Opinion: A Two-Part State Supreme Court

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The highest courts of our nation and state are being inundated by an ever-increasing caseload of appeals. From 1961 to 1981 the U.S. Supreme Court docket rose from 2,570 cases annually to 3,814, and this year's number will be higher. Chief Justice Warren E. Burger has called for a major reform in the creation of a new intercircuit appellate tribunal to relieve what he has described as an intolerable burden on the high court. A bill offered by Senator Robert Dole (R-Kan.) would create such a tribunal.

According to Judicial Council statistics, the increase in the...
work of the California Supreme Court has been even more dra-
matic. Total business transacted by the seven justices rose from
4,673 matters in 1971 to 7,208 in 1981. Petitions for hearing in-
creased from 2,417 in 1971 to 3,179 in 1981; approximately 8% of
such petitions are granted.

As the figures appear to verify, if the workload of the United
States Supreme Court requires a major overhaul of the federal ju-
dicial process, it follows that an improvement in California proce-
dures is indicated. The comparatively recent addition of volu-
minous death-penalty records to the already heavy burden on
the California Supreme Court have focused additional attention
on the problem.

Under the state Constitution, only the supreme court hears ap-
peals in a capital case. There are now 126 death-penalty appeals
before the California court in various stages of completion. Most
of them have not yet been fully briefed by defense counsel and
the attorney general; many are still awaiting completion of the
trial court record. Still others require U.S. Supreme Court deci-
sions on related issues. But some day in the foreseeable future
those appeals and others to follow will be completed and then
must be heard and decided by the California court.

There are some impatient legislators who insist that death-pen-
alty cases must receive absolute priority, that they must be heard
and determined by the Supreme Court in preference to all other
pending matters. This, I suggest, is an unrealistic tampering with
the judicial process. Can it be said that a death-penalty case de-
serves to be heard before an appeal involving the care, custody
and welfare of a minor child; or ahead of a matter involving an im-
minent election; or a personal-injury suit by one who became a
paraplegic as the result of a drunken motorist's negligence; or an
injunction sought by a business to prevent its destruction by un-
fair competition; or a judgment for millions of dollars against an
industrial or commercial company that is accumulating thousands
of dollars in interest while awaiting final decision; or ahead of a
petition involving the license of a professional person whose con-
duct requires discipline to protect the public? Examples abound
of other litigation that arguably may be more urgent than the ulti-
mate fate of a murderer who has been convicted and is isolated
on Death Row, thus presenting no imminent danger to society.

The judicial process will never achieve an equitable apportion-
ment of resources between criminal and civil litigation as long as
the tendency persists for legislators and politicians to inject their
ad hoc views on priorities. Since that appears to be an emerging
pattern, I sense a pressing need for a major overhaul of our ultimate appellate process.

To that end I point to the method employed in two states, Oklahoma and Texas, to avoid the competition for attention between civil and criminal appeals. In Oklahoma the supreme court hears only civil appeals, whereas a separate court of criminal appeals has exclusive appellate jurisdiction in all criminal matters. In Texas a similar procedure prevails.

I propose for California a constitutional amendment to create two separate divisions of our supreme court—one devoted exclusively to criminal matters, the other to hear only civil cases. Indeed, up until 1966 the state Constitution provided for the court, when not sitting all together, to consist of two separate departments. That provision was never operative and was subsequently deleted, but its principle can be readily restored through a vote of the people.

To handle the current and future caseload, the number of justices must be increased. In my plan there would be an increase from seven to eleven justices. Five would sit as the Supreme Court/Criminal Division, and five would constitute the Supreme Court/Civil Division. One of each five would be designated presiding justice of the division. The chief justice would not be confined as a formal member of either panel, but would have administrative responsibility for supervising the total workload, and would be empowered to sit in either division to replace a justice who is disqualified, ill or on vacation, or to assign pro tem justices as required. The chief justice would continue to be chairperson of the Judicial Council and to sit on the Commission on Judicial Appointments.

Under this plan, three of the five justices in either division would be able to grant petitions for hearing, and the vote of three justices would constitute a majority for decision. The opinions of the two divisions would be published in separate volumes of California reports.

Initially all existing members of the supreme court would retain their positions in the revised scheme, and would be permitted to select the division in which to serve. There might be a federal constitutional impairment-of-contract problem if that were not permitted. The governor would fill the remaining four vacancies, and would have the authority to designate the presiding justices for the two divisions.
No reform plan can be entirely free of problems, and this proposal undoubtedly has its share. I anticipate dilemmas arising in determining the nature of some litigation in such areas as contempt proceedings, executive-clemency petitions, traffic violations, State Bar disciplinary actions and other matters involving administrative penalties. Whenever a doubt arises, the chief justice should be permitted to designate the division to hear the appeal.

Undoubtedly refinements and revisions may be offered to improve on my basic suggestion. And there should be debate on the underlying merits. But the time has arrived for consideration of major appellate reform—not merely on the federal level as proposed by Chief Justice Burger, but right here in California as well.