Neal Appointed Dean

On January 8, 1963, George Wells Beadle, President of the University, announced the appointment of Phil C. Neal as sixth Dean of the Law School.

Dean Neal was born in Chicago, in 1919, and grew up in the western suburb of Oak Park. In 1940, he received the Bachelor of Arts degree, summa cum laude, from Harvard University, and in 1943, the LL.B., magna cum laude, from Harvard Law School. While in college he was elected to Phi Beta Kappa and to the Presidency of the Student Council. In Law School he became President of the Harvard Law Review, an unusually happy association, since Miss Mary Cassidy, then secretary to the Review, subsequently became Mrs. Neal.

A Glimpse of the Supreme Court at Work

The Seventh Ernst Freund Lecture

By The Honorable JOHN M. HARLAN
Associate Justice, The Supreme Court of the United States

Apart from the honor of being asked to deliver a paper under a lectureship bearing the revered name of Ernst Freund, there are two other reasons why I was especially pleased to accept the invitation of the former Dean of this Law School to address you. One is that this School numbers among its faculty or alumni not a few of our Court's most distinguished Law Clerks of the past, and that the School's annual Supreme Court Review, edited by Professor Kurland, ranks high among the annual critiques of our Court's work. The other, and more personal, reason is that your invitation brings me back to the city of my...
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birth, whose ways I like to think still course in my outlook.

It is a favorite pastime among lawyers, as well as laymen, to speculate on whether the Supreme Court with any change in membership is likely to become more "liberal" or "conservative," words which as applied to the judicial office I intensely dislike. What the Court decides in great cases is, of course, the thing of ultimate importance. But since the character of the cases that reach the Court for review and how they are decided once there are products not only of the individual qualities of its members but of the character of its deliberative processes as well, it is important that the way in which the Court's business is conducted should also be understood, particularly, of course, by members of the Bar who expect to practice there.

I therefore thought it appropriate before an audience like this to discuss, as compendiously as time permits, the manner in which the Court goes about its work, with special emphasis, I hope, on certain things which even well versed lawyers appear sometimes to overlook or underestimate. I shall deal with the subject from three standpoints—the intake of cases, the decision of cases, and the work load of the Court.

I

The cornerstone of the operations of the Court is the control it possesses over the amount and character of its business. That control is found primarily in the statutory certiorari system which in the main enables the Court to select the cases brought before it for review. Another aspect of that control is found in the Jurisdictional Statement procedure, a judge-made device through which the Court is enabled to deal with some appeals, representing that part of the Court's appellate jurisdiction that is obligatory, without setting them for argument and thus to cut down on the time necessary to dispose of cases as to which the Court has no option of refusal.

Prior to 1925 the Court's appellate jurisdiction was
obligatory to the extent of some 80 per cent of its appellate 
business. That is, in most instances litigants had an absolute 
right to invoke the Court's reviewing powers by writ of error or appeal. The other 20 per cent of appellate cases 
reached the Court only through the exercise of its discretionary reviewing power, that is, by certiorari. By the 
early nineteen-twenties this had resulted in the Court's docket becoming clogged with a large backlog of cases, so 
that it sometimes took as much as two years after a case was filed for it to be heard and decided.

The Court, concerned about this state of affairs, formed a committee, chaired by Mr. Justice Vandeventer, to 
make remedial proposals to the Congress. This resulted in an overhauling of the Court's appellate jurisdiction in the Judiciary Act of 1925. That Act greatly broadened the classes of cases which henceforth could be brought to the Supreme Court only by certiorari, and conversely decreased the number of those that could still be brought there for review as a matter of right. The consequence has been that since the new system took hold the Court, despite the great increase in federal litigation and state federal-question cases, has been able to keep virtually abreast of its business.

This is not the occasion for a detailed discussion of the refinements, or mysteries if you please, of certiorari. But 
there are several aspects of the system that it is appropriate to mention. The first is that the Supreme Court, contrary to what many lawyers surprisingly enough still seem to think, is not a court of general errors and appeals, in the sense that most of the highest state courts are. That is, the rights and wrongs of a particular case will not alone assure its review by the Supreme Court. I recognize that this statement may fairly be regarded as subject to qualifications in some areas of the Court's business, but this general concept of the Court's role still remains for the most part true.

Speaking broadly, there are three basic questions that a lawyer who can only bring his case to the Court by certiorari should ask himself in gauging the chances of getting it there: Does the case involve a substantial constitutional issue? Does it present a question of law of general importance, as distinguished from its importance only to the particular litigants? Does it entail a conflict of decision on the same point of law among the federal Courts of Appeals or other federal courts whose decisions are immediately reviewable by the Supreme Court? While there are many variables that affect these generalizations, it is fair to say that a lawyer whose case falls in one of these categories will more likely than not get it to the Court.

The second thing that is worthy of mention is that every petition for certiorari and Jurisdictional Statement 
is voted on by each member of the Court. It is not true, as I have heard it sometimes said, that these matters are divided among the Justices for disposition or recom-

mendation. It requires the votes of four Justices, that is a minority, to bring any case to the Court for plenary consideration, the scales being tipped to that extent in favor of full-scale review. This is not a statutory or formal rule requirement, but an unwritten custom which, however, is strictly adhered to. The practice has its origin in representations made to the Congress when the Court's discretionary appellate jurisdiction was enlarged, in order to assure the fears of some who thought that the new system might result in depriving worthy cases of Supreme Court review. And the practice has been carried over to the disposition of appeals on Jurisdictional Statements. The short of the "rule of four," as it is called, is that a minority of the Court can control the character of new business, while it takes a majority of the Court, that is five Justices, or of a quorum (not less than six) to dispose of a case once taken.

The next thing that should be given an observation is the Court's oft repeated statement that a denial of certiorari signifies nothing beyond the fact that there were not as many as four Justices who deemed the case worthy of review. This is, of course, literally so as far as precedential value is concerned, although seemingly not always recognized by lawyers and some lower federal or state courts. It is also true in the administration of the certiorari system, in that a point of law deemed "uncertworthy" at one time may, in light of intervening circumstances, be thought so at a later period.

Before passing to the next part of my subject, a word should be said about a phase of the intake of cases that is perhaps not as widely known about as it should be. This is what we call our Miscellaneous Docket, consisting of cases brought to the Court by indigent persons, mostly those who have been convicted of crime in the state or federal courts. These litigants, at the stage of petitioning for certiorari or filing their appeals, are almost always without lawyers. Their papers are filed in typewritten form, and often in handwriting, and run all the way from laboriously prepared legal documents to the most informal statements of grievances. All of these applications are processed through the Court and, as with the cases of represented litigants, are voted on by each Justice. If a case is taken for review, a lawyer is assigned by the Court to represent the indigent litigants on the plenary hearing. These lawyers serve without pay, but their traveling expenses and the cost of the printing of records and briefs are defrayed out of the fees paid by lawyers upon admission to the Bar of the Supreme Court. The willingness of lawyers to serve in these cases reflects great credit on the Bar.

In recent years the Miscellaneous Docket has grown to very sizable proportions. Those who keep abreast of the Official United States Reports will be interested to observe how many of the leading criminal cases come from this source.
Let me turn now to handling of cases after they have been accepted for review.

II

The Court sits two weeks each month of the Term to hear arguments. The other two weeks are devoted to opinion writing. Fridays (except for the Friday falling in the midst of the two weeks' recess) are Conference days. On those days the cases argued during the week are discussed and voted on, at least tentatively, and the current grist of petitions for certiorari, Jurisdictional Statements, and motions are dispatched. The Conferences, beginning promptly at 10:00 A.M. and lasting usually to at least 5:00 P.M., except for a 12:30 to 1:00 luncheon recess, continue on Saturday or some day during the following week if necessary to cover the agenda. Until the 1955 Term Conference Day was on Saturday. With the change to Friday, extra argument sessions were added to compensate for the loss of one day of arguments occasioned by the new system.

Last Term also saw a change in the timing of the daily argument sessions. Until then the Court had sat from 12:00 M. to 2:00 o'clock, and, following a half-hour luncheon recess, again from 2:30 to 4:30. The present sessions are now from 10:00 A.M. to 12:00 and from 12:30 to 2:30, with the luncheon recess from 12:00 to 12:30.

The time allowed for oral argument is normally one hour to each side, with one-half hour in the less complicated cases, so-called Summary Calendar cases. In exceptional circumstances more time is allotted. In the Colorado River Water cases, for example, 16 hours, a full argument week, were allowed for the original arguments at last Term, and seven hours on reargument this Term.

This description of an argument week brings me to a point that should be particularly emphasized in connection with the plenary consideration of cases. It is the importance of oral argument. It has often seemed to me that many lawyers appear to underestimate the significance of that part of their job in our Court. They seem to assume that since their briefs will be read anyway, the oral argument is little but the relic of a bygone day, more important to satisfying a client than of significance to the outcome of their cases. I can assure you that this is a greatly mistaken notion.

The reasons for this confident statement are found not in tradition, nor in the tastes of particular Justices, but in practical considerations. From the outline that has been given of the argument work week, you will doubtless have gathered that the time between the hearing of a case and its discussion at the Friday Conference leaves little time for study. A considerable amount of the work on a complex case indeed takes place before its argument. Even in less intricate cases the briefs are usually read before the case is heard, at least to the extent that each Justice has more than a casual acquaintance with each case. The oral argument furnishes the occasion for coming to grips with the issues that are likely to be controlling, an opportunity which, if not initially grasped by counsel, is usually quickly created for him by questions from the Bench. A lawyer who is not prepared to take full advantage of this golden opportunity is missing an important milestone in the process of decision of his case. For if he is able to enlist the favorable interest of even one member of the Bench, his cause will have advocacy in the Conference debate which the lawyer, who is content to rest on his brief, is, in the nature of things, not so likely to have. Although the Conference discussion by no means always determines what the final outcome of a case will be, it is certainly a very vital stage, for positions once taken in Conference debate are not easily dislodged.

This brings me to the heart of the decisional process. At the Conference each case is stated by the Chief Justice, who, after expressing his own view as to what the decision should be, then calls on each Justice, in order of seniority, for his viewpoint. In controversial cases this is followed by general debate and then a vote is taken, this time in inverse order of seniority. In some instances, memoranda by individual Justices to support their views of a case are circulated before or after the Conference. This was the uniform practice, and still is, in the Second Circuit Court of Appeals on every case. I wish it were also the practice in the Supreme Court, but, because of the quite different circumstances, this would hardly be feasible.

After the Conference vote is taken it falls to the lot of
the Chief Justice, if he is in the majority to assign the case for the writing of an opinion, or if he is in the minority that function falls to the senior member of the majority. If decision of the case is by a divided vote, the members of the minority usually agree among themselves on one of their number to write the dissenting opinion, unless the issues are so divisive as to call for multiple dissents, such cases frequently also producing multiple opinions on the majority side. All draft opinions are of course circulated, and usually more than once, among all members of the Court, and not until the last word has been written is the decision announced in open court, always on a Monday morning.

But the point I would especially emphasize is that the books on voting are never closed until the decision actually comes down. Until then any member of the Court is perfectly free to change his vote, and it is not an unheard-of occurrence for a persuasive minority opinion to eventuate as the prevailing opinion. In short, decisions of the Court are not the product of an institutional approach, as with a professional decision of a law firm or policy determination of a business enterprise. They are the result merely of a tally of individual votes cast after the illuminating influences of collective debate. The rule of ultimate individual responsibility is a respected and jealously guarded tradition of the Court.

III

The final aspect of this paper is the work load of the Court, a subject about which there has been much recent discussion. The matter is not an easy one to get at, for it is attended by many variables, but I shall venture some general observations.

To begin with it can be said with assurance that the annual statistics of the Court's operations are not alone a solid yardstick of the work load. Indeed they are apt to distort the picture. For example, in the three Terms ending with the last, the total cases on the docket rose from 2178 in 1959 to 2585 in 1961. These figures of course include all cases offered but not taken for review. But it would not be realistic to regard this increase in numbers as reflecting a comparable drain upon judicial energy. The reason is that, of these some 400 additional cases, all but 15 were of the Miscellaneous, or in forma pauperis, variety.

In the nature of things most of the Miscellaneous cases, coming as they do from impoverished persons not represented by lawyers, do not present the volume of substantial or even marginal legal questions as do those coming from litigants acting under the constraints of economic influences and legal advice. This means, in the first place, that petitions for certiorari or appeals on the Miscellaneous Docket can generally be disposed of by the Court with less expenditure of time than those on the regular or Appellate Docket. It also means that, of a given number of Miscellaneous cases, fewer will be taken for plenary consideration than of the same volume of nonindigent cases. Thus, in the last three Terms about 4.5 per cent of the Miscellaneous cases have been taken for plenary hearing as against some 14 per cent of Appellate Docket cases. The short of it is that the over-all figures alone are not very revealing of recent trends in the volume of the Court's work. Nor do I think that other purely statistical approaches that appear from time to time are in themselves very significant.

A truer measure of things is the character of the cases that the Court is called on to deal with in a particular Term. An important controversial case inevitably leads to divisions in the Court, which in turn add to the amount of time-consuming opinion writing. A complex case, involving a long record or difficult question of law, even though not necessarily divisive, also naturally requires more time than others to decide. And I think it fair to say that the increasing number of both kinds of cases accounts for the fact that the last three Terms have been among the busiest in recent Court history. I think it would be foolish to suppose that this is a temporary phenomenon. It can hardly be anticipated that the period ahead is likely to produce comparatively more equilibrium in the Court's affairs.

Where can we look for preventative against the Court becoming unduly overburdened? An increase in the membership of the Court is certainly not the answer. Unlike the Court of Appeals, the Supreme Court sits en banc in every case, whether at the intake or adjudication stage. It should not be otherwise, even though a contrary course were deemed constitutionally permissible. An increase in the Court's membership would thus
simply add to the burdens of the decisional process. Chief Justice Hughes put it well when he said some years ago: "There would be more judges to hear, more judges to confer, more judges to discuss, more judges to be convinced and to decide." These factors, I believe, would not be offset by the broadening of the manpower base for opinion writing. Indeed, the contrary would more likely be the case.

Nor does it seem to me that the answer lies in any of the general proposals that have been made from time to time to relieve the Court of some of its normal appellate jurisdiction. I do believe, however, that substantial avenues of relief could be found in eliminating at least some facets of the Court's "direct" review jurisdiction, that is, where a case does not first pass through intermediate appellate review. The anachronistic requirement of direct review in Government antitrust cases certainly affords one prime example. From the standpoint of sparing the Court the necessity of reviewing what in most of such cases are essentially factual issues, involving the time-consuming task of reading often enormous records, as well as assuring the parties more satisfactory appellate review, it would be much better to leave primary appellate review in such cases to the Courts of Appeals, with further review by the Supreme Court subject to the process of certiorari.

There is also an opportunity for relief in one area of the Court's self-imposed procedures. Until the 1929 Term it was not unusual for the Court to carry over to the next Term any unfinished opinions. Beginning with the 1929 Term it has been the practice of the Court not to rise for the summer vacation until the opinions in all argued cases have been handed down. It happens not infrequently that a case requiring a difficult opinion or multiple opinions is not reached for argument until the closing period of the Term. Under present procedures the alternative lies between doing the best one can with such opinions within the pressures of reasonable adjournment deadlines or setting the case for reargument at the next Term, even though reargument would otherwise not be deemed necessary. It is not difficult to understand why any Justice confronted with that choice usually prefers to stretch his energies, or perhaps even to cut corners at the expense of solid professional work, in order to avoid the necessity of imposing an otherwise unnecessary reargument upon his Brethren and the litigants. The time may come when this procedure will have to yield to exigencies that call for recognition.

For the present and I believe at least the immediate future, the Court can keep the management of its business in good order by appropriate use of its certiorari power. I have heard it said in recent months that the Court has been taken an increasing volume of cases for plenary consideration. This is not true, and indeed the contrary is the fact, as the following percentages of grants of certiorari for the past three Terms indicate.

<table>
<thead>
<tr>
<th>Term</th>
<th>Appellate Docket</th>
<th>Miscellaneous Docket</th>
<th>Combined Dockets</th>
</tr>
</thead>
<tbody>
<tr>
<td>1959</td>
<td>15.9%</td>
<td>6.9%</td>
<td>11.3%</td>
</tr>
<tr>
<td>1960</td>
<td>12.2%</td>
<td>2.5%</td>
<td>6.8%</td>
</tr>
<tr>
<td>1961</td>
<td>13.4%</td>
<td>3.4%</td>
<td>7.4%</td>
</tr>
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In evaluating these percentage comparisons it should be borne in mind that in each of these Terms the actual numbers of cases on the Appellate Docket have been relatively stable, while those on the Miscellaneous Docket have shown marked increase. *

I do not suggest by what has been said that there is not room for further tightening up of certiorari standards. And that will undoubtedly occur if the time arrives when the Court's dockets reach seriously unmanageable proportions.

There is another phase of the matter, on which I have taken occasion to speak to lawyer groups in the past, but without making much headway, I fear. The largest part of the petitions for certiorari annually filed is, from the standpoint of the legitimate business of the Court, composed of quite insubstantial, if not indeed frivolous, cases. This is mostly due to nothing more than unfamiliarity with the nature of the Court's functions, and doubtless reflects the passing of anything that can really be regarded as a Supreme Court Bar, in the sense of one composed of lawyers having special familiarity with the ways of the Court. Again, in terms of the statistics of the last three

* Appellate Docket: 1959 Term, 1047; 1960 Term, 1046; 1961 Term, 1062.

Miscellaneous Docket: 1959 Term, 1119; 1960 Term, 1255; 1961 Term, 1510.
Terms: Of the Government petitions for certiorari, all of which must receive the approval of the Solicitor General before they can be filed, between 60-70 per cent were granted, as compared with some 14 per cent of the Appellate Docket petitions involving private litigants. Even with due allowance for the fact that the Solicitor General does not practice under the same influences and urges as a private lawyer, this does surely tend to show that more "know-how" or circumspection on the part of the Bar would substantially decrease the number of filings, with a consequent saving in the expenditure of judicial time now devoted to the examining of petitions.

The Miscellaneous Docket petitions, of course, present quite different problems and, short of legal aid coming into the picture at an earlier stage than it does now, it is difficult to see how the numbers of such filings can be appreciably checked or reduced.

Perhaps I am stargazing in adverting to the possibility of a change for the better in this state of affairs, but before an audience like this I thought it at least deserving of mention.

Let me bring this paper to a close with a remark or two about the present Term. It is proving to be a very busy one, though again not fully revealed by the mere statistics. The unexpected retirements of Justices Frankfurter and Whittaker caused the carrying over for reargument at this Term of some 16 cases, most of which would otherwise have been put away with the last Term's business. This, combined with the fact that a larger number of cases than usual has been put on the Summary Docket, meaning that a greater number of cases will be argued and decided on the merits, is likely to result in more full-scale opinions than in any Term of the recent past. I can assure you, however, that the Court is in good vigor and spirit and that you, rather than we, are more likely to be victims of this increased output!