cummins maneuvered the bill through the Judiciary Committee. However, for Walsh and Reed to have pursued that topic would have been counterproductive, in that it might have provided documentation in the Congressional Record for political opponents to use to support charges that Walsh or Reed neglected their Senate responsibilities. Walsh was already under attack from the Montana Bar Association, which had passed a resolution of censorship against him for his opposition to court reform legislation.

Whether Walsh or Cummins initiated the negotiations for a compromise is unknown. The amendments agreed upon were minor, but they did provide a conventional rationale for Walsh and other opponents to shift positions.
CHAPTER 8

THE JUDICIARY ACT OF 1925: IN RETROSPECT

The essential function of the U.S. Supreme Court is to resolve conflicts among coordinate appellate tribunals and to determine matters of national concern. The essential issue which all functional court reformers must address is how the system can be adjusted to maximize the Court's ability to perform efficiently that function. In drafting the Judiciary Act of 1925, the justices of the U.S. Supreme Court provided a flexible approach to the problem of how the Court could perform this basic function and yet restrict jurisdiction in a practical manner that would eliminate litigation that had no great public significance. Both Congress and the Supreme Court recognized that past classifications had been too rigid to successfully accommodate the myriad different, unpredictable judicial questions which had arisen.

The Judiciary Act of 1925 revolutionized the appellate jurisdiction of the U.S. Supreme Court and the circuit courts of appeals according to Charles Bunn (1925, p. 311). Because of its massive transfer of categories of cases from the Supreme Court's obligatory jurisdiction to its

58. Bunn was General Counsel of the Northern Pacific Railroad Company, St. Paul, Minnesota.
discretionary jurisdiction, the Act of 1925, indeed, did appear revolutionary. The Act culminated the evolution of the circuit courts of appeals into the major federal courts of last resort. Only a few classes of litigation remained reviewable by the U.S. Supreme Court as a matter of right. All other cases involving federal questions could be brought to the Supreme Court only by petitioning for a writ of certiorari. From those petitions the justices would grant a review to those cases which in their opinion raised significant public questions. Hence, the Act of 1925 was revolutionary in that the focus of the Supreme Court shifted from reviewing the merits of each case to the significance of the litigation in terms of public policy.

A Summary of the Judiciary Act of 1925

The Judiciary Act of 1925 designated five classes of litigation as subject to direct review by the U.S. Supreme Court from the U.S. district courts. William Hughes (1925, p. 267) succinctly listed these classes in the *Georgetown Law Review* as follows:

1. Interlocutory or final judgements or decrees from district courts under section 2 of the Act of February 11, 1903 (32 Stat. 823)—anti-trust cases.


3. Orders granting or denying interlocutory or permanent injunctions against enforcement of state statutes under section 266 of the Judicial Code as
amended by the Act of March 4, 1913 (37 Stat. 1013) --the Expedition Act.

4. Orders or decrees granting or denying interlocutory or permanent injunctions against the enforcement of orders of the Interstate Commerce Commission under the Act of October 23, 1913 (32 Stat. 225).

5. Appeals provided for in the Packers and Stock Yards Act of August 15, 1921, Section 316.

Prior to the enactment of the Judiciary Act of 1925, the circuit courts of appeals had final appellate jurisdiction in the following classes of litigation (Bunn, 1925, p. 310):

1. cases wherein the amount involved did not exceed $1,000;
2. diversity of citizenship cases;
3. patent cases;
4. copyright cases;
5. revenue cases;
6. bankruptcy cases;
7. cases under employers' liability;
8. cases under Hours of Service Act;
9. cases under the safety applinance act; and
10. habeas corpus cases.

Such cases reach the U.S. Supreme Court only by certification or by writ of certiorari.

All other classes of litigation in the U.S. circuit courts of appeals could be brought before the U.S. Supreme Court on a writ of appeal or a writ of error. Section 24 of
the Judicial Code designated twenty-five classes of civil suits in which the litigant had the right to appeal to the U.S. Supreme Court after a U.S. circuit court of appeal had reviewed the decision of a U.S. district court. The details encompassed in the statutes, indeed, were a major source of confusion in the law.

As discussed in previous chapters, the proponents of the judges' bill had rejected the idea that litigants should have the right to more than one appellate review. On that theory, the justices had placed all cases from the circuit courts of appeal under the U.S. Supreme Court's discretionary jurisdiction. However, Congress had amended the judges' bill to accommodate the objections of Senators Thomas Walsh and Royal Copeland. As passed, the Judiciary Act of 1925 permitted the review of federal questions on a writ of error or appeal of cases in which a U.S. circuit court of appeals had invalidated a state statute. However, the review was limited to the federal issue, and the appellant was specifically prohibited from double filing in such cases. If he sought a review of the entire case, he could elect to petition for a writ of certiorari thus waiving the right of review on a writ of appeal or error. Hughes (1925, p. 270)

59. These classes are listed and discussed in "Appellate Procedure of the United States Supreme Court and the Circuit Courts of Appeal," American Bar Association Journal, 1925, pp. 146-147.
noted that this provision of the Act of 1925 would "present a dilemma at times" for attorneys seeking to get a case before the U.S. Supreme Court.

The Judiciary Act of 1925 eliminated the ambiguities of the previous law regarding appeals from state courts of last resort. Although introducing no major changes in the existing jurisdiction of the U.S. Supreme Court, the Act of 1925 unequivocally specified that the only cases which could be appealed to the U.S. Supreme Court as a matter of right were:

(1) Where there is drawn in question the validity of a treaty or a statute of the United States and the decision is against its validity.

(2) Where is drawn in question the validity of any state statute 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.

The vague, troublesome provisions regarding cases asserting a federal right or claim were completely purged from the scope of the U.S. Supreme Court's obligatory jurisdiction.

All other classes of litigation from all the federal courts and the state courts of last resort could be brought before the U.S. Supreme Court only via a petition for a writ of certiorari. However, the circuit courts of appeals and the court of claims could certify questions or propositions of law involved in cases before them to the U.S. Supreme Court for instruction.
Thus the Judiciary Act of 1925 unequivocally restricted the right of review before the U.S. Supreme Court and bestowed upon the Supreme Court the broad authority to limit its own jurisdiction. The Act of 1925 provided for flexibility within the scope of the Court's jurisdiction to select on an ad hoc basis the cases which the justices agreed raised the most important issues.

The Judiciary Act of 1925 also included several important remedial provisions. First, cases filed as writs of error, writs of appeal, or petitions for writs of certiorari which should have been brought before the Supreme Court by one of the other writs, could be treated by the Court as though they had been properly filed. This provision eliminated the need for double filing if an attorney remained in doubt as to the proper method of filing and protected the litigant from losing his case on that procedural error.

Second, litigants could substitute in suits against public officials who had ceased to hold office the name of the successor as a party to the suit brought by or against them. Although such a provision had existed for federal officials, the law had not contained a similar provision regarding state officials. Consequently, a number of state cases had abated because the official involved in the original litigation had ceased to hold the office involved in the litigation.
A third provision removed all rights of corporations organized by Congress to seek standing in federal courts on the grounds of diversity of citizenship. The previous law had placed that limitation upon railroad companies. The Act of 1925 merely expanded the provision to all other corporations except those owned by the federal government.

In terms of the stated objective of bringing together all the laws governing federal appellate jurisdiction, the Judiciary Act of 1925 fell short of the goal. For strategic reasons to facilitate passage, the justices had not included laws regarding the court of customs appeals and Congress deleted references to the Canal Zone, leaving the previous laws governing review from that territory's courts intact. The Judiciary Act of 1925 did accomplish the goal of condensing, simplifying and clarifying the laws governing federal appellate jurisdiction.

The Impact of the Judiciary Act of 1925

The impact of the Judiciary Act of 1925 upon the docket of the U.S. Supreme Court was immediate. Table 1 illustrates a significant reduction of cases in arrears after 1925, although the number of cases in arrears began to increase again, but did not exceed the 1925 level until 1965 with 591 cases in arrears.
Table 1. The United States Supreme Court Docket from 1923 to 1940: New Cases and Cases in Arrears

<table>
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<th>Term</th>
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<th>Arrears</th>
<th>Term</th>
<th>New Cases</th>
<th>Arrears</th>
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<td>1932</td>
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<td>533</td>
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<td>90</td>
</tr>
<tr>
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<td>175</td>
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<td>949</td>
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<td>120</td>
<td>1940</td>
<td>973</td>
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</table>

Source: The Annual Reports of the United States Attorney General, 1923 to 1941.

Other factors also contributed to the impressive reduction of arrears from 1923 to 1940. The passage of the Judiciary Act of 1925 signified congressional recognition that the U.S. Supreme Court had to have broad discretionary powers if litigation brought before it was to be promptly resolved. The Act of 1925 was supplemented in 1928 with legislation bestowing upon the U.S. Supreme Court broad
discretionary powers regarding writs of appeal. Since 1928, the U.S. Supreme Court has had the authority to reject writs of appeal on the grounds that the case failed to raise a substantial federal question. In regard to writs from the state courts, the federal question has to be "validly raised early in the state court." Even if both conditions appear to be present, the Supreme Court may dismiss the case on the grounds that the state court's judgment can be sustained on an independent ground of state law (Abraham, 1975, p. 173).

In 1928, Congress also abolished the use of writs of error in the federal courts. During the House hearings in 1922 Judge Benjamin Salinger had charged that the judges' bill eliminated writs of error. Although the Judiciary Act of 1925 did not entirely eliminate writs of error, the Act did provide part of the foundation for the elimination of the writ in 1928. Hence, after 1928, the only remaining writs of review by which an appellant could bring his case before the U.S. Supreme Court were writs of appeal and petitions for writs of certiorari.

As a result of the Judiciary Act of 1925 and the legislation in 1928, the U.S. Supreme Court has exercised de facto discretionary jurisdiction over its docket. Abraham (1975, p. 173) reports that of the appeals and petitions for certiorari presented to the Supreme Court during the 1972-1973 term, 91.3 percent were dismissed. William O. Douglas
(1960, p. 410) reported that the U.S. Supreme Court reviewed no more than fifteen percent of the writs of appeal. In the 1970's the U.S. Supreme Court has accepted less than ten percent of the cases brought before it on writs of appeal and petitions for writs of certiorari.

With the passage of the Judiciary Act of 1925, the U.S. courts of appeals, 60 became the de facto federal courts of last resort for most federal litigation. 61 The Act of 1925 added to the dockets of the courts of appeal cases from the U.S. district courts which previously had had a direct appeal to the U.S. Supreme Court. To a degree, however, the clarification, simplification, and codification of the laws governing federal appellate jurisdiction mitigated the increase in case loads of the courts of appeal. The Judiciary Act of 1925 had eliminated many of the jurisdictional questions which had previously burdened the federal appellate courts.

The additional responsibilities accruing to the U.S. courts of appeals with the passage of the Judiciary Act of 1925 provided momentum to the efforts of some court reformers to add a tenth judicial circuit. Proponents of a tenth

60. The name was changed from the circuit court of appeals in 1948.

61. Abraham (1975, p. 193) states that the court of appeals "finally decides approximately 85 per cent of all federal cases."
circuit had, in fact, succeeded during the Sixty-fourth Congress in 1916 in getting a bill reported favorably from both the House and Senate Committees on the Judiciary, but the Senate had failed to act upon the bill. In 1929, Congress finally enacted legislation creating a tenth judicial circuit and restructuring the federal judicial circuits into their present composition. 62

The pressures for the tenth circuit and the realignment of the circuits existed long before the Judiciary Act of 1925. The Tenth Judicial Circuit Act of 1929 was intended to relieve excessive stress caused not only because of large case overloads, but also because of the burdens upon the legal profession and litigants due to the excessive distances which some attorneys had to travel to argue their case before the U.S. court of appeals. Had the Judiciary Act of 1925 and the Tenth Circuit Act not been adopted to relieve the functional stresses upon the judicial system, eventually some other reform measures would have had to have

been implemented to prevent an inevitable breakdown of the system.

Judicial Reforms: Some Tentative Observations

Although primarily a descriptive case study of the Judiciary Act of 1925, this study has been premised upon several important assumptions of functional systems analysis. All systems have inputs which are labeled demands. Demands cause stress upon the system. All systems need an optimum amount of demands balanced by other inputs known as supports. When the optimum condition exists, the system has an equilibrium; that is, the system is functioning at capacity and efficiency. The stress within the system is within normal range.

Judicial reforms are changes of the judicial system to correct some perceived problem. The discussion of both policy-oriented and functional oriented proposals evidence that unsatisfied demands precipitate reform proposals. The identification of the demands which precipitate reform proposals and the point in the system at which the stress exceeds the optimum level for the reformers appear significant in understanding the dynamics of judicial reform. The identity and political resources of the groups perceiving the stress has major importance in terms of both the types of reform proposals which are advocated and the strategies
which are developed to promote the implementation of the reforms.

From the overview of judicial reform proposals which have occurred throughout the history of the federal courts, several distinct types of demand stress conditions appear significant. The rarest condition occurred between 1891 and 1911, when the district courts absorbed the functions of the old circuit courts to the extent that the circuit courts remained only a vestigial part of the federal court system. Because of the supports within the political culture which can be identified as emotional attachment to the traditions of the circuit system, the demise of the circuit courts was postponed for twenty years. The condition which resulted in the phasing out of the circuit courts can be identified as starvation. After 1891, the circuit courts had only a nominal identity distinct from the district courts.

The most common condition throughout the history of judicial reform has been when demands exceeded the optimal number, and an overload condition prevailed. The causes of overloads have been varied. First, structural deficiencies within the system have resulted in overload stress. The designation of the Supreme Court justices and the U.S. district court judges as circuit court judges resulted in circuit riding responsibilities and dual judicial roles. Although initially few cases were on the federal docket, the
physical demands and inconveniences of circuit riding resulted in immediate demands for revision of the system.

A second overload condition has been caused by deficiencies in the laws governing jurisdiction and procedure. Rules of procedure must be considered dysfunctional when a significant number of cases are decided upon procedural points rather than upon their merits. Demands of a litigant go unsatisfied either because no decision was rendered on the merits of his case or because the expense and time involved in obtaining a final decision negated the relief originally sought. The Judiciary Act of 1925 relieved the stress caused by the chaotic state of the law governing federal appellate jurisdiction. By simplifying, clarifying and codifying those laws, the Act eliminated much time and money expended upon questions of jurisdiction. Hence, providing relief to litigants, lawyers, and judges, the Act relieved a major source of stress upon the federal appellate courts, particularly the U.S. Supreme Court.

A third cause of overload stress is more cases on the courts' dockets than can be adjudicated within a reasonable length of time. The number of new cases docketed exceeds the number of cases decided; consequently, each year the number of cases in arrears increases, as does the time required to dispose of the cases on the docket. The longer the condition remains out of balance, the greater the stress
upon the judicial system. This cause of overload stress has been a reoccurring phenomena in the American court systems. The increase of cases in arrears has been the inevitable result of the dynamic social, economic, and political growth which transformed the environment.

The classic, traditional approach to the problem has been to create more courts and to appoint additional judges. However, that remedy has not been feasible for the U.S. Supreme Court. The Constitution specifically states that there shall be one Supreme Court. Any proposal to create another Supreme Court or to have the justices divide into several groups to hear cases would require a constitutional amendment. Nor has the addition of justices to the Supreme Court proven an effective means of relieving stress. When two additional justices were added in 1837, Justice Joseph Story commented that rather than improve efficiency, more time was required to allow each justice to discuss cases.

The Circuit Court of Appeals Act of 1891 and the Judiciary Act of 1925 are the most successful examples of reform legislation which brought the case input and the decision output into balance. The remedy in the first

63. A current reform proposal to relieve the case overload of the U.S. Supreme Court suggests the creation of a national court of appeals to screen all petitions for review now filed in the Supreme Court and hear and decide on the merits many cases of conflicts between circuits (Murphy and Pritchett, 1974, pp. 83-86).
instance consisted of the creation of the intermediate ap-
pellate courts—nine circuit courts of appeals—having final
jurisdiction over all diversity of citizenship cases. The
Act of 1891 introduced the innovative concept of discretion-
ary jurisdiction. Confronted with overload stress in the
1920's, judicial reformers resolved the problem with the Ju-
diciary Act of 1925 reclassifying most classes of litigation
over which the U.S. Supreme Court had jurisdiction under its
discretionary jurisdiction.

Stress also occurs as a result of the courts' deci-
sions. Litigation is an adversary proceeding in which one
side prevails over the other. Hence output stress is a nor-
mal condition. However, like demand stress when output
stress exceeds normal limits, demands for court reform oc-
cur. Throughout this study these reform proposals have been
designated as policy oriented reforms.

Several conditions appear to be prerequisites for
output stress to exceed the normal limits. First, the court
decisions which precipitate excess stress have had a major
impact upon public policy. Second, the litigation group ad-
versely affected by the decision has been organized and has
had a broad political base. Third, the reformers have per-
ceived themselves as disadvantaged by the status quo to the
extent that the only remedy is to alter the judicial system
directly.
With the notable exception of the adoption of the Eleventh Amendment of the U.S. Constitution, policy-oriented reformers have usually failed to alter the structure or authority of the U.S. Supreme Court. The major reason appears to be that if they represent a durable political majority other tactics are available to accomplish their goals more directly. Second, through attrition and judicial appointments, the policy position of the U.S. Supreme Court evolves to reflect the views of the dominant political majority. Hence, the output stress is not a chronic condition as in the case of overload stress, but rather a symptom of the political struggle occurring within the political system. Policy-oriented reformers who have not represented a political majority have sometimes made court curbing proposals an election issue in an attempt to gain a political majority and a popular mandate. However, most candidates who utilize this strategy have been unsuccessful in major elections. 64

Whereas judicial reform proposals are responses to stress that exceeds normal limits, the initiator of the proposal—the reformer—would logically be the actor who has to cope with the stress. The actors who must cope with overload stress are the judges, attorneys, and litigants. Unlike attorneys and litigants, judges are incessantly

64. Richard Nixon's campaign in 1968 promising to pack the Court with strict constructionist judges might be considered an exception.
confronted with the problems caused by overload stress. Consequently, they are the most likely actors to initiate reform proposals. The Judiciary Act of 1925 is not unique as reform legislation drafted by judges. Frankfurter and Landis (1928) chronicle judicial reform legislation from 1789 to 1925, and their study reveals that indeed most successful judicial reforms have been proposed initially by the judges, at least insofar as reforms affecting the U.S. Supreme Court. Equally significant, judicial endorsement and support of the organized bar and the major institutional litigant—the U.S. Department of Justice—enhances the prospect of passage; whereas opposition from any of these groups will prevent passage of a proposal.

The role of federal judges as court reformers acquired an institutional framework with the creation of the United State Conference of Senior Circuit Court of Appeals Judges in 1922. Subsequent legislation has built upon that initial framework a structure through which data can be collected providing accurate information regarding the conditions of the federal courts. The impact of institutional development upon judicial reform should be studied in depth. From this study, the formation of professional interest groups such as the American Bar Association appears to have had an important impact upon court reform legislation. Bar associations and groups such as the American Judicature
Society have lobbied effectively for reforms. These interest groups have not been constrained by the proprieties which limit the political activities of the judiciary.

In contrast to overload stress, the unsuccessful litigant is the actor most concerned with output stress. The isolated litigant does not have the political resources with which to launch reform proposals. An institutional litigant, however, may advocate court curbing reforms if he believes that he has a broad political base. Policy oriented reforms often occur when "politically disadvantaged" groups become institutional litigants. These litigants challenge in the judicial process the status quo which has caused them distress. Their position as litigants may be that of a plaintiff initiating court action; or that of a defendant who has refused to comply with an offensive law. If these institutional litigants prevail in the court, their opponents may then attack the courts and advocate court curbing legislation. Court curbing proposals have built in opposition from the judiciary, many attorneys, and the prevailing institutional litigation groups. In reaction to policy oriented attacks upon the court, political opponents of the court curbers often become active supporters of functional oriented reform. A common strategy is to redirect decision makers' and the public's attention to other sources of stress. For example, during the first three decades of
the twentieth century, functional reformers responded to the progressive charge that the courts served "vested interests" with the diagnosis that the problem stemmed from the laws which bound the courts to outmoded, cumbersome procedures and enabled unsuccessful litigants to pursue endless appeals. Such conditions, William Howard Taft repeatedly noted, favored the litigant with the longest purse. The fault rested with the law not the courts which were bound by the law.

Policy-oriented court curbers thus lack the pre-requisite support of all the major actors in the judicial system. Even with significant support from all the major actors in the judicial system, court reformers are not always successful. In order to obtain positive congressional action, reformers need able and dedicated allies upon the Senate and House Committees of the Judiciary. Reform legislation appears to have a low priority on the congressional agendas, unless a crisis situation exists, e.g., 1890. Congressional apathy has had its advantages in obtaining passage of reform legislation when there has been a determined and able congressional leadership directing the reform bill through both Houses. To what extent, if any, the institutionalized role of judges as judicial reformers had altered this requirement, of course merits further study.
Opposition to reform proposals appears to occur when the proposed change has political implications. Judicial reform is often involved in partisan politics. Judges are political appointees. Their decisions establish policy and create new law. When one house of Congress or the presidency is controlled by a different party, the probability of court reform legislation being adopted diminishes. The efforts to reform the circuit court system throughout its hundred year history illustrates the problem of the U.S. Senate responding one way and the U.S. House of Representatives the other to reform proposals. Bills creating additional district courts, circuit courts, and judges have been killed by one house after passage by the other when the President was of the other party.

Political parties in the United States are decentralized and state oriented. Therefore, Republicans or Democrats may differ greatly from one region to another. During the reform period studied, there appears to have been greater differences between progressive Republicans and conservative Republicans than between either group and the Democrats. In the post World War II civil rights era, there have been greater differences between Southern Democrats and more liberal Democrats than between either group and Republicans on some issues. Often throughout American history, political coalitions have been necessary to push legislation
through Congress in spite of the party occupying the White House having a majority in both houses of Congress. Proponents of the Judiciary Act of 1925, fearing potential opposition from progressive Republicans, had cultivated bipartisan support. They omitted from the bill materials which might have reopened old political debates. For example, omission of the laws pertaining to appellate review from the court of customs appeals was omitted to avoid the potential controversy regarding the merits of specialized legislative courts.

An intense minority in either house of Congress can utilize procedural rules to block legislation. A Senate filibuster prevented confirmation of Abe Fortas as chief justice in 1968. Republicans confident that Richard Nixon would win the 1968 presidential election, fought to preserve that appointment for him. They were joined by some Southern Democrats who objected to Fortas' liberal decisions as an associate justice. During Woodrow Wilson's last term, the House of Representatives repeatedly killed bills providing for additional district judges. The Senate had passed the legislation accompanied by well documented reports, but the more partisan House did not want the Democratic President appointing Democrats with life tenure to the federal bench. Additional positions were created when Republican Warren G. Harding became President.
Through procedural devices such as scheduling on the calendars, passing over bills, tabling, and recommitment to committee, the opposition has killed or delayed reforms. Opponents repeatedly killed the bill to restrict comments of federal judges to juries and the uniform judicial procedure bill by utilizing procedural devices. Careful, well planned strategy prevented the opposition's successful use of procedural devices against the passage of the Judiciary Act of 1925.

Even when there is no intense opposition to a reform, it may languish for reasons of indifference. Indifference may also be an asset if key members of the House and Senate Judiciary Committees can be recruited and become committed to the passage of a reform bill. Indifference then diminishes the potential of opposition developing. The Judiciary Act of 1925 illustrates that the chairmen of those committees, assisted by the leadership and a few others, can guide a bill through the legislative process with relative ease, if they can neutralize the potential opposition.

Opposition also occurs when the reform proposal is perceived as contrary to some norm of the political culture. Such norms may be myths or have substance. When the norm is based on a myth the probability of overcoming the opposition is much greater than when it has substantive content. The argument against the Judiciary Act of 1925, which Senator
Thomas Helfin asserted, was the ideal—"Every American has a right to appeal his case to the United States Supreme Court." Although no such right has ever existed, that ideal has permeated American political culture and has been a manifestation of the "cult of the robe." The "cult of the robe" forms the foundation of the charisma of the United States Supreme Court, which constitutes a major attribute of the Court's legitimacy.

Proponents of the judges' bill could easily provide evidence that Helfin's myth had never, in fact, existed and that without the remedial measures which the justices proposed, the time required for the U.S. Supreme Court to reach a case on its docket would render a Supreme Court review meaningless. Moreover, the proponents utilized the charisma of the Court as a support for the judges' bill, stressing that the bill originated in the U.S. Supreme Court.

Other norms have proven more formidable obstacles, particularly when supported by tradition. For example, from 1790, court reformers, particularly Supreme Court justices, sought to eliminate circuit court responsibilities and establish separate circuit court judges. Although, as Chapter 3 details, the circuit courts finally were abolished, the tradition of "circuit riding" continues via the assignment of judicial circuits to the justices at the beginning of each Court term, with the two "extra" circuits usually
being assigned to the junior justices. The justices also continue to have authority to act on certain pleas that arise from court actions in "their circuits" (Abraham, 1975, p. 164). Indeed, to many laymen, the old circuit courts would tend to indicate that some traditions and norms are so formidable that reformers must draft their proposals in a manner that preserved the tradition at least in a nominal manner.

Chapter 2 emphasized that reform must harmonize with the political culture. The tactics utilized by the reformer are predetermined, in part, by the United States Constitution, which establishes the Congress as the major decision making arena in terms of court reform; but reformers' strategies must be equally cognizant of the affected norms within the political culture. The legitimacy of the U.S. Supreme Court rests not only upon the legal grants of power, but also upon tradition and charisma. Because the charisma and traditions of the U.S. Supreme Court are firmly embedded in the political culture, the U.S. Supreme Court has been able to withstand most policy oriented court curbing proposals. For example, of all the suggested constitutional amendments which would have altered the Court's authority, only the eleventh was ever formally proposed and ratified. It is significant that it was ratified in the early stages of the nation-building process. The U.S. Supreme Court had
not developed the charisma and traditions which emerged as nationalism developed. In the political culture of the 1970's, the leadership and the public at large still identified more closely with their own states than with the nation. The post Civil War court curbing legislation reflected the political cataclysm resulting from the war and the assassination of President Lincoln. The stigma of the *Dred Scott* decision had diminished the charisma of the Supreme Court. Many Congressmen distrustful of President Andrew Johnson may well have rationalized that the negative court packing was an attempt to restore the Court's integrity. Rather than "curbing the Court," they were protecting it from a President who might make inept appointments. *Dred Scott* illustrated what might happen if the wrong persons were appointed to the Court. Proposals which would have drastically altered the role of the Court as a political subsystem all failed. In like manner, however, functional oriented court reformers have succeeded only when their proposals have been incremental in nature. Innovative reforms have been adopted usually after years of discussion on limited trial basis. When they have proved effective remedies, then, as in the case of discretionary jurisdiction, Congress has been receptive to proposals broadening the scope of their application.
Thus, many of the proposals which William Howard Taft advocated at the beginning of the century have been implemented gradually over the past fifty years. The Court administration and management of the 1970's harmonizes with other trends within the political system. In the political environment of the 1920's, many of Taft's proposals appeared radical and a threat to the independence of the lower federal court judges. The limited experimentation of the 1920's, however, with the Conference of Senior Judges of the United States Courts of Appeal provided the foundation for subsequent development of federal judicial administration.

From the above analysis, several conditions appear to be prerequisites for judicial reform in the United States. First, the major involved actors must agree that a problem exists. That agreement must include identification of the problem, its causes, and possible solutions. Differences regarding the remedies may result in a deadlock unless the actors are willing to compromise.

Second, the reform must be complementary to the political system and in harmony with the prevailing political culture. Reforms promoting efficiency, simplicity, and economy must be conformable to separation of powers, checks and balances, and federalism. They must be reconcilable
with, if not supported by, traditions and the charisma of the Court.

Third, if the reform requires congressional action, then several members of the Committees on the Judiciary of the House and Senate, including the chairmen, must be advocates of the reform and controversial issues must be kept at a minimum. Indifference must be converted into an asset through the legislative skill and strategy of the bill's floor leaders. Without these prerequisites, reforms probably will not be adopted.

The effect which the institutionalization of the judge's role as a court reformer has had upon the politics of the court reform is beyond the scope of this study. The observations regarding court reform derived from this study must be tested with studies of contemporary court reform legislation.
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