Volume IV: Appellate Justice in the Federal Courts

To Be Discussed—January 25-26

This Conference has been planned by the Advisory Council for Appellate Justice, a 33-member group which jointly advises the National Center for State Courts and the Federal Judicial Center on the work of appellate courts. The Council is comprised of state and federal judges, practicing lawyers and law teachers in roughly equal numbers. Financial support has been provided by grants from the Law Enforcement Assistance Administration and the Council on Law-Related Studies.

MEMBERS

Professor Maurice Rosenberg, Chairman

Honorable Griffin B. Bell
Honorable Charles D. Breitel
Honorable Louis H. Burke
Professor Paul D. Carrington
Honorable Winslow Christian
Dean Roger C. Cramton
Honorable Wilfred Feinberg
John P. Frank, Esquire
Honorable Floyd R. Gibson
Honorable Horace W. Gilmore
Honorable William A. Grimes
Honorable Erwin N. Griswold
Honorable James D. Hopkins
Seth M. Hufstedler, Esquire
Honorable Shirley M. Hufstedler
Honorable Charles W. Joiner
Honorable Benjamin Kaplan
Professor Delmar Karlen
Professor Robert A. Leflar
Honorable Harold Leventhal
Honorable Wade H. McCree, Jr.
Honorable Carl McGowan
Professor Daniel J. Meador
Professor Russell D. Niles
Professor Alan Polasky
Honorable Walter V. Schaefer
Dean Murray L. Schwartz
Honorable Albert Tate, Jr.
Honorable Roger J. Traynor
Honorable Joseph Weintraub
Honorable John Minor Wisdom
Bernard E. Witkin, Esquire

SPONSORING ORGANIZATIONS

National Center for State Courts
Honorable Edward B. McConnell, Director
John C. Ruhnka, Esquire, Project Liaison
William E. Benjamin, Esquire, Conference Implementation Programs

Federal Judicial Center
Honorable Walter E. Hoffman, Director
William B. Eldridge, Esquire, Project Liaison

APPELLATE JUSTICE, 1975

Materials for a National Conference

San Diego, January 23-26

VOLUME IV

APPELLATE JUSTICE IN THE FEDERAL COURTS

(to be discussed January 25-26)

edited by

Paul D. Carrington

This project is supported by Grant Number 75 TA 99-0002 awarded by the National Institute of Law Enforcement and Criminal Justice of the Law Enforcement Assistance Administration, U. S. Department of Justice, under the Omnibus Crime Control and Safe Streets Act of 1968. Points of view reflected in this document do not necessarily represent the position of the U. S. Department of Justice. Preparation of these materials was also supported by grants from the Council for Law-Related Studies and West Publishing Company.

DETAILED TABLE OF CONTENTS

VOLUME IV

CHAPTER 8 REVISION OF THE FEDERAL COURT STRUCTURE: GOALS AND ALTERNATIVES

A. POSSIBLE LIMITATIONS ON DISTRICT COURT JURISDICTION

FEDERAL JURISDICTION: A GENERAL VIEW

Henry J. Friendly*

. . . My thesis will be that the general federal courts can best serve the country if their jurisdiction is limited to tasks which are appropriate to courts, which are best handled by courts of general rather than specialized jurisdiction, and where the knowledge, tenure and other qualities of federal judges can make a distinctive contribution. Presumably there will be little disagreement with so general a statement; the troubles will come in its application.

. . . While no one disputes the general proposition that enforcement of federal criminal law is a proper subject of federal jurisdiction, and indeed today that the federal courts should have exclusive jurisdiction over federal prosecutions,[1] there is much debate whether too many matters have not been swept into the federal penal code. There can be no controversy over what, until the Civil War, had been the exclusive subject of federal criminal jurisdiction—"acts directly injurious to the central government"[2]—revenue frauds, interference with or misdeeds by federal officers, counterfeiting United States securities and coins,[3] espionage and treason. There can be equally little argument about the next step taken beyond this, the Civil Rights legislation prescribing criminal sanctions against those who refused to recognize the changes wrought by the Civil War and the three amendments of the Reconstruction period.[4] Again, there is no unreasonable expansion of federal criminal jurisdiction when Congress takes over substantive regulation of a field and decides that criminal as well as civil sanctions are desirable.[5] The antitrust laws and the securities laws are sufficient examples.

---

*Senior Circuit Judge; at the time of publication, Chief Judge of the United States Court of Appeals for the Second Circuit. Reproduced from a work of the same title published by Columbia University Press in 1973, Pages 13-14, 55-59, 100-107, 129-143, 173-177.

1. For the contrary practice employed in some instances in earlier days, *see* pp. 8–9 *supra*. I perceive scant merit in the idea of a cession of jurisdiction to the state courts over minor federal crimes. If they are too minor to warrant federal court jurisdiction, they should not be federal crimes.

5. This does not mean that the use of criminal sanctions is always desirable. Attorney General Mitchell in his address to the American Bar Association at London noted the increasing tendency of Congress to pass regulatory statutes dependent on enforcement by criminal proceedings, as distinguished from leaving the matter to a regulatory agency. *In Quest of Speedy Justice* 7 (July 16, 1971). Since the Department of Justice cannot possibly prosecute every violation, such statutes must require it to set up internal arrangements to determine which cases should be prosecuted. While something can and should be done by promulgating guidelines, a good deal must still be left to discretion, generally exercised in secret. See, as to the latter, DAVIS, DISCRETIONARY JUSTICE 17–19, 216–17 (1969) and, as to the propriety of the criminal sanction in one important area, AREEDA, ANTITRUST ANALYSIS 28–30 (1967).

A very different question is posed when the primary basis for federal criminal jurisdiction is the use of facilities crossing state lines provided by the federal government or by private enterprises or, for that matter, when the defendant has crossed a state line on his own power. The progenitor appears to have been three provisions in the Post Office act of 1872, making the use of the mails to promote frauds[6] or lotteries,[7] or to disseminate obscenity,[8] federal crimes. The progeny spawned by this statute is enormous; more than three closely printed pages of the index to the Criminal Code are required to list the federal offenses that can result from using the mails to transmit various things, ranging from articles designed for producing abortion to dangerous weapons. The similar development with respect to movement in interstate commerce seems to have begun in 1910 with the Mann Act,[9] followed shortly by the National Motor Vehicle Theft Act of 1919.[10] These statutes also have given rise to a population explosion, often sparked by a *cause célèbre* such as the Lindbergh kidnapping.[11] One might have thought the limit was reached in the so-called Travel Act of 1961,[12] but that was not to be so. Congress has since enacted statutes which make certain activities criminal on the basis of its determination that they *affect* interstate commerce, even though the acts in the particular case were entirely local, and the Supreme Court has sustained this.[13] Along with this has come an expanded notion of what constitutes interference with Government property; an example is the expansion of the statute against robbery of a national bank to include all banks which are members of the Federal Reserve System or whose deposits are insured by the Federal Deposit Insurance Corporation, any federal savings and loan association, any savings and loan association insured by the Federal Savings and Loan Insurance Corporation, and federal credit unions and certain other savings institutions.[14] This means almost all institutions in any way engaged in banking or the handling of savings. It is thus fair to say that today "[t]here is practically no offense within the purview of local law that does not become a federal crime if some distinctive federal involvement happens to be present"[15]—and the involvement may be exceedingly thin. The interest of the United

States in the theft of $100 from a federally insured state savings and loan association is truly minimal.

In this respect as in others, the present condition of the federal criminal code is in utter disarray. Different jurisdictional tests are provided without any sensible basis for distinction. Sometimes the Government must establish that the defendant knew of the jurisdictional basis, sometimes not. Where it must, the prosecutor often relies on inferences, some created by statute, others (like that relating to possession of stolen property) going back to the common law. An enormous amount of the time of appellate courts has been spent in deciding whether allowance of these inferences is constitutional and whether the trial judge has charged them in exactly the right way. But these are problems that can be met by better drafting; the real issues lie deeper.

The question whether federal criminal prosecutions have not greatly outreached any true federal interest thus deserves the most serious examination, particularly in light of the tremendous increases in criminal filings in 1972. Why should the federal government care if a Manhattan businessman takes his mistress to sleep with him in Greenwich, Connecticut, although it would not if the love-nest were in Port Chester, N.Y.?[16] Why should it make a difference that a New York pimp chooses Newark, N.J., rather than Nyack, N.Y., as the place where his employees transact their business? If the house is in Nyack, why is the United States interested because the girls have traveled over the George Washington bridge and thence through New Jersey although it would not be if they crossed the Hudson over the New York Thruway? Why should the federal government be concerned with a $100 robbery from a federally insured savings bank although it is not if someone burned down Macy's? Is it right to have so many areas where local law enforcement officers can neglect their responsibilities on the basis of an expectation that the "federals" will do the job? On the other hand, is it right that there should be so many federal offenses which go unprosecuted because of secret administrative decisions, very likely sensible in most instances, that no sufficient federal interest is at stake? The Department of Justice has sought to enunciate some standards by instructions to United States Attorneys, but generally these are not known to the public, surface only rarely,[25] are necessarily worded in rather general terms, and are not effectively policed.[26]

---

16. While ordinarily these cases are not prosecuted, the potential remains.

. . . Thirty-three years have passed since Chief Justice Stone proposed the transfer of the three-judge district court review of orders of the Interstate Commerce Commission, other than for the payment of money,[3] to the courts of appeals.[3] Although the Commission initially opposed this, its annual reports to Congress since 1963 have consistently recommended it.[3] If there is any justification for the difference in mode of review of orders of the ICC and those of other independent commissions,[3] this has not been stated. Placing the review of ICC orders in three-judge district courts, one member of which must be a circuit judge, was an expedient hastily devised by Congress in 1913 when it pronounced the death sentence upon the Commerce Court, and no other independent commissions yet existed; the statute is appropriately called the Urgent Deficiencies Act.[4] Creation of such courts disrupts the orderly functioning of the district courts and the courts of appeals, and imposes further unnecessary burdens on the chief judges of the latter. Still worse is the provision for mandatory Supreme Court review of decisions to enjoin ICC orders.[5] While the Court has wisely endeavored to escape these shackles by frequent use of summary affirmance, such action, unlike the denial of certiorari, would seem to have precedential force in theory, however little it may deserve this in fact.

A second desirable step within the present structure would be to adopt the proposal of the Administrative Conference that orders of the National Labor Relations Board should be self-enforcing like those of other agencies, unless a proceeding to review was brought within a reasonably short period.[6] The reasons are amply set forth in the report of the Conference. Presumably this discrimination against the Board must have been a by-product of the hostility to its very creation. After thirty-seven years, it has become sufficiently a part of our national life that it should no longer be treated as a step-child in this respect. This change would eliminate much delay resulting from the necessity for the Board's preparing petitions for enforcement, papers that are rarely read by anyone, and, by my uneducated guess, would effect a reduction of approximately 50% in Labor Board proceedings in the courts of appeals.[7]

Third, I would favor repeal of the statute providing for direct review by the courts of appeals of final orders of deportation,[8] and return this to the district courts. This legislation, sponsored by the long-time chairman of the House Committee on Un-American Activities, the late Representative Walter of Pennsylvania, was enacted in an effort to expedite the deportation of certain highly visible, wealthy aliens who could afford repeated appeals of deportation orders, thereby continually postponing their departure date. While the amendments may have expedited the deportation of some such aliens,[9] it has probably had the opposite effect in the vast majority of cases. Although the matter requires more detailed investigation, such figures as I have seen indicate that prior to this legislation most aliens who failed to obtain a stay of their deportation orders in the district court did not appeal.[10] While a legislative desire to terminate continuous frivolous appeals and habeas corpus petitions of unquestionably deportable aliens is understandable, the chanelling of all such cases

directly to the courts of appeals was a mistake. Instead of having to act speedily, the deportee now has six months to file a petition for review and this works as an automatic stay unless the INS moves to vacate it,[98]—which, whether because of the press of business or consideration for the courts of appeals, it does rather infrequently. Also the statute has engendered numerous jurisdictional disputes which have already demanded three Supreme Court decisions and will probably require more.[99] The clear answer to this problem is to place appeals from all final deportation orders back in the district courts, and expect the courts of appeals to give expeditious treatment to those orders of the district courts that are appealed.

A somewhat more debatable change, still within the contours of the existing system, would be to provide that where review of administrative action lies in the district court and that court has affirmed, appeal should be only by leave of the court of appeals.[100] The argument would be that it is enough to grant an aggrieved citizen one judicial look at the action of a disinterested governmental agency, unless a superior judicial body believes the case to present a problem going beyond the particular instance. There would be much to recommend such a procedure, for example, with respect to the many complaints of denial of relief, whether partial or total, by the Social Security Administration, or the review of deportation orders which I would return to the district courts. On the other hand, care would have to be taken not to include in this proposal cases where, due to the anomaly whereby the courts of appeals are the initial judicial forum for review of "orders" but not of "regulations,"[101] initial review of some of the most important actions of federal agencies takes place in the district courts. A still better solution of that problem is to correct the anomaly so that when the court of appeals has initial review of an agency's "orders," it would also have initial review of that agency's "regulations" in a pre-enforcement challenge for injunctive and declaratory judgment relief.

* * * *

The final point for discussion with respect to federal-state relationships in the civil rights area is whether there should be a requirement of exhaustion of state remedies under the general statute, such as exists by explicit congressional enactment with respect to habeas corpus for state prisoners.[102]

It is clear that the Supreme Court has not sanctioned any general requirement of exhaustion of state *judicial* remedies as a prelude to federal suits for damages or for injunctive or declaratory relief against unconstitutional state action.[103] Until recently it was equally clear that exhaustion of state *administrative* remedies was required;[104] I have undertaken to show in an opinion that this is still the law except when the administrative remedy is inadequate or resort to it is certainly or probably futile.[105] There is no justification for

leaving the matter in doubt. Congress should provide that a federal court faced with a challenge to the constitutionality of state action, whether under the Civil Rights Act or otherwise, *may* abstain pending exhaustion of state administrative remedies and *shall* do so whenever these remedies are plain, adequate and effective. The reasons have been so well stated in a note in this University's law review as to render their repetition in text supererogatory.[106]

If this step were taken, should Congress enact still further legislation to establish a general requirement of exhaustion of state *judicial* remedies in civil rights cases? Although there are arguments for this, I am not persuaded by them. For one thing, it is misleading in most instances to speak as if, after litigating his federal constitutional claims in state court, the plaintiff could then come to federal court to litigate them again. Under present law, if the federal claims have been raised in a state court and decided against plaintiff on the merits, such a judgment would be res judicata and bar a subsequent federal suit on the same issue.[107] Of course, insofar as such actions raise questions of both state and federal law, one could introduce in the context of an exhaustion requirement the kind of saving procedure now employed in abstention[108] whereby the private litigant would carefully preserve his federal claim, litigating only issues of non-compliance with state law. As has been the case in abstention,[109] some state courts would undoubtedly decline even to participate in this piecemeal method of litigation. Moreover, in abstention, such complexity, entailing as it does substantial hardships for the litigant who desires a federal forum, is justified by the countervailing considerations of federalism which arise when a federal court is faced *in a particular case* with an unsettled question of state law, the resolution of which might make decision of a federal constitutional question unnecessary, or with other special circumstances. Since such circumstances clearly do not exist in *every* private civil rights action, it does not seem proper to require every such litigant who desires that a federal court should decide his federal constitutional question to shuttle between state and federal courts. Congress could simply withdraw res judicata effect from state determinations of federal issues in such cases; but we would again encounter arguments such as delay, expense, and lesser receptivity of some state courts to federal constitutional claims.

A general exhaustion requirement would thus mean, in practical effect, that all private civil rights litigants would be left to the state courts with the attendant possibility of Supreme Court review of the state court judgment. The inadequacies of such a procedure from a federal perspective are self-evident. The Court is in no better position to correct constitutional errors in all civil rights judgments of 50 state courts than it was with respect to their judgments in criminal cases; it was this bursting of the dikes that led to the efflorescence of federal

habeas corpus for state prisoners.[116] To be sure, in my discussion of abstention, I indicated that in certain circumstances a federal court, in the exercise of its equitable discretion, would be justified in declining jurisdiction and leaving the parties to state court proceedings and the possibility of Supreme Court review. But the circumstances in which such action is appropriate are narrow and should not be expanded into a general rule. In short, I would consider it a serious mistake to impose a general requirement of "exhaustion" of state judicial remedies in civil rights cases.[117]

A requirement of exhaustion for a more limited class of cases —namely, state prisoner civil rights actions—is another matter. The power of federal courts to deal with the federal constitutional claims of state prisoners has long been a subject of controversy. Until recently, though, this has focused upon federal court jurisdiction to entertain the habeas corpus petitions of state prisoners challenging the validity of their convictions. It seems appropriate to consider this by way of introduction—though I shall not say very much since I have expressed my views elsewhere.[118] I there noted how the volume of petitions for such relief had grown from the 541 which Mr. Justice Jackson in 1953 had characterized as the "floods of stale, frivolous and repetitious petitions [which] inundate the docket of the lower courts and swell our own"[119] to 7,359 in 1969.[120] After a further rise to 9,063 in 1970, these dropped to 8,372 in 1971 and 7,949 in 1972.[121] While this downturn is gratifying, it should not obscure the facts that these petitions still compromise 8.3% of the "civil" filings[122] and that they are largely, and increasingly, a waste of judicial time. The figures for 1971 indicate that 96% of the petitions failed to attain even the limited success of winning a new trial or appeal.[123] These figures emphasize the need for legislation that would limit such petitions, save for certain exceptions which I have noted, to cases where the alleged constitutional error may be causing the punishment of an innocent man.[124]

We come then to the new area of controversy with respect to state prisoners—civil rights complaints. The moderate downturn in petitions by state prisoners attacking their convictions has been accompanied by a violent upswing in complaints by state prisoners attacking the conditions of their confinement and the denial of good-time credits. These rose from 218 in 1966 to 2,915 in 1971[125] and 3,348 in 1972.[126] The handling of such a complaint imposes burdens on the district judge considerably greater than the usual habeas corpus petition attacking the validity of a state conviction. Whereas most of the latter can be decided without an evidentiary hearing on the basis of the record of state proceedings, the new breed of prisoner complaints generally involves disputed issues of fact. Unless

116. Brown v. Allen, 344 U.S. 443 (1953); *see* Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 154–55, 164–65 (1970).

117. For a good statement on this, see Judge Wisdom's opinion in Moreno v. Henckel, *supra*, 431 F.2d 1299.

such complaints are to be subjected to higher standards of specificity than are complaints in general[127] or the Rules of Civil Procedure should be amended to broaden the use of summary judgment in such cases, oral hearings would seem necessary in the great bulk; indeed, it is quite likely that this factor itself enhances the attractiveness of such complaints.

No one can deny, however, that some of these complaints have revealed serious denials of federal constitutional rights,[128] although many are exceedingly trivial. There could be no more thought of suggesting that such wrongs should go without a remedy than of proposing such a course with respect to state prisoners attacking the validity of their convictions. It would be equally improper to deny a "final federal say." The serious question is what, if anything, state prisoners must do within the state system before getting this.

My first proposition is that if a state has provided suitable administrative remedies for hearing prisoner complaints, these must be exhausted. While, as stated, I favor a general requirement of exhaustion of state administrative remedies,[129] the reasons for this are particularly compelling here. Such a step would help substantially to stem the rising tide of prisoner civil rights complaints, *provided* that the states develop adequate administrative schemes. It is in everyone's interest that they should, as was the case with the development of state post-conviction remedies. The state, which has a special concern with the rehabilitation or incapacitation of persons convicted of violating its penal laws, also has a special responsibility to give them decent treatment and to impose only such restrictions on rights accorded other citizens as are necessary to prevent disorder and escape.[130] Moreover, the administrative process is far better suited than the judicial to deal with complaints, many of them minor, emanating from such large government run institutions as the prisons. A sweeping federal injunction, which leaves state prison officials to struggle with the day to day problems it creates, is generally not a satisfactory means of dealing with the issues that arise in this context. Rather, complaints concerning the action of prison officials should be handled in the first instance by state administrative machinery, which should provide for hearing officers independent of the prison administration, review of their reports by a senior state official not connected with the particular prison, and, to the extent feasible, assistance to prisoners by lawyers or volunteer law students.

Beyond this, prisoner complaints seeking declaratory or injunctive relief constitute a category that should be governed by the same formula applied in prisoner petitions attacking their convictions—initial resort to the state courts if effective state corrective process exists, with a right to return to the federal courts if satisfaction has not been obtained—rather than that applicable in civil rights cases generally. I have contended that this, in fact, has always been required since, under the broad scope the Supreme Court has given

to the Great Writ as enacted by the Act of 1867,[124] all such petitions by state prisoners for injunctive relief with respect to the length or the conditions of their custody are, in fact, petitions for habeas corpus and are thus governed by the exhaustion requirement,[125] but are not subject to *res adjudicata* as a result of adverse state determination.[126] While that view has seemingly been rejected by the Supreme Court in summary dispositions that gave no real consideration to the arguments,[127] a recent grant of certiorari[128] may indicate that the issue has not been foreclosed. Whatever the Court may decide on this point which is now before it, nothing stands in the way of legislation assimilating such petitions to those attacking convictions. Whether such legislation should encompass actions for damages is another matter; I think it should if the state provides an adequate remedy, as most do not.

The relationship of the state to prisoners in its institutions is sufficiently different from its relations to other persons complaining of denial of civil rights guaranteed by the Constitution to warrant a requirement of initial invocation of state judicial remedies not usually imposed. These are people who have been adjudged guilty of breaking state criminal laws, often with very grave consequences to others. The state is in contact with them not merely daily but throughout the day—and the night as well. Their grievances are frequently of a sort that cannot be cured by prescription of a general rule but require determination of the facts of a specific incident. There are serious physical problems in hearing these cases in a federal court, usually many miles away, as distinguished from hearing by a state judge in a nearby county courthouse or in the prison itself.[129] While state officials may not precisely welcome federal interference in education, welfare, or public housing,[130] I believe there is particular resentment—and substantial ground for it—when a far-off federal judge issues declaratory or injunctive orders on behalf of a prisoner who has bypassed a nearby state judge ready and willing to hear him. Although one or more of these factors favoring prior resort to the state court may be found in other categories of civil rights litigation, I know of no other that combines them all. I realize that this is an unpopular position since prisoner complaints now lie so close to the hearts of civil rights lawyers. But that attitude will pass if Congress legislates a sensible system for dealing with state prisoner complaints and the states do their job.

In attempting to direct the work of the federal courts to cases where their special qualifications can be used to best advantage, the first step is to eliminate certain types of cases that do not belong in the courts at all. I shall identify three: injuries to railroad workers in the course of their employment, similar injuries to most maritime workers, and—a problem of concern to both state and federal courts—motor vehicle accident litigation.

The most obvious and compelling instance for change from a judicial to an administrative remedy is afforded by the Federal Employers' Liability Act.[1] The purpose of this 1908 statute, relating to employees of railroads engaged in interstate commerce, was wholly salutary. Its principal objectives, as stated in the Report of the House Judiciary Committee,[2] were to abrogate the fellow-servant rule and the doctrine of assumption of risk, and to replace the common law principle making contributory negligence a complete defense with a rule of comparative negligence. The reports and debates afford no indication that Congress gave any consideration to the alternative of a workmen's compensation law.[3] That was by no means so unnatural as would now appear. Three years after enactment of the FELA, the New York Court of Appeals held a workmen's compensation law to be a denial of due process, even though it was applicable to a very limited number of specially hazardous activities;[4] the validity of such laws under the Federal Constitution was not established until 1917.[5]

If there is any good reason why, in contrast to almost all other workers in the United States, this particular group should still be put to the burden of maintaining a court action or have the benefit of an unlimited recovery, I have not heard of it. To be sure, workmen's compensation, like other institutions, has its faults, but it is hard to quarrel with the assessment by the head of the program in one of our largest industrial states:[6]

> It is a means through which prompt and reasonable compensation is paid to victims of work-produced injuries and to their dependents; it is a means of freeing the courts of the delays and costs inherent in the hearing of such a common situation; it is a method of relieving the public welfare agencies of a tremendous financial drain which would otherwise result if such injured individuals and their families did not have this system of compensation; it provides through its case files ample evidence for those interested in learning the causes and the possible preventions of the most typical industrial accidents.

6. Kelly, *Workmen's Compensation—Still a Vehicle for Social Justice*, 55 MASS. L.Q. 251, 252 (1970). For a sampling of criticisms, see Johnson, *Can Our State Workmen's Compensation System Survive?*, 3 FORUM 264 (1968); Colvin, *Workmen's Compensation—Its Moment of Truth*, 4 FORUM 151, 152–54 (1969); Horowitz, *Worldwide Workmen's Compensation Trends*, 59 KY. L.J. 37, 87–92 (1970).

There does not seem even to be any real need that the compensation scheme for railway workers should be federal; workers in other forms of interstate transportation, such as bus lines, truckers, and airlines, have been handled quite satisfactorily under the workmen's compensation law of the states.[47] However, with the political difficulties such as they are, a federal railway worker's compensation act might be more acceptable, as well as furnish a model for the upgrading of outmoded state statutes.

A second category of business to be partially eliminated from the courts consists of injuries to certain maritime workers.

> . . . So far as concerns seamen on vessels of American registry, I perceive no reason why a new system of compulsory workmen's compensation should not be an exclusive remedy against the ship and its owner, as is now the case with seamen employed by the United States.[48] No more than in the case of railway workers should this change be regarded as adverse to the employee.[49] If desired for good measure, maintenance and cure could also be retained, with appropriate provisions against doubling up the two remedies.

This leaves the problem of the seaman, whether an American or a foreigner, injured on a foreign-flag ship, whether in American waters, on the high seas, or in a foreign port, under circumstances making it proper to allow him to sue in an American court.[50] Here, it would seem to me, the right course would be that instead of allowing an action for unseaworthiness and disallowing one for negligence,[51] recovery should be only for negligence, although, of course, this will include many, indeed most, cases of unseaworthiness since the owner is bound to use due care to provide a seaworthy vessel. The reasons for such a policy are set forth in the dissents of Mr. Justice Frankfurter and Mr. Justice Harlan in *Mitchell v. Trawler Racer, Inc.*,[52] and need not be repeated. Here again Congress might wish to relieve against the common law principle that contributory negligence is a total bar.

The third category of cases that I would banish is not a matter of exclusively federal concern; I refer, of course, to actions arising out of motor vehicle accidents. While the subject is substantially less important to the federal courts than to the states, it is nevertheless appropriate for brief mention here. Although there are other ways for eliminating these cases from the federal courts, one great advantage of the no-fault route, apart from its intrinsic merit, is that the relief this would give the state courts would eliminate one argument often used against the abolition of diversity jurisdiction although, as I will later show, it lacks validity even now.

The topic is the subject of a large literature,[53] and I shall limit myself to the highlights. I have heard no valid argument against the point that there is need for a remedy that will compensate the vast number of persons injured in such accidents swiftly, surely and inexpensively, and that our system in its present form is incapable of doing that. While there may be controversy over the precise figures, there can be no real doubt that the accident liability insurance system overcompensates for small injuries, where the costs of litigation promote liberal settlements, and undercompensates for large ones,[54] and that it involves more than a dollar of expense to deliver a dollar of benefits.[55] Yet these miserable results have been accompanied by precipitate increases in liability insurance costs.[56] Motor vehicle accident litigation requires over 11% of the time of federal district judges and approximately 17% of the time of judges of state courts of general jurisdiction.[57]

Since both motor vehicles and insurance are traditionally subjects for state regulation, state statutory solutions to this highly visible problem seem most desirable. After years of inaction, fostered by an alliance of personal injury lawyers and insurance companies, many insurers have seen the light and the log-jam has started to break. As of this writing, nine states[58] have enacted various reforms to their automobile accident law, ostensibly designed to promote a more rapid settlement of claims, remove the bulk of cases from the courts, reduce insurance costs, and channel a higher percentage of the insurance premium to benefits. Although most of the state plans permit too much litigation of claims[59] and at least half of them seem intended to impair rather than enhance their own effectiveness,[60] some at least are moving in the proper direction.[61] While the Department of Transportation initially favored uniform legislation at the state level,[62] President Nixon has later declared himself in favor of experimentation by the states.[63] I agree with this, provided—and the proviso is important—that a genuine and general effort toward reform can be discerned. Though normally such a movement continues in the states once it has attained a critical mass, the invalidation of the Illinois statute under the state constitution,[64] although on grounds rather easily met, and the failure in 1972 of what had seemed promising efforts in New York and California, only partially compensated by successes in New Jersey, Connecticut, and Maryland, and the tendency to water down such laws as are passed, now cast doubt on whether most of the states will move at the requisite speed and effectiveness.

A sharp spur to action by the states is furnished by the threat of federal legislation. House and Senate committees have considered bills which would preempt the field with a federal "no fault" law.[36] The plaintiffs' personal injury trial bar would not have quite the same influence in Congress, especially in the Senate, that it has in state capitols. While action by the states would be preferable, the possibility of federal legislation should be preserved and, if necessary, implemented.

However all this may be, Congress should remove automobile accident litigation from the federal courts, and do it now. Even though there has been a slight decline in the number of these cases, nearly 8,000[34] are still too many for courts overburdened with peculiarly federal tasks, when state judges, familiar with applicable state law, can handle them sufficiently well. This reform could be accomplished either by the abolition of diversity jurisdiction[35] or, doubtless more speedily, by simply removing automobile accident litigation from the federal courts.[36]

To conclude this section, I will try to estimate the impact of the three proposals here made. Of the 96,173 civil cases filed in the district courts in 1972, there were 1,391 FELA cases, 7,700 motor vehicle cases, and 6,534 cases labelled only as "Personal Injury: Marine."[37] The statistics do not enable us to tell how many of the latter would disappear under legislation enacted or proposed; it would be conservative to estimate that half would do so. This would mean a 13% reduction in the civil caseload. The beauty of this is that while it would constitute appreciable relief to the federal courts, it would not create a substantial added burden for the states. The changes proposed for railway and marine workers would create none;[38] indeed, they would eliminate a number of such cases now heard by state courts. Changed treatment of motor vehicle accidents would likewise be without consequences for the state courts to the extent that the states took these out of their own judicial machinery. Even if the remedy were to take the form of excluding motor vehicle accident litigation from the federal courts without reform in the state liability system, the increase in the business of the state courts would be negligible in proportion to their existing volume.[39]

. . . Of the 96,173 civil cases filed in the district courts in 1972, 24,109 were predicated on diverse citizenship.[1] Ten years ago they comprised 18,359 out of 61,836 civil filings.[2] While their proportion and ratio of increase have thus been less than for civil filings as a whole, a head

of jurisdiction constituting 25% of the civil filings cannot be ignored as *de minimis* or as of sharply decreasing significance. Opponents of diversity are not required to shoulder the burden of showing it is "working badly"[3] which some have tried to cast upon them. Rather the proponents have the burden of showing sufficient reasons for its retention at a time when the federal court system is severely pressed.

The first and greatest single objection to the federal courts entertaining these actions is the diversion of judge-power urgently needed for tasks which only federal courts can handle or which, because of their expertise, they can handle significantly better than the courts of a state. There is simply no analogy between today's situation and that existing in 1789 when, in the words of the ALI Study, "[s]ince diversity of citizenship was one of the major heads of federal judicial business, it contributed to the expansion of the federal courts throughout the nation" and thus "enhanced awareness in the people of the existence of the new and originally weak central government."[4] Without diversity jurisdiction, the circuit courts created by the First Judiciary Act would have had very little to do. Perhaps this is as good an explanation as any why the statute made a broad grant of diversity jurisdiction, although this had been hotly contested and not very staunchly supported in the ratifying conventions,[5] including the invocation of a jurisdiction supposedly based on prejudice against out-of-staters by a citizen of the state where the suit was brought.

As indicated in an earlier portion of these lectures, the problem of the volume of cases filed is not simply in the district courts, where the addition of judges may afford opportunity for relief, but in the courts of appeals and the Supreme Court. In 1972 diversity accounted for 18% of civil appeals to the courts of appeals; if habeas corpus and other types of federal and state prisoner petitions were excluded from the "civil" category, the proportion would be 24%.[6] A significant number of these cases must translate themselves into petitions for certiorari, although almost none are granted.[7] For the moment I shall defer discussing whether *anything* is accomplished by having these cases in federal court. Certainly the accomplishment is materially *less* than when a federal question is present, and if anything must be eliminated from the business of the federal courts, beyond the categories discussed in the preceding section, diversity cases are the prime candidate. Mr. Justice Frankfurter said that "[a]n Act for the elimination of diversity jurisdiction could fairly be called an Act for the relief of the federal courts."[8] Twenty-three years after that statement, the time for such relief has come.

A second difficulty with diversity jurisdiction is that in such cases federal courts cannot discharge the important objective of making law. When the state law is plain, the federal judge is reduced to a "ventriloquist's dummy to the courts of some particular state."[9] Much worse are the cases where, in Judge Wright's phrase, "state law on the point at issue is less than immaculately clear."[10] Whereas the highest court of the state can "quite acceptably ride along a crest of common sense, avoiding the extensive citation of authority,"[11] a federal court often must exhaustively dissect each piece of evidence thought to cast light on what the highest state court would ultimately decide.[12] In

other cases what passes as an attempt at prediction is a mere guess or fiat without any basis in state precedents at all.[27] All such cases are pregnant with the possibility of injustice.[28] Furthermore, the very availability of litigation in a federal court postpones an authoritative decision by the state courts that otherwise would be inevitable.[29] Diversity jurisdiction thus "can badly squander the resources of the federal judiciary" since it uses them in a way which precludes the attainment of one of a judge's most important functions, namely "to establish a precedent and organize a body of law."[30]

BOOK REVIEW

John P. Frank*

FEDERAL JURISDICTION: A GENERAL VIEW. By Henry J. Friendly. Columbia University Press, 562 West 113th Street, New York, New York 10025. 1973. $10.00. Pages 199.

Chief Judge Henry J. Friendly of the United States Court of Appeals for the Second Circuit gave the Carpentier lectures at Columbia Law School in 1972. Dean Michael Sovern, in introducing their publication here, aptly says, "It is not easy to be both timely and timeless on any subject, least of all federal jurisdiction, but Henry Friendly has managed it in this volume." Agree or disagree with the thesis of the volume—and I find myself in the latter posture—Dean Sovern is also right when he says that this is an "extraordinary work."

Justice Frankfurter, Judge Friendly's dominant mentor, began his federal jurisdiction casebook with a century-old quotation from Justice Curtis: "Questions of jurisdiction were questions of power as between the United States and the several states." Judge Friendly, without need to refer to Curtis, operates from this premise. He views the federal court system not as a network of intricate rules with separate lives of their own but whole. So viewed, he renounces much of the power and the duties that go with it. The volume is a kind of intellectual shearing around the edges of all of federal jurisdiction to get the federal courts out of the business of so much judging.

The judge starts digging where others stop. He has the usual survey of caseload by the numbers and then begins his systematic effort to get rid of it. For example: (1) Diversity must go; that is ten thousand or more cases out the window. (2) The state prisoner cases should be in the state courts. (3) Stop all this injunction business on civil rights. (4) Quit putting federal courts into the "protect the environment business." (5) Send the seamen's, railroad workers', and longshoremen's personal injury business somewhere else. (6) Put patents and taxes into a special court. (7) Cut back on class suits. (8) Don't adopt the American Law Institute proposals which would expand federal question jurisdiction. (9) Eliminate overbroad federal criminal laws. (10) Over-all, retrench the federal jurisdiction.

This series of compressions does the injustice of stripping the delightfully scholarly flavor from the argument, which is too bad; Judge Friendly invites his readers to a real feast of compact and well-put learning. But within the limitations of a book review, the list gives the purport if not the flavor of the thesis.

Comprehensive as is the Friendly view of federal jurisdiction, its comprehension stops at the edge of its subject. As the doughty judge shovels caseload off the federal pile, he rarely concerns himself very seriously with where it is going. There is much respect for the wisdom of the state judges, much deference to their capacity to decide. There is no real recognition of the fact that they, too, have rather more work to do than they can manage. Relatively, of course, a big federal reduction is a small state increase, and this is recognized. The straw that breaks the camel's back is not.

If there is any recognition that the mounting caseload represents real people with real problems, most of which ought to be dealt with quickly and economically somewhere, I don't find it. This is a preachment of a kind of federal isolationism, a get-off-our-backs-and-we-don't-care-what-happens-to-you.

This isolation may, of course, be justified, a legitimate plea for a Little Federalism, just as there is something to be said for a Little England instead of a Great Britain. Judge Friendly offers his justification: unless the federal load is cut back or checked, there will come to be too many federal judges. This will limit their prestige, "a very important factor in attracting qualified men to the federal bench," will result in excess administration, and will "prove utterly destructive to the courts of appeals and to the Supreme Court."

This is true, and it is bad. It must be said respectfully that dumping the offending surplus over to the already jammed state courts is a unappealing way to preserve the prestige of federal judges.

There is, in short, nothing wrong with the Friendly lectures except their conclusions: and the arguments are sufficiently put that one may read and disagree as he goes along. The court overload problem is at least as serious as Judge Friendly thinks it is; in my book, *American Law: The Case for Radical Reform*, I argued that it is even more so. Solutions do not lie in moving the load from one pile to another. There are short-term improvements to be made in improved administration. The only long-term improvement is the elimination of decision points altogether. No fault, to which the judge gives passing and apparently kindly recognition, is one possibility. Reconstruction of the rules on collateral attack on criminal convictions is another that will relieve both the state and federal systems without preferring one at the expense of the other.

There are items in the prescription which, if universally adopted, would lighten everyone's load, as, for one example, the proposals as to class suits. For the most part, the remedy is jurisdiction shifting, a kind of a federal grab for the life preserver by throwing states overboard.

*Member of the Arizona Bar. Reproduced from 59 A.B.A.J. 466 (1973).

BOOK REVIEW

Paul D. Carrington*

FEDERAL JURISDICTION: A GENERAL VIEW. By Henry J. Friendly. Columbia University Press. 462 West 113th Street, New York, New York 10025.

Judge Friendly argues that the federal jurisdiction should be pared to the bone in order to reduce the pressure on the federal appellate courts. The argument is carefully considered and powerfully presented. His proposals, however, would be only a palliative to the problems they seek to meet. They also tend to elevate the importance of procedure over substance, and thereby encounter some serious political difficulties while raising a difficult theoretical question about the basis on which the excluded classes of cases are selected.

I

The dimensions of the cuts which Judge Friendly proposes are not so great as they may seem, and would provide less relief than some of his readers may suppose.

Thus, for example, he proposes to reduce the number of federal criminal prosecutions by eliminating federal criminal jurisdiction based upon the crossing of state lines for criminal purposes or upon an interference with a federally authorized activity. The kidnapping and white slave legislation would be examples of the former class, bank robbery of the latter. A list of appropriate categories enumerated in the latest Annual Report of the Director of the United States Courts might include:

Bank robbery	307
Interstate shipment of stolen property	159
Auto theft	178
Shipment of forged securities	85
White slave traffic	22
Kidnapping	26

These categories total 777, a minor fraction of the total of 4,453 criminal filings in that fiscal year. It seems fair to conclude that Judge Friendly's parings would not reduce the federal criminal intake by as much as 25%.

His proposals for the reduction of the number of appeals to the courts of appeals from administrative agencies might well have substantially less effect on the total caseload. The proposal to make NLRB orders self-enforcing has been fully justified by the Administrative Conference, but the change would not materially alter the relationships of the adversaries; those who are prone to make a full presentation to an appellate court are

*Professor of Law, University of Michigan. Not previously published.

likely to continue to do so. A similar result seems likely with respect to the suggestion that litigants wishing to challenge orders of the Immigration and Naturalization Service be required to proceed through the District Courts. Doubtless some poorer immigrants or aliens would be deterred by this added expense, and some of these cases would not reach the courts of appeals, but the proportion will not be large and the net saving in appellate filings would be barely perceptible. Thus, the total number of administrative agency appeals would not be substantially affected by Judge Friendly's proposals.

With respect to federal question litigation, Judge Friendly would make certain appeals from district court decisions a matter of grace, these being the appeals in cases in which the district court is itself serving as a court of review. Without pausing to evaluate the wisdom of this proposal, it can be said to have little effect on the caseload of the appellate courts. The only substantial block of cases likely to be affected are the social security cases; there were 193 filings in the courts of appeals in such cases in the last year. These cases are rarely difficult and time consuming for the appellate court; a decision not to accept such a case for review would require but little less effort than the brief affirmation on the merits which most now receive.

Clearly significant are Judge Friendly's proposals for reducing the level of state prisoner litigation in the federal courts. 1828 of the 4483 federal question cases filed in the last year were brought by state prisoners. Judge Friendly would not completely eliminate these categories of filings, but he would very substantially reduce them. The overall effect of this reduction must be weighed in light of the fact that these state prisoner cases are disposed of with a minimum of judicial effort. The Third Circuit Time Study suggests that these cases may require as little as one third of the normal quota of judicial energy. If so, the gross saving would still be significant, but not substantial in relation to the total workload of the courts of appeals.

Judge Friendly's final suggestion with regard to federal question litigation would be to abrogate or modify the federal compensation laws governing transportation workers. Some of these claims he would prefer to send to state courts, the remainder to administrative agencies. The total number of such appeals in the last year were about 300. It would be optimistic to suppose that the number could be reduced to 100 by the adoption of all of these suggestions.

There remains the matter of the diversity jurisdiction. Judge Friendly renews his long-standing plea to abolish it, thereby eliminating 1468 federal appellate filings. In the alternative, he proposes a federal no-fault automobile accident legislation which would materially reduce the number of auto case appeals, most of which arise within the category of diversity litigation.

Most optimistically, the total effect of all proposals would be to eliminate up to 1000 criminal appeals, 200 administrative appeals, 1500 prisoner appeals, 1500 diversity appeals, and perhaps 300 other civil cases. The 4500 filings which might be eliminated constitute less than one third of the 15,629 filings recorded in the last year. The intake of the courts of appeals last year would still be about 11,000 cases, a rate of intake which would correspond to that recorded in the calendar year 1969. The court of appeals caseload having quadrupled in recent years, a reduction of 25% of the caseload would be a modest palliative.

This calculation takes no account of the cases which Judge Friendly would divert to specialized federal appellate courts. But the effect of those additional changes would not materially alter the picture. The workload of the present courts of appeals would still be very excessive by traditional measures.

II

A second level of concern aroused by Judge Friendly is that his analysis tends almost inevitably to invert public priorities. The federal appellate courts are the lesser organ of the federal judiciary, which, in turn, is a lesser organ of the federal government. It is misleading to try to think about industrial accident compensation laws, environmental protection, the punishment of bank robbers, or even the diversity jurisdiction by focusing on the impact of such programs on the appellate courts.

As a practical matter, the force of this observation will be felt in the political arena. There is very little chance that a proposal to repeal federal bank robbery laws will be taken seriously, and none at all if the argument is based on the asserted need to reduce the 15,000 federal appellate filings by 300. The judicial administration lobby will simply be overwhelmed by the national banking lobby on that issue, and rightly so. It may be that banking institutions can be as well protected by state law as by federal, or that federal prosecutions could as well proceed in state courts, but the risk that the federal protection is significant is not worth taking for the trivial benefit to the judicial enterprise. Similarly, industrial accident legislation is the result of a long development based on a series of political compromises and reflects the present political tension between unions and employers in the transportation industries. There is no chance that an effort to disturb that equilibrium will succeed if it is based on the proposed advantage of saving the federal appellate courts 200 filings a year.

These practical considerations reveal a more theoretical difficulty with Judge Friendly's effort to restrict the intake of the federal courts. What is illuminated is the fact that the contours of the federal jurisdiction, like most compromises, are inherently irrational. It might be rational to nationalize the industry of judging so that the only judicial system would be the federal courts; and it might be rational to abolish the federal courts altogether; indeed, both of these alternatives were proposed at the time that Article III was drafted. But Article III

emerged, and the dual court system was created, as a political compromise based on no principle except the matching of judicial business to the political concerns of Congress and the executive. Accordingly, Judge Friendly's observations about the irrationality of using state lines as a basis for federal criminal jurisdiction are rather beside the point. He challenges irrationality where there was little pretense of rationality.

Given this lack of coherent principle governing the shape of the federal jurisdiction, it is not surprising that the basis of Judge Friendly's own selection is not always clear. It seems fair to say that he is striving to sort out the chaff of cases which he deems least important, but the standards for measuring importance are not fully articulated. One feature which most of his unwanted classes of cases seem to share is that they present relatively few issues of national law in relation to the number of cases in which disputed fact findings are challenged. Thus, although federal appellate jurisdiction may be quite important to seamen, social security claimants, or corporate defendants, the issues which such litigants raise are frequently of greater interest to themselves than to others. Judge Friendly seems to perceive it a lesser function of the federal appellate courts to gratify such demands for service. He would give priority to those classes of cases which present a larger number of novel questions of interest to others than the litigants themselves or, in other words, legal questions of substance which challenge the creative intellectual skills of the judges. Such a standard for selecting the chaff seems certain to attract the support of most sitting appellate judges because it tends to assure that their jobs will hold greater interest and command greater status. Perhaps such a standard will attract broader support as well; certainly it is a matter for concern to us all that the important role of the federal appellate courts be performed by persons who are interested and take pride in their work. But caution should be expressed that such a principle of selection tends to emphasize the importance of a task which the intermediate federal courts are not organized to perform. The courts of appeals can settle issues of national law which are of general importance only on a regional basis, if at all. The historic function of the courts of appeals is to improve the quality of federal justice by regulating the idiosyncracies of the more isolated individual federal trial judges and the more partisan administrative agencies. The importance of that primary task should not be inadvertently minimized.

THE GEOGRAPHICAL BOUNDARIES OF THE SEVERAL JUDICIAL CIRCUITS: ALTERNATIVE PROPOSALS*

I. INTRODUCTION

For more than a decade the United States Courts of Appeals—courts of last resort for all but a handful of federal cases—have been a source of continuing concern. During this period they have experienced an increase in caseloads unprecedented in magnitude. In Fiscal Year 1960, a total of 3,899 appeals were filed in all eleven circuits; with 69 authorized judgeships, the average was 57 per judgeship. In 1973 the filings had soared to 15,629; with 97 authorized judgeships, the average per judgeship was 161, almost three times the figure for 1960. The filings themselves increased 301 per cent during the same period, compared with an increase of only 58 per cent in district court cases.

This flood-tide of appellate filings has given rise to changes in internal procedures. Opportunity for oral argument has been drastically curtailed in a number of circuits. At the same time, the use of judgment orders and per curiam opinions has increased dramatically. Many of these changes may be desirable, worthy of emulation in their present form. Some may contain the germ of good ideas which need refinement if they are to be retained. Others may be no more than responses of the moment, designed to avoid intolerable backlogs, but generating concern in their implementation. Without passing judgment on any of them, suffice it to say that they present questions which merit careful study.

An increase in the volume of judicial business typically spawns new judgeships. The Fifth Circuit has grown to a court of 15 active judges, each of whom shoulders a heavy workload despite the use of extraordinary measures to cope with the flood of cases. Serious problems of administration and of internal operation inevitably result with so large a court, particularly when the judges are as widely dispersed geographically as they are in the Fifth Circuit. For example, it becomes more difficult to sit en banc despite the importance of maintaining the law of the circuit. Judges themselves have been among the first to recognize that there is a limit to the number of judgeships which a court can accommodate and still function effectively and efficiently. In

*The interim report of the Commission on the Revision of Federal Court Appellate System (1973), reported in 62 F.R.D. 223. Senator Roman Hruska is Chairman of the Commission, and Professor Leo Levin is Executive Director.

1971 the Judicial Conference of the United States endorsed the conclusion of its Committee on Court Administration that a court of more than 15 would be "unworkable". At the same time, the Conference took note of and quoted from a resolution of the judges of the Fifth Circuit that to increase the number of judges on that court "would diminish the quality of justice" and the effectiveness of the court as an institution.

In terms of geographical size, the Ninth Circuit presents an even more striking picture; it ranges from the Arctic Circle to the Mexican border, from Hawaii and Guam to Montana and Idaho. With thirteen judgeships, it is the second largest in the country, both in terms of size of court and of case filings, and has serious difficulties with backlog and delay.

In recognition of the problems faced by the Courts of Appeals, the Congress created the Commission on Revision of the Federal Court Appellate System (P.L. 92–489 (1972)), directing it, in the first instance, "to study the present division of the United States into the several judicial circuits and to report . . . its recommendations for changes in the geographical boundaries of the circuits as may be most appropriate for the expeditious and effective disposition of judicial business." Taking note of the urgency of the need for relief, Congress provided that the Commission report to the President, the Congress and the Chief Justice within 180 days of the appointment of its ninth member.

The Commission has held hearings in ten cities; a preliminary report was widely circulated. The Commission has received ideas and opinions on the alignment of the circuits from the bench and bar in every section of the nation. We have concluded that the creation of two new circuits is essential to afford immediate relief to the Fifth and Ninth Circuits.

We have not recommended a general realignment of all the circuits. To be sure, the present boundaries are largely the result of historical accident and do not satisfy such criteria as parity of caseloads and geographical compactness. But these boundaries have stood since the nineteenth century, except for the creation of the Tenth Circuit in 1929, and whatever the actual extent of variation in the law from circuit to circuit, relocation would take from the bench and bar at least some of the law now familiar to them. Moreover, the Commission has heard eloquent testimony evidencing the sense of community shared by lawyers and judges within the present circuits. Except for the most compelling reasons, we are reluctant to disturb institutions which have acquired not only the respect but also the loyalty of their constituents.

In making its recommendations the Commission has relied primarily on data from Fiscal Year 1973. We have heard testimony concerning what the future may hold, and we appreciate the need for anticipating it. Making projections of future caseloads, however, is at best a risky business, and as specificity increases, confidence decreases. For example, in Fiscal 1973 the number of filings in the United States district courts decreased for the first time in at least a decade; yet it would be folly to predict from this alone a continuing downturn which would obviate the necessity for the changes we recommend in the Fifth and the Ninth Circuits. Moreover, as we look to the future we find many variables which will surely have some impact on caseloads but are nonetheless incapable of being integrated meaningfully in a statistical analysis. The Congress has before it proposed legislation which, if enacted, may bring significant relief to both the appellate and the district courts. Other legislation may give rise to new federal causes of action; new judicial doctrines may expand or contract access of litigants to the courts; patterns of litigation may change. Furthermore, caseload is but one of a number of factors relevant to the question of circuit realignment. Procedures which enhance the ability of the Courts of Appeals to dispose justly and efficiently of the business before them may well be of greater significance. The past decade has witnessed dramatic achievements on the part of the courts in their effort to keep pace with rising caseloads; greater efficiencies and productivity may yet be possible.

We have considered these factors, so difficult to predict or to quantify, and find it impossible to conclude that solutions can soon be found which will obviate the need for circuit realignment. Accordingly, we remain persuaded that the creation of two additional circuits is imperative at this time.

The Commission harbors no illusions that realignment is a sufficient remedy, adequate even for a generation, to deal with the fundamental problems now confronting the Courts of Appeals. These problems are unlikely to be solved by realignment alone without destroying or impairing some of the most valuable qualities of the federal court appellate system. It is our opinion, however, that realignment is a necessary first step in the Fifth and Ninth Circuits, not only to afford relief to the pressing problems of the present, but also to provide a firm base on which to build more enduring reforms.

Our view that realignment of the Fifth and Ninth Circuits is a necessary initial measure is shared by the American Bar Association's Special Committee on Coordination of Judicial Improvements. The American Bar Association itself, acting upon the report of that committee, has expressed its recognition of the "urgent need" for realignment of the Fifth and Ninth Circuits and its support for such a change.

The Congress in creating the Commission has recognized that however exigent a report on realignment, more is required. Accordingly, the governing statute directs the Commission, in the second phase of its work, to study the structure and internal procedures of the "Federal courts of appeal system," and to report its recommendations for such additional changes "as may be appropriate for the expeditious and effective disposition of the caseload of the Federal courts of appeal, consistent with fundamental concepts of due process and fairness."

In conformity with the mandate of the statute, the Commission herewith reports its recommendations for change in the boundaries of the several judicial circuits. We are not all of one mind on all issues, but we share the conviction that the situation in the Fifth and Ninth Circuits should not be allowed to continue. Work on the second phase of our assignment has already begun. We emphasize once again, however, that, whatever may emerge from that effort or from changes by the Congress or by the courts themselves which can now be envisioned, litigants in the Fifth and Ninth Circuits are entitled to that immediate and significant relief which our proposals would provide.

Creation of the new courts must be accompanied by authorization of judgeships sufficient to deal effectively with the volume of judicial business which litigants will bring before them. Accordingly, we recommend that the Congress, concurrently with realignment, create new judgeships adequate to man each of the courts affected by such legislation.

II. THE FIFTH CIRCUIT

The case for realignment of the geographical boundaries of the Fifth Circuit is clear and compelling. With 2,964 appeals filed in Fiscal Year 1973, this Circuit has by far the largest volume of judicial business of any of the Courts of Appeals—almost one-fifth of the total filings in the 11 circuits. Although it is the largest federal appellate court in the country, with 15 active judges, it also has one of the highest caseloads per judge—198 filings in FY 1973, 23 per cent more than the national average. Geographically, too, the circuit is huge, extending from the Florida Keys to the New Mexico border.

Heavy caseloads in the Fifth Circuit are not a new problem. Proposals for dividing the circuit have been under serious consideration for some years, but instead additional judges were added. The caseload, however, has continued to grow and the active judges of the circuit, acting unanimously, have repeatedly rejected additional judgeships as a solution: to increase the number beyond 15 would, in their words, "diminish the quality of justice" and the effectiveness of the court as an institution.

To the credit of its judges and its leadership, the Court of Appeals for the Fifth Circuit has remained current in its work. It has been innovative and imaginative, avoiding what might have been a failure in judicial administration of disastrous proportions. The price has been high, however, both in the burdens imposed on the judges and in terms of the judicial process itself. This is the considered view of a majority of the active judges of the Court of Appeals for the Fifth Circuit who, joining in a statement which calls for prompt realignment, assert that "the *public interest* demands immediate relief" (emphasis in the original). Even 15, they emphasize, is too large a number of judges for maximum efficiency, particularly with respect to avoiding and resolving intra-circuit conflicts. Pointing both to geographical area and to the number of judges, they conclude: "Jumboism has no place in the Federal Court Appellate System."

As a result of the pressure of a flood-tide of litigation, the court has instituted a procedure under which oral argument is denied in almost 60 per cent of all cases decided by it. The Commission has heard a great deal of testimony concerning this practice, but even among the strongest proponents of the Fifth Circuit's procedures there is the feeling that oral argument may have been eliminated in too many cases. Certainly this is the strongly held view of many attorneys who appeared before the Commission. The court has also decided an increasing proportion of cases without written opinions.

It is easier to perceive the problem than to propose a solution. At hearings in four cities in the Fifth Circuit, and in extensive correspondence with members of the bench and bar, we have heard opinions on a wide spectrum of possible realignments. The Commission considered numerous proposals before arriving at the conclusions presented in this report.

In considering the merits of the various proposals, we have given weight to several important criteria. First, where practicable, circuits should be composed of at least three states; in

any event, no one-state circuits should be created. Second, no circuit should be created which would immediately require more than nine active judges. Third, the Courts of Appeals are national courts; to the extent practicable, the circuits should contain states with a diversity of population, legal business and socio-economic interests. Fourth is the principle of marginal interference: excessive interference with present patterns is undesirable; as a corollary, the greater the dislocation involved in any plan of realignment, the larger should be the countervailing benefit in terms of other criteria that justify the change. Fifth, no circuit should contain noncontiguous states.

On the basis of these criteria, we have rejected a number of proposals. For instance, to divide the Fifth into three circuits without affecting any adjacent states would require the creation of three two-state circuits, one of which would be too small to constitute a viable national circuit; moreover, as stated above, we think it undesirable to proliferate two-state circuits.

Once we begin to consider realignment plans affecting adjacent circuits, the principle of marginal interference comes into play. For instance, Georgia could be moved into the Fourth Circuit only if one of the Fourth Circuit states were moved into yet another circuit. Similarly, if Florida, Alabama and Mississippi were placed in one circuit, and Georgia, Tennessee (now in the Sixth Circuit), and South Carolina (now in the Fourth Circuit) in another, both would have manageable caseloads, but at the cost of interfering significantly with two adjacent circuits.

Similar considerations suggested the rejection of various proposed realignments for the western section of the Fifth Circuit. A circuit composed of Texas, Louisiana, Oklahoma and New Mexico, for example, would have a much higher workload than is desirable. In addition, it would leave the Tenth Circuit with only 527 filings, smaller than any existing circuit except the First.

In its Preliminary Report of November 1973 the Commission presented three possible plans for realignment of the Fifth Circuit. After careful consideration of the responses of the bench and bar, and further study of possible alternatives, a majority of the Commission now recommends that the present Fifth Circuit be divided into two new circuits: a new Fifth Circuit consisting of Florida, Georgia and Alabama; and an Eleventh Circuit consisting of Mississippi, Louisiana, Texas and the Canal Zone. Such a realignment satisfies all five of the criteria deemed important by the Commission. In particular, no one- or two-state circuits would be created; no other circuit would be affected.

Commission Recommendation

Fifth Circuit	Filings FY '73 [1]
Florida	800
Georgia	451
Alabama	249
	1,500

Eleventh Circuit	Filings FY '73
Texas	838
Louisiana	477
Mississippi	143
Canal Zone	6
	1,464

With nine judgeships for each of the new courts, the filings per judgeship in the new Fifth Circuit would be 167; in the Eleventh Circuit, 163. These figures may be compared with the national average in FY 1973 of 161. The circuits, it should be noted, are well balanced in terms of case filings.

If for any reason the Congress should deem this proposal unacceptable, the Commission recommends enactment of one of the other two proposals presented in its Preliminary Report and set forth below. Either plan would represent a significant improvement over the current situation. The Commission expresses no preference between them.

Alternative No. 1

Eastern Circuit	Filings [1] FY '73
Florida	800
Georgia	451
Alabama	249
Mississippi	143
	1,643

Western Circuit	FY '73
Texas	838
Louisiana	477
Arkansas	93
Canal Zone	6
	1,414

This alternative affects only one circuit other than the Fifth: Arkansas is moved out of the present Eighth Circuit, which has

[1] The Administrative Office of the United States Courts reports appeals from administrative agencis for each circuit, but not by state of origin. (The same is true with respect to original proceedings. These are relatively few in number and are here treated together with and considered as administrative appeals.) The figures in the text include, in addition to appeals from United States District Courts, an allocation to each state of administrative appeals in the same proportion to total administrative appeals in the circuit as the number of appeals from the District Courts within the state bears to the total number of District Court appeals within the circuit. In Fiscal Year 1973, the total number of administrative appeals and original proceedings in the Fifth Circuit was 218, which constituted 7 per cent of the circuit's total filings.

one of the lowest caseloads in the country. The addition of Arkansas to Texas, Louisiana and the Canal Zone avoids the creation of a two-state circuit.

This plan, however, does create a relatively large eastern circuit—1,643 filings in FY 1973. With nine judges the circuit would have 183 filings per judgeship, well above the national average of 161. It would nonetheless effect an eight per cent reduction from the present Fifth Circuit figure. Further, a court of nine judges rather than 15 could be expected to achieve a greater measure of efficiency in holding en banc hearings and circulating panel opinions among all of the judges so as to minimize the possibility of conflicts within the circuit.

Alternative No. 2

Eastern Circuit	Filings [2] FY '73
Florida	800
Georgia	451
Alabama	249
Mississippi	143
	1,643

Western Circuit	Filings FY '73
Texas	838
Louisiana	477
Canal Zone	6
	1,321

This alternative creates the same eastern circuit as Alternative No. 1, with the same disadvantages. It does create a two-state circuit in the west. It does not, however, alter any circuit other than the Fifth, and thus respects the principle of marginal interference.

III. THE NINTH CIRCUIT

The Ninth Circuit today handles more cases annually than any circuit other than the beleaguered Fifth. Since 1968 the number of appeals filed each year has consistently exceeded the number of terminations, resulting in a backlog of 170 cases per judgeship at the end of Fiscal Year 1973—enough to keep the court busy for a full year even if no new cases were filed. Delays in the disposition of civil cases, often of two years or more, have seriously concerned both judges and members of the bar. The size of the court (13 authorized judgeships since 1968) and the extensive reliance it has been required to place on the assistance of district and visiting judges have threatened its institutional

unity. Attorneys and judges have been troubled by apparently inconsistent decisions by different panels of the large court; they are concerned that conflicts within the circuit may remain unresolved. Whatever the reason, for two successive fiscal years, 1971 and 1972, there were no en banc adjudications. More recently, the court has accepted a number of cases for en banc determinations and appears to be doing so with increasing frequency. It remains to be seen whether this will serve further to exacerbate the problems of delay.

At the Commission's hearings, held in four cities of the Ninth Circuit, the vast majority of the witnesses recognized that some change in the structure of the circuit is necessary. It was also generally recognized that the problems faced by the court could not be adequately resolved by simply increasing the number of judges. Adding judges without more is no solution. The Fifth Circuit judges, having lived with a court of 15, have repeatedly gone on record as opposing any increase beyond that number. Indeed, a majority of the active judges of the Fifth find 15 too many. Some of the Ninth Circuit judges, too, have pointed to the difficulties encountered by their own court of 13 in maintaining institutional unity. Indeed, in more ways than one the Ninth Circuit is close on the heels of the Fifth, where a majority of judges, despite their remarkable efforts to cope with a burgeoning caseload and a vast geographical area, have requested immediate relief. It should not be necessary for the Ninth Circuit to re-live the history of the Fifth Circuit before its problems of caseload and geographical size are ameliorated.

Accordingly, the Commission recommends that the present Ninth Circuit be divided into two circuits: a Twelfth Circuit to consist of the Southern and Central Districts of California and the states of Arizona and Nevada; and a new Ninth Circuit to consist of Alaska, Washington, Oregon, Idaho, Montana, Hawaii, Guam and the Eastern and Northern Districts of California. Such a realignment will by no means solve all of the Ninth Circuit's problems for all time, but it will make them more manageable in the short run and establish a sound geographical base on which to build more fundamental reforms.

The Ninth Circuit's filings in Fiscal Year 1973 would have been allocated as follows if the division now recommended had been in effect:

Twelfth Circuit		New Ninth Circuit	
California—Southern		California—Northern	
California—Central	998	California—Eastern	545
Arizona	234	Alaska	26
Nevada	70	Washington	183
		Oregon	121
		Idaho	30
		Montana	36
		Hawaii	38
		Guam	35
TOTAL	1,302 [3]		1,014

With nine judgeships in the proposed Twelfth Circuit the court would have had 145 filings per judgeship, virtually equal to the filings per judgeship (144) in all of the circuits in FY 1973 excluding the three busiest. That figure also represents a decrease of 19 per cent from the Ninth Circuit's current rate of 178 filings per judgeship. The states of the new Ninth Circuit, of course, had a lower caseload and, depending on the number of judgeships provided, would have had at least as much relief.

The Commission has received a number of other plans for realignment of the Ninth Circuit. Most strongly pressed is the suggestion that California, Nevada, Hawaii and Guam constitute one circuit, that Arizona be shifted to the Tenth Circuit, and that a separate circuit be created to consist of Alaska, Washington, Oregon, Idaho and Montana, the five northwestern states. After careful consideration we have concluded that, for reasons developed below, this plan, too, is so clearly inferior to the recommended realignment that we have no choice but to reject it. Nevertheless, and without minimizing the difference in relative merits of the plans, the Commission is of the view that adoption of this proposal—joining California, Nevada, Hawaii and Guam, shifting Arizona to the Tenth, and creating a northwestern circuit of the remaining states—is preferable to leaving the Ninth Circuit as it is now.

We find the plan just described to be inferior in several respects. First, it appears highly undesirable at this juncture to create a new circuit which in Fiscal 1973 would have had close

[3] Adjusted to reflect appeals from administrative agencies and original proceedings. In the Ninth Circuit, these constituted 16 per cent of the total filings in FY 1973. See Footnote 1, page 233.

to 1,700 filings, particularly when much of the area it would encompass is expected to experience substantial growth. The crucial fact is that California today already provides two-thirds of the judicial business of the Ninth Circuit. To keep it intact, and to join it in a circuit with other states, would make it impossible to provide adequate relief for the problems of the circuit. Second, to shift Arizona into the Tenth Circuit would violate the principle of marginal interference. It would involve moving a state into a different, existing circuit in the face of vigorous, reasoned objections concerning the impact of such a move. Relocation would take from the bench and bar at least some of the law now familiar to them. We have also heard extensive testimony about the close economic, social and legal ties between Southern California and Arizona and the more limited nature of such ties between Arizona and the Tenth Circuit with its seat at Denver. Moreover, opposition to such a plan has come from California as well as Arizona. Finally, as we develop more fully below, a separate circuit for the five northwestern states does not appear justified or desirable at this time.

Although the underlying problems of caseload and size facing the Fifth and Ninth Circuits are similar, realignment of the Ninth poses difficulties not encountered or raised in deliberations concerning the Fifth. Some of these considerations are discussed immediately hereafter.

1. A single state—in this instance California—should not constitute a single federal circuit.

A one-state circuit would lack the diversity of background and attitude brought to a court by judges who have lived and practiced in different states. The Commission believes that such diversity is a highly desirable, and perhaps essential, condition in the constitution of the federal courts of appeals. Moreover, only two senators, both from a single state, would be consulted in the appointment process; a single senator of long tenure might be in a position to mold the court for an entire generation. Finally, a circuit consisting of California alone would immediately require nine judges even to maintain the high caseload per judge that now obtains in the Ninth Circuit. In addition, it would do little to solve the existing problems of the Ninth Circuit because California now provides two-thirds of the caseload of the circuit as presently constituted.

2. Dividing the judicial districts of California between two circuits raises no insoluble or unmanageable problems.

The realignment plan we have recommended would divide the judicial districts of California between the new Ninth Circuit and the proposed Twelfth Circuit. The division of a state between two circuits would be an innovation in the history of the federal judicial system. The problems that may be anticipated fall into two broad classes: those involving actual or potential conflicting orders to a litigant, and those involving the promulgation of inconsistent rules of law in suits involving different litigants. Special concern has been voiced over the possibility of conflicting decisions as to the validity of state statutes or practices under federal law. However, after full consideration, we are convinced that any problems that might arise are of lesser magnitude and significance than those created by a single state circuit, or any of the other proposals that have been suggested to us. In any event, they can be resolved by existing mechanisms and others that could readily be developed.

Conflicting judgments. Among the wide variety of mechanisms developed in the law to avoid repetitive litigation and conflicting judgments, at least half a dozen are explicitly designed or frequently used to deal with litigation arising out of controversies crossing circuit boundaries. These include transfers between circuits, transfers of venue under 28 U.S.C. sec. 1404(a), consolidations by the Judicial Panel on Multidistrict Litigation, stays, injunctions, and statutory interpleader. Either in their present form or with modifications, these mechanisms would avoid many of the potential conflicts in the state divided between two circuits.

Conflicting legal rules—issues of state law. The Commission has heard testimony to the effect that a division of California such as the one proposed will mean that two federal appellate courts rather than one would be interpreting California law. Of course, this may be true today. As the law governing choice of law has developed, every federal court may at some point be called upon to interpret California law. With litigation over mass torts such as airplane accidents and multi-state business transactions so common, we are neither surprised nor disturbed by a district court within one circuit applying the law of a state from another circuit. Moreover, even within California there are today four federal district courts which regularly interpret California law. Experience in the federal system shows that district courts within the same state may differ in their interpretation of state law. These differences may or may not be resolved by a Court of Appeals; if

they are, the resolution may take years. Of central significance, on issues of state law both of the proposed circuits would be obliged to follow the well-developed jurisprudence of the California legislature and courts. This would be equally true in diversity cases and in cases involving federal claims which turn on points of state law.

Where unusual circumstances militate against federal decision of state-law issues, devices such as abstention and certification are available to delay or avoid federal adjudication (and thus the possibility of conflict) until resolution by the California courts. Whether to provide for certification of doubtful state law issues, as some states have done, is of course for the California legislature to decide. Such legislation might be anticipated if it were thought that the federal courts were having undue difficulty in interpreting state law.

Forum shopping on issues of federal law. Witnesses at the Commission's hearings have expressed the fear that to divide California between two judicial circuits would foster forum-shopping by litigants whose cases turned on federal-law issues. We note, however, that opportunities for forum-shopping exist today in the federal courts, and that the decision to choose one court rather than another will depend on a variety of considerations. It is far from clear that forum shopping would increase if California were divided between circuits. It may be that litigants challenging laws of statewide application would have a greater incentive to forum-shop, but if this were felt to be a problem, Congress, using devices such as venue restrictions and transfer provisions, could restrict forum shopping (and avoid conflicts as well). Much the same may be said of litigation by state prisoners. In both contexts—as in many others in our federal system—a certain amount of forum shopping may be tolerable, especially if the alternatives are even less appealing.

Actions against state agencies. At the Commission's hearings in the Ninth Circuit several witnesses expressed concern that if the judicial districts of California were divided between two circuits, a state agency might be subject to conflicting orders of federal courts in the two circuits. The fear was also expressed that a state law or practice might be held valid in one of the circuits and invalid in the other.

When parallel lawsuits in the two circuits threaten either possibility, the mechanisms referred to above may be invoked to channel two actions into a single court. Even if both lawsuits are permitted to proceed independently, they will often reach the same outcome, and unless the precedents are not clear, they may

be expected to do so. If the two judgments are inconsistent, it will not necessarily follow that the state agency will have to violate one order to obey the other: for example, one court might require a change in procedures and the other approve the status quo, or one court might mandate broader relief than the other. Indeed, it is not easy to hypothesize cases in which the two courts' orders would be such as to make it impossible for the defendant to obey both. If such an impasse should occur, it would most likely result from so fundamental a clash of values that Supreme Court review would be appropriate; moreover, other procedures for the resolution of inter-circuit conflicts, either of broad applicability or specifically tailored to the Ninth and Twelfth Circuits, might be provided by the Congress. For example, in acting upon the realignment proposed by the Commission, Congress may wish to enact companion legislation providing for a single appellate resolution of multiple challenges to the federal validity of state laws. A model already exists for transfer and consolidation at the appellate level: 28 U.S.C. sec. 2112(a). That section provides that when proceedings have been instituted in two or more courts of appeals with respect to the same order of an administrative agency, the proceedings are to be consolidated in the court where the first appeal was filed. Further, authority is granted to that court to transfer the proceedings to any other court of appeals for the convenience of the parties in the interest of justice. We emphasize, however, that our recommendation is not dependent on the creation of new procedures; we regard existing mechanisms as adequate for the problems that are foreseeable.

Federal court review of state governmental actions is a delicate matter whether in two circuits or one. The reluctance to have federal courts interfere with state institutions or procedures is reflected in the requirement of exhaustion of state remedies, the various abstention doctrines, and the Anti-Injunction Acts. These statutes and doctrines will prevent many conflicts that might otherwise arise in a state lying within two circuits. We note, too, that the judges of each of the new courts may be expected to reflect an appropriate sensitivity to the consequences of conflicting decisions and a willingness to invoke the principles of comity and deference to a recent decision by a court of equal stature.

In short, the Commission agrees with the conclusion of the Committee on Coordination of Judicial Improvements of the American Bar Association that "the principles of federalism and the advantages which flow from infusion of judges from several states into a circuit considerably outweigh any disadvantages which might be generated if part of a state were placed in two or more circuits."

3. Creating two "divisions" within the present Ninth Circuit is not likely to solve the circuit's problems.

At the Commission's hearings testimony was received suggesting that rather than recommend realignment, the Commission should urge a "restructuring" of the Ninth Circuit into two "divisions." A major advantage of this scheme, in the view of its proponents, is that it would preserve the availability of judges from the less busy northern districts of the circuit for assignment to the undermanned southern districts. The Commission has concluded, however, that the proposal would generate more problems than it would solve.

In our view, demonstrated needs for more district judges should be met by measures which are directly responsive to that problem. Adding new judgeships is, of course, the most direct response. The Judicial Conference of the United States has recommended added district judges for the Ninth Circuit, and the proposal is under active consideration in the Congress. Moreover, flexibility in the transfer of judges between circuits need not be limited to intra-circuit transfers. If necessary, the procedure could be modified, as, for example, by the promulgation of guidelines to assure adequate judicial manpower where needed and when needed. Special provisions might be made for transfers between circuits created from the present Ninth Circuit, until such time as the needs of the circuit were met on a permanent basis.

We note, too, that the Ninth Circuit today has 59 district judgeships. The recommendations of the Judicial Conference of the United States, if implemented, would bring the total to 70. These figures, of course, take no account of senior district judges. In a circuit stretching from the Arctic to the Mexican border, and including Hawaii and Guam, the administration of the work of such a large number of judges is bound to pose complex administrative problems. These problems have already come under the scrutiny of the Subcommittee on Judicial Machinery of the Senate Judiciary Committee. Whatever the difficulties in the past, it would be troubling to create an appellate structure designed to foster extensive use of intra-circuit district judge transfers as the solution of the manpower needs of the district courts.

The factual basis of the argument also deserves analysis. The three southern districts said to be dependent on the reserve judicial manpower from the northern districts are the districts of Central California (Los Angeles), Southern California (San Diego), and Arizona. In fact, however, the Central District in Fiscal Years 1972 and 1973 loaned considerably more judge days to the northern districts than it received from them. The District of Arizona has also given substantial help to the northern districts: in FY 1973 it received more than it gave, but in Fiscal 1972 the figures were reversed and it loaned more judge time to the northern districts than it borrowed from them. The Southern District of California is indeed a borrowing court, but most of the visiting judges come from other southern districts or are senior judges from the northern districts. Senior judges have considerable discretion in deciding where they wish to sit, and under current practices may be assigned to districts outside their own more easily than active judges. Thus even with the recommended realignment they would be available to sit in the Southern District of California. To put the point more precisely, only one per cent of the total visiting judge-time received by the Southern District in Fiscal 1973 was from active judges of the northern districts.

Any scheme for restructuring the Ninth Circuit into divisions depends for its success on a mechanism for preserving a unified law within the circuit. The proposals we have received recognize this but defer the consideration of specific details on this crucial matter. Thus, it is difficult to predict how the divisions would operate. In all likelihood, however, the two divisions would soon act and be perceived as separate courts. As a result the circuit would be divided in fact though not in law. Enormous administrative difficulties might be created by the need to coordinate the activities of the two divisional headquarters and the directives of the two divisional chief judges. The present problems of avoiding intra-circuit conflicts would be exacerbated, inasmuch as only a proceeding that included judges from both divisions could speak with authoritative finality.

4. A separate circuit for the five northwestern states is not now warranted.

The appeals filed from the five northwestern states (Alaska, Washington, Oregon, Idaho, and Montana) in Fiscal Year 1973 accounted for only 17 per cent of the workload of the circuit and totalled slightly less than the filings in the three-judge First Circuit, regarded as something of an anomaly within the overloaded federal appellate system. To create another small circuit would be undesirable. The Commission has heard testimony that the rapidly growing population and expanding business in the northwest will soon result in substantially increased litigation at the appellate as well as the trial level. Should these projections be borne out, a separate circuit for the four or five northwestern states may become appropriate.

IV. ASSIGNMENT OF JUDGES

If Congress enacts legislation to create new circuits, the Commission recommends that judges of affected existing circuits be assigned to the new circuit in which their official station is located. Choice as to their assignment is assured by the judges' ability to change their official station pursuant to 28 U.S.C. sec. 456. At some point before realignment becomes effective, however, the judges should be required to declare their intentions and to designate their desired official stations in accordance with the provisions of section 456. Their options will, of course, be limited by the number of judgeships authorized for each circuit by the Congress.

APPENDIX I

A. Data for Fiscal Year 1973

Circuit	Authorized Judgeships	Filings FY '73	Terminations FY '73	Terminations After Hearing or Submission FY '73	Pending End of FY '72	Pending End of FY '73
D. C.	9	1,360	1,288	601	1,220	1,292
First	3	401	370	223	166	197
Second	9	1,709	1,462	958	681	928
Third	9	1,197	1,281	723	839	755
Fourth	7	1,573	1,676	1,168	825	722
Fifth	15	2,964	2,871	2,092	1,636	1,729
Sixth	9	1,261	1,239	745	653	675
Seventh	8	1,117	1,088	630	892	921
Eighth	8	821	821	556	415	415
Ninth	13	2,316	2,140	1,347	2,033	2,209
Tenth	7	910	876	736	579	613
All Circuits	97	15,629	15,112	9,779	9,939	10,456

Source: AO Report

B. Data for Fiscal Year 1972

Circuit	Authorized Judgeships	Filings FY '72	Terminations FY '72	Terminations After Hearing or Submission FY '72	Pending End of FY '71	Pending End of FY '72
D. C.	9	1,168	1,001	466	1,053	1,220
First	3	421	385	253	130	166
Second	9	1,317	1,593	897	957	681
Third	9	1,179	1,201	675	861	839
Fourth	7	1,399	1,391	861	817	825
Fifth	15	2,864	2,662	1,877	1,434	1,636
Sixth	9	1,248	1,098	679	503	653
Seventh	8	999	882	443	775	892
Eighth	8	798	797	508	414	415
Ninth	13	2,258	1,968	1,221	1,743	2,033
Tenth	7	884	850	657	545	579
All Circuits	97	14,535	13,828	8,537	9,232	9,939

Source: AO Report

C. **Data on Disposition Time**

Circuit	Median Time in FY 1973 from Filing of Complete Record to Final Disposition (Civil) Cases	Interval (Months)	Median Time in FY 1973 from Filing of Complete Record to Final Disposition (Criminal) Cases	Interval (Months)
D. C.	237	14.5	282	10.2
First	138	4.5	60	6.4
Second	420	5.8	434	3.8
Third	415	10.6	220	6.1
Fourth	889	5.8	238	5.7
Fifth	1,445	5.2	484	4.3
Sixth	459	7.1	205	6.7
Seventh	354	12.0	207	9.6
Eighth	327	4.6	162	4.5
Ninth	536	13.8	646	4.9
Tenth	508	6.7	166	5.8
All Circuits	5,728	6.9	3,104	5.5

Source: AO Report

D. **Appeals by State FY–1973** *

			Appeals Filed FY 1973
I.	Fifth Circuit States		
	Alabama		249
	Florida		800
	Georgia		451
	Louisiana		477
	Mississippi		143
	Texas		838
	Canal Zone		6
II.	Eighth Circuit States		
	Arkansas		93
	Total of all other states		728
III.	Ninth Circuit States		
	Alaska		26
	Arizona		234
	California		1,543
	Northern & Eastern	545	
	Central & Southern	998	
	Hawaii		38
	Idaho		30
	Montana		36
	Nevada		70
	Oregon		121
	Washington		183
	Guam		35

* State figures adjusted to reflect appeals from administrative agencies and original proceedings. See Footnote 1, page 233.

THE 'LAW OF THE CIRCUIT" AND ALL THAT

Henry J. Friendly*

* * * In my view, the really important work of the courts of appeals, other than as mere dispatchers of business, inheres in a relatively small number of cases each year. These present significant issues of federal law, not controlled by Supreme Court decisions, which have not previously arisen in the circuit but which the Supreme Court will not regard as so important as to justify intervention until a conflict has arisen or, sometimes, even when it has. I should guess that each term would see a score of such decisions — perhaps either "by reason of strength" or by using a less rigorous standard — two score, out of nearly a thousand cases disposed of after hearing or submission.

Leaving last term's decisions to the editors, I will cite two examples of what I mean. In *United States v. DeSisto*,[30] we held that testimony given at a former trial or before a grand jury by a witness who was on the stand and subject to cross-examination could be used not simply for impeachment but as affirmative proof of the facts stated, although a good argument could be made that testimony at a former trial should not be so usable since the witness was not "unavailable" and grand jury testimony should not be for the further reason that it was not subject to cross-examination at the time. While it was also arguable that our ruling ran counter to a Supreme Court decision which we distinguished,[31] the Court denied certiorari. We have continued to apply what Professor Chadbourn calls "the Second Circuit view"[32] with what we think to be good results. No circuit has yet followed us; one has declined to do so;[33] and others have been able to avoid a decision.[34] Now the *Proposed Federal Rules of Evidence* would go far beyond our decision, dangerously and wrongly so, and allow such use of any prior utterance by a witness, even an oral one which he denies having made.[35]

My second example is a view, developed in our circuit long before my time, that a trial judge's conclusion with respect to negligence is not a "finding of fact" within the protection of the "unless clearly erroneous" rule.[36] Six years ago we reexamined this in the light of an earnest argument that our doctrine ran counter to a later Supreme Court decision[37] and decided it did not.[38] Here we are in clear conflict with other circuits.[39] Yet the Court has been willing to leave the conflict unresolved.[40]

What I have just written leads directly to my final point, namely, that a series such as this finds justification in the concept of the "law of the circuit." Although the dimensions of this may have been exaggerated, it is true that the Supreme Court's inability to hear more than a relatively few cases each term, its desire sometimes to let the dust settle before moving in, and other factors permit each circuit to make its own federal law in limited areas at least for a short time and occasionally, as the foregoing examples show, for a long one.

This process can lead to forum-shopping, and also to difficulties in cases transferred from one circuit to another,[41] since I take the Supreme Court's decision[42] that the transferee court is bound to apply the same conflict of law rules as the transferor to be limited to choices of *state* law. However pleasant it would be to share Judge Parker's anticipation[43] that all circuits will decide a question of federal law the same way or be corrected by the Supreme Court if they don't, such a view is mere wishful thinking. This is vividly demonstrated by the differing results reached with respect to the very subject, patentability, of which the judge was speaking.[44] The Supreme Court's recent ex-

30 329 F.2d 929 (2d Cir.), *cert. denied*, 377 U.S. 979 (1964).

31 Bridges v. Wixon, 326 U.S. 135, 153-54 (1945).

32 3A WIGMORE, EVIDENCE § 1018 at 996-98 n.2 (Chadbourn rev. 1970).

33 Byrd v. United States, 342 F.2d 939, 940 (D.C. Cir. 1965).

34 United States v. Classen, 424 F.2d 494, 495 n.1 (6th Cir. 1970); United States v. Schwartz, 390 F.2d 1, 5-6 (3d Cir. 1968).

35 PROPOSED FEDERAL RULES OF EVIDENCE Rule 801(d)(1). *See* United States v. Cunningham, 446 F.2d 194, 198 (2d Cir. 1971).

36 F. R. Civ. P. 52(a). We have added the gloss that the trial judge's conclusion "will ordinarily stand unless the lower court manifests an incorrect conception of the applicable law." Cleary v. United States Lines Co., 411 F.2d 1009, 1010 (2d Cir. 1969).

37 McAllister v. United States, 348 U.S. 19 (1954).

38 Mamiye Bros. v. Barber Steamship Lines, Inc., 360 F.2d 774, 776-78 (2d Cir.), *cert. denied*, 385 U.S. 835 (1966).

39 Merritt v. Interstate Transit Lines, 171 F.2d 605, 608-09 (8th Cir. 1948); Imperial Oil Co. v. Drlik, 234 F.2d 4, 10 (6th Cir.), *cert. denied*, 352 U.S. 941 (1956); Pacific Tow Boat Co. v. States Marine Corp., 276 F.2d 745, 752 (9th Cir. 1960). Several other circuits generally oppose the Second Circuit view. *See* Weiner, *The Civil Nonjury Trial and the Law-Fact Distinction*, 55 CAL. L. REV. 1020, 1024-1041 (1967).

40 The denial of certiorari in *Mamiye Bros.* was not significant since we affirmed the district judge's conclusion of lack of negligence, although reasserting one power to reverse on something less than a "clearly erroneous" standard. But the Court has also denied certiorari where, applying the "Second Circuit rule," we reversed a conclusion of negligence, by an especially able judge, that would have necessarily been affirmed under the standard applied by the Sixth, Eighth and Ninth Circuits. Esso Standard Oil Co. v. S.S. Gasbras Sul., 387 F.2d 573 (2d Cir. 1967), *cert. denied*, 391 U.S. 914 (1968).

41 28 U.S.C. § 1404(a) (1970). *Cf.* Ackert v. Bryan, 299 F.2d 65, 71, 73 (2d Cir. 1962) (dissenting opinions).

42 Van Dusen v. Barrack, 376 U.S. 612 (1964).

43 Clayton v. Warlick, 232 F.2d 699, 706 (4th Cir. 1956).

44 *See also* Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 596-604 (1969).

*Senior Circuit Judge, United States Court of Appeals for the Second Circuit. Reproduced from 46 St. John L. Rev. 406, 411-13 (1972)

tension of the rule of collateral estoppel in patent cases,[45] sound as I think it to be, will mean that a patentee who has lost his case on validity in a circuit which is "tough" on patents will not have whatever slight opportunity formerly existed to get a conflicting decision from another more favorably disposed.

A presupposition of the "law of the circuit" concept is that a court of appeals is not overly impressed by the fact that another has reached a contrary conclusion. One circuit will follow another or others when it is persuaded, has no strong views either way,[46] or considers immediate nationwide uniformity to be unusually important, but generally not when it firmly believes the other circuit or circuits have been wrong. The volume of precedents in each circuit and in the Supreme Court has become so great that only rarely is it necessary to rely on opinions of other circuits,[47] and a district court opinion is not likely to have an impact merely as authority unless it comes from a judge enjoying special esteem. The circuits have become increasingly ingrown or, if one prefers a less pejorative term, self-contained.[48]

INTERCIRCUIT HETEROGENEITY

Paul D. Carrington*

The most telling criticism against the proposal for divisions at the circuit level is that the plan fails to meet the root problem — the instability of intercircuit conflicts produced by the balkanized system of separate circuits. We should face the apparent fact that the national judicial enterprise is outgrowing its central nervous system. Schemes preserving en banc procedure can do no more than avoid aggravation of the ailment; they do nothing to control it. Perhaps the most conservative approach, then, is to seek national uniformity in federal law through restructuring the appellate court system.

Perhaps the most serious drawback of intercircuit heterogeneity is the forum-shopping it encourages, with frustrating consequences for legal planning. To the extent that circuits seem to offer the planner different results, ventures that are only marginal on an economic assessment are overlaid with unresolvable confusion. To be sure, the venue statutes deny a completely open choice of forum, for private litigation generally must be conducted in the district in which the individual defendant resides or in which the cause of action arose.[207] But in most important litigation, there is at least some range of choice. If the defendant is a corporation, the choice may be as broad as its business activity, for the corporation is deemed to reside wherever it transacts business.[208] Venue provisions for review of determinations of administrative agencies differ widely, but it is rare that the plaintiff is restricted to one forum.[209] The Federal Power Commission, for example, can be challenged either in the circuit in which a utility affected by its order has its principal place of business or in the District of Columbia;[210] the National Labor Relations Board can seek enforcement of its orders in any circuit in which the employer resides or transacts business.[211] Even more complex are the alternatives open to tax litigants.[212] If the taxpayer refuses to pay, the Government will commence collection in the Tax Court,[213] whose decisions are reviewable in the circuit in which the return was filed.[214] If the taxpayer pays the tax under protest, he has a choice of forum that includes the collector's district,[215] his district,[216] and the Court of Claims.[217] In fact, the only review of administrative decision which is clearly limited to a single appellate forum is review of licensing proceedings by the Federal Communications Commission.[218]

---

* Professor of Law, University of Michigan. Reproduced from Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law, 82 HARV. L. REV. 542, 596-604 (1969).

With such wide choice, forum-shopping to take advantage of intercircuit differences of view cannot be dismissed as trivial. Where the legal consequences of one's actions depend on the complaining party's choice of forum, legal planning — the creation of systems of private ordering — is frustrated.[230] It would be quite ironic if we should find it necessary to evolve a body of conflict of laws doctrine to be employed by legal planners dealing with intercircuit conflicts. One might suggest half seriously a rule that the law of the circuit in which a contract is made should control its tax consequences, or its enforceability under section 301 of the Labor Management Relations Act. Such complexity may be a necessary feature of state-federal or multi-state relations, but it is unbecoming to a single legal system.[230]

A secondary evil of forum-shopping is the "race to the court house" in appeals from administrative decisions, a repugnant development of recent years.[230] The controlling legislation provides that the choice of forum is determined by the aggrieved party who first files his appeal.[231] This rule has led to some very marginal claims to be an aggrieved party for the apparent purpose of asserting the choice.[232] Parties have constructed elaborate systems to assure first filings, and it is no longer extraordinary to find appeals perfected in Chicago, or New Orleans, or Denver, within thirty minutes after the administrative decision has been announced in Washington.[233] The following description of a race after an NLRB decision in 1964[234] illustrates both the ludicrous extremes parties are willing to go to and the serious extent to which courts are compromised under such a system of review: [235]

> GE, certain that the board would affirm its examiner's findings, was determined to appeal to the courts. And the court in which it wanted to have its appeal heard was the Seventh Circuit Court of Appeals in Chicago. GE didn't say why, but its reason was obvious; the Seventh Circuit court is known as the "company" court. Over the years its decisions have given it the reputation of favoring corporations over labor unions.
>
> At the same time, however, the IUE also was prepared to appeal. Its grounds were to be that the board's findings didn't go as far as the union wanted, but there's the suspicion that the union, knowing GE was determined to appeal anyway, wanted the case heard in a court of its choice — the District of Columbia Court of Appeals. It is no coincidence that the D.C. court is known as the "labor" court.
>
> . . . .
>
> The day the board's decision was to be announced lawyers for both GE and the IUE arrived at the seventh floor offices of the NLRB in downtown Washington shortly before 10:30 a.m. About 10:30 — everyone agreed at the start it was 10:30 though the union lawyer said it looked more like 10:29 — Ogden Fields, executive secretary of the NLRB, handed out copies of the decision. Things began to move rapidly.

[235] Taylor, *Great Court Race — All for Naught*, Wall Street Journal, Feb. 24, 1965, at 18, col. 3. Reprinted with permission from the *Wall Street Journal*. Copyright 1965 by the Wall Street Journal Corp. All rights reserved.

> GE lawyer Thomas F. Hilbert, Jr. scanned the final page of the decision, "saw the board had adopted the order of the trial examiner and that it was necessary for us to ask for a court review," and said "O.K." to a colleague, Robert C. Wentz, a member of GE's employe [*sic*] relations services. Mr. Wentz, following a union lawyer so closely that "I didn't have to touch the door," nodded to Robert Johnson of GE's communications products department, who was standing at the door to a stairwell across from the NLRB office. Mr. Johnson was carrying in a manila envelope a GE two-way radio. Stepping into the stairwell Mr. Johnson pulled up the antenna and sent a signal to a receiving unit a block away in the law offices of Kenneth C. McGuiness.
>
> Ten minutes earlier, Mr. McGuiness had received a telephone call from Theophil C. Kammholz, a lawyer who was standing in a phone booth on the 27th floor of Chicago's new Federal building. When the signal came in on his radio unit, Mr. McGuiness, who had kept the line open, said "Go ahead." In Chicago Mr. Kammolz shouted "File it" to George Blake of his law firm, who was standing 40 feet away in front of R. Hays Blanchard, chief deputy clerk of the Seventh Circuit Court of Appeals. Mr. Blanchard, having quit work two minutes earlier in order to be free for this moment, filed it.
>
> Because the building wasn't finished, there was no clock in the clerk's office. But Mr. Blake, who earlier had synchronized his watch with the Illinois Bell Telephone Co.'s time check and adjusted it so that it was "two seconds slow in comparison to the correct time," thoughtfully provided the time: 9:30:14 a.m. CST — that is, 10:30:14 a.m. EST.
>
> Since the IUE had only a mile to go to reach its court, its preparations weren't quite as extensive as GE's. Nor were they as polished. But they were quick.
>
> When Mr. Fields handed out the decision, a copy was taken by IUE counsel Ben Sigal. Mr. Sigal glanced at the decision and "immediately" nodded to his assistant, Winn Newman, who dashed out the door and down the hall into another office. He then called a pay telephone on the fifth floor of the District of Columbia's Court of Appeals, where Miss Margaret C. Fairbanks was waiting. When the phone rang, she picked it up. Mr. Newman shouted "Go" and Miss Fairbanks leaned out and cried "Winn says go." That cry was heard by Marilyn G. Rose, who then handed the appeal papers to Miss P. Casey, a deputy clerk of the court, who glanced at the clock — which had no second hand — and recorded the time.
>
> But there were complications. The time Miss Casey wrote down was 10:25 a.m. — five, or anyhow four, minutes before the decision was handed out. Just before 10 a.m. that frantic day there had been a power failure in the courthouse, and its 400 clocks stopped. Though the power came back later, the clocks weren't corrected for two hours. So what time was it?
>
> Miss Rose had synchronized her watch an hour earlier with the Chesapeake & Potomac Telephone Co., which in turn gets its time from the U.S. Naval Observatory. She said it was 10:30 a.m.

Both sides filed dissents to the time-keeping and eventually the NLRB threw up its hands and said it couldn't determine who filed first. The board proposed instead that the whole mess be filed in the Second Circuit Court of Appeals in New York City, where GE's headquarters are maintained, where the hearings originally had been held and in the district where the unfair acts allegedly had taken place. The District Court of Appeals eventually agreed that it couldn't decide either, and also recommended the Second Circuit. Finally, so did the Seventh Circuit.

Such races may even result in vigorous intercircuit disputes over the jurisdictional issue.[235] The undesirable consequences of intercircuit forum-shopping might be partially avoided, perhaps, by making the venue requirements more restrictive [236] or by revising the transfer provision [237] to make it a more flexible tool with which to force a selection of the best forum, if it can be identified.

Such changes, however, would have little effect on another undesirable consequence of the circuit system: non-uniform treatment of similarly-situated litigants. Proliferation of unequal treatment is an inevitable result of a legal system which operates in disjointed units: that such discrimination is entirely unintended is of little comfort. The recent case of *Gondeck v. Pan American World Airways, Inc.*[238] provides a striking illustration of the evil. Petitioner's husband was killed in a jeep accident while working at an Air Force construction site abroad, and the claim arose under the Longshoremen's and Harbor Workers' Compensation Act.[239] She lost in the Fifth Circuit, and the Supreme Court denied certiorari.[240] Two years later the Fourth Circuit upheld an award in favor of a plaintiff whose decedent had been injured in the same accident.[241] Shortly thereafter, in an unrelated case, a different panel of the Fifth Circuit expressed doubt about the decision in *Gondeck*; it suggested that *Gondeck* was probably inconsistent with the Supreme Court decision it relied on and therefore declined to follow it.[242] One year later the Court reversed the only decision in direct support of *Gondeck*.[243] Although three years had passed since certiorari had first been denied, the widow asked for leave to file a petition for rehearing on the denial, pointing out that she was the only plaintiff with a claim arising from the accident who had been denied relief under the Act. In an unusual action, the Court granted leave to file, vacated the denial of certiorari, granted certiorari, reversed the old judgment of the Fifth Circuit, and rendered judgment for the widow.[244]

So unfairly had the widow been treated by the system of semi-

[236] For further consideration of this possibility see Comment, *A Proposal to End the Race to the Court House in Appeals from Federal Administrative Orders*, 68 COLUM. L. REV. 166 (1968).

independent circuits that the Court was impelled to act, but in a manner which raises doubts about the finality of all federal judgments resting on disputable statutory interpretation.[249] Although the widow's plight was very compelling, her situation was not extraordinary.[247] There must be many litigants in similar circumstances who accepted their disappointment at the initial denial of certiorari in good grace or in ignorance; there must be many others who failed to file timely petitions because their lawyers recognized that they had little chance. A much larger number of claimants may have failed to appeal, or even to sue, when confronted with a precedent they did not suspect might be overruled.[248]

Regional competition for industry on the basis of favorable application of federal law is another danger. Awareness of this danger has been demonstrated in the past by withdrawal of certain classes of commercial cases from the courts of appeals. The creation of the Commerce Court in 1910 was motivated in part by this concern.[249] Customs appeals are directed to the central Court of Customs and Patent Appeals partly to avoid any favoritism to particular ports if judicial control were more diffuse.[250] More recently, it was found necessary to create the wartime Emergency Court of Appeals [251] to review price and wage regulation because the prospect of regional pricing in a national economy was simply intolerable.[252] The structure of the courts of appeals was not intended to allow regional adaptation of federal law. On the contrary, the legislative history of the Evarts Act [253] indicates that these courts were intended to harmonize and unify the national law, not to fragment it. Further, circuit regionalism violates the premise of the commerce clause and other provisions of article II of the Constitution that national uniformity is desired on many subjects of federal legislation.[254] It would be a most peculiar scheme of government whose judiciary made decisions in the regional interest without the support or restraint of any politically responsible executive or legislative officials. The needs of regionalism are adequately protected by a healthy respect for federal-state relations and, in exceptional circumstances, by federal legislation which explicitly incorporates state law.[255]

Finally, it may be emphasized that a consequence of the system is to increase administrative discretion. An administrator who loses in court tends to regard the reversal as an isolated event and in his dealings with the public may even discount the intermediate court decision. Because the executive branch has through the Solicitor General unavoidably great influence on the Supreme Court in the exercise of its certiorari power, it can in substantial measure prevent doubts it may welcome from being resolved. So pressed is the Court by the certiorari burden that it must rely in substantial measure on his guidance in selecting cases worthy of its review. Inevitably, and without the least guile on the part of anyone, this dependence builds into the system a factor favoring the positions taken by the agencies.

[252] *See* Yakus v. United States, 321 U.S. 414, 432–33 (1944). *See generally* Sprecher, *Price Control in the Courts*, 44 COLUM. L. REV. 34 (1944).

[253] *See generally* STAFF OF THE SENATE COMM. ON THE JUDICIARY, *supra* note 165.

[254] *Cf.* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 347–48 (1816) (Story, J.); Wisdom, *supra* note 201, at 426–27.

COURTSHIP AND OTHER LEGAL ARTS

Shirley M. Hufstedler*

The obvious byproducts of these huge appellate overruns are solidifying backlogs, lengthening delay in dispositions, and diminished quality controls. Less evident and, even in the short run, more alarming are the systemic effects: (1) inexorably rising pressures on the Supreme Court and the Courts of Appeals, (2) diminishing visibility of the processes of appellate justice, and (3) increasing disarray of federal jurisprudence.

Judges' responses to excessive pressures are not dissimilar to those of other mortals: They get tired, discouraged, and the work product suffers. The institutional responses, however, are more troubling than those of their individual human agents: We are observing signs of breakdown because the appellate courts are not able adequately to perform their institutional roles of authoritatively interpreting federal statutes, of formulating and expressing policy on legal issues of sytem-wide concern, and of supervising each level of the system below them. Increased reliance on law clerks' work, the issuance of cryptic dispositions of appeals, and the diminution of oral argument--as necessary as they have been to move these litigation mountains--have produced the deleterious side effects of lowering the profile of justice. The consequences are an erosion of the bar's confidence in the intellectual integrity of the appellate judicial process and a reduction of public confidence in the fairness of the federal courts. Although the impact of these responses defies quantification, I believe that they threaten the very foundations of the system. The great force of the federal judiciary has derived in large measure from the convictions of the bar and the public that the federal appellate courts were intellectual and moral legal bulwarks. And those convictions have been largely based on the traditional practices of federal appellate judges personally to read the briefs, to participate in oral argument, and to express their judgments in thorough published opinions--all of which have made the decisional process both human and visible.

Another symptom of systemic distress is the increasing evidence of intra- and inter- circuit jurisprudential conflict and disharmony. The Supreme Court is the sole judicial institution empowered to pronounce law binding the whole federal judiciary and, therefore, the only agency capable of eradicating intercircuit conflicts. The Courts of Appeals were not designed to perform this function, and good reasons exist for their not doing so. If, for example, each circuit were bound to follow the first holding on an issue by another circuit, lawyers and circuit judges would be required to keep abreast of the opinions of every Court of Appeals in the country--an overwhelming task. Moreover, circuit harmony would be promoted at the expense of eliminating divergences of views that can be very creative. Circuit conflict can illuminate hard issues in much the same way as can a cogent dissent. But, unlike a

*Circuit Judge, United States Court of Appeals for the Ninth Circuit. Portions of an address delivered before the annual luncheon of the Fellows of the American Bar Foundation and the National Conference of Bar Presidents, February 3, 1974.

dissent, circuit differences are useful only if they light the way to an authoritative conclusion. When the conclusion is postponed for years or forever because the Supreme Court has insufficient time to reach the issues, jurisprudential disarray becomes an intolerable legal mess.

The Supreme Court does not have the decisional capacity to keep the federal jurisprudential house in order. It can give plenary consideration to not more than 200 cases per year, and usually the figure is closer to 150 cases annually. Statistical data to support the conclusion that the Court's housekeeping capacity has been exceeded are not readily available because the extent of disharmony is difficult to define and to quantify. Counting certiorari petitions that claim intercircuit conflict is possible, though tedious, but it is not a particularly helpful exercise. Head-on conflicts are easy to spot; however, sideswipes are much more common, and their detection and cumulation would require an enormous amount of work. Substantial clues to the pervasiveness of the problem can be gathered from reporting services for legal specialties and quasi-specialties, such as taxation, antitrust, securities regulation, selective service law, and administrative law. The services regularly call practitioners' attention to the new developments, conflicts, and aberrations in their respective fields. Brief examination reveals that only a small fraction of the reported wrinkles are ironed out by the Supreme Court despite invitations to do so. Of course, some of the issues are of insufficient moment to deserve a national answer, but the residue cannot be so lightly dismissed.

In my view, case counting is unnecessary to sustain the thesis because common sense, or if you prefer, informed intuition, is itself convincing. The Supreme Court now hears less than one percent of the cases decided by the federal Courts of Appeals. The present and anticipated flow of litigation to the Supreme Court from both the federal and the state systems forbids any expectation that the percentage of federal decisions reviewed can be increased. Courts of Appeals can be neither right nor harmonious 99 percent of the time. One percent supervision is patently inadequate.

Not only are 150 cases too few to permit effective supervision of lower federal courts, they are too few to supply national answers to issues that have become pressing long before circuit disagreements have arisen. The lack of reasonably prompt definitive answers to issues of national concern can thwart rational public and private planning, whether the subject is the location or design of a new dam or a factory, the licensing of a communications facility, or the budgeting of funds to meet demands for social services, or managing the securities markets. Moreover, the lack of certitude excessively breeds litigation, particularly when the litigants have both the motivation and the power to renew lost battles in forum after forum.

UNITED STATES APPEALS IN CIVIL CASES: A FIELD AND STATISTICAL STUDY

*Paul D. Carrington**

I. The Decision of the United States to Appeal

Appellate litigation by the United States is subject to the control of the Solicitor General.[1] No appeal or certiorari petition is filed on behalf of the United States in any appellate court without his authorization. The Office of the Solicitor General now handles about 3,000 matters a year in which appeal decisions are to be made.[2]

In general, appeal decisions are made by means of a deliberative institutional process that engages the attention of a number of government lawyers at several levels within and outside the Justice Department. The Solicitor General depends not only on staff work performed within his office, but also on the recommendations of the appellate sections of the various divisions of the Justice Department, and, in some instances, on the recommendations of staffs of administrative agencies. Divisional and agency recommendations are themselves prepared by a deliberative, institutional process. More than 900 of these recommendations were examined in preparing this report; most of these were the work of more than one appellate attorney.

With respect to appeals taken at the intermediate court level, the Solicitor General seems to depend heavily on divisional recommendations. While many of the matters are thoroughly reconsidered in the Office of the Solicitor General, it is rare that a divisional recommendation is rejected with respect to an appeal to a court of appeals. In contrast, the divisional recommendation seems to carry much less weight with respect to prospective action in the Supreme Court of the United States. Of the 30 recent recommendations for the filing of certiorari petitions examined, only 19 were accepted; in addition, the Solicitor General filed a certiorari petition in one of the 125 cases in which such action was not recommended by the division.

In the great bulk of cases, the decision whether to appeal is made on the basis of an assessment of the probable outcome in the higher court. Because of the institutional nature of the process, personal motives are largely eliminated, and the possibility of a frivolous or hopeless appeal is greatly reduced. Rarely, a recommendation to the Solicitor General may reflect consideration of a factor not bearing on the merits of the appeal: in one case, some deference was paid to the strong feelings of a cabinet officer who was incensed by a judicial opinion published by the trial court; in another, the sheer size of the amount in controversy seemed to be a factor motivating the appeal. But almost without exception, the Justice Department appears to approach the decisions as rational ones, to be made on the basis of a careful analysis of the principles likely to control the outcome, with due regard for judicial sentiments likely to be evoked by the particular circumstances in dispute.

*Professor of Law, University of Michigan. Reproduced from 11 HOUSTON L. REV. 1101 (1974).

At all levels, the United States is a cautious and successful litigant. Of the 10,800 civil judgments rendered in government litigation in the district courts in 1972,[3] about 1,000 were deemed adverse to the United States. At this level, the comparable figures for criminal cases are 37,000 convictions and 2,000 acquittals.[4]

In civil matters, the United States appealed approximately one adverse decision in three, or about 330 appeals from civil district court judgments in 1972. Meanwhile, the 9,800 civil judgments not adverse to the United States yielded about 1,400 adversary civil appeals, since private adversaries challenged the district court less frequently than the United States. But the United States was much more successful in the courts of appeals. The overall success rate of civil appellants is about 20%. But the United States prevails on 50% of its appeals, while its adversaries succeed in only 10% of theirs. The latter figure again confirms the conservatism of the United States as a district court litigant; its victories are less subject to successful appellate attack. Complete current data on success rates is not available, but older data, current impressions, and fragments confirm that the results of the Tax Division[5] are fairly typical.

TABLE 1

Success Rates in Tax Appeals

Fiscal Year	Govt. Appeals	Success Rate	Payer Appeals	Success Rate	Total Appeals	Govt. Wins
1960	77	56%	196	24%	273	70%
1961	83	64	209	25	292	72
1962	61	64	267	25	328	73
1963	88	60	230	20	318	74
1964	100	47	272	19	372	73
1965	82	53	233	13	315	78
1966	71	58	216	17	287	76
1967	71	60	225	15	296	78
1968	51	57	178	18	229	76
1969	73	55	192	14	265	78
1970	64	54	191	9	255	82
1971	101	47	209	10	310	75
1972	103	45	249	13	352	76

It is somewhat surprising that taxpayer appellants are less successful than criminal appellants.

The caution and success of the United States is also marked at the highest level. The United States was involved in almost 9,000 final decisions of courts of appeals in the fiscal year 1971; of these, about two-thirds were criminal matters, and the balance were divided between administrative and civil.[6] Confirming the foregoing analysis of success rates, about 600 of these decisions were deemed to be adverse to the United States. Of these adverse decisions, about 40 were deemed "certworthy" by the Solicitor General; a majority of his petitions were, as usual, granted.[7] In contrast, the 7,400 decisions that were not adverse to the United States yielded about 2,000 certiorari petitions of which only 61 were granted.[8] To put these data in another form, the United States sought review in about 6% of its defeats and obtained it in 3%, while its adversaries sought review of over 25% of their victories and obtained it in less than 1%. For comparison, it may be helpful to note that about 25% of all decisions of the courts of appeals are challenged by the filing of a certiorari petition, and that about 10% of all petitions are successful.

The success of the United States in the Supreme Court is largely attributable to the special role played by the Office of the Solicitor General. Having a stable relationship with the Court, the Office is much more attuned to the screening process and more obligated to assist in it than

private counsel. This is dramatically demonstrated by the fact that the number of certiorari petitions filed by the United States has not increased over the years, despite the increase in volume at the lower levels and the corresponding increase in the number of private petitions. Indeed, as recently as the mid-sixties, it was customary for the Solicitor General to seek review of about 10% of the court of appeals decisions adverse to the United States.[8]

This caution reflects, at least in part, a sense of responsibility for the congested condition of the Supreme Court docket. That sense is clearly articulated in some memoranda, most notably among those of the Antitrust Division. That division is responsible for making recommendations with respect to Interstate Commerce Commission and antitrust appeals that are routed directly to the Supreme Court under the Urgent Deficiencies Act procedure. It is clear that some appeals are not sought in such cases, although they would be sought if the appellate jurisdiction were routed to the courts of appeals rather than the Supreme Court;[9] this results from the fact that some Urgent Deficiencies Act cases are not seen to be sufficiently important to merit the Supreme Court's attention. Such restraint is not likely to be found among private litigants.

II. Issues in United States Civil Appeals

The primary purpose of this study is to examine the behavior of the federal appellate courts in cases where the Justice Department is an appellant. In particular, it is hoped that some gauge might be placed on the capacity of the intermediate courts to resolve questions that have proved troublesome in the administration of the national law. Despite the substantial number of memoranda examined, the data is not very conclusive. The data can, however, be said to support, if not confirm, the following observations:

1. The bulk of government civil litigation is more prosaic than many experienced observers imagine; the substantive issues presented are most often fairly narrow questions of statutory interpretation involving only a modicum of social policymaking and affecting only a small number of citizens.

2. The proportions vary greatly among categories of cases and among the division, but at the present time, United States civil appeals at the intermediate level can generally be divided into three classes roughly equal in number:

   (a) appeals presenting novel substantive issues;

   (b) appeals presenting substantive issues that the United States has previously litigated;

   (c) appeals presenting issues that have little or no prospective significance.

3. The United States does not regard a decision of the United States Court of Appeals as authoritative in the traditional common law sense. It is prepared to continue to litigate in other circuits a question that has been resolved in only one; even in the same circuit, the United States may be willing to relitigate an issue if minor factual distinctions can be made between the pending matter and the preceding decision. It appears to be the house rule of the Justice Department that three unanimous Courts of Appeals decisions are sufficient to establish authoritatively that a government position is wrong.

4. Many of the issues that are troublesome in the administration of the national law and that are litigated in the lower federal courts do not reach the Supreme Court; those that do reach the Court usually do so only after a substantial period of gestation leading to a conflict in circuit decisions.

5. Direct and unresolved conflict is a rare phenomenon.

For the most part, the support for these assertions is derived from an analysis of 693 memoranda sent to the Solicitor General in 1971 and 1972. The sample includes all the memoranda prepared by the Civil Division in 1971, all prepared by the Lands and Natural Resources Division in 1972; a random sample of the 1971 and 1972 products of the Tax Division approximating in size about half a year's production; all the memoranda prepared by the Antitrust Division for both years; a random sample of about one-half of the memoranda prepared by the Internal Security Division in 1972 in selective service litigation; and all of the memoranda submitted by the General Counsel of the National Labor Relations Board.

Table 2 represents a taxonomy of issues presented by challenged

TABLE 2

Types of Civil Appellate Issues: 448 Decisions of District Courts and Tax Court Adverse to United States

	Anti-Trust Div.	Taking Cases	Other Lands Div.	Sel. Serv. Cases	Soc. Sec. Cases	Other Civil Div.	Tax Div.	Total
Novel Issues:								
Appealable to Supreme Court	8	0	0	0	1	0	0	9
Appealable to Courts of Appeals	4	2	2	2	4	16	14	44
Total Novel	12	2	2	2	5	16	14	53
Recurring Issues:								
Existing Conflict	0	0	0	1	0	0	3	4
Precedent for U.S.	1	0	0	0	5	10	7	23
Precedent v. U.S.	1	0	0	1	0	5	7	14
Pending Elsewhere	0	0	0	0	0	3	6	9
Total Recurring	2	0	0	2	5	18	23	50
Issues Lacking Prospective Significance:								
Factual Disputes	0	0	4	1	6	8	7	26
Procedural Disputes	3	1	4	0	1	6	5	20
State Law Issues	1	0	4	0	0	1	2	8
Issues of Law Repealed or Expired	0	0	1	0	0	1	3	5
Total Lacking Prospective Significance	4	1	13	1		16	17	59
Total Appeals	18	3	15	5	11	50	54	162
Total No Appeal	21	35	6	35	54	65	70	286
Total Cases	39	38	21	40	71	115	124	448

rulings of district courts. Tables 3 and 4 list some of the specific issues summarized in table 2. Table 5 classifies the issues presented by intermediate decisions as they are analyzed in the certiorari memoranda. Tables 6 and 7 list the specific issues summarized in table 5. The specific lists in tables 3, 4, 6, and 7 are not complete, particularly with regard to tax cases; the omissions are more or less random, reflecting the completeness of the author's notes and the ease with which a case can be succinctly and fairly summarized in a sentence. The lists should suffice to give the reader a feel for the kinds of questions under discussion, if not a complete documentation of the tables.

TABLE 3

CIVIL APPELLATE ISSUES SPECIFIED: NOVEL ISSUES ARISING IN TRIAL COURT LITIGATIONS

* * * *

TABLE 4

CIVIL APPELLATE ISSUES SPECIFIED: TRIAL COURT ISSUES RECURRING IN COURTS OF APPEALS[74]

1. The deductibility as a loss of the cost of taxpayer's building destroyed by the tenant as authorized by the lease.
2. The deductibility as a loss of the cost of taxpayer's building destroyed by the tenant as authorized by the lease, when the tenant was required to rebuild with improvements of greater value.
3. Whether lessees' payments of ad valorem taxes on minerals in place are to be treated as constructive royalties included in the computation of depletable gross income.
4. Whether absorption is a production process or a conversion process for the purpose of determining whether the depletable mineral is the gas before or after it has been through that process.
5. Whether income tax liability for taxes assessed after bankruptcy, but payable before bankruptcy, may be discharged.
6. The jurisdiction of a bankruptcy court to enjoin the United States from collecting postpetition interest on the tax obligations of a discharged debtor.
7. The conclusive effect of an uncontested state court decision declaring the marital status of a social security claimant.
8. The validity and effect of legislation authorizing HEW to suspend disability benefits pending a hearing.
9. The propriety of HEW reliance on res judicata when it is asked to reconsider a decision denying benefits to a claimant not previously represented by counsel.
10. The reviewability of VA action terminating on grounds of remarriage benefits payable to a widow.
11. The pre-induction reviewability of a local board decision denying a fatherhood exemption.

12. The pre-induction review of a local board decision denying a medical classification.
13. The right of a soldier to a discharge on the basis of "good time" accumulated while he was at home awaiting orders for many months.
14. The propriety of a court order requiring an agency to produce documents for in camera inspection where it has explicitly found that it is not in the public interest to disclose them.
15. The right of a disgruntled bidder to a preliminary injunction against performance of a government contract pending judicial review of compliance with various statutory standards of government contracting.
16. The liability of the United States on the contracts of nonappropriated fund activities.
17. The right of the United States to set off its debts against its claims in a bankruptcy proceeding.
18. The constitutionality of the requirement of a filing fee for voluntary bankrupts.
19. The propriety of a preliminary injunction staying the issuance of a certificate of authority by the comptroller to a branch bank pending judicial review of the comptroller's decision.
20. The right of the United States to priority for obligations owing to the Small Business Administration.
21. The right to a hearing and decision on the record prior to a "general discharge for honorable reasons."
22. Whether the sixty-day limitation on suits to set aside union elections can be waived by agreement of the union and the Department of Labor.
23. The deductibility of that portion of the price attributable to the stock conversion feature to a corporation redeeming its convertible bonds.
24. The civil liability of offenders against Federal Trade Commission orders.
25. The effect of Federal Maritime Commission approval of the merger of ocean carriers as immunization against an antitrust attack.
26. The vulnerability to attack of an induction order based on the misleading character of advice received by the registrant from a board employee.
27. The length of the academic year for purposes of a student deferment.

TABLE 5

TYPES OF CIVIL APPELLATE ISSUES: 203 COURT OF APPEALS DECISIONS ADVERSE TO UNITED STATES

	Anti-Trust Div.	Taking Cases	Other Lands Div.	Sel. Serv. Cases[12]	Soc. Sec. Cases	Other Civil Div.	Tax Div.	NLRB (71 only)	Total
Novel Issues:									
Reviewed by Supreme Court	2	1	0	0	0	0	0	1	4
Deemed Certworthy by SG: Cert. Den.	0	0	1	0	0	0	0	0	1
Not Deemed Certworthy by SG	7	1	4	4	3	6	7	3	35
Total Novel	9	2	5	4	3	6	7	4	40
Recurring Issues:									
Reviewed by Supreme Court	2	1	1	0	0	4	5	2	15
Deemed Certworthy by SG: Cert. Den.	0	0	0	0	0	1	2	1	4
Not Deemed Certworthy by SG	1	0	3	4	4	1	11	6	30
Total Recurring	3	1	4	4	4	6	18	9	49
Issues Lacking Prospective Significance:									
Factual Disputes	2	2	0	14	4	5	11	24	62
Procedural Disputes	10	2	1	9	2	5	0	5	34
State Law Issues	0	1	1	0	1	0	3	0	6
Issues of Laws Repealed or Expired	0	0	0	2	0	1	2	0	5
Issues Unripe	0	0	0	0	0	3	0	4	7
Total Lacking Prospective Significance	~12	5	2	25	7	14	16	33	114
Total Reviewed	4	2	1	0	0	4	5	3	19
Total No Review	20	6	10	33	14	22	36	43	184
Total Cases	24	8	11	33	14	26	41	46	203

12. About half of these cases are reversals of criminal convictions.

* * * *

TABLE 6

CIVIL APPELLATE ISSUES SPECIFIED: NOVEL ISSUES DECIDED BY COURTS OF APPEALS

TABLE 7

CIVIL APPELLATE ISSUES SPECIFIED: ISSUES RECURRING IN COURTS OF APPEALS

A. Reviewed by the Supreme Court[13]

1. The compensability at taking of the value of the landowner's revocable license to graze his livestock on adjoining federal land.
2. The deductibility as interest of payments made to purchase Class C stock in a federal farm cooperative bank, when the purchase is required in order to establish loan eligibility.

3. The liability of the wife for the tax on community income where she has exercised a right of exoneration conferred by state legislation.
4. The pre-induction reviewability of a local board action denying conscientious objector status on grounds of untimely assertion.
5. The pre-induction reviewability of a local board action denying an inductee's challenge to the board's compliance with the statutory lottery requirement.
6. The propriety of an order setting aside a union election on the basis of defects and violations other than those complained of by the aggrieved candidate.
7. The power of the Federal Drug Administration to order a New Drug Application filed and marketing terminated on the basis of summary determinations that the product affected is a "new drug."
8. Whether a utility district is exempt from the National Labor Relations Act as a political subdivision.
9. The effect of arbitration between competing unions when the employer is not a party to the proceeding.

B. Not Reviewed[14]

1. The standing of packers to challenge the validity of a Department of Agriculture order limiting the importation of tomatoes.
2. Whether the Corps of Engineers is required to make an impact statement before issuing a permit to discharge into navigable waters.
3. Whether bridge construction may be enjoined pending an appraisal by the Department of Transportation of all possible variations in design as part of the "continuing comprehensive transportation planning process."
4. Whether one agency can rely on factual determinations made by another as a basis for its own impact statement.
5. Whether the cost of caring for young orange trees is to be treated as an expense or a capital investment by the taxpayer who operates the grove.
6. The applicability of net loss carryback provisions to a consolidation of operating subsidiaries that could be characterized as an F reorganization.
7. The deductibility of that portion of the amortized cost of a purchased life estate that is allocable to a tax-exempt interest.
8. Whether movable building partitions are structural components or tangible personalty for purposes of calculating the investment credit.
9. The applicability of the tax lien to assets acquired after the filing of the taxpayer's bankruptcy petition.
10. The eligibility of widows of doctors dying in 1965 for benefits pursuant to social security amendments of that year which were of questionable retroactivity.

11. The propriety of invoking a presumption of death to establish the right to death benefits of the children of a wage earner who has disappeared.

12. The propriety of the Department of Health, Education, and Welfare reliance on res judicata when it is asked to reconsider a decision denying benefits to a claimant not earlier represented by counsel.

13. The reviewability of a Department of Health, Education, and Welfare decision cutting off payments to a nursing home for violation of the terms of an agreement.

14. The right of a soldier to a discharge on the basis of "good time" accumulated while he was at home awaiting orders for many months.

15. The taxability as income of employee death benefits voted by corporate directors as an act of grace.

16. Whether payments received by a taxpayer from a former husband are taxable income where they are made pursuant to an agreement that does not specify whether the payments are in lieu of alimony or for support of minor children.

17. The effect of tax loss carrybacks on recapture of excessive airline subsidies.

18. The vulnerability of an induction order to attack on grounds of premature notification.

19. The allocation of the burden of proof of intent where a selective service registrant is charged with failure to notify his local board of a change of marital status.

20. The allocation of the burden of proof of actual receipt of notice of induction.

21. The validity of a requirement that a conscientious objector manifest "depth of conviction" as well as sincerity.

22. Whether lapse of time and employee turnover justifies an employer's failure to abide by a union election result.

Several observations should be made about the foregoing data. One necessary comment bears on the problem of identifying conflicts in decisions. Table 2 itemizes four such conflicts; these were all situations in which no distinction whatever could be made between the conflicting decisions by the memorandum writers. In other words, there was conflict on the basis of the narrowest possible interpretation of the precedents. It is, however, a standard dogma of common law theory that such narrow interpretations are not always required nor always appropriate. If prior decisions were interpreted more broadly, on the basis of the value judgments apparently underlying them, the amount of conflict among federal decisions would be much greater. The memorandum writers seldom attempted such broader gauge analysis of court of appeals decisions, although they often made such analyses of Supreme Court decisions. This difference in treatment not only marks the lesser degree of attention paid to court of appeals opinions, but it also makes the task of counting the more profound conflicts insurmountable.

A related observation is that the sample may understate the frequency of conflict. Thus, the Tax Division has identified in the two sample years 28 cases in which it petitioned for rehearings en banc on the basis of intra-circuit conflict.[15] Although the sample included more than a fourth of the total, it included only 2 of these 28 cases. The sample also lacks any of the more spectacular examples of multi-circuit litigation of the type that is most productive of inter-circuit conflict. One such example was offered by the Lands Division; it has been litigating the same venue question, one arising under the Clean Air Act of 1970,[16] in all eleven circuits simultaneously.

The sample probably overstates the impact of the Supreme Court. The Solicitor General was substantially more successful with the certiorari petitions included within the sample than he is generally. (Sixteen of 20 were granted.) Moreover, because private petitioners are so much less successful than the United States, it is likely that a larger portion of the recurring issues presented in cases won by the United States at trial are left at large by the denial of certiorari. Taking these factors into account, it seems reasonable to estimate that about one out of four issues recurring in the United States civil appellate litigation reaches the Supreme Court. But, as indicated by the specific tables, the issues not reaching the Supreme Court are never cosmic in importance, nor even particularly interesting, unless perhaps to a few administrators and citizens directly affected by the actions.

Another observation derives from the contrast of tables 2 and 5. Table 2 reflects 161 cases going into the courts of appeals, and table 5 describes 203 cases that are coming out of those courts. The latter involve a somewhat lower percentage of cases presenting substantive issues. The explanation for this figure lies in the fact that these are all cases lost by the Government. Thus, most notably, the United States rarely appeals from an adverse decision in a selective service case, but its adversaries often do. Most typically, these adversary appeals challenge the fact finding results in the trial court and yield a very low success rate; but, in gross, the number of selective service cases lost on appeal by the United States is substantial as a portion of its appellate losses, and it is dominated by less significant factual issues.

There is, however, one trend revealed by the study that bears further analysis. The trend is described in table 8.

TABLE 8

RATE OF APPEAL BY THE UNITED STATES IN CIVIL CASES

	FY 1962	FY 1964	FY 1966	FY 1968	FY 1970	FY 1972
Total District Court Judgments in U.S. Civil Cases (Prison Matters Excluded)	4838	5385	5711	6321	9706	10812
Appeals in U.S. Civil Cases (Prison Matters Excluded)	836	969	966	1015	1349	1714
Appeals Authorized by Solicitor General (less Tax Court and Crim. Div. Matters) (est.)	260	280	190	210	310	330
U.S. Appeals as Pct. of Civil Judgments	5.4%	5.2%	3.3%	3.3%	3.2%	3.0%
Private Adversary Appeals (est.)	576	689	776	805	1029	1384
Adversary Appeals as Pct. of Civil Judgments	12%	13%	14%	13%	11%	13%

15. Data supplied by Meyer Rothwacks, Esq., Chief of the Appellate Section of the Tax Division.

16. 42 U.S.C.A. § 1857h-5 (Supp. 1974).

The exclusions of Tax Court and Criminal Division appeals are only estimates, but there seems to be no doubt that the number of government appeals is diminishing in relation to the number of civil judgments to which the United States is a party. The trend would be even more pronounced if fiscal year 1963, an extraordinary year for government appeals, were included in the table. Unfortunately, data is not available for 1969 or 1971.

There are three possible explanations for the observed phenomenon. One is that the United States is winning a higher percentage of its cases in the trial courts and thus has less frequent reason to appeal. This hyphothesis is supported by the court of appeals memoranda sent to the Solicitor General in the years in question. In general, such memoranda are prepared for each trial court disposition deemed adverse. It appears that there were about 900 memoranda regarding civil dispositions in district courts in 1962, 1,200 in 1963, 1,000 in 1965, 950 in 1970, and 900 in 1972. On the other hand, it is improbable that the victory rate of the Justice Department has improved so dramatically. Such a conclusion does not accord with the impressions of appellate lawyers in the department, and there is no known cause for such an improvement. It seems more likely that time pressure caused by congestion in both the courts and the department have resulted in a gradual tightening of standards respecting the degree of adversity needed to trigger a memorandum to the Solicitor General. A second possible explanation is that there has been some change in the substantive character of the issues litigated that might reduce the frequency of government appeal. No such change has been identified, and the possibility is somewhat negated by the relatively steady rate of adversary appeals.

A third possible explanation for the trend, at least a possible contributing cause, is that there are some cases that are not being appealed in 1972 that would have been appealed in 1962. Moreover, it seems likely that some of the cases not being appealed are cases that might have been won in 1962; this assumption can be inferred from the probability that the success rate of the United States has improved significantly in the last decade. Full data supporting this observation is available only in the Tax Division, but it is also supported by fragments and impressions from other divisions. There is some independent data supporting the third possibility which may illuminate its cause, and which may suggest a problem. The other data is skimpy, but it tends to suggest that the United States is significantly less likely today than formerly to take an appeal that challenges the sufficiency of evidence supporting an adverse decision.

Thus the Lands Division memoranda reveal that, in fiscal year 1966, 7 of 43 adverse decisions in taking cases were appealed, 4 on grounds of insufficiency of the evidence to support the valuation. In 1972 no appeals were authorized on that ground in any of the 38 taking cases reviewed. Similarly, challenges to the factual sufficiency of the trial court decisions were mounted in 6 of 17 tax appeals in 1961 and in 6 of 22 tax appeals in 1966. But there was not a single appeal of this sort included among 27 tax appeals filed in 1972.

At least as an initial reaction, it would seem a plausible explanation that the change could result from time pressure on the appellate sections which might thus be husbanding their energies for cases that have greater prospective significance, and foregoing appeals that can produce at most only a few more dollars of revenue or a few less dollars of compensation

in particular cases. In support of this explanation, it may be noted that the increase in the number of appellate lawyers in the Justice Department has not kept pace with the growth in caseload.

On the other hand, interviews with appellate lawyers in the Justice Department provided little confirmation for this inference. And, indeed, one memorandum writer put the matter in quite a different light. It was suggested in one case that, although the fact finding in the trial court was clearly erroneous and unfair to the government, no appeal should be taken because *the court* would be too time-pressed to give serious consideration to the trial record and to the contention of the United States. It was predicted that such an appeal would be assigned to a summary docket and decided without argument or opinion, and perhaps without a reading of the government's brief. Some other Justice Department lawyers shared the view that such was a more plausible explanation for the shift away from record-based appeals challenging the sufficiency of the evidence to support an adverse result.

The report of this apparent trend should be qualified with the reservation that it does not seem to apply to some special situations. These special situations involve the known propensities of particular judges to distort the fact-finding process in particular classes of cases. Some judges are known to be inclined to convert the Social Security Act into an unemployment compensation scheme by finding all workers to be disabled; other judges are known to be inclined to credit every claim of conscientious objection to military service, however thin the evidence supporting the claim; one judge seems to be known throughout the department as generally hostile to the Government. In such special situations, the factual records are more thoroughly considered, and there is a manifest inclination to challenge findings that may be reversed on appeal as clearly erroneous. Moreover, there is no evidence that the courts are more deferential to Labor Board findings. No historical data is available for comparison, but the fact that 24 board decisions favorable to enforcement were reversed in one year as factually unjustified suggests that the courts are still actively reviewing board fact finding.

III. Appraisal

The data does serve to give some tangibility to concerns about the limited ability of the federal courts to give firm answers to issues that have been fully litigated. To those who have been most concerned, the data is somewhat reassuring; it is fairly well established that there are no grave social problems immediately associated with the instability of the national law. On the other hand, the data does confirm that there are a number of legal issues of some significance that are amenable to judicial resolution but that are not resolved with firmness and dispatch. From the perspective of this data, the problem resembles a very low grade infection; it poses no apparent threat of a crisis in the health of the system, but it would appear to impair its effectiveness.

If one were to attempt to quantify the problem on the basis of this data, it would seem reasonably conservative to say that 5 to 10% of the civil appeals by the United States are duplicate litigations that would not have occurred if earlier cases had been authoritatively decided. This figure would amount to about 15 to 25 appeals a year. If one could project the

same percentage to the bulk of appeals filed by adversaries of the United States, the total would be 150 to 250 appeals a year. But, especially given the crudity of the initial calculation, this projection would seem to be too great a leap of faith. We know that the adversaries' decisions to appeal are less rational and more speculative than those made by the United States; this characteristic could magnify or nullify the effect of doctrinal instability caused by the organization of the courts. It would be even more fanciful to project the results of this data into the large bulk of wholly private federal question litigation, which includes quite different substantive areas.

The data also serves to illustrate that the problem cannot be measured wholly in the coin of appellate filings. Each appeal corresponds to as many as six dispositions in the trial courts and a larger number of trial court filings. In turn, each trial court filing corresponds to a larger bulk of matters that are handled at the administrative level. And each matter handled at the administrative level may, in some areas, represent only the surface of a still greater mass of incidents that are managed wholly by private citizens or organizations that plan their affairs to avoid the toils of the legal system. The issues specified in tables 3, 4, 6, and 7 vary greatly in the scope of their potential effect on a class of prospective ligitants, but all of them involve the interests of others than those immediately involved. Any failure of the system to provide authoritative resolutions of these issues must produce, in varying degrees, some uncertainty on the part of private planners, some erratic behavior by administrators and trial courts, and some waste of both time and treasure on the part of both the government and the citizens who are its momentary adversaries.

In its attempt to respond to this problem, the recent *Report of the Study Group on the Caseload of the Supreme Court* suggested that the proposed National Court of Appeals might exercise some jurisdiction to resolve intercircuit conflicts.[37] This data suggests that such conflicts are not necessarily the issues in greatest need of resolution. Some cases that present conflicts may have substantially less prospective significance than other cases not now destined to reach the Supreme Court. If a court is to exercise such jurisdiction, this data would tend to indicate that the jurisdiction should not be cast in the limiting terminology of conflict.

The data also bears on another feature of the same *Report*. In urging the abolition of the Urgent Deficiencies procedure and the routing of all federal appeals to the Supreme Court through the courts of appeals, the *Report* expresses a widely shared view of the obsolescence of that procedure.[38] By eliminating it, the *Report* would enable the Supreme Court to substitute on its docket some matters in greater need of resolution than those that now reach it by direct appeal. At the same time, however, the data sheds some light on the limited cost of that desirable change. The low grade infection of uncertainty would be spread to the transportation and antitrust laws of the United States, as some issues now reaching the Court would be left to the less authoritative dispositions of the courts of appeals.

Perhaps the most significant aspect of the study is the unexpected signal that the fact-finding review function of the courts of appeals may be diminishing. By definition, the failure of that function in any individual case is almost certainly less consequential than a failure to perform the legislative function of resolving issues that have prospective significance in a class of cases. But a massive failure of the fact review function, if that is what is indicated, should be regarded as a serious matter.

It should be kept in mind that it is the fact review function for which the courts of appeals were created in 1891 to perform.[39] It was not until 1948, when the circuit en banc procedure was formally recognized,[24] that any expectation of law making by the courts of appeals was articulated by Congress.[39] While inadequate performance of the law making function may result in instability, uncertainty, and expense, inadequate performance of the fact review function threatens the integrity of the process and can lead to a crisis of confidence that is far more grave. This situation could occur if the expectation of the one memorandum writer that the record might remain unread became generally shared by judges and litigants with respect to all kinds of cases. If the trier of fact does not expect the record to be reviewed, he will be tempted to insulate his entire decision from review by finding facts that suit his favored disposition. To the extent that this happens, the legislative authority of Congress can be frustrated by erratic administration. Whether or not it happens, litigants who believe that it may can be expected to suffer considerable anxiety about the fact findings. The kind of crisis of confidence in the trial courts that characterized the eighth and ninth decades of the nineteenth century could be reproduced.[28]

One should hasten to add that the data does not suggest that any such crisis is at hand. There is no indication in the data that the adversaries of the United States, much less litigants in private disputes, are less prone than they were to challenge fact finding. The fact that some insiders may perceive a slackening of the courts' willingness and ability to review fact finding does not necessarily indicate that any such perception is widespread.

One may, indeed, conclude that this apparent problem is still very manageable if it is attended to. To some extent, the circuit judges may be able to eliminate the threat by a conscious effort, not only to review factual records, but to be seen doing so. Screening devices that have become commonplace in the courts of appeals in the last five years should be operated with this problem in mind, in order to dispel any belief by the bar that factual challenges are not taken seriously. On the other hand, the problem may not be entirely within the grasp of circuit judges, many of whom are now virtually embattled by the caseload. It is at least possible that the courts of appeals are reluctant to take the time to review records carefully. To the extent that this is correct, it presents another problem to be considered by the Commission on Revision of the Federal Court Appellate System.

C. SPECIAL PROBLEMS AND SPECIAL SOLUTIONS

THE NEED FOR A COURT OF TAX APPEALS

Erwin N. Griswold*

Any tax practitioner has frequently had a client come to him with a recent decision of the Tax Court which he has found in a service or news letter. The client has been enthusiastic, feeling that the case, which was decided favorably to the taxpayer, squarely covers the problem with which he has been confronted. But the lawyer has to shrug his shoulders. Though the case is well considered and carefully reasoned, he knows that there are eleven courts of appeal which review the decisions of the Tax Court. Even if this case is not appealed, and thus becomes final, another case involving the same point may come along which will be appealed. But the case is in fact appealed to a circuit court of appeals, and in due time that court affirms the decision of the Tax Court. Now the client returns with even more enthusiasm. He feels that he must have something fairly definite and certain by now. The Tax Court and an important appellate court have both considered the very question he is interested in, and both have reached the same result. Besides, the question has been pending in court for many months. But the lawyer must again shrug his shoulders. He knows that there is no conflict, and thus small chance that the Government will even try to take the case to the Supreme Court. Some other case must start somewhere and work its way along through the same process until at last a conflicting decision may develop. And then finally the question may go to the Supreme Court. But when it does go to the Supreme Court, everything is wide open. The prior decisions have only such weight as the reasoning of their opinions may carry. The Supreme Court decides it as a brand new question. And until the Supreme Court has decided it, there is virtually nothing that the taxpayer or his counsel — or the Government — can rely on. It is curious that we should still have a system in which the final answers to many important questions are so long postponed.

*Member, D.C. Bar. Formerly Dean of the Law School of Harvard University and Solicitor General of the United States.
Reproduced from 52 Harv. L. Rev. 1153, 1155-1165 (1939).

What is the effect of this on tax administration? If the Tax Court decision, or its affirmance by a circuit court of appeals, does not produce anything upon which the taxpayer or his counsel may rely, this is equally true of the tax administrator. Suppose a question comes before a tax administrator, and it is pointed out to him by counsel that two circuit courts of appeals have decided the question against the Government. It is argued to the administrator that he should therefore not press the point further against the taxpayer with whom he is concerned. The administrator may feel that the two cases in question are well reasoned, and that the point should be settled in favor of the taxpayer. Nevertheless, it takes a large amount of independence and courage on his part to make such a decision, and very generally he will not feel able to take that responsibility. For the point is still an open one until the Supreme Court has spoken. Even though one of the circuit court of appeals decisions cited to him is by the court in the taxpayer's circuit, it is not necessarily controlling. For the same question may go up through another circuit, a conflict may develop, and then the point will be open in the Supreme Court; and its decision may well be contrary to the decision of the circuit court of appeals which is cited to the administrator.

In such a situation, administrators necessarily feel that they must continue to press points which have been decided against the Government by the Tax Court or even by several circuit courts of appeals. And taxpayers and their counsel frequently feel that they must make a settlement of a point on which they think they are right, and on which the decisions are in their favor, because they cannot afford to litigate the question themselves, and the wait for a Supreme Court decision may be long and hazardous. Like nearly everything in the tax field, this is a matter which works both ways.

There may be several lower court decisions in favor of the Government on a point, but the administrator will feel that he should compromise the question with the taxpayer, because the taxpayer is still free to litigate it and seek a conflict, or hold the matter open until someone else carries through the search for the ultimate route to the Supreme Court. In this process tens of thousands of cases must be adjusted in the absence of an authoritative rule, and the result is expense and discrimination for taxpayers and dissatisfaction for nearly everyone on both sides of the administrative process.

Numerous examples could be given of the unhappy working out of this process in actual operation. It is nothing new. One of the most striking illustrations involved a type of question which normally and naturally arises very frequently in tax administration — the situation where a man dies and leaves a trust in favor of his widow. In such a case, there was room for controversy as to how the widow should be taxed on the income from the trust. The Treasury undertook to tax the income to the widow like the income of any ordinary trust. But it was argued that the widow had bought her interest in the trust by giving up her right to dower, and that she should not have any tax to pay until the income payments to her should equal in the aggregate the amount of the dower which she had given up in order to obtain the benefit of the trust. This question was first decided by a circuit court of appeals in *Warner v. Walsh*.[7] This case involved the tax years 1917 and 1918. The decision was reached in 1926, and was in favor of the taxpayer. The Government nevertheless persisted in its efforts to tax the beneficiary in such cases. It was unsuccessful, however, in two other circuit courts of appeals.[8] The Commissioner then felt that he had tried long enough and that he should not harass taxpayers further. He therefore issued a ruling to the effect that the widows should not be taxed in such a case.[9] A natural consequence of this ruling was that the Commissioner should try to tax the income to the trustee. But some trustees resisted and the question as to them wended its way through the courts. It finally got to the Supreme Court in 1933 in *Helvering v. Butterworth*.[10] The counsel for the Commissioner there made a curious argument. He said in effect: "If you won't let us tax the widows, then we think that you should let us tax the trustee, and we so argue here. But our real position is that the widows are taxable, and if you agree with us on that then you should of course decide this case in favor of the trustee." The Supreme Court did agree, and it was finally decided that the widows were taxable. This decision came in 1933, seven years after the question had first been decided by a circuit court of appeals, and sixteen years after the first of the tax years involved in that case. In the meantime, there must have been

[7] 15 F.(2d) 367 (C. C. A. 2d, 1926).

[8] United States v. Bolster, 26 F.(2d) 760 (C. C. A. 1st, 1928) (involving the tax years 1919 through 1923); Allen v. Brandeis, 29 F.(2d) 363 (C. C. A. 8th, 1928) (involving the tax years 1920 through 1924).

[9] I. T. 2480, VIII-2 CUM. BULL. 141 (1929). See also I. T. 2506, VIII-2 CUM. BULL. 129 (1929); G. C. M. 8668, IX-2 CUM. BULL. 93 (1930); G. C. M. 8689, IX-2 CUM. BULL. 333 (1930).

[10] 290 U. S. 365 (1933).

many thousands of controversies in the Bureau which had to be argued out and adjusted in one way or another for want of a definite and authoritative rule on what was, after all, a rather typical and homely sort of point. And the consequences of the confusion persisted for many years after the question was at last settled. There was the problem of *Stone v. White*; [11] and the Supreme Judicial Court of Massachusetts had to decide a question in this field as late as 1941,[12] which could have been avoided if the federal tax question had not been left so long in confusion.

This is one example. It could be illustrated many times again. The rule as to the deductibility on the cash basis of prepaid insurance premiums has not yet been authoritatively established, though it has been changed and rechanged to follow conflicting lower court decisions.[13] But no one even now knows with any certainty what is the proper rule on this simple point. Someone may some day get a conflict and take the question to the Supreme Court, which will be wholly free to decide either way. For a recent striking illustration, consider the famous and unhappy *Virginian Hotel* decision.[14] The effect of a lack of "tax benefit" on an excessive depreciation deduction in prior years had been many times decided by the Board of Tax Appeals. It must have been an issue before the Bureau in many thousands of cases. It was first considered by an appellate court in *Pittsburgh Brewing Co. v. Commissioner*,[15] and the decision was in favor of the taxpayer. The Government did not apply for certiorari. There was no basis for it in the absence of a conflict. This decision was repeatedly followed by the Board.[15a] Four years later the *Virginian Hotel* case came along; the necessary conflict had developed,[15b] and the Supreme Court finally decided the question against the taxpayers' contentions. It would be difficult to devise a system which would make tax administration more difficult and more unsatisfactory.

For a final illustration, let us consider the problem finally decided in *Helvering v. Janney*.[16] The question was how to compute the amount of the deduction for charitable contributions on a joint return of husband and wife — certainly a homely matter, and one which must have been involved in many thousands of cases before the administrative authorities. It is also the type of question on which one rule is about as good as another; the really important thing is to have a definite answer to the question so

[11] 301 U. S. 532 (1937).

Problems of this sort, arising out of the long delays now required before important tax questions can be settled by an authoritative court decision are responsible for one of the most complex provisions in the Internal Revenue Code. This is § 3801, first passed as § 820 of the Revenue Act of 1938. See Maguire, Traynor and Surrey, *Section 820 of the Revenue Act of 1938* (1939) 48 YALE L. J. 509, 719. The necessity for such a section as this under our present system is a strong argument in support of the position here advanced.

[12] Blair v. Claflin, 310 Mass. 186, 37 N. E.(2d) 501 (1941).

[14] Virginian Hotel Corp. v. Helvering, 319 U. S. 523 (1943). See (1943) 56 HARV. L. REV. 1164.

[15] 107 F.(2d) 155 (C. C. A. 3d, 1939). The tax years involved were 1933 and 1934.

[16] 311 U. S. 189 (1940).

that it can be quickly resolved in the many cases in which it is presented to taxpayers and the administrative authorities. The question first came before the Circuit Court of Appeals for the Second Circuit, where the decision went against the taxpayer and an application for certiorari was denied.[20] Then, in *Sweet v. Commissioner*,[21] the taxpayer lost in the First Circuit. He, too, applied for certiorari — his only recourse — and it was denied.[22] Then the question came before the Fourth Circuit. It said that it was "much impressed" by the taxpayer's position, but felt constrained to follow the earlier decisions "in view of the denials of certiorari by the Supreme Court."[23] After all of this, however, the magic conflict developed,[24] and the Supreme Court ultimately resolved the question in favor of the taxpayers.[25] Thus, the prior taxpayers, who had done everything in their power to obtain a Supreme Court review, lost their cases, although it was eventually decided that they had been right all the time. One of these taxpayers sought to get the judgment against him reopened, so that he might have the result of the Supreme Court decision applied in his case. But the Circuit Court of Appeals for the First Circuit felt — and rightly under the law — that it must let the prior error stand.[26] A system which allows and requires such results carries a very heavy burden. If it were inevitable, that would be the end of it. But it is not a sound system of judicial tax administration. And it is not inevitable. The reasons for its existence are almost exclusively historical. It is hard to find much more than inertia as a reason for its retention.

Many other equally simple, frequently-recurring questions, affecting many taxpayers, could be added to the list.[27] But it is not necessary to make a list, for there is no question which is not on it, or has not been on it until the Supreme Court spoke. Those who say that instances of the sort mentioned are merely unfortunate accidents in an otherwise sound system[28] are merely shutting their eyes to the overwhelming glare of the facts. Our present system of tax adjudication inevitably leaves nearly every question uncertain during the entire period while it must be dealt with, usually in thousands of instances, by the administrative officers. And yet that is just the period when there should be an authoritative rule if the system is to work smoothly, effectively, speedily, fairly, and without discrimination. Under our present system delay and discrimination are typical and inevitable.[29]

[20] Pierce v. Comm'r, 100 F.(2d) 397 (C. C. A. 2d, 1938); DeMuth v. Comm'r, 100 F.(2d) 1012 (C. C. A. 2d, 1938), *cert. denied*, 307 U. S. 627 (1939).

[21] 102 F.(2d) 103 (C. C. A. 1st, 1939).

[22] 307 U. S. 627 (1939).

[23] Nelson v. Comm'r, 104 F.(2d) 521 (C. C. A. 4th, 1939). The court added that "it is hard to imagine that certiorari would have been denied in a case of this character unless the Court was satisfied of the correctness of the decision below, particularly as its correctness had been challenged by a dissenting opinion."

[25] Helvering v. Janney, 311 U. S. 189 (1940).

[29] "At the present time, it is impossible to obtain a really authoritative decision

The point may likewise be illustrated by examining the work of the Supreme Court for the last complete calendar year. During 1943, the Court decided 21 federal tax cases.[30] Of these, two involved questions of liens for estate taxes. Three involved questions of estate tax liability; one of the decedents died in 1935, and the two others in 1936. Thus it took from seven to eight years for an estate tax question to get through the Supreme Court. Two of the cases involved questions of gift tax liability, the gifts having been made in 1936 and 1937. It took from six to seven years to get a gift tax question before the Supreme Court. Of the rest of the cases, one was criminal.[31] The case came to the Supreme Court because of a conflict with two previous cases decided in 1931 and 1932.[32] The earlier of these cases arose out of a tax return which was filed in 1926. It was seventeen years after that return was filed before the question at issue was finally passed upon by the Supreme Court. One of the remaining cases involved an excise tax for the year 1934.[33] It got to the Supreme Court because of a conflict with a decision rendered in 1938, likewise involving the year 1934.[34] The decision of the Supreme Court was contrary to that reached in the 1938 case. Thus the point was finally put at rest nine years after the tax was due, and in a way which it may be confidently asserted was contrary to that which had been applied in the case of the great majority of the taxpayers who were affected by the tax.

The remaining twelve cases involved income tax liability for years from 1935 through 1939. Thus, the elapsed time varied from four to eight years. But in nearly every case, the question got to the Supreme Court because of a conflict. The conflicting decision was rendered as long ago in one case as 1933,[35] and the tax year involved in that case was 1921. Thus it was about twenty-two years before that particular complexity was resolved. The years involved in the conflicting decisions in the other income tax cases ranged from 1929 through 1938. On the whole, it may be said that in the cases decided by the Supreme Court in the calendar year 1943 it was on the average at least ten years from the time the point was first raised until it was finally authoritatively determined.

of general application upon important questions of law for many years after the close of any taxable year. The average period between the taxable year in dispute and a Supreme Court decision relating thereto is nine years. Meanwhile confusion reigns in the day-by-day settlement of the more debatable questions of the tax law. One circuit court holds that a certain situation gives rise to tax liability; another circuit holds the contrary. The Commissioner and the lower federal courts are both confronted with the problem of reconciling the irreconcilable. A great part of the criticism of changing interpretations of the law announced by the Commissioner of Internal Revenue is properly attributable to the multitude of tribunals with original jurisdiction in tax cases, and to the absence of provision for decisions with nation-wide authority in the majority of cases. If we were seeking to secure a state of complete uncertainty in tax jurisprudence, we could hardly do better than to provide for 87 Courts with original jurisdiction, 11 appellate bodies of coördinate rank, and only a discretionary review of relatively few cases by the Supreme Court." MAGILL, THE IMPACT OF FEDERAL TAXES (1943) 269.

This is not written in criticism of the Supreme Court. No one who is familiar with the work of that Court could criticize it for delay. If anything, it may be said that the cases sometimes come up for hearing there too quickly to give counsel an adequate opportunity to prepare them properly. The difficulty is not with the time the Supreme Court takes with the cases after they get there, but with the time it takes to get a question actually before the Supreme Court. It is true that the Court could help a great deal even under our present system by making less of a fetish of the conflict test as a basis for granting certiorari. The Court could exercise a greater instinct for the vital federal tax questions, and grant certiorari the first time such a question appears.[28] But this would not go to the heart of the problem. Many of the questions on which authoritative rules are needed are not striking questions. There are more of such cases than the Supreme Court could handle consistently with its important duties in other fields of the law. Though the Supreme Court could undoubtedly help by showing a greater heed for the administrative consequences of its decisions, the Court cannot under our present system do all that has to be done.

THE ADMINISTRATIVE COURT*

Streamlining the administrative structure will facilitate timely implementation of policy decisions. But it must be recognized that the demands on the present judicial superstructure increasingly threaten to nullify economies to be realized through structural reform.

Moreover, just as the pressures imposed on administrators have intensified, the burden on the courts has become more pressing. Never before have courts been asked to assume a heavier workload; never before have the pressures for timely judicial decision been greater. In 1957 there were less than 4,000 proceedings commenced in the U.S. Courts of Appeals while in 1969 more than 10,000 appeals were commenced; and between fiscal years 1966 and 1969 alone, the appellate workload increased 42.7 percent.[29] While the number of administrative agency appeals increased slightly between 1955 and 1969, criminal and quasi-criminal appellate matters increased approximately 4½ times. Similarly, in the Federal district courts where three-judge panels—normally consisting of two district judges and one appellate court judge—review ICC determinations, between 1968 and 1969 there was an 8 percent increase in the civil caseload and a 9.3 percent increase on the criminal side.[30]

This presents a significant dilemma. In view of the fact that to date the size of the judiciary has not been expanded to keep pace with the increasing caseload,[31] the question of priorities inevitably arises. In criminal proceedings, the right of both the individual and society to timely judicial resolution must be recognized and respected. Expeditious disposition of civil wrongs is also called for. In our judgment, these types of proceedings, which lie entirely within the province of the judiciary, should be acknowledged to be its priority assignment.

At the same time, the essence of administrative process is expeditious delineation and implementation of public policy. Where that process requires a significant alteration of economic or social policy, unnecessary delay in implementation cannot be tolerated if the public interest is to be served. If an agency has erred, it should be advised accordingly at the earliest possible time so that it properly can focus its attention and expertise to the problem at hand. Conversely, where the agency response was a permissible one, all clouds of illegality should be removed as soon as possible so that the public and the industry can adjust their behavior as called for.

---

*Excerpted from A NEW REGULATORY FRAMEWORK 53-55 (1971), a report of The President's Advisory Council on Executive Organization, Roy L. Ash, Chairman.

The present judicial review mechanism cannot, in view of all the competing pressures it faces, serve this need effectively.

We have concluded that the existing Federal courts should be free to concentrate on those priority areas in which only they can exercise ultimate decisionmaking responsibility and that a new mechanism should be created to respond to the unique problems presented by the administrative review process. We recommend that an Administrative Court be established and charged with the review of decisions of the transportation, securities, and power agencies.[32]

A single Administrative Court, with review authority over several agencies, would also permit the development of a uniform body of substantive administrative law. Moreover, while subject matter differs from agency to agency, there is little justification for major differences in procedures.[33] The rules of standing should be comparable as well as the privileges of cross-examination, production of documents, freedom of information, and other procedural guarantees. Inasmuch as a unified body of procedures would simplify the process and thereby encourage public participation, a single review court would assist in realizing that objective by assuring that procedural advances of one agency are adopted by the others.

In arriving at this recommendation, we considered the alternative that the collegial commission be retained in the form of a quasi-judicial tribunal solely to execute a review function. That is, the chairman would be given sole authority with regard to agency administration but decisions of hearing examiners would be reviewed by the full commission. We rejected this alternative because of the danger that the full commission, however precise and limited its scope of activities, would have a tendency to usurp the policy function vested with the chairman, thus continuing most of the serious deficiencies of the existing administrative structure.

Similarly, we rejected creating a separate administrative court for each agency. To so limit a court's scope would seriously diminish its attractiveness to the most qualified candidates for judgeships, would encourage an overassociation with the agency being reviewed, and might well lead to a usurpation of the agency's policy responsibilities. It would also preclude development of integrated administrative procedures as well as uniform application of procedural advances. The approach would create three courts where the discernible benefit to be derived is not greater than would obtain if one court were created.

Finally, we rejected the suggestion that a separate administrative court be established in each of several geographic areas. Any such division would perpetuate disparity of judicial interpretation and complicate the development of uniform procedures and review standards. This result is not uncommon today, with review in 11 regional Courts of Appeals.

It does not follow, however, that the Administrative Court should have a fixed venue. While it appears advantageous to give the court a nationwide jurisdictional scope, the court should be easily accessible to persons throughout the country. In 1966, Congress recognized that it

would be a hardship to require that challenges to administrative action be initiated only in Washington, D.C. It responded by amending the venue provision to allow the filing of review proceedings in each of the 11 Courts of Appeals.[34]

In order not to inhibit access, we recommend that the Administrative Court develop procedures for assuring its periodic presence at locations across the country. In view of the novel nature of the court's structure, we believe that it would be best for it to experiment with alternative ways of meeting this objective. It may be wise to consider the possibility that the entire court ride circuit, that segments of the court sit permanently in several strategic locations, or any of several other alternatives.[35]

The Administrative Court should consist of judges appointed by the President, with the advice and consent of the Senate, to serve terms of sufficient duration as to attract men of quality. At the outset, we expect that as many as 15 judges would be needed, and suggest terms of 15 years. One judge should be designated by the President as Chief Judge, responsible for court organization, case assignments, and general supervision. Judges should participate in cases on a rotational basis, rather than be divided into subject matter panels.

THE CASE FOR CREATING A SPECIAL ENVIRONMENTAL COURT SYSTEM

Scott C. Whitney*

In Title V of the Federal Water Pollution Control Act of 1972, Congress directed the President of the United States through his Attorney General to study the feasibility of an environmental court. Title V, Section 9 provides: "The President, acting through the Attorney General, shall make a full and complete investigation and study of the feasibility of establishing a separate court or court system, having jurisdiction over environmental matters and shall report the results of such investigation and study together with his recommendations to Congress not later than one year after the date of enactment of this Act." [1]

Specialized courts are by no means a novel or rare judicial phenomenon in the American experience. A wide variety of specialized courts have been considered by Congress; a lesser number have been tried, and only a few have succeeded. This Article will not undertake to analyze the various specialized courts that have been considered but not established.[8] However, the successful specialized courts may offer productive analogies, and their failures may reveal caveats that should be considered in connection with the proposed environmental court.

Of the special courts that have succeeded, the United States Tax Court offers the most complete basis for comparative study. It was created as a special adjudicatory tribunal necessary to achieve five basic purposes.[9] First, the complexities of tax adjudication were deemed to require the special expertise that a specialized court could best provide. Next, it was hoped that such a specialized tribunal would free the "regular" courts of a significant and steadily increasing workload. Third, it was envisioned that a specialized court would achieve a degree of uniformity or at least a consistency in its decisions that was lacking in the regular courts. Further, by relegating most tax litigation to a special court, it was anticipated that greater dispatch would be achieved in the resolution of controversies. Finally, it was predicted that an independent tax tribunal would allay public mistrust of a system which previously had combined tax assessment and adjudication within a single

1. Pub. L. No. 92-500, 86 Stat. 816.

8. The special federal courts proposed prior to 1918 but which were never adopted are described in Rightmore, *Special Federal Courts*, 13 ILL. L. REV. 15, 18 (1918), which discusses the proposed Court of Indian Claims, the Court of Pension Appeals, and the Court of Arbitration. Professor Rightmore also discusses the Court of Private Land Claims which existed briefly, between March 3, 1891, and June 30, 1904, to adjudicate claims arising under Spanish and Mexican grants in Arizona, New Mexico, Colorado, Utah, Wyoming, and Nevada. From the outset it was viewed as a temporary court whose *raison d'etre* would cease upon completion of its specialized mission. For an account of the Choctaw and Chickasaw Citizenship Court see Ex parte Bakelete Corp., 279 U.S. 438, 457 (1929), citing Wallace v. Adams, 204 U.S. 415 (1907). For reference to Indian Reservation Courts, see United States v. Clapox, 35 F. 575 (D. Ore. 1888). Several special federal courts have been proposed subsequent to Professor Rightmore's history. Proposals for various types of administrative courts have been perennial, an alternative that will be discussed *infra*. *See also* Dix, *The Death of the Commerce Court: A Study in Institutional Weakness*, 8 AM. J. LEGAL HIST. 238 (1964).

A number of proposals for special administrative courts advocate a special labor court and a trade court. For separate discussion of a special labor court see Kutner, *Due Process of Economy: A Proposal For a United States Economy Court*, 15 U. MIAMI L. REV. 341 (1961). For debate of the merits of a trade court see Berger, *Administrative Courts*, 27 J. BAR ASS'N D.C. 16 (1960); Kintner, 24 J. BAR ASS'N D.C. 10 (1957) (for the negative); Sellers, *The Administrative Court Proposal–Or Should Judicial Functions of Administrative Agencies Be Transferred to an Administrative Court*, 23 J. BAR ASS'N D.C. 703 (1956) (for the affirmative). *See also* Berger, *A Reply to Commissioner McIntyre's Attack on the Trade Court Proposal*, 29 J. BAR ASS'N D.C. 337 (1962); Berger, *Removal of Judicial Functions from the Federal Trade Commission to a Trade Court: A Reply to Mr. Kintner*, 59 MICH. L. REV. 199 (1960); Kintner, *The Trade Proposal: An Examination of Some Possible Defects*, 44 A.B.A.J. 441 (1958); Kintner, *The Current Ordeal of the Administrative Process: In Reply to Mr. Hector*, 69 YALE L.J. 965 (1960) (defense of the Federal Trade Commission's performance and in opposition to a trade court); MacIntyre, *Administrative Court Proposal*, 29 J. BAR ASS'N D.C. 316 (1962); Minor, *The Administrative Court: Variations on a Theme*, 19 OHIO ST. L.J. 380 (1958). The foregoing is by no means exhaustive, but rather provides a representative survey of some leading points-of-view. For a discussion of the Emergency Court of Appeals, see Laws, *The Work of the United States Emergency Court of Appeals*, 11 J. BAR ASS'N D.C. 100 (1964).

9. The Board of Tax Appeals was created in 1918. (Revenue Act of 1918, ch. 18, § 1301, 40 Stat. 1140-41). It was removed from the Internal Revenue Service by the Revenue Act of 1924 and achieved its present status as technically an independent agency in the executive branch of the government in 1926. It became known as the Tax Court by the Revenue Act of 1942, 56 Stat. 619, Tit. 5, § 504 and has continued through various succeeding Revenue Acts as a distinct judicial entity with national jurisdiction. Brown, *The Nature of the Tax Court of the United States*, 10 U. PITT. L. REV. 298, 309 (1949); Brown & Whitmire, *Forum Reform: Tax Litigation*, 35 U. CIN. L. REV. 644 (1966); Del Cotto, *The Need for a Court of Tax Appeals: An Argument and a Study*, 12 BUFF. L. REV. 5 (1962); Drennan, *The Tax Court of the United States*, 75 W. VA. B. ASS'N J. 12 (1959); Griswold, *The Need for a Court of Tax Appeals*, 57 HARV. L. REV. 1153, 1154 (1944) ("[T]he Tax Court is in organization, tradition, and function a judicial

*Professor of Law, The College of William and Mary. Of counsel, Bechhoefer, Snapp, Sharlitt & Trippe, Washington, D.C. Reproduced from 14 W. & M. L. Rev. 473 and 15 W. & M. L. Rev. 33 (1973).

body.[53] The actual experience of the Tax Court has proved that although some of these expectations were chimerical, others were realized to various degrees; generally, the Tax Court has been reasonably successful, albeit not totally free of the need for improvement.

* * *

With respect to the five previously noted reasons that provided the basis for the creation of the Tax Court, there is little, if any, dispute that the Tax Court has been least successful in achieving uniformity or consistency of decisions. However, this failure is not attributable to the functioning of the Tax Court itself. The inability of the court to produce uniformity or consistency in tax decisions results from two structural problems. The first is that it was not given exclusive jurisdiction. This problem was articulated in the Report of the Senate Judiciary Committee to the 91st Congress:

> The existing tax litigation system is not the product of reasoned analysis. . . . At the heart of the problem is the trifurcation of the existing tax litigation structure. Trial of tax disputes is divided among three separate forums: the U.S. district courts, the Tax Court, and the Court of Claims. This division breeds diverse interpretation and application of the tax laws, delays [in] resolution of conflicts, encourages forum shopping, and contributes significantly to the strain on our overburdened judicial system.[54]

The second obstacle to uniformity and consistency in tax decisions is the appellate process: Tax Court decisions are reviewed in 11 different circuit courts of appeals, a system that tends to foster conflicts and diverse rulings even in the relatively precise and ascertainable field of knowledge it controls.

54. Senate Subcomm. on Improvements in Judicial Machinery, The Federal Judicial System, S. Rep. No. 92-134 92d Cong., 1st Sess. 7 (1971).

The lesson of the experience of the Tax Court appears to be that if Congress decides to create a special environmental court system, it will be necessary, if uniformity is to be achieved, to grant exclusive trial *and* appellate jurisdiction over environmental litigation to the specialized system of environmental courts and to narrow the grounds for appeal to the Supreme Court to the smallest ambit consistent with the Constitution and American judicial tradition.

With respect to the scope of Supreme Court review of decisions of a possible Court of Environmental Appeals, the Court's evident distaste for grappling with technical environmental details and its concern for the impact of such time-consuming litigation on its workload (manifest in the *Wyandotte*, *General Motors* and *City of Milwaukee* cases), strongly suggest that the Supreme Court could be relied upon to respect the purpose and function of a Court of Environmental Appeals and to grant certiorari sparingly. Yet even the determination of whether to grant certiorari requires deliberative time. The Congress, if it decides to create an environmental court system including a Court of Environmental Appeals, should give careful consideration to the scope of review by the Supreme Court in view of its increasingly onerous workload.

It is important to consider whether environmental litigation has manifested anything approaching the conflicts and diversity that gave rise to the creation of the Tax Court. Decisions construing and applying the National Environmental Policy Act (NEPA)[63] span a period of only three years—1970 through 1972. During this period, NEPA has been the cynosure of a substantial part of environmental litigation, although such litigation also has arisen from other statutory and common law bases.[64] NEPA, therefore, is likely to continue to be the source of prolific litigation in decades to come.

By declaring the national environmental policy in broad and general terms that invite interpretational dispute, NEPA is fashioned in a manner calculated to breed litigation.[65] Section 101(a) declares that "it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practical means . . . to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." Section 101(b) is perhaps some-

64. It is noted in 3 Council on Environmental Quality Ann. Rep. 249 (1972) that at that point in time: "The lawsuits brought under NEPA since its enactment now number over 200."

65. *See* Hanly v. Mitchell, 4 E.R.C. 1152, 1153 (2d Cir. 1972), in which Judge Feinberg noted that NEPA is "a statute whose meaning is more uncertain than most, not merely because it is relatively new, but also because of the generality of its phrasing."

what less general: "[I]t is the continuing responsibility of the Federal government to use all practicable means, consistent with other essential considerations of national policy . . ." to achieve six stated environmental objectives, which are in themselves quite general. For example, the third objective seeks to "attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences."[66]

It would be difficult to devise a more effective way to stimulate litigation, and, given the general tone (some would say, vagueness) of the policies, reasonable judges in the various district courts and courts of appeal would almost inevitably read these policy objectives to mean different things in differing factual contexts and accordingly would require differing standards of conduct. If these six enumerated "policies" are transformed into "substantive rights" as a recent decision in the Eighth Circuit holds,[67] then the tendency of the quoted portion of section 102(1) to proliferate litigation would be enhanced.

NEPA contains no enforcement provisions as such, but as a result of the public outcry resulting from the ill-famed 1969 oil blowout of the offshore wells in the Santa Barbara Channel, Congress added the so-called "action forcing" provisions of section 102.[68] This section directs that "to the fullest extent possible: [T]he policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act. . . ."

Section 102(2) requires *all* agencies of the federal government to perform eight categories of complex environmental duties. To date, the duty to prepare a detailed impact statement has been the most prolific stimulant of litigation. Section 102(2)C requires all agencies of the federal government to "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official." This statement must include the nature of the environmental impact, adverse effects which cannot be avoided, alternatives to the proposed action, the short term uses versus long term productivity of the environment, and any irreversible and irretrievable commitments of resources involved. Although these requirements are slightly more specific than the stated environmental objectives of NEPA, courts have adopted markedly different philosophies in construing the meaning of these prerequisites—differences which by no means have definitively resolved the question in a uniform manner. *Calvert Cliffs' Coordinating Committee v. AEC*[69] is perhaps the most celebrated early environmental decision that considered what was sufficient to constitute an adequate impact statement under the NEPA. Judge Wright not only undertook to determine the legal adequacy of the Atomic Energy Commission's initial regulatory response to the requirements of NEPA in its nuclear licensing proceedings,[70] but also went beyond the immediate dispute in order to write an essay which purported to interpret "NEPA's

67. Environmental Defense Fund v. Corps of Engineers, 4 E.R.C. 1721, 1725-26 (8th Cir. Nov. 28, 1972).

69. 449 F.2d 1109 (D.C. Cir. 1971).

structure and approach."[71] The decision is replete with dicta having the tendency to expand the impact of the application of NEPA to the agency licensing process.

The court remanded the case for further AEC proceedings because, *inter alia*, the AEC, pursuant to its published regulations,[72] had accepted at face value a certification that the proposed plant would conform to the standards established by the Water Quality Improvement Act of 1970 (WQIA).[73] The AEC made no independent reappraisal of that certification but, pursuant to its regulations, considered it "dispositive" as to the environmental impact on water. The court characterized this AEC action as "abdicating entirely to other agencies' certifications."[74] It reasoned that because WQIA did not *forbid* a further evaluation of impact on water including "the NEPA balancing analysis," that therefore AEC ". . . *must* conduct the obligatory analysis under the prescribed procedures."[75] The court's view was expressly contrary to the statements of Senators Jackson and Muskie, and Congress subsequently has statutorily contradicted this aspect of *Calvert Cliffs'* in Section 511 of the Federal Water Pollution Control Act of 1972.[77]

By contrast, the federal district court in *Environmental Defense Fund v. Army Corps of Engineers*[79] expressed a considerably less rigorous and expansive philosophy of interpretation of NEPA's impact statement requirements. Judge Eisele held that "the NEPA sets up certain requirements which, if followed, will insure that the decision-maker is fully aware of all pertinent facts, problems and opinions with respect to the environmental impact of the proposed project. . . . Although the impact statement should, within reason, be as complete as possible, there is nothing to prevent either the agency involved, or the parties opposing agency action, from bringing new or additional information, opinions and arguments to the attention of 'upstream' decision-makers even after the final EIS has been forwarded to CEQ. So it is not necessary to dot all the I's and cross all the T's in an impact statment."[80]

The Court of Appeals for the Eighth Circuit upheld the decision of the district court to dissolve the injunction against continued construction of the Gilham Dam and specifically concurred in the district court's holding: "[I]t is doubtful that any agency, however objective, however sincere, however well-staffed, and however well-financed could come up with a perfect environmental impact statement in connection with any major project."[81] The Eighth Circuit also quoted with approval

79. 4 E.R.C. 1097 (E.D. Ark., May 5, 1972).

81. 4 E.R.C. 1721, 1725 (8th Cir., Nov. 28, 1972).

the language of *Natural Resources Defense Council v. Morton*[82] that "the statute must be construed in the light of reason if it is not to demand what is, fairly speaking, not meaningfully possible, given the obvious, that the resources of energy and research—and time—available to meet the Nation's needs are not infinite." [83]

Apart from such divergent judicial philosophies as to how liberally NEPA should be interpreted, virtually every term and criterion of NEPA, and especially its impact statement requirements, are the subject of litigation; even the question of when in the decisional process the impact statement is required has received various treatment.

After the decision in *Calvert Cliffs'*, the AEC issued new regulations to meet the requirements imposed by the Court's interpretation of NEPA. These regulations provide, *inter alia*, that "each applicant for a permit to construct a nuclear power reactor—shall submit with his application three hundred (300) copies—of a separate document, entitled 'Applicant's Environmental Report—Construction Permit Stage'. . . ." [84] Implicit in this rule is that an impact statement will be supplied prior to beginning any act of construction. Indeed, no act of construction can begin until after the AEC final detailed impact statement and adversary hearings are completed. However, this requirement has been challenged by environmentalists as being inadequate for various reasons. The Scientists' Institute has contended[85] that such an impact statement was required before the AEC legally could undertake research and development concerning the feasibility of the Liquid Metal Fast Breeder Reactor. The AEC took the position, upheld by the district court, that an impact statement was not required by NEPA until the stage of constructing the demonstration plant was reached. The court held that "[a] decision to proceed with the proposed LMFBR demonstration plant is *not* an action of the Federal government which will commit the Nation to the construction of large numbers of LMFBR's." [86] Indeed, the court would not impose the requirement for an impact statement until a commercial applicant had filed its application for a permit to construct an LMFBR.[87]

In *Gage v. Commonwealth Edison*,[88] plaintiffs (farmers and concerned citizens of Brookfield, Illinois) sought an injunction against Commonwealth Edison (CE) to preclude CE from exercising its powers of condemnation under Illinois law to appropriate farmland for use as a cooling pond for a proposed nuclear power reactor. Plaintiffs argued that a NEPA impact statement is required prior to acquisition of land for power plant sites. The court rejected this argument and held that "until the AEC receives notice by an application for a permit it cannot

82. *Id.* at 1725, citing 458 F.2d 827 (D.C. Cir. 1972).

84. 10 C.F.R. § 50, App. D (4)A (1972).

85. Scientists' Institute v. AEC, 4 E.R.C. 1517 (D.D.C., March 27, 1972).

86. 4 E.R.C. 1767 (N.D. Ill., Nov. 27, 1972).

begin its environmental survey." [89] In *Lathan v. Volpe*,[90] however, the Ninth Circuit, reversing the district court, prohibited further property acquisition for a proposed highway until completion of an adequate impact statement. On remand, the federal district court noted that "a sufficiently detailed final impact statement, which appends the comments received on the draft impact statment, provides the court with an administrative record which is reviewable." [91]

The different results in *Lathan* and *Gage* may be accounted for in part by the fact that *Lathan* involved a highway project, for which no adjudicatory proceeding is held prior to construction, whereas the AEC does compile an evidentiary record in an adversary proceeding prior to issuing a construction permit; nevertheless, in both instances the impact on the landowners—their land had become the target of condemnation proceedings—would appear to be the same regardless of the point in time that is fixed for completion of the draft impact statement. This impact arises from the fact that land acquisition is an important, perhaps irreversible step in the total process, and even if it does not start an irresistible bureaucratic momentum toward ultimate construction, it cannot avoid tainting the value and quiet enjoyment of the property involved.

In *Greene County Planning Board v. FPC*,[92] the FPC sought to file its impact statement after conclusion of hearings involving a licensing under section 4(e) of the Federal Power Act.[93] The FPC relied on section 7 of the CEQ Guidelines[94] which provides for publication of a draft environmental statement at least 15 days prior to hearing, ". . . except where the agency prepares the draft statement on the basis of a hearing subject to the Administrative Procedure Act and preceded by adequate public notice and information to identify the issues and obtain the comments provided for in Sections 6-9 of these guidelines." [95] The Commission argued that the applicant had submitted a preliminary impact statement that supplied "adequate public notice and information to identify the issues. . . ." The court held that the Commission was in violation of NEPA by conducting hearings prior to the preparation *by its staff* of its own impact statement. The decision is silent as to how long before the hearing the staff's draft impact statement is required, although CEQ guidelines provide for making the draft impact statement available to the public at least 15 days prior to the time of the relevant hearings.[96] Thus, even with respect to such a fundamental mechanical detail as the timing of the impact statement, considerable diversity has resulted between the different forums that have ruled on the question.

90. 3 E.R.C. 1362 (9th Cir., Nov. 15, 1971).
91. 4 E.R.C. 1487, 1489 (W.D. Wash., Aug. 4, 1972).
92. 455 F.2d 412 (2d Cir. 1972).
93. 16 U.S.C. § 797 (1970).
94. 36 Fed. Reg. 7724-29 (1971).

95. CEQ Guidelines § 10e, 36 Fed. Reg. 7726 (1971).

Even more direct conflict has arisen on the important question whether the six objectives set forth in section 101(b) of NEPA[97] constitute substantive environmental rights or mere policy goals. The issue first arose in two widely separated federal district courts that were reviewed in the Tenth and Eighth Circuits. *McQueary v. Laird*[98] was a class action brought by persons residing adjacent to the Rocky Mountain Arsenal to challenge storage of chemical and biological warfare agents. The Court of Appeals for the Tenth Circuit affirmed the federal district court's decision dismissing the complaint on the basis of sovereign immunity. At oral argument on appeal, plaintiffs raised for the first time the argument that section 101 of NEPA provided a substantive basis for granting an injunction. The Tenth Circuit disagreed, holding that "... NEPA does not create substantive rights in the plaintiffs-appellants here to raise the environmental challenge in regard to the Rocky Mountain Arsenal."[99] *Environmental Defense Fund, Inc. v. Corps of Engineers*[100] arose in a federal district court in Arkansas and involved plaintiff's contention that NEPA creates some substantive rights in addition to its procedural requirements. Specifically, sections 101(b)2 and 4 were said to be substantive in nature.[101] The court held: "The Act appears to reflect a compromise which, in the opinion of the Court, falls short of creating the type of 'substantive rights' claimed by the plaintiffs. . . . It is true that the Act required the government 'to improve and coordinate Federal plans, functions, programs, and resources,' but it does not purport to vest in the plaintiff, or anyone else, a 'right' to the type of environment envisioned therein."[102] The court concluded that "... the plaintiffs are relegated to the 'procedural' requirements of the Act."[103]

Before the Eighth Circuit completed its review of this decision, the Seventh Circuit in *Bradford Township v. Highway Authority*[104] affirmed the dismissal of a complaint against a state-financed highway extension on the ground, *inter alia*, that NEPA section 101 did not create a substantive right providing a basis for federal jurisdiction. The Seventh Circuit, relying on both the *McQueary* and the *EDF* decisions, held that NEPA section 101 was merely a statement of policy and created no substantive rights.[105]

Subsequently, the Eighth Circuit expressly reversed the district court, holding in *EDF v. Corps of Engineers*:[106] "The district court found that NEPA 'falls short of creating the type of substantive rights claimed by the plaintiffs', and therefore 'plaintiffs are relegated to the procedural requirements of the Act.' We disagree. The language of NEPA, as well as its legislative history, make it clear that the Act is

98. 449 F.2d 608 (10th Cir. 1971).

100. 325 F. Supp. 749 (E.D. Ark. 1971).

104. 4 E.R.C. 1301 (7th Cir., June 22, 1972).

106. 4 E.R.C. 1721 (8th Cir., Nov. 28, 1972).

more than an environmental full-disclosure law. NEPA was intended to effect substantive changes in decisionmaking."[107] The court proceeded to cite various portions of section 101 as constituting such substantive provisions.

This conflict was compounded in the Fourth Circuit. A district court ruled with respect to NEPA in *Conservation Council v. Froehlke*[108] that, "[c]ourts that have discussed these requirements have consistently held that these requirements provide only procedural remedies instead of substantive rights. . . ."[109] The court relied, *inter alia*, on the district court's decision in *EDF v. Corps of Engineers*.[110] Subsequently, the Fourth Circuit affirmed this decision in a brief per curiam opinion

. . . .

Courts have also differed substantially on the question of the scope of judicial review of agency determinations under NEPA. The question as to whether the six provisos of section 101 are mere policy objectives or are substantive rights has influenced judicial determination of the proper scope of review. The spectrum of possible review includes at one extreme the *Froehlke* view that NEPA requires only full disclosure, and as long as the agency adequately canvasses the alternatives and their environmental implications in its impact statement, it has satisfied NEPA.[112] *Calvert Cliffs'* would seem to contemplate a somewhat broader review: "The reviewing courts probably cannot reverse a substantive decision on its merits, under Section 101, unless it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values."[113]

The Second Circuit in *Scenic Hudson Preservation Conference v. FPC*[114] specifically addressed itself to the contention that "different standards ought to prevail with respect to issues arising in an environmental context."[115] The court rejected this view, . . .

108. 340 F. Supp. 222 (M.D.N.C. 1972).

110. 325 F. Supp. 749 (E.D. Ark. 1971). *See* notes 100-03 *supra* and accompanying text.

112. The Tenth Circuit in National Helium Corp. v. Morton, 455 F.2d 650 (10th Cir. 1971), held that no review on the merits is available: "The decisions are also clear that the mandates of the NEPA pertain to procedure and do not undertake to control decision making within the departments." *Id.* at 656.

113. 449 F.2d 1109, 1115 (D.C. Cir. 1971). This view was followed in Natural Resources Defense Council v. Morton, 458 F.2d 827, 838 (D.C. Cir. 1972): "So long as the

The court cited the holding in *Citizens to Preserve Overton Park, Inc. v. Volpe* that "although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." [117] Under this line of cases,[118] the reviewing court can extend its review to ascertain whether the agency acted in an arbitrary or capricious manner (*e.g.*, gave no consideration or demonstrably inadequate consideration to environmental issues) and whether the findings of the agency are supported by substantial evidence.

Unfortunately, these "traditional" tests of the scope of judicial review become blurred and perhaps, eroded depending on the reviewing court's view as to how far it must go to determine whether the evidence is "sufficient," and also as to whether NEPA is strictly a procedural, full-disclosure statute or whether section 101 creates substantive rights. The Eighth Circuit in *EDF v. Corps of Engineers*[121] while impliedly recognizing these "traditional" tests, nonetheless held that "the trial court's opinion is in error insofar as it holds that courts are precluded from reviewing agencies' decisions to determine if they are in accord with the *substantive* requirements of NEPA." [122] The court upheld the agency and found that "we have reviewed the record thoroughly and are convinced that even if all factual disputes are resolved in favor of the plaintiffs, the decision of the Corps to complete the dam cannot be set aside as arbitrary or capricious . . . . We have reached this conclusion after a serious consideration of the arguments in favor of and against completion of the project. In large part this has necessitated a *balancing*, on the one hand, of the benefits to be derived from flood control, and on the other, of the importance of a diversified environment." [123] In this regard, the court conducted a detailed factual analysis that amounted to a judicial cost-benefit analysis. The danger of this approach is obvious. Even if the facts had been different or the court more environmentally "liberal," it is clear that the court felt empowered to conduct its own cost-benefit analysis and reach a conclusion opposite that of the agency. Indeed, this is precisely the approach taken by Judge Oakes in the dissent in *Scenic Hudson:*

> If this case came to us without environmental overtones, . . . I would be constrained to take the viewpoint of the majority. For, whether or not I agreed with the weight given by the Federal Power Commission to alternative sources of power, . . . the court would be conclusively bound . . . by findings supported by "substantial evidence," particularly when the Commission is acting within its own field of "expertise and judgment." [124]

officials and agencies have taken the 'hard look' at environmental consequences mandated by Congress, the Court does not seek to impose unreasonable extremes or to interject itself within the area of discretion of the executive as to the choice of the action to be taken." (citing *Calvert Cliffs'*).

114. 453 F.2d 463 (2d Cir. 1971).

117. *Id.*, citing 401 U.S. 402, 416 (1971).

121. 4 E.R.C. 1721 (8th Cir., Nov. 28, 1972). *See* note 81 *supra.*

124. 453 F.2d at 482.

> . . . Judge Oakes' approach is not distinguishable from the "balancing" by the Eighth Circuit in the *EDF* case.

Whatever the appropriate scope of judicial review of environmental issues, whether they arise under NEPA or some other statute, it is essential to have a consistent rule and to know what that rule is. Moreover, if judicial review is to be "liberalized" in environmental cases, and agency cost-benefits analyses are to be supplanted by judicial cost-benefit determinations, it becomes even more important that the court on review possess an authentic expertise. Otherwise, not only the scope of review will vary from court to court, but the degree and nature of judicial "second-guessing" of agency determinations will vary with the court's largely non-expert and subjective judgment concerning environmental values. From the foregoing, which by no means exhausts the examples of conflict and varying interpretations of NEPA by the courts,[125] it is apparent that environmental decisions issuing from the existing federal courts are achieving far less consistency than is desirable, and indeed necessary, to cope with national environmental reform objectives. As a result, agency action is being seriously impeded for lack of consistent judicial interpretation having precedental value.

A FURTHER COMMENT

On April 27, 1973, the Deputy Assistant Attorney General in charge of the Land and Natural Resources Division of the Department of Justice announced that that Division "has tentatively taken a position recommending against the establishment of an environmental court." [3] This announcement aligns with the generally negative views expressed by several commentators as to the feasibility and desirability of a special environmental court system.[4]

The Task Force report asserts:

> There is virtually no evidence of support for a separate environmental court among those most directly affected by the manner in which environmental controversies are handled. Experience suggests that a court lacking active support from any of the influential interests to be affected by its operations does not have a bright future.[126]

4. Oakes, *Developments in Environmental Law,* 3 E.L.R. 50001, 50011-12 (1973)

Elsewhere, the report notes that various respondents to its questionnaire expressed "fear that an environmental court would lack institutional strength to withstand the pressures likely to be focused upon it by special interest groups."[83] Similar misgivings about the institutional strength of special environmental courts have been expressed by Judge Oakes:

> [I]t is quite possible that the appointment of Environmental Court judges would be much more subject to influence by lobby than are appointments of district or court of appeals judges. This is true simply because those whose aims are not supportive of environmental protection would be likely to concentrate their very substantial resources on influencing the appointments to these specialized positions.[84]

It is, of course, possible to postulate a priori that any proposed institution will be weak and venal. Absent any corroborative evidence, however, such speculation is unpersuasive. Moreover, in the case of an environmental court, there are several constraints which indicate such pessimistic assumptions are without basis. Since one of the postulates of the Task Force study is that "the court would be created as a constitutional, rather than a legislative court," [85] all of the existing civil and criminal laws and regulations and the canons of ethics that assure proper conduct by federal judges and parties participating in litigation before existing federal courts would apply in an environmental court.

Furthermore, judges designated to handle environmental litigation can be selected in the same manner as judges in existing federal courts. Such appointments are subject to confirmation by Congress, a body which repeatedly has demonstrated its disposition to enact effective environmental reform legislation regardless of the impact on powerful interest groups. In addition, Congress has on occasion refused to confirm appointments, especially those to quasi-judicial agencies, when there is evidence that a prospective appointee might be unduly industry oriented.[86] There is thus no basis to assume that even if the President appointed judges with backgrounds suggesting a possible bias against environmental reform, Congress would confirm them. Finally, in light of the high quality of appointments to top positions in agencies such as the Environmental Protection Agency, the Council on Environmental Quality, and the National Oceanic and Atmospheric Administration, there is no indication that the President would not continue to appoint candidates possessing the highest order of competence, integrity, and objectivity.

In an abundance of caution, Congress may well see fit to assure both institutional strength and high integrity by creating special judicial machinery as an adjunct to existing federal district courts to try environmental litigation. A special panel of the trial level judges could

constitute a single environmental court of appeals to review environmental decisions. Implementation of such a system would remove the serious threat to the credibility and effectiveness of adjudication of environmental cases presently resulting from conflicts among circuits on interpretation of NEPA.[87] Such conflicts not only significantly obstruct uniform and consistent enforcement of important environmental laws, but also render compliance by the many important affected industries more difficult. As a result, such industries have incurred significant unnecessary economic costs.[88] Moreover, uncertainties regarding statutory requirements have resulted in delays in bringing on-line many industrial activities required by the public interest.

Certainty, or at least predictability, in environmental law would enhance appreciably industry's ability to plan complex and costly facilities, some of which require a decade's lead time to complete. This certainty in the environmental area is at least as important to the orderly growth of an industrialized, populous society as is certainty in the area of tax law.[89] Faced as it is with the need greatly to expand industrial capacity to keep pace with public demand and to assure attainment of the high standard of living that is one of the society's stated goals, the United States can ill afford a "trial and error" jurisprudence that unnecessarily renders environmental planning unpredictable and costly. It is submitted that uncertainty as to the substance of environmental legal requirements, not the possibility of excessive industry-oriented pressures, is the major present threat to the institutional strength of federal courts adjudicating environmental cases.

The so-called "energy crisis" is only the first of a series of resource crises this nation will experience unless the present large and growing body of environmental constraints on productivity are skillfully, promptly, and consistently articulated. Thus, in evaluating the final conclusions of the Task Force on the need for creation of a special environmental court, Congress should give careful attention to the importance of achiev-

87. Whitney, *supra* note 5, at 486-501.

88. It is not a little disquieting to learn that at least one judge appears to *approve* of inter-circuit conflicts. Judge Oakes notes: "Although the Supreme Court *may eventually* bring into line conflicting doctrine in the different circuits and states, there is a healthy cross-fertilization which occurs from having different courts rule on given environmental questions and then living with those decisions for a time." Oakes, *supra* note 4, at 50011 (emphasis supplied).

ing uniformity and consistency in adjudication of environmental questions. It is manifest that the present judicial system fails to produce the requisite uniformity and consistency. It is equally clear that a special environmental adjudicatory system such as that here discussed would produce uniformity and consistency as well as other significant advantages, not the least of which would be noticeable workload relief at all levels of the federal court system.

A final matter reported by the Task Force deserving comment is the "concern over the possibility that creation of an environmental court would lead to additional specialized courts and the fragmentation of our judicial system." It is not clear why the possibility that Congress might enact additional techniques for special adjudication of identifiable bodies of specialized litigation should be a matter for concern. Additional special courts may or may not be required to cope with future workload crises facing the federal judiciary. Specific proposals for other special adjudicatory mechanisms may well be advanced and should be considered on their merits. However, Congress retains the power to determine whether any given proposal will be implemented. Its decision to provide the institutional machinery for special environmental adjudication would in no way irreversibly commit it to a course of action that would result in an unduly balkanized judiciary. The simple fact is that the judiciary has functioned acceptably for decades with a system embracing both general and specialized courts, and there is nothing in the experience of existing special courts which supports the contention that the effectiveness of our judicial system would be impaired by providing for specialized adjudication of environmental litigation.

CONTINUED

1 OF 3

SPECIALIZED FEDERAL COURTS

Henry J. Friendly*

Judicial jurisdiction in patent matters is now divided between specialized and unspecialized tribunals. If the Patent Office denies an application, the applicant may choose between an appeal to the Court of Customs and Patent Appeals and a civil action against the Commissioner in the District Court for the District of Columbia, with an appeal lying to the Court of Appeals for that circuit. A party dissatisfied with a decision of the board of patent interference on a question of priority may appeal to the Court of Customs and Patent Appeals or may sue in any appropriate district court; if the adverse party chooses the latter remedy, the appeal to the Court of Customs and Patent Appeals will be dismissed. No reason appears in either of these situations for allowing a choice between an expert and an inexpert tribunal.

The more familiar types of patent litigation are the action seeking an injunction against infringement of a patent actually issued, and its converse, the action for a declaratory judgment of invalidity or non-infringement. Such actions are brought in the district courts, and are subject to the same provisions for appeal as any other case in those courts.

An objection that has long been made to this method of handling patent litigation is the disparity of results. This was put, quite moderately, thirty years ago:[10]

> [I]t is widely felt that although the court decisions are a necessary improvement to the prospective and sketchily informed judgment of the Patent Office, they leave much to be desired in consistency and uniformity and consequently in their effect on the confidence of those dealing with meritorious inventions. It is quite possible that in districts where patent litigation is less frequent, a series of cases involving weak or oppressive patents may incline a judge harshly toward meritorious patents; and a converse effect is likewise possible.

10. Woodward, *A Reconsideration of the Patent System as a Problem of Administrative Law*, 55 HARV. L. REV. 950, 960 (1942) (footnote omitted).

*Senior Circuit Judge, United States Court of Appeals for the Second Circuit. Reproduced from FEDERAL JURISDICTION: A GENERAL VIEW 154-159, 161-163, 165-168, 177, 182-189 (Columbia Univ. Press, 1973).

The serious problem today is not the differing visceral sensations of district judges, but rather the contrasting attitudes of the various courts of appeals on the issues of invention and novelty[11]—a difference which the Supreme Court's two decisions of 1966,[12] not surprisingly, did not end. This accounts for the mad and undignified races that sometimes occur between a patentee who wishes to sue for infringement in one circuit believed to be benign toward patents, and a user who wants to obtain a declaration of invalidity or non-infringement in one believed to be hostile to them.[13] The stakes have now become higher than ever. While it was long the rule that a court of appeals should give great respect to the decision of another upholding or denying the validity of a patent,[14] the Supreme Court broke new ground in 1971 by deciding that a declaration of invalidity in a suit for infringement in one circuit would generally work as a collateral estoppel on the patentee from claiming validity in another,[15] although, of course, the converse is not true. If this rule should be extended to actions for declaratory judgments by alleged infringers, as much of the opinion's discussion of judicial economy would suggest, the incentive to anticipate a patentee's suit by instituting such an action in a circuit thought to be tough on patents will be heightened.

Another strong argument for removing patent litigation from the ordinary courts is the increased complexity of their subject-matter. It was not hard for ordinary judges to comprehend a patent like that in one of the leading cases of early years, which substituted porcelain or clay for wood or metal in doorknobs.[16] Indeed, I did not find the subject for what for long was my only patent opinion—women's girdles[17]—to be unduly technical. But the courts must also deal today

11. Professor Irving Kayton has made an empirical study of the attitude of the circuits toward patents. The extremes range from the Fifth Circuit, which upheld 52% of the patents it considered between February 1966 and September 1970, to the Eighth Circuit, which invalidated every patent it considered during the same period. Kayton, THE CRISIS OF LAW IN PATENTS A-10 (1970).
12. Graham v. John Deere Co., 383 U.S. 1 (1966), with which were decided Calmar, Inc. v. Cook Chem. Co. and Colgate-Palmolive Co. v. Cook Chem. Co.; United States v. Adams, 383 U.S. 39 (1966). These cases represented the first occasion since Great Atlantic & Pacific Tea Co. v. Supermarket Equip. Corp., 340 U.S. 147 (1950), in which the Supreme Court dealt with the issue of patentability.
13. See Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., 342 U.S. 180 (1952), for a discussion of the relevant considerations when the patentee sues to enforce in one circuit and an alleged infringer brings a declaratory judgment action in another circuit to find it invalid. An excellent example of this phenomenon is reflected in Mattel, Inc. v. Louis Marx & Co., 353 F.2d 421 (2d Cir. 1965), *petition for cert. dismissed*, 384 U.S. 948 (1966), where less than 24 hours elapsed between the service of process in a declaratory judgment action instituted in the District of New Jersey and the filing of an infringement action in the Southern District of New York.
15. Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971). The Court here accomplished by decision what President Johnson's Commission on the Patent System had recommended should be effected by legislation. "*To Promote the Progress of . . . Useful Arts" in an Age of Exploding Technology*, REPORT OF THE PRESIDENT'S COMMISSION ON THE PATENT SYSTEM 38–39 (1966) [hereinafter cited as JOHNSON COMMISSION REPORT]. The estoppel will not exist if the patentee can establish that he did not have "a full and fair chance to litigate the validity of his patent" in the earlier case. 102 U.S. at 333.

with a great number of patents in the higher reaches of electronics, chemistry, biochemistry, pharmacology, optics, harmonics and nuclear physics, which are quite beyond the ability of the usual judge to understand without the expenditure of an inordinate amount of educational effort by counsel and of attempted self-education by the judge, and in many instances, even with it.[18] The judges who hear the case in a suit for infringement on appeal are no better off except for the benefit they can derive from the district court's opinion. Indeed, save in this respect, they are rather worse off since the limited time available for argument prevents their getting as much assistance from counsel as did the district judge and, once the argument is over, it is cumbersome to have further recourse to counsel for help on technical matters that may assume new importance as a result of study.

I am unable to perceive why we should not insist on the same level of scientific understanding on the patent bench that clients demand of the patent bar, or why lack of such understanding by the judge should be deemed a precious asset.[19] As Judge Learned Hand well said, "To judge on our own that this or that new assemblage of old factors was, or was not, 'obvious' is to substitute our ignorance for the acquaintance with the subject of those who were familiar with it."[20] Such superior competence over the experts of the Patent Office as a judge may possess comes "not because of his non-expert personality, nor yet because he hears tax cases, bankruptcy cases, and other private litigation, but because he has the advantage of hind-

18. During an early year on the bench, I was told that a computer patent, then in litigation in the District Court for the Southern District of New York, involved electronics so complex that the subject-matter could be fully understood by only a dozen or so men in the United States. Most of them were in the employ of the parties, and the charmed circle surely did not include the district judge or the judges of the Second Circuit. Fortunately the case was settled.
19. *See* Rifkind, *A Special Court for Patent Litigation? The Danger of a Specialized Judiciary*, 37 A.B.A.J. 425 (1951). One commentator, not fearing specialization, has renewed the proposal, *see* p. 154 *supra*, that denials by the Patent Office be appealable only to the Court of Customs and Patent Appeals. Ditlow, *Judicial Review of Patent Office: A More Rational Review System*, 53 J. PAT. OFF. SOC'Y 205, 221–23 (1971). This proposal would seem to be "half a loaf," or much less, since it would still retain district court jurisdiction for other types of patent litigation.
20. Reiner v. I. Leon Co., 285 F.2d 501, 504 (2d Cir. 1960), *cert. denied*, 366 U.S. 929 (1961).

sight and of the research of industrious counsel who usually spend far more time on searching the art relating to a particular invention than the Patent Office can afford to devote to any one application."[21] It is true that, as a distinguished objector to a specialized patent court has said, "It is hardly to be supposed that the members of a patent court will be so omniscient as to possess specialized skill in chemistry, in electronics, mechanics and in vast fields of discovery yet uncharted."[22] But a Patent Court, following the model of the Court of Claims, would have a number of commissioners to conduct the trials; they could represent a broad spectrum of scientific knowledge and would be assigned cases in accordance with their individual capabilities. The case would thus come before the Patent Court with detailed findings of fact by a disinterested "judge" expert in the subject-matter. Even though no member of the reviewing court could be expert in all the technologies that would be involved, I do not agree that "[t]he expert in organic chemistry brings no special light to guide him in the decision of a problem relating to radioactivity." He is still likely to know a good deal more about radioactivity than someone like the writer, whose college specialty was European history and who avoided science courses because of lack of real comprehension. At the very least, such a judge would contribute a scientific approach and an acquaintance with the lingo not possessed by the common run. Furthermore, such a court could have a staff of experts who would be available both to the commissioners and to the judges, as law clerks are now. It is true that, as also has been said by way of objection, suits for patent infringement, or for a declaration of invalidity, often involve issues in other branches of the law, notably antitrust. But the judges of a Patent Court would be judges, not laboratory technicians; moreover, experience should make them particularly familiar with the rather esoteric antitrust doctrines relating to patents. If all that is not enough, Supreme Court review with respect to such issues would remain as a safeguard.

This leaves only the fear that a specialized court having exclusive jurisdiction over patent litigation might be overly liberal or unduly strict in its attitude toward patents—more likely the former. I perceive no real basis for this. The patent bar, from whom most of the members of the court should be drawn, is not exclusively engaged in defending patents; the same lawyer will be doing this one month and attacking validity the next. To be sure, the patent bar does have a stake in the existence of a viable patent system. Judge Rich, of the Court of Customs and Patent Appeals, has made this point:[28]

21. Woodward, *supra*, 55 HARV. L. REV. at 959.
22. Rifkind, *supra*, 37 A.B.A.J. at 426.

28. Rich, *The Proposed Patent Legislation: Some Comments*, 35 GEO. WASH. L. REV. 641, 644 (1967) (emphasis in the original).

> We should stop thinking in terms of the "strength" of individual patents or the "strength" of the presumption of their validity and concentrate on the strength of the patent *system* . . . . The weakness or strength of individual patents when they get into court is something wholly unrelated to the weakness or strength of the system.

Well-chosen members of a specialized court could not ignore this thought. And here again there would be the safeguard of occasional Supreme Court review.

The structure for the judicial determination of disputes over United States taxes incapable of resolution at the administrative level is the result of history rather than logic. Suffice it here to say that a taxpayer disputing his liability for income, gift or estate taxes[35] has a choice among three initial forums: the Tax Court of the United States or, if he is willing and able to pay the tax and sue for a refund,[36] a district court or the Court of Claims. A decision by the Tax Court or a district court is reviewable by the appropriate court of appeals, whose decision, in turn, is subject to review on certiorari by the Supreme Court. A decision by the Court of Claims is subject to review only on certiorari by the Supreme Court. As was said thirty years ago:[37]

> If we were seeking to secure a state of complete uncertainty in tax jurisprudence, we could hardly do better than to provide for 87 Courts with original jurisdiction, 11 appellate bodies of coordinate rank, and only a discretionary review of relatively few cases by the Supreme Court.

The worst single feature in this structure is the lack of any point of authoritative determination of questions of statutory interpretation

33. Act of June 25, 1948, ch. 646, § 1541, 62 Stat. 942, *as amended*, 28 U.S.C. § 1541.
34. 36 Stat. 105 (1909); 45 Stat. 1475 (1929).
35. A taxpayer disputing liability for an excise or employment tax must pay the tax and sue for refund in a district court or the Court of Claims. Tax suits by the United States, civil or criminal, may be brought only in the district courts.
36. Flora v. United States, 362 U.S. 145 (1960), *reaff'g* 357 U.S. 63 (1958), established that, when a tax is not "divisible," payment of the entire amount of the assessed deficiency, rather than a lesser token amount, is a prerequisite to a suit for a refund.
37. MAGILL, THE IMPACT OF FEDERAL TAXES 209 (1943).

short of the Supreme Court. The evils were exposed so thoroughly and brilliantly by Professor Roger Traynor, as he then was, in 1938,[38] and by Professor Erwin Griswold, as he then was, in 1944,[39] that the barest summary will suffice: Until 1970, a decision by a court of appeals of one circuit bound no court other than itself and the district courts within the circuit; in that year the Tax Court, reversing a long-standing position,[40] decided that "better judicial administration requires us to follow a Court of Appeals decision which is squarely in point where appeal from our decision lies to that Court of Appeals and to that court alone."[41] If the decision is for the Government, the Supreme Court will rarely grant certiorari on the taxpayer's request in the absence of a conflict; if the decision is against the Government, the Solicitor General normally will not even seek it unless a conflict exists. A study has shown that for the five Supreme Court terms beginning in 1955, the median "conflict-resolving" period, dating from the first court of appeals decision, itself many years after the tax year at issue, ran from a low of three years and one month to a high of eleven years and nine months.[42] However, on a number of

38. Traynor, *Administrative and Judicial Procedure for Federal Income, Estate and Gift Taxes—A Criticism and a Proposal*, 38 COLUM. L. REV. 1393 (1938). Chief Justice Traynor has contributed so greatly to other fields of law—conflicts, criminal procedure, contracts, judgments and torts, to name only a few—that most people have forgotten that he began his career as a tax lawyer. Professor Traynor's original proposal received a great deal of commentary. The principal comments are collected in Ferguson, *Jurisdictional Problems in Federal Tax Controversies*, 48 IOWA L. REV. 312, 371 n.302 (1963).
39. Griswold, *The Need for a Court of Tax Appeals*, 57 HARV. L. REV. 1153, (1944). The study is updated in Del Cotto, *The Need for a Court of Tax Appeals: An Argument and a Study*, 12 BUFFALO L. REV. 5 (1962). The case has again been strongly pressed in *A Report on Complexity and the Income Tax*, 27 TAX L. REV. 327, 354–58 (1972).
40. Arthur L. Lawrence, 27 T.C. 713 (1957), *rev'd on other grounds*, 258 F.2d 562 (9th Cir. 1958).
41. Jack E. Golsen, 54 T.C. 742, 757 (1970) (footnotes omitted). The last phrase points up a serious problem, namely, where the proceeding in the Tax Court involves taxpayers residing in circuits which entertain different views. *See Note, The Old Tax Court Blues: The Need for Uniformity in Tax Litigation*, 46 N.Y.U.L. REV. 970, 981–83 (1971). *Compare* Robert A. Hitt, 55 T.C. 628 (1971), *with* Donald W. Fausner, 55 T.C. 620 (1971).
42. Del Cotto, *supra*, 12 BUFFALO L. REV. at 30.

significant issues, from fifteen to thirty years were required for the resolution of conflicts.[43] When the resolution was against the Government, thousands of taxpayers in Government-deciding circuits had paid taxes they did not owe; when the resolution was in favor of the Government, the revenue had suffered in circuits that had decided otherwise. Thousands of cases had been settled, in light of the uncertainty, on a basis too favorable to one side and too unfavorable to the other. Another evil by-product is that once the Court of Claims has decided a new point in favor of a taxpayer, there may never be a conflict since all similarly situated taxpayers who are in a position to pay the tax can bring their suits there. The obvious solution is a single Court of Tax Appeals to which all appeals from tax decisions of courts of first instance are to be routed.

* * *

The principal objections that have been made to such a court are that it would lack familiarity with local law, which may sometimes figure prominently in tax cases,[51] and that it would be composed of "specialists." With respect to the first objection there is little that can be added to Professor Griswold's analysis;[52] whatever small weight this may have, it is minuscule as compared to the great benefits to be achieved. The second argument is somewhat semantic. Tax lawyers are not narrow specialists; they deal with problems touching every phase of life and, consequently, of law.[53] To such extent as they come to the bench equipped with a knowledge of tax law, which spares them the Herculean efforts at mastering the intricacies of the Internal Revenue Code so vividly described by Judge Learned Hand in his tribute to Judge Swan,[54] that is all to the good. The real fears are two: that the judges will be, or become, unduly government-minded, and that the court would be used to take care of lame ducks rather than for the appointment of men highly qualified for the job. No one could honestly deny that this has sometimes occurred in the four "national" inferior appellate courts—the Court of Claims, the Customs Court, the Court of Customs and Patent Appeals and the Court of Appeals for the District of Columbia Circuit, as, indeed, it has elsewhere. On the other hand, for all the many years I have known it, the Court of Appeals for the District of Columbia Circuit has maintained a level of excellence well above the average for the courts of appeals. There would seem to be an added safeguard with respect to a Court of Tax Appeals; the Treasury would surely not

51. Probably the outstanding example is the effect of community property law on questions of estate and gift taxation.
52. 57 HARV. L. REV. at 1188–90.
53. *Id.* at 1183–84.
54. "In my own case the words of such an act as the Income Tax . . . merely dance before my eyes in a meaningless procession: cross-reference to cross-reference, exception upon exception—couched in abstract terms that offer no handle to seize hold of—leave in my mind only a confused sense of some vitally important, but successfully concealed, purport, which it is my duty to extract, but which is within my power, if at all, only after the most inordinate expenditure of time." Hand, *Thomas Walter Swan*, 57 YALE L.J. 167, 169 (1947).

wish to see determinations vitally affecting the revenues in the hands of incompetents. The danger is rather that the Treasury would seek to overload the court with tax lawyers having a background in government. There is some feeling among the bar, whether justified or not, that an unduly large proportion of the members of the Tax Court of the United States has come from these sources and that the court thus is slanted in favor of the Government. Such a belief, along with the occasional desire for a jury trial, undoubtedly is the principal reason for the approximately fifteen hundred cases each year where a taxpayer elects to pay the tax and sue for a refund.[58]

While a statute limiting the proportion of the judges of a Court of Tax Appeals who could come directly from the Bureau of Internal Revenue, other sections of the Treasury, and the Tax Division of the Department of Justice would be of dubious constitutionality, a President would hardly ignore legislative history making Congress' intention clear; if he did, the Senate would always be there to remind him of it. The remaining danger is that the high proportion of tax appeals in which the Government is right might lead the judges of the new court to think it is right in all. But that danger exists today; if anything, it should be mitigated by the expertise properly to be expected in a specialized court.

The remaining issue at the appellate level is the extent of Supreme Court review over the decisions of the Court of Tax Appeals. Everyone would agree there should be such review when the Court of Tax Appeals had decided a substantial constitutional issue; the only question is whether review should be by appeal or certiorari. While the Supreme Court could and would guard against frivolous appeals by requiring a preliminary showing of substantiality,[59] the certiorari device is preferable; in the rare case when there was particular need for a quick settlement by the Supreme Court, certiorari in advance of decision by the Court of Tax Appeals could be sought.[60]

The serious question is whether decisions of the Court of Tax Appeals not presenting constitutional issues should be reviewable by the Supreme Court at all. In my judgment they should not. Allowing such review would not be objectionable from the standpoint of delay if denial of certiorari meant that the point was settled; but the Supreme Court has repeatedly adjured us that this is not at all the case,[61] nor should it be. Allowing Supreme Court review would thus mean that "no point decided by the Court of Tax Appeals would be finally settled and no decision of the Court of Tax Appeals could be relied on with complete safety."[62] The argument that it could be "confidently expected that the Supreme Court would undertake to reexamine very few" decisions of the Court of Tax Appeals, particularly because the possibility of conflict would have been eliminated,[63] is essentially self-defeating. If the Court reviews only one tax case not presenting a constitutional issue in five years, such review is not worth the price in terms of uncertainty.

Several other considerations support the conclusion of no Supreme Court review except for constitutional questions. The interpretation of tax statutes is typically the kind of issue where "it is more important that the applicable rule of law be settled than that it be settled right";[61] indeed, the Government's interest often is only that it not be whipsawed.[62] Furthermore, this is a field which is under constant surveillance by the Treasury and the experienced committees of Congress. A decision by the Court of Tax Appeals seriously damaging to the revenue or grossly unfair to taxpayers can be speedily corrected for the future; indeed, but for the usually unwarranted fear of prejudicing the result of litigation, clarifying legislation could often have been obtained before the decision was reached. Finally, there is no assurance that a Supreme Court decision in this area will be any sounder than that of a tribunal experienced in tax matters. Rather, it is a considerable understatement to say that "[t]he Supreme Court has not been unduly felicitous in some of its tax decisions."[63] This is no criticism of the Justices, who have more important things to do than saturate themselves in the intricacies of tax law.[64] The final consideration is relieving the Court from the need of considering petitions for certiorari in a field where, by hypothesis, it will grant exceedingly few. Here is a particularly good place to lessen the Court's certiorari load.

61. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).
62. *Cf.* the issue concerning the respective rights of lessor and lessee to percentage depletion presented in United States Steel Corp. v. United States, 445 F.2d 520, 522–28 (2d Cir. 1971), *cert. denied*, 405 U.S. 917 (1972).
63. Griswold, *supra*, 57 HARV. L. REV. at 1169. Others have gone much further, *e.g.*, Professor Lowndes' well-known statement, "It is time to rescue the Supreme Court from federal taxation; it is time to rescue federal taxation from the Supreme Court" and his supporting analysis. *Federal Taxation and the Supreme Court*, 1960 SUP. CT. REV. 222 *et seq.* (1960). Writing from the standpoint of a political scientist, Professor Martin Shapiro criticizes what he considers the retreat of the Warren Court from tax policy-making, saying that "its present hesitant attitude imparts a confusion and vagueness to the corpus of tax law that appear undesirable in terms of the Court's general institutional interest in the quality of the legal system." LAW AND POLITICS IN THE SUPREME COURT 172 (1964). Professor Lowndes' analysis indicates that greater activism would probably have made things worse.
64. A single ill-chosen phrase in a Supreme Court opinion, very likely not at all critical to the result, can give rise to thousands of tax controversies whose solution will take many years. Recognizing this danger, my mentor, Mr. Justice Brandeis, made it a cardinal principle to keep his tax opinions exceedingly short; although no innocent in tax law, he recognized this to be a field where he was not truly expert. Would that all his successors had shared this modesty!

With this much out of the way, we can approach the broad issue of the desirability of "administrative courts," a subject that has been discussed for nearly forty years.[17] The discussion has been frustrating, in considerable part because while the discussants have used the same words, they have not meant at all the same things. At least three separate threads can be discerned.

The proposal that has attracted most attention over the years found its most influential expression in the separate views of Members McFarland, Stason and Vanderbilt in the Report of the Attorney General's Committee on Administrative Procedure in 1941.[18] The proposal was to strip the agencies, or certain of them, of their "quasi-judicial" functions, or certain of them, and to vest these in separate tribunals, *e.g.*, a Trade Court, a Labor Court, a Transportation Court, a Securities Court, etc. The proposal was somewhat vague on whether the judgments of these "courts" would be subject to review in the ordinary judicial system or by a super-administrative court, presumably having Article III status, which the lower specialized courts would not. After slumbering for fourteen years, the proposal gained new life in 1955 from its endorsement by the Hoover Commission.[19]

* * *

Another and quite different thread in the "administrative court" proposals would be to scrap our system of review of administrative action by the ordinary courts and substitute an entirely separate set of tribunals modeled on the French system of administrative courts culminating in the Conseil d'Etat. Study has surely proved how seriously erroneous were the adverse views of French administrative law which, in an excess of parochialism, were entertained a half century ago. Many scholars now believe the French system affords the citizen greater protection against arbitrary governmental action

17. For some of the early proposals, see 59 A.B.A. REP. 148–53, 539–64 (1934) (Reports of Special Committee on Administrative Law); 61 A.B.A. REP. 218–27, 232–33, 720–67 (1936) (*id.*); Caldwell, *A Federal Administrative Court*, 84 U. PA. L. REV. 966 (1936).
18. Pp. 203–12 (1941).
19. COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, REPORT TO THE CONGRESS ON LEGAL SERVICES AND PROCEDURE 84–88 (1955); COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, TASK FORCE REPORT ON LEGAL SERVICES AND PROCEDURES 1–50 (1955). For discussions of the proposal see Jaffe, *Basic Issues: An Analysis*, 30 N.Y.U.L. REV. 1273, 1283–89 (1955); Nutting, *The Administrative Court*, *id.* at 1384; Schwartz, *Administrative Justice and its Place in the Legal Order*, *id.* at 1390, 1406–10.

than do those of this country or England.[34] The French courts will annul administrative action not only for "error of law" either in failing to recognize the terms of a statute or in giving it "an improper significance or meaning"; they will also review "mixed questions of law and fact."[35] Evidently they enjoy the full confidence of the public; indeed, my own impression is that they are more highly regarded than the general courts. Yet, at the same time, they seem to have avoided the hostility of the executive. Procedures that have had such success are surely entitled to respectful consideration.

A system based on the French model would have all the review and enforcement powers now possessed by the courts of appeals and three-judge and sometimes one-judge district courts, and a great deal more. It would take in the Tax Court, the Customs Court, the Court of Claims, the Court of Customs and Patent Appeals, and suits against the Government in the district courts under the Tucker Act, the Federal Tort Claims Act, the Suits in Admiralty Act, and the Public Vessels Act. Moreover, it would include actions for prohibitory or mandatory injunctions against federal officers, including the mandamus jurisdiction under 28 U.S.C. section 1361. Such a system might even encompass actions by the Government or its agencies to enforce regulatory statutes in the absence of an administrative proceeding, for example, civil antitrust suits by the Department of Justice, enforcement actions by the SEC, and suits for the collection of taxes or those under the Fair Labor Standards Act. Such a system would take over the whole gamut of controversies between the federal government and the citizen save those covered by the criminal law.

In theory I can see much merit in such a system. It would create a corps of judges truly experienced in administrative matters, yet with a jurisdiction so broad as to guard against any evils of overspecialization and a hierarchy of courts that should attract men of great talent. It would also provide uniformity in the application of procedural rules. I surely would not reject it on the ground stressed in Professor Bernard Schwartz' interesting book, *French Administrative Law and the Common-Law World*, namely, the danger that a litigant might find, after many months of struggle, that he had picked the wrong court system.[36] This problem could be satisfactorily met by combining the ALI's proposal for foreclosure of jurisdictional issues that are not early raised[37] with ready provision for transfer of cases found to have been brought in the wrong system; once the case was transferred, it should remain even if the jurisdictional holding were wrong. My negative view would rest rather on the ground that so radical a change from centuries of tradition could be justified only by proof that our system has not worked in the past or that it cannot be expected to work in the future. I do not believe either proposition can be established.

34. Professor Robson, before the English Committee on Ministers' Powers, proposed the creation of an administrative appeal court and the abolition of the jurisdiction of the High Court of Justice in administrative matters. *See* B. SCHWARTZ, FRENCH ADMINISTRATIVE LAW AND THE COMMON-LAW WORLD 20–21 (1954); R. ROBSON, JUSTICE AND ADMINISTRATIVE LAW 618 (3d ed. 1951).
35. B. SCHWARTZ, *supra* note 34, at 239–42.

The third thread in the administrative court proposals is different still. It would leave the agencies and the scope of review as they are. I will assume, for simplicity, it would also leave district court review of administrative actions and appeals from such review to the courts of appeals as they are, although it would doubtless be more logical to take all such review out of the general court system. But it would remove petitions to review administrative action from the courts of appeals and vest these[38] in a Court of Administrative Appeals.

> One argument for the creation of a Court of Administrative Appeals is to alleviate the burdens on the courts of appeals. . . .

Like the Court of Tax Appeals, the Court of Administrative Appeals would have to ride circuit—not only an inconvenience to the judges but a likely source of delay.[39] This is a factor often of great importance in this area; my experience is that there is no category of appeals which courts of appeals more frequently feel required to hear on an expedited basis.

A second advantage asserted for a Court of Administrative Appeals is that it will assure greater expertise both on procedural and on substantive questions. The argument as to the former is unimpressive. A judge who finds enormous difficulties in wending his way through the Internal Revenue Code need experience no such frustration with respect to the Administrative Procedure Act, many of whose provisions simply embody conceptions of elementary fairness that are the very warp and woof of procedural law. The possibility of acquiring greater expertise on substantive matters is considerably better. It is often urged that the variety of matters coming before such a court (atomic energy, electricity and gas, air, rail, motor and water transportation, communication by telephone, telegraph, radio and television, securities regulation,[44] unfair labor practices, and many others) would prevent the acquisition of real expertise in any particular area, such as the Court of Appeals for the District of Columbia Circuit has undoubtedly acquired over the years by virtue of its exclusive jurisdiction over appeals from the FCC's licensing decisions.[45] Granting force to this argument, I still think that *some* gain in substantive expertise would be both possible and highly beneficial. A judge who has gone through even one minimum rate case is better equipped for a second than when he was as a virgin; the third time he will be better still. A proper use of the panel system would allow for further development of expertise; and the court could have a modest size staff of technical experts in the principal areas subject to its jurisdiction. There would thus be a significant gain in expertise on the substantive side.

A third argument for a Court of Administrative Appeals is that it would avoid conflicting decisions and thus reduce the load, but also the role, of the Supreme Court in this area. Here again, we must distinguish between procedural and substantive questions. There would hardly be uniformity concerning the former if the courts of appeals retained jurisdiction over district court review of administrative action. On the substantive side there would be a noticeable increase in uniformity. No one can deny this would be an advantage in cases where decision turns on the sufficiency of the evidence, including the validity of inferences drawn from undisputed facts. It is a bad thing when one circuit acquires a reputation as "labor" oriented and another as "company" oriented, to the extent that this causes the kind of race we observed with respect to patents.[46] It is also a bad thing if a party to a transportation dispute can obtain a more favorable decision in its "home" court than in that of its adversary.[47] As against this, so long as the regulatory statutes are less than pellucid and the Supreme Court is to play a part in these matters, there may be value in the expression of different points of view on legal issues that are subject to fair differences of opinion. An example would be the dispute among the circuits over the use of union organization cards that was ultimately decided in *NLRB v. Gissel Packing Co.*[48] Another example would be the dispute, decided by *NLRB v. Exchange Parts Co.*,[49] whether a company which confers economic benefits shortly before a representation election with the purpose of influencing the vote has committed an unfair labor practice. And there are methods for at least reducing the invidious kind of forum shopping encouraged

45. 47 U.S.C. § 402(b). Compare the comment with reference to the District of Columbia Circuit by Caldwell, *The Proposed Federal Administrative Court*, *supra*, 36 A.B.A.J. at 82:

> Its members are familiar with the radio technical jargon and, in arguing a case before it, it is unnecessary to take most of your time explaining frequencies, channels, kilocycles, millivolts-per-meter and the many other words that must be understood before a court can pass on the claims made by the parties, and before it can even determine who the necessary parties are. It is able also, as it must be in radio, to see a particular case in its proper setting in regard to radio communications as a whole.

48. 395 U.S. 575 (1969). While the Fourth Circuit stood alone in its total rejection of such cards, *see* 395 U.S. at 590 & n.6, there was much variation in the degree to which the circuits would allow cards unambiguous on their face to be challenged on the basis of misrepresentation or coercion by union organizers. *See* 395 U.S. at 604–05.
49. 375 U.S. 405 (1964).

by the "first instituted" rule[50] without suppressing the differences of opinions on substantive matters among the circuits that may be useful in provoking a Supreme Court ruling. Unlike issues of the interpretation of the Internal Revenue Code, the interpretation of regulatory statutes cannot generally be described as falling into the category where "it is more important that the applicable rule of law be settled than that it be settled right . . . even where the error is a matter of serious concern, provided correction can be had by legislation."[51] In contrast to the Internal Revenue Code, such statutes are not kept under continuous legislative scrutiny. Major revisions come only rarely, and an interpretation by a Court of Administrative Appeals would be likely to stand for a long time unless it truly outraged Congress or the Supreme Court, which would necessarily regard its certiorari jurisdiction (if it were given any in other than constitutional cases) as something to be exercised quite restrictively.

This leads to the counterargument that such a court would be *too* expert. Here, as with patents and taxes, the real force of the objection is not that the judges would know too much about the Administrative Procedure Act, on the one hand, or the Interstate Commerce Act, the National Labor Relations Act, the Federal Communications Act, etc., on the other, qualities that in and of themselves are surely desirable, but that they would have too one-sided a point of view. Here is where the spectre of the Commerce Court[52] would truly become Banquo's ghost. One important difference is that we are envisioning a court not confined to one agency but encompassing a large number, so that there is less danger of its coming to believe itself more expert than the agencies under review. Although I would favor using panels of members who were expert in certain subjects, their decisions would be subject to review by the court en banc, and here, as in the case of the Court of Tax Appeals,[53] I would allow less than a majority to invoke an in banc court. The real fear, as in the case of the Court of Tax Appeals, is that the court would be overloaded with lame ducks and former agency members;[54] the answer is generally the same.[55]

50. 28 U.S.C. § 2112(a). *See* Comment, *A Proposal to End the Race to the Court House in Appeals from Federal Administrative Orders*, 68 COLUM. L. REV. 166 (1968). This proposal, to center such review in the Court of Appeals for the District of Columbia Circuit when there was no sufficient reason for having it elsewhere, might have particular appeal now that the role of that court as Supreme Court of the District has been partially eliminated, Act of July 29, 1970, 84 Stat. 473.
51. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) (footnote omitted). See the discussion at p. 167 *supra*.

The arguments for and against a Court of Administrative Appeals thus are in fair balance. What will ultimately be decisive are two things: One is whether the reforms advocated up to this point will permit the courts of appeals to carry their loads; if not, a Court of Administrative Appeals would give significant help. Another is whether the need for reducing the Supreme Court's load of certiorari petitions will require elimination of those in administrative appeals not involving constitutional issues. If this modification becomes necessary, there would be a good case for a Court of Administrative Appeals having final jurisdiction in such cases.[56] In order to insure uniformity, the new court would have to be given original or appellate jurisdiction over administrative review of cases now heard in the district courts, with attendant problems of volume.

My conclusion thus is that the proposal for a general Court of Administrative Appeals should neither be adopted immediately nor dismissed out of hand, but rather should be kept under consideration both by the Administrative Conference and by the Judicial Conference of the United States.

THE ADMINISTRATIVE COURT PROPOSAL OF THE PRESIDENT'S ADVISORY COUNCIL ON EXECUTIVE ORGANIZATION

N. L. Nathanson*

The proposal of the President's Advisory Council on Executive Organization (the Ash Committee) for the establishment of a new Administrative Court to review determinations of the proposed Transportation Regulatory Agency, Federal Power Agency and Securities & Exchange Agency is so intimately related to the proposed reorganization of those agencies that it cannot be fully considered apart from the proposed reorganization itself. Nevertheless, there are certain reasons given for the creation of the new court whose validity may be usefully analyzed apart from the proposed reorganization. These reasons deal with the burden now placed upon the federal courts by the review of determinations of the presently comparable agencies; the desirability of freeing the existing federal courts from the burden of such cases so as to enable them to concentrate upon "those priority areas in which only they can exercise ultimate decision-making responsibility", and the contributions which the Administrative Court could make to the regulatory process because of the expertise which it would develop in the areas of administrative law and administrative procedure. Report at pp. 53-55.

In elaborating the increasing burden carried by the regular federal courts, the Committee's Report notes that the total number of all appeals to the United States Courts of Appeals has more than doubled in the last nine years--rising from 4,204 in 1961 to 10,248 in 1969. The Report does not inquire with respect to the relative burdens imposed by the cases involving review of the regulatory agencies which would be subject to review in the proposed Administrative Court. The available statistics show, however, that the relative burden imposed by this type of cases is surprisingly small. Thus all types of administrative review cases commenced in the Courts of Appeals accounted for approximately 16% of the total number of cases commenced during the period 1965-69. But over 85% of this administrative review caseload was accounted for by agencies which would not be subject to the proposed Administrative Court, leaving only about 4% of the total caseload of the Courts of Appeals which might be subject to the proposed Administrative Court. Annual Report of the Director of the Administrative Office of the United States Courts (1969) Table B-3, p. 190. However, the total caseload of the Courts of Appeals has been increasingly phenomenally in the last few years while the administrative review cases have been relatively constant. Consequently, using the average figures for 1969-1970, rather than for 1965-1969, it appears that judicial review of the administrative agencies involved in the Ash Committee proposal

*Professor of Law, Northwestern University. This memorandum was prepared in 1971 for the Administrative Conference of the United States.

would constitute only about 2% of the total caseload of the Courts of Appeals, including in the figures three-judge district court cases reviewing ICC orders, which are also included in the Ash Committee proposal.

The other considerations mentioned by the Ash Committee in support of the Administrative Court proposal are less susceptible to objective analysis. It is suggested that members of the Court will develop an expertise in the subject-matter which will enable them to operate more efficiently and expeditiously and will also enable them to contribute to the development of uniform administrative substantive law and uniform administrative procedures. The desirability of expertise in a reviewing court is not entirely beyond question, as will be developed more fully later. The conventional standards for reviewability which the court would presumably apply--the rationality and substantial evidence tests--usually require intelligence and judgment rather than expertise. The Ash Committee itself seems somewhat suspicious of the advantages of specialization in reviewing judges, when it advises against specialized panels of the Administrative Court. Yet specialization which embraces transportation, electric power and natural gas, and securities-exchange regulation seems hardly worthy to be regarded as subject-matter specialization at all. Finally, the notion that the Administrative Court would be in a position to foster both the development of a uniform administrative substantive law and greater uniformity in administrative procedure seems to defy analysis. No hint is given as to what the Committee regards as substantive administrative law. Perhaps it has in mind the meaning of such terms as "reasonable rates", or "public convenience and necessity". If so, one wonders what the Administrative Court could usefully add to the various Supreme Court interpretations of such terms. As for the development of uniform procedures, the suggestion seems to ignore both legislative requirements such as the Administrative Procedure Act and constitutional requirements under the due process clause. It is not apparent how an Administrative Court could press the agencies toward greater uniformity in procedures than is presently required through the application of such general standards by reviewing courts, even assuming that such an objective is a desirable one. If it is, it would seem peculiarly within the competence of the top administrators to impose, or if necessary, within the competence of Congress by further elaboration of the Administrative Procedure Act.

The foregoing considerations suggest that the proposal for an Administrative Court must have envisaged some radical change in the relationship between the regulatory agencies and the federal courts eventuating from other aspects of the Committee's recommendations, including perhaps a substantial increase in either the volume of litigation, or the scope of judicial review, or both. An increased scope of review is rather vaguely suggested in the very term Administrative Court. It is also suggested by the emphasis upon the relative expertise of the judges developed by constant contact with the regulatory process. This emphasis upon expertise is qualified, however, by the insistence that the court should not specialize with respect to the particular branches of regulation. Neither is it explicitly suggested that the scope of review would be different

than presently, either with respect to questions of fact or questions of policy. Silence on this subject stands out in contrast to the expressed assumption that the Administrative Court would contribute toward uniformity in procedures and in substantive administrative law. Consequently, in terms of the scope of review, both the contribution and the responsibility of the proposed Administrative Court must for present purposes be assumed to be practically the same as that now exercised by the regular federal courts.

This leaves for analysis the possibility that the caseload of the proposed Administrative Court will be substantially higher than the comparable caseload of the federal courts under the present system. The entire thrust of the proposed changes in intra-agency review seems calculated to transform this possibility into a likelihood. The emphasis of the report is that top agency review of hearing officer decisions should be kept to a minimum, and would be designed simply to ensure that particular decisions are consistent with general policies. This is further implemented by the proposal for a thirty-day limit on the period in which the Administrator may act. The practicability of such a time limit, even for the preliminary determination of consistency with agency policy, leaving aside the possibility that policy may require re-evaluation, is not relevant for our purposes, except to suggest the possibility that the particular time limit is not likely to survive the realities of implementation. However that may be, the likelihood remains that any substantial cutting off of review within the agency of decisions by hearing officers will tend to increase the recourse to the courts. This tendency will be encouraged by the very appellation of "administrative Court." It will appear, at the outset, at least, as a substitute for review by the Administrator. Whether it will eventually earn the right to be so regarded will depend upon whether the scope of review which it actually exercises coincides with the expectations of litigants. This, in turn, will depend, at least, to some extent upon the statutory terms of reference which control the Court and the interpretation which the Supreme Court gives to its mandate. Faced with all if these imponderables, a realistic assessment of the likelihood of the successful operation of such a court is practically impossible. It is, however, reasonably safe to say that a marked disparity between the obvious expectations of litigants and the possibilities of performance is not likely to contribute to the success or popularity of the Court. If the general framework of the Court suggests that the judicial review is being offered as a substitute for top agency review, but the statutory standards as interpreted by the Supreme Court confine the scope of review to present conventional standards, the prospects for success seem far from encouraging. If, on the other hand, the standards of review are expanded significantly beyond current standards the prospects for tension between the Administrative Court and the regulatory agencies are equally discouraging.

In evaluating this latter possibility some further consideration must be given to the details of the relationship between the regulatory agency and the reviewing court. In the conventional situation now prevailing, the reviewing court naturally assumes that the decision under review has the full approval of the agency head or heads, and is to be accorded the full respect which such approval implicates. This is true even when the

agency has declined to exercise its review powers, as now happens quite frequently with respect to the decisions of trial examiners in some agencies (e.g., CAB) or review boards in others (e.g., FCC). Such approval and respect is predicated upon a deliberate decision of the agency heads indicating approval of, or at least acceptance of, the decision below. It is hard to believe, however, that the artificial time limit of 30 days suggested by the President's committee would imply similar approval of respect. It is also hard to believe that a similarly hurried decision of approval or disapproval would exhaust the various issues which might later be developed in the review process itself. It is now the conventional law of judicial review that agency decisions may not be defended in the courts upon grounds not advanced or apparently considered by the Administrator in the process of decision. If this rule is to be applied to trial examiner decisions so summarily or hastily reviewed by the Administrator, the process of judicial review will itself suffer from artificially imposed blinders. If, on the other hand, the rule is relaxed so as to permit judicial exploration of issues not fully explored in the agency process, the Court will in effect be invited to substitute new grounds of decision for those avowedly considered by the agency at the time of decision. If the agency prevails on these new grounds, the private parties concerned are likely to feel that they have been short-changed by the Administrator or the Court or both. This dilemma appears to be implicit in a system apparently designed to shift the major responsibility for the ultimate decision of individual cases outside the agency to the courts.

The uncertainties which appear to shroud the actual working relationship that would exist between the regulatory agencies and the Administrative Court are probably related to the more fundamental ambiguities inherent in the term Administrative Court as used by the President's Committee. In part, at least, the proposed Administrative Court must be distinguished from the kind of Administrative Court envisaged in earlier proposals advanced by the American Bar Association and the Hoover Commission. The original ABA proposal for an Administrative Court in 1934 and 1936 was conceived primarily as a way of achieving a separation of judicial functions from prosecutory and legislative functions. See 59 A.B.A. Rep. 148-153, 539 et seq. (1934) and 61 A.B.A. Rep. 218-227, 231-233, 720 et seq. (1936); Caldwell, A Federal Administrative Court, 84 U.Pa.L.Rev. 966 (1936). Later proposals of the Hoover Commission and the Bar Association reflected fundamentally the same thinking, although the application of the idea was more closely confined. See 81 A.B.A. Rep. 378, 379 (1956); U.S. Commission on Organization of the Executive Branch of the Government, Legal Services and Procedure (1955) pp. 84-88. As eventually reflected in bills supported by the ABA, the separation would have been achieved only with respect to the Labor Board and the Federal Trade Commission. The Tax Court was also included in recognition of the fact that here was a body which already reflected the kind of separation of functions which proponents of the Administrative Court idea favored. S. 2541, 84th Cong., 1st Sess., S. 1273, 1274, 1275, 86th Cong., 1st Sess. The Ash Committee proposals, on the other hand, pay no explicit obeisance to the separation of functions principle. The single Administrator would continue to embody full responsibility for the

(1911), reversed, Interstate Commerce Commission v. Southern Pacific Co., 234 U.S. 315 (1914); Louisville and Nashville R.R. Co. v. Interstate Commerce Commission, 195 Fed. 541 (1912), reversed, 227 U.S. 88 (1913), Goodrich Transit Co. v. Interstate Commerce Commission, 190 Fed. 943 (1911), reversed, 224 U.S. 194 (1912). In some of these cases the Supreme Court's reversal turned on questions of statutory interpretation; in others upon the Commerce Court's substitution of its own judgment for that of the Commission's regarding factual questions. Some authors have assumed that these reversals by the Supreme Court eroded both public and congressional confidence in the Court. Minor, The Administrative Court: Variations on a Theme, 19 Ohio St. L. J. 380, 390 (1956). Irrespective of the validity of the charges against the Court, the widespread belief in the charges was sufficient to secure its undoing. This attitude is reflected in Senator Lewis' speech in the Congress on October 3, 1913: ". . . Whenever the citizens of a free country lose their confidence in any established court, to maintain that court as an institution is a useless proceeding, because once that confidence is gone, all respect for its adjudications is ended and the court loses its usefulness either to itself as a court or as an agency of welfare to the community which it assumes to serve. Since this seems to be the view concerning the Commerce Court located at Washington, I affirm the opinion of the people, as expressed by them in different branches and through different avenues, that the court should go." 50 Cong. Rec. 5413.

Congress moved to abolish the Commerce Court (but not the judges) in 1912. But President Taft refused to allow his special project to die without a last ditch fight and he vetoed the bill on August 15, 1912. 48 Cong. Rec. 11025, 11026, 11027. The Court was thus given a temporary reprieve pending the outcome of the presidential election of 1912. With the defeat of Taft, the Court's fate was sealed and it was legislated out of existence on October 22, 1913. 38 Stat. 208, 219. The four remaining judges were retained as circuit judges; one of the original five had lost his position through impeachment. The Court ultimately closed its doors on December 31, 1913.

While it was in existence, 94 cases were docketed in the Commerce Court. Forty-three decisions were rendered including one rehearing. Twenty-two cases were appealed to the Supreme Court. Of these, 13 were reversed, 2 modified, and 7 affirmed. Frankfurter at 606; Frankfurter and Landis at 165.

Yet the record of the Commerce Court, as compared with the previous record of the lower federal courts, was not as great a disaster as certain of its critics would have us believe. From 1887 until 1910, 58 orders of the Interstate Commerce Commission came before the circuit courts for review. Twenty-five of the 58 cases ended in the lower courts. Of these the Commission's order was sustained in 6 and reversed in 19 cases. In the other 33 cases which were appealed to the Supreme Court, the lower court decided 12 of them in favor of the Commission and 21 against it. The Supreme Court decided 9 in favor of the Commission and 24 against it. In the lower courts the decisions against the Interstate Commerce Commission prior to 1910 were 39 out of 58, or 67%. Of those decided by the

legislative, prosecutory, and judicial functions of his agency. He would, however, be encouraged to shift as much of the judicial function as possible either down to the Trial Examiner or over to the Administrative Court. Conceivably, if the proposal worked out in practice as its progenitors seem to anticipate, it could result in de facto separation of most judicial functions outside the hands of the Administrator. Nevertheless, he would remain titularly responsible for such functions and in extremely important cases he would actually exercise them. Presumably he would exercise rule making powers as well. The Administrative Court would, theoretically at least, be reviewing the exercise of the Administrator's quasi-judicial and quasi-legislative functions. Consequently, the Administrative Court here proposed cannot easily be assimilated to the administrative courts envisaged by the Hoover Commission and the ABA.

Apart from the name Administrative Court and the suggested 15 year-term of the judges, the proposed Administrative Court may more appropriately be considered as comparable to other specialized appellate federal courts such as the United States Commerce Court, the United States Court of Customs & Patent Appeals and the United States Emergency Court of Appeals. Probably the most famous, or infamous, of these was the United States Commerce Court. President William Howard Taft in a special message to Congress, on January 7, 1910, urged the creation of such a court to review decisions by the Interstate Commerce Commission. President Taft suggested that "[r]easons precisely analogous to those which induced the Congress to create the Court of Customs Appeals" supported the establishment of the Commerce Court. 45 Cong. Rec. 378, 379. More specifically, the President noted that the "questions presented . . . are too often technical in their character and require a knowledge of the business and the mastery of a great volume of conflicting evidence which is tedious to examine and troublesome to comprehend. . . . What is, however, of supreme importance is that the decision of such questions shall be as speedy as the nature of the circumstances will admit, and that a uniformity of decision be secured so as to bring about an effective, systematic, and scientific enforcement of the commerce law, rather than conflicting decisions and uncertainty of final result." Id. at 379. The President's recommendation was incorporated in bills dealing with the Administration's program of railway regulation introduced by Senator Elkins (45 Cong. Rec. 2379, S. 6737, 61st Cong., 2d Sess.), and by Representative Townsend of Michigan. Id. at 497, H.R. 17536, 61st Cong., 2d Sess. When the Mann-Elkins Act became law on June 18, 1910, the Commerce Court was officially established. 36 Stat. 539.

The Commerce Court quickly became embroiled in numerous difficulties. Its opponents charged that the Court favored the carriers and frustrated the work of the Interstate Commerce Commission. (Frankfurter, A Study in the Federal Judicial System, 39 Harv. L. Rev. 587, 607-609 (1926); Frankfurter and Landis, The Business of the Supreme Court (1928) pp. 166-168. To some extent these charges were given credence by decisions of the Supreme Court reversing decisions of the Commerce Court, although not all such reversals were in favor of the shippers. E.g., Proctor and Gamble Co. v. United States, 188 Fed. 221 (1911), reversed, 225 U.S. 282 (1912); Intermountain Rate Case, 191 Fed. 856 (1911), reversed, 234 U.S. 476 (1914); Atchison & S.F. Ry v. I.C.C., 188 Fed. 229 (1911), reversed, Los Angeles, Switching Case, 234 U.S. 294 (1914); Southern Pac. v. I.C.C., 188 Fed. 241

Supreme Court, 24 out of 33, or 73% went against the Commission. Thus out of 58 decisions taken to the federal courts, 43 or 74% were decided against the Commission. 48 Cong. Rec. 10945, 10946.

At the time that congressional reaction to the Commerce Court reached a high point (July-August, 1912), 24 decisions had been decided by the Commerce Court. Of these 24, 2 were concerned only with the jurisdiction of the Court. In the other 22, the Commission's order was sustained in 12, reversed in 9, and partially reversed and sustained in the remaining one. In 3 of the 9 reversals the Commission had decided in favor of the railroads and it was the shipper who had enlisted the aid of the Court. Two more of the 9 reversals were cases in which the Commerce Court merely continued decrees previously issued by the circuit courts. Thus out of 22 final decisions, there were only 4 where the Commerce Court reversed an order of the Commission in favor of a shipper. Ibid.

Attorney-General Wickersham speaking before the House Committee on Interstate Commerce stated that for the period from 1906 to May 1912 the Commission had been reversed in 56% of the cases before the circuit courts, 45% of the cases before the Supreme Court, and only 41% before the Commerce Court. 48 Cong. Rec. 6152.

Certainly these figures do not give credence to the argument that the Commerce Court was biased in favor of the railroads and was undermining the role of the Interstate Commerce Commission. (It must be remembered though that these figures disregard the relative importance of the cases; each is weighted equally.)

There is also some indication that the Commerce Court had cut down the total time taken for the adjudication of cases. For the first year and a half the Commerce Court took an average of less than a year from the filing of the suit to final decision in the Supreme Court as compared to a previous average of two years and one month. Id. at 10945, 10946.

This period in the United States history was the "trust busting" era of Theodore Roosevelt and William Howard Taft. The railroads were regarded both as monopolists themselves and as tools of other monopolists. The entire process of curtailing the abusive power of the railroads vis-a-vis the individual shippers was a slow, cumbersome, and rarely successful process. The Interstate Commerce Commission was reversed in all but 2 of its first 23 cases in which it sought the aid of the courts to achieve its orders. 48 Cong. Rec. 10946. From the passage of the Hepburn Act of 1906 to the establishment of the Commerce Court only 57 suits had been instituted in the circuit courts, of which only 24 had been determined. (The remaining 33 were transferred to the Commerce Court.) Id. at 6144, 6145.

Thus taking all these factors into consideration--the economic and political climate, the short span of its existence, the heavy load the Commerce Court undertook ("Probably no court has ever been called upon to adjudicate so large a volume of litigation of as far-reaching import in so brief a time." Frankfurter at 605; Frankfurter and Landis at 164)

and the highly controversial nature of the substantive issue to be decided--the experience of the Commerce Court hardly provides a conclusive test of the desirability of specialized courts, although it does provide warning signals.

The Court of Customs and Patent Appeals, another institution comparable to the proposed Administrative Court, both in its specialized administrative jurisdiction and its appellate character originated first in the creation of the Court of Customs Appeals in 1909. 36 Stat. 11, 105. The reasons for the establishment of this court are not hard to discover. According to Frankfurter, the second circuit, which absorbed 85% of the customs litigation in the early 1900's, was swamped with appeals from the Board of General Appraisers. At first the situation was particularly intolerable because the cases were being tried de novo in court rather on the record before the Board. Some relief was provided in 1908 by legislation restricting review to the record before the Board. Subsequent investigation by a subcommittee of the Senate Finance Committee disclosed "great losses of revenue through the existing system of customs administration which permitted of extensive frauds, fatal delays, costly conflicts in the decisions of circuit courts of appeals." The courts too "suffered through a volume of business whose nature was outside of their usual province of experience, and which they did not effectively discharge." Frankfurter at 592; Frankfurter and Landis at 151. Nevertheless, there were some senators, including particularly Senators Borah, Cummins and Dolliver, who were not convinced. They feared the "vices of specialization--narrowness and partiality." Ibid; 44 Cong. Rec. 4185-4200. Despite their opposition, Senator Aldrich secured the adoption of the proposal for a special court as an amendment to the Payne-Aldrich Tariff Act of 1909. 36 Stat. 11, 105.

The provision for a special patent court was much longer and harder in coming, despite the vigorous support of the patent bar. Bills for this purpose began to appear in 1787. The first reform in 1891, succeeded only in easing the burdens of the Supreme Court by relieving it of its obligatory jurisdiction in patent matters. But this in turn created new difficulties for the patent bar, as unresolved conflicts developed between different circuits involving even the same patent. "Thus, to the earlier justifications for the proposal of a patent court, namely a desire for specialized judges and speed of disposition, was added the need for uniformity in decision and enforcement." Frankfurter at 619; Frankfurter and Landis at 178. Even so the movement for a special patent court when Frankfurter was writing in 1925 seemed doomed to failure. The apparent failure of the Commerce Court had discouraged some from further experimentation with specialized courts. Increasing liberality by the Supreme Court in granting certiorari to resolve conflicts and increasing skill in the Circuit Courts of Appeals in handling patent litigation seemed to dull the need for a separate court. Nonetheless, the movement for a separate patent court finally triumphed in part with the creation in 1929 of the Court of Customs and Patent Appeals. 45 Stat. 1475. The change effected by the 1929 statute was considerably more modest than the original proposal for a specialized court to handle all patent litigation. It simply transferred to the Court of Customs and Patent Appeals the jurisdiction of the Court of Appeals of the District of Columbia with respect to appeals from the

Commissioner of Patents in patent and trademark cases. The principal reason for this change was that the Court of Appeals was greatly overburdened with cases while the Court of Customs and Patent Appeals did not have enough work to keep its five judges fully occupied. 69 Cong. Rec. 5015, 70 Cong. Rec. 4388; Fenning, Court of Customs and Patent Office Appeals, 17 A.B.A.J. 323 (1931). Consequently, the judges of both courts welcomed the change, although there was little reason to believe that one court would be more expert than the other. Since the expansion of its jurisdiction, the Court of Customs and Patent Appeals has of course developed an expertise in patents and trademarks as well as customs. It is, however, an expertise which must be shared in practice with other federal judges who handle patent and trademark infringement suits. See Rifkind, A Special Court for Patent Litigation? The Danger of a Specialized Judiciary, 37 A.B.A.J. 425 (1951).

Our last example of a specialized court somewhat comparable to the proposed Administrative Court, the Emergency Court of Appeals, was established by the Emergency Price Control Act of 1942 with authority to exercise exclusive jurisdiction, subject to review in the United States Supreme Court, with respect to the validity of price and rent regulations and orders. 56 Stat. 23, 31. It was unique in the respect that the judges were regular federal circuit or district judges designated by the Chief Justice of the United States to sit on that court. Like the proposed Administrative Court, the Emergency Court was authorized to sit in panels anywhere in the United States. During the 20 years of its existence the court traveled extensively, sitting at places convenient to counsel for the complainants. The scope of its review was clearly delineated; its principal function was to determine whether administrative decisions were arbitrary and capricious or otherwise not in accordance with law. The cases were reviewed on the record made before the Administrator, with provision for the taking of additional evidence, either before the Administrator or the Court, when appropriate grounds existed. In these respects the review was very similar to review of ICC orders by three-judge district courts. The Court was granted similar functions with respect to review of administrative decisions under the Housing and Rent Act of 1948, 62 Stat. 93, 97, the Housing and Rent Act of 1949, 63 Stat. 18, 23, and the Defense Production Act of 1950, 64 Stat. 799, 809. Its total docket consisted of 676 cases of which approximately 400 were heard orally.* During the period of its heaviest dockets, the war years 1943-1945 the judges of the Court divorced themselves from practically all other business.

The principal reasons for the creation of a special court for price and rent control involved considerations both of uniformity and expedition. It was important that price and rent regulations should be enforced uniformly throughout the country. It was also important that judicial review should be as expeditious as possible because the Emergency Price Control Act explicitly provided that price and rent regulations should not be enjoined or suspended while litigation was pending. Consequently, it was only

*Annual Report of the Director of the Administrative Office of the United States Courts (1965) Table G-4, p. 250.

successful conclusion of judicial review proceedings that brought relief to the litigant. When the objective of the litigation was primarily the change in an applicable price, expedition was especially important. Where there were other objectives, such as an increase in subsidy payments or immunity from pending enforcement proceedings, time was not so much at a premium. On the whole, the demand for expedition was admirably satisfied. The average time elapsed between final submission and disposition of cases was two months. Proceedings of Final Session of the Court, 299 F.2d 1-21 (Emer. Ct. App. 1961).

Examination of a few of the most involved and important pieces of litigation before the Emergency Court will indicate that, even in a situation with such demanding pressures for speedy adjudication, there were no easy shortcuts to complicated problems. Meat price control, for example, presented both the Price Administrator and the Emergency Court with some of their thorniest problems. Complaints challenging the validity of the basic meat price regulations were filed in November 1943. The progress of the cases was temporarily suspended in the Emergency Court by the issuance of orders in January, 1943 granting applications by the complainants for leave to file additional evidence, and directing such evidence to be presented to the Administrator. The cases were then first argued before the Court in September and October 1944, and were first decided by the Court in March 1945. Armour v. Bowles, 148 F.2d 529; Heinz v. Bowles, 149 F.2d 277. The Heinz case was reopened, however, on April 2, 1945 and was not finally disposed of until July 31, 1945. Heinz v. Bowles, 150 F.2d 546. Petitions for certiorari were denied by the Supreme Court on June 4, 1945, 325 U.S. 871, and October 8, 1945, 326 U.S. 719. Similarly, in the most complicated of the rent control proceedings involving the New York City defense rental area, 315 West 97th Street Realty Co. v. Bowles, 156 F.2d 982 (1945), the complaint was filed in the Emergency Court on September 29, 1944, the first argument was held on February 8, 1945, and the first decision was handed down on June 25, 1945. However, the case was not finally disposed of until an opinion on rehearing was filed by the Emergency Court on August 23, 1946, and a petition for certiorari was denied by the Supreme Court on January 6, 1947, 329 U.S. 801. Cases such as these might well be examined by those fond of suggesting that there must be a much simpler and more expeditious method of handling complex problems of economic regulation, such as the pricing of natural gas by the Federal Power Commission and the courts, or the disposition of railroad mergers by the Interstate Commerce Commission and the courts. Besides the impetus for speedy action involved in the Emergency Price Control Act itself, price control had the advantages of a single-headed Administrator and a special court of outstanding judges carefully handpicked by the Chief Justice of the United States. Yet, the hardest problems did not lend themselves to noticeably quick solutions. See too, Nathanson, The Emergency Court of Appeals, in Problems in Price Control Legal Phases (G.P.O. 1947); Hyman and Nathanson, Judicial Review of Price Control: The Battle of the Meat Regulations, 42 Ill. L. Rev. 584 (1947).

Nevertheless, the record of the Emergency Court of Appeals was an impressive one, both in terms of the substance of its decisions and the expeditiousness of its procedures and deliberations. Although it sustained the Administrator in a large majority of the case, this was by no means universally true. The complainants were partially successful in the cases already mentioned, and wholly so in others. It also exercised a healthy effect upon the Administrator in occasionally requiring him to expedite his own decisions. It decided many questions of statutory interpretation of importance to the price and rent control program, but not all of its decisions on such questions were sustained by the Supreme Court. E.g., Davies Warehouse Co. v. Bowles, 321 U.S. 144 (1944); Utah Junk Co. v. Porter, 328 U.S. 39 (1946); Parker v. Fleming, 329 U.S. 531 (1947). Obviously not even a highly competent and specialized court is proof against ultimate error, as that final test is conceived and applied by the United States Supreme Court.

The lessons to be drawn from these three experiments with specialized federal courts are not obviously conclusive so far as further experimentation with specialized courts in the federal judicial system is concerned. The Emergency Court of Appeals was a specialized court only in a very qualified sense; it consisted of regular federal judges with broad experience in the general jurisdiction of federal courts, who devoted themselves entirely to a particular subject-matter for a relatively brief period. The Commerce Court experience tells us that a specialized court may easily lose public confidence if it must face highly controversial issues of great public importance. The Court of Customs and Patent Appeals, on the other hand, operates in the relatively protected waters of extremely technical litigation where no one case or even group of cases is likely to become of great public moment.

It may also be of some significance to notice that neither the Emergency Court of Appeals nor the Court of Customs and Patent Appeals dealt with a particular industry or group of industries. Their jurisdiction, unlike that of the Commerce Court, though specialized in terms of legal subject-matter, was generalized so far as its impact on society was concerned. Consequently, suspicion of bias in favor of or against particular groups in society was less likely to be generated with respect to particular judges or the courts as a whole. The opposite is likely to be true of any body, judicial or quasi-judicial, which deals with particular industries. The charge that regulatory commissions over the years tend to be dominated by the industries which they regulate, whether justified or not, is too common to be ignored entirely in establishing new institutions. The concern that a commission which regulates competing industries, such as the different modes of transportation, should not unduly reflect the attitudes or interests of any one of the competitors must always be present in the staffing of such agencies. It would obviously be unfortunate if such concerns had to be carried over to the creation of purely judicial bodies such as reviewing courts. Yet it is difficult to see how this could be avoided if a special court were set up to exercise jurisdiction with respect to the transportation industry, the power industry, or the securities markets or all three of them. The dangers which Professor Frankfurter epitomized as those of "narrowness and partiality" may, of course, be diminished by the comparative breadth of the jurisdiction, but they will not entirely be avoided by including a few more industries.

The supposed advantages of additional expertise in terms of the specialization of the proposed Administrative Court is also extremely dubious. The most important function performed by the federal courts in reviewing the decisions of administrative agencies has generally been in determining legal questions. For the most part these fall into two categories--the interpretation of substantive statutory provisions and the determination of procedural questions. Both these categories may also involve constitutional problems. With respect to such questions it is doubtful that the expertise derived from continuous work with a particular statute or group of statutes is of great significance to the work of a reviewing court. The agency's point of view, based on its intimate association with the statute, is presumably communicated to the court with appropriate emphasis. The art of statutory interpretation depends on skills which, so far as experience demonstrates, are not significantly enhanced by concentration upon a single statute. Most of the Supreme Court's reversals of the Commerce Court decisions turned on disagreements over statutory interpretation, as did all of its reversals of the Emergency Court of Appeals. A recent study of the review of the Tariff Commission by the Court of Customs and Patent Appeals suggests that the Court has had relatively little success in working out a consistent and satisfactory pattern of interpretation for the statutory framework governing both the Tariff Commission and the Court, and their relations with one another. See Metzger and Musrey, Judicial Review of Tariff Commission Actions and Proceedings, 56 Cornell L. Rev. 285 (1971). Of course, this does not prove that the regular federal courts would have done better in the handling of such problems. The federal courts, especially the Courts of Appeals, are, however, probably as expert as any courts we can hope to establish, apart from the Supreme Court, both in the interpretation of federal statutes and in the review of administrative determinations according to presently accepted standards of judicial review.

The working out of an appropriate balance between the substitution of judicial judgment for administrative judgment, on the one hand, and the rubber stamping of administrative determinations, on the other hand, has not been an easy one for the federal courts, as the history of the substantial evidence rule demonstrates. See Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951); NLRB v. Walton Mfg. Co., 369 U.S. 404 (1962). Nevertheless, there has been an accumulation of experience which may not be so easily transferred to an entirely new institution--particularly one which is supposed to justify its existence by its presumed expertise in the subject-matter of regulation. Similarly, with respect to the problems of administrative procedure, the federal courts have over the years been developing an expertise which is not bounded by the subject-matter realms of particular agencies--even though the procedures of particular agencies may vary significantly depending either on their subject-matter or their own deliberate choices. For example, the decisions on standing which have upset the conventional procedures of many agencies have been evolved by the federal courts in the exercise of their general reviewing power. See, Scenic Hudson Preservation Conf. v. F.P.C., 354 F.2d 608 (1965); Office of Communication of the United Church of Christ v. F.C.C., 359 F.2d 994 (1966). The same was true of the earlier decisions on ex parte communications which generated sweeping reforms in administrative procedures.

E.g., Sangamon Valley Television Corp. v. U.S., 269 F.2d 221 (1959). A widespread contact with a great variety of administrative agencies is probably more conducive to such a healthy influence by the judiciary than limited contact with a few agencies which may tend to operate in the same way.

These considerations may suggest the possible alternative that judicial review of all the federal regulatory agencies should be concentrated in a separate division of the federal courts of appeals whose judges would be entirely relieved of both the federal criminal jurisdiction and private litigation. Whether such a fundamental change in the federal judiciary is desirable is doubtless fairly debatable, but it is hardly helpful in resolving the particular questions presented by the Ash Committee recommendations. A dilution of the regular federal courts' administrative review jurisdiction has its own drawbacks which might not be associated with a wholesale withdrawal of such jurisdiction. As presently constituted, the regular federal courts have a prestige and attractiveness so far as professional talent is concerned which cannot be equaled by any other judicial assignments. It is apparent that the Administrative Court envisaged by the Ash Report could not rival the existing federal courts, particularly the Courts of Appeals, in such attractiveness. This would be true not only because of the more limited tenure of the judges, but also because of their more limited jurisdiction. Neither can it be assumed that the establishment of a court of such limited jurisdiction would provide a fair trial run for a general administrative review court of broader jurisdiction. The very nature of the limitation would so drastically affect the character of the court that it could not be regarded as a fair test of a general administrative review court. The latter type of court, besides making a substantial dent in the total caseload of the Courts of Appeals, would also be in a much better position to make such contributions as a court might usefully make to the development of both uniformity and innovation in substantive and procedural administrative law. The judges of such a court would presumably be Article III judges who could occasionally substitute for other Article III judges, when the distribution of the caseload warranted. It is also conceivable that a new administrative review section of the federal courts might be partially staffed from sitting federal judges so that its birth pangs would be less terrifying. Appointment to such a court--clearly delineated as an Article III court--might, for example, be attractive to sitting district judges, which would clearly not be true with respect to the court suggested by the Ash Committee. Finally, the periodic transfer of judges between the two systems might achieve some of the benefits of both specialized and generalized jurisdiction--namely growing familiarity with a particular subject-matter accompanied by the broader perspective of a wider experience. Of course this suggestion might be carried further to include several subject-matter divisions within the Courts of Appeals. See, Carrington, Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law, 82 Harv. L. Rev. 542, 587-596 (1969).

The Ash Committee proposal must also be viewed in relationship to the present and proposed jurisdiction of the Supreme Court itself. The phenomenal growth in the Supreme Court's own total caseload in recent years has been reflected primarily in the increasing proportion of denials of certiorari. (The statistics show 2586 denials and dismissals in October Term 1968 as compared with 1388 in October Term 1959, Ann. Rep. of Dir. of Admin. Office of U. S. Courts (1969) at 180-181.) Those denials in turn reflect, in part, the confidence which the Supreme Court must repose in the Courts of Appeals as courts of almost last resort. Whether this system itself is now growing out of hand, as some believe, and must eventually require some further major surgery, is again a larger question which does not help to resolve the particular issue before us. See Hart, Foreword: The Time Chart of the Justices, 73 Harv. L. Rev. 84 (1959); Wiener, Federal Regional Courts: A Solution for the Certiorari Dilemma, 49 A.B.A.J. 1169 (1963). The immediate point is that the establishment of a new and less prestigious tribunal, of more limited jurisdiction, from which direct review lies to the United States Supreme Court, is not likely to contribute to a healthy relationship between the Supreme Court and the lower federal courts. This is illustrated further by Chief Justice Stone's support, as early as 1942, of proposed legislation which would have transferred the three-judge district court review of Interstate Commerce Commission orders to the Courts of Appeals.* Although this would have involved another element--the transfer of such cases from the obligatory to discretionary jurisdiction of the Supreme Court--it also demonstrates the confidence which the Supreme Court would prefer to place in the Courts of Appeals. An appropriate concern for the preservation and improvement of this special relationship between the Courts of Appeals and the Supreme Court, especially in matters of federal law, must therefore raise additional doubts with respect to the wisdom of any proposal for the establishment of a non-Article III court of limited jurisdiction directly below the Supreme Court in the hierarchy of the federal judiciary.

Finally, any proposal for reorganization of the federal courts designed in part to reduce the caseload now pressing upon the existing Courts of Appeals must be weighed against other proposals designed to accomplish somewhat the same objective by curtailing the basic jurisdiction of the federal courts. Probably the most notable among these is the proposal of the American Law Institute for the revision of diversity jurisdiction so as to eliminate cases brought by plaintiffs who are citizens of the state in which the suit is brought, or who have had for more than two years a principal place of business or employment in that state. American Law Institute: Study of the Division of Jurisdiction Between State and Federal Courts, §§ 1301-1307 (1969). The commentary accompanying the ALI proposal estimates that the effect of the proposed revision upon the actual incidence of diversity cases in the federal

---

*Hearings before Subcommittees No. 3 and No. 4 of the Committee on the Judiciary, House of Representatives, on H.R. 1468, H.R. 1476, H.R. 2271, 80th Cong. and Hearings before Subcommittee No. 2 on H.R. 2915 and H.R. 2916, 81st Cong. (1949).

district courts would be to reduce the caseload by approximately 50%; as applied to the 1968 total of 21,009 this would constitute an approximate reduction of slightly more than 10,000 cases. Id. Appendix B, pp. 465-473. Just how this would be reflected in the Courts of Appeals adds another dimension of speculation, but it is presumably reasonable to anticipate a proportionate reduction in diversity cases in the Courts of Appeals. The Annual Report of the Director of the Administrative Office of the United States Courts shows 1233 diversity cases filed in the Courts of Appeals in 1970. Table B-7--first page. A reduction of 50% would amount to approximately 600 cases. This would compare with a total of 1522 for all administrative appeals (Table B-1), or 175 for appeals from the particular agencies with which the Ash Committee is concerned, including the ICC cases. Id. Table B-3--first page, plus figures supplied by ICC. Thus the reduction in caseload achieved by the ALI proposal would be three times the reduction achieved by the Ash Committee proposal and something over one-third of the reduction which would be achieved by a general administrative review court. Of course, the ALI proposal, or any similar reduction in, or elimination of, the diversity jurisdiction involves a host of difficult and controversial questions far beyond the scope of our present consideration, as indicated by the variety of comment which the ALI proposals have generated. See for example, Wright, Restructuring Federal Jurisdiction: The American Law Institute Proposals, 26 Washington and Lee Law Review 185 (1969); McGowan, The Organization of Judicial Power in the United States (1967) pp. 84-93; Currie, The Federal Courts and the American Law Institute, 36 U. of Chi. L. Rev. 4-49 (1968); and many other articles cited in Wright, Law of Federal Courts (1970) pp. 73-80. Some of the critics think that the ALI proposal goes too far in reducing diversity jurisdiction; others that it does not go far enough. Nor is diversity jurisdiction the only aspect of the present distribution of judicial power between state and federal courts which has been questioned. There are some who believe that a larger measure of the enforcement of federal law--particularly the punishment of petty crimes--might well be entrusted to the state courts. See for example, Smith, A Federal District Judge Looks at His Jurisdiction, 51 A.B.A.J. 1053 (1965); Anderson, The Line Between Federal and State Court Jurisdiction, 63 Mich. L. Rev. 1203 (1965); Anderson, The Problems of the Federal Courts--and How the State Courts Might Help, 54 A.B.A. J. 352 (1968). These particular suggestions do not, by any means, exhaust the possibilities of thorough reorganization of the federal courts to enable them to cope with a burgeoning caseload. See especially Carrington, Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law, 82 Harv. L. Rev. 542 (1969). They only illustrate the various alternatives which must be painstakingly weighed and the priorities which must be established before a considered judgment can be made with respect to the wisdom of even moving in the direction which is suggested by the proposed establishment of a separate administrative review court in the federal judicial system.

A National Court of Appeals

By PAUL A. FREUND*

THE mission of the Supreme Court is as unique as it is essential: in the decision of actual controversies, to advance, clarify and rationalize the law for an entire nation, and to do so through opinions that are as invulnerable and persuasive as they can be made by research, reflection, collaboration, mutual criticism and accommodation. Does the caseload of the Court present a problem for the effective performance of that function? If so, what measures of relief would be most appropriate? Those are our two questions, and I shall address myself briefly to both of them.

In 1959, Justice Harlan, after four years on the Supreme Court, expressed his concern over the Court's capacity to discharge its responsibilities under the mounting caseload of petitions for certiorari:

> At the time the Act of 1925 was passed the rapid growth of the Court's *certiorari* business could hardly have been foreseen. During the past eight Terms the number of petitions dealt with by the Court has grown from about 1,000 to approximately 1,500. Increasingly, the time required to handle the *certiorari* work and that needed for adjudication of cases, and more particularly for the writing of opinions, are coming into competition. This is something that gives food for thought. On the one hand, the willingness of Congress to relinquish to the Court what in practical effect amounts to control of its appellate docket naturally presupposed that the Court would exercise this responsibility with a proper degree of deliberation. . . . On the other hand, *certiorari* would be self-defeating if its demands upon the Court's time were allowed to impinge upon the processes involved in the adjudication of cases. For after all the Court exists to decide cases, and *certiorari* is but an ancillary process designed to promote the appropriate discharge of that duty. It would be most unfortunate were the demands of *certiorari* permitted to lessen the number of cases on its calendar which the Court had time to decide, to consider on a plenary basis, or to dispose of with full-scale opinions. It would be still more serious if the demands of *certiorari* should ever reach the point of making significant inroads in the time which individual members of the Court can afford to devote to reflection upon the decision of important issues. I think it can fairly be said that none of these things has come about so far. . . . While it can . . . be said that the *certiorari* work, despite its continuing growth, is still within manageable proportions, it would be shortsighted not to recognize that preserving the system in good health, and keeping it in proper balance with the other work of the Court, are matters that will increasingly demand thoughtful and imaginative attention.[1]

1. Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States*, 33 AUSTRALIAN L.J. 108, 113-14 (1959).

*Carl M. Loeb University Professor, Harvard Law School.
Reproduced from 25 HASTINGS L.J. 1301 (1974).

Since the halcyon days of 1959, when Justice Harlan spoke, the docket has swelled from 1500 to over 4600 cases, of which over 3700 were newly filed during the term. The increase is not explainable simply as an increase in the *in forma pauperis* filings. Those have indeed risen dramatically, but the paid cases have risen almost as rapidly—from 890 new filings in 1961 to 1713 in 1971—almost doubled in a decade. At the same time, the number of petitions granted has remained substantially level, so that the percentage of grants has dropped overall from 17.5 percent in 1941 to 11.1 percent in 1951 to 7.4 percent in 1961 and 5.8 percent in 1971. The *paid* petitions granted dropped from 19.4 percent to 15.4 percent to 13.4 percent to 8.9 percent during the same period.[2]

But statistics are only the beginning of an assessment. After listening to every member of the present Court on the subject of the current caseload, the Study Group appointed by the chief justice under the auspices of the Federal Judicial Center concluded without dissent and without doubt that there was a serious problem—though not every member of the Study Group had come to the assignment with that preconception. One member of the Court, to be sure, stated to us, as he has stated publicly before and since, that the Court is vastly underworked.[3] But it is fair to say that he is, in a number of ways, an exceptional judge.

Our judgment that, put conservatively, the Court has reached the saturation point, did not rest on the views merely of the newer justices. One of the senior justices remarked sadly and trenchantly that decision-making had become for the Court an event rather than a process. Another senior judge was able to cope with the docket because he had given up all outside activities—lecturing, writing, summer institutes—and worked evenings as well; because of his experience, he explained, he is able to consider petitions now in the same time as he required for half the number when he began (it is difficult to see on this evidence how he could perform the function if he were newly appointed today). Another senior justice observed that when he came to the Supreme Court from another court he thought that now he would be able, as he had not been before, to plumb every case to its bottom; that proved to be an illusion, he acknowledged, since the load was even greater on the Supreme Court. But, he said, you learn to numb yourself to it. In this sense, of course, the caseload is not impossible or intolerable. That conclusion is hardly reassuring.

2. The figures are taken from the Report of the Study Group on the Case Load of the Supreme Court (1972). Copies are available from the Federal Judicial Center, Washington, D.C.

3. *See, e.g.*, Tidewater Oil Co. v. United States, 409 U.S. 151, 174-78 (1972) (Douglas, J., dissenting). Mr. Justice Douglas, noting his dissents from denials of certiorari, would have had the Court hear some 460 cases per term, beyond the approximately 175 actually taken. *See* A. BICKEL, THE CASELOAD OF THE SUPREME COURT 26-27 (1973).

One justice who has not numbed himself to it is Mr. Justice Powell. In April of last year, at the Fifth Circuit Judicial Conference, he said:

> The conditions cited in the Committee's [study group's] report pose the question whether the Court can continue acceptably to discharge [its] responsibility. As a new member of the Court, moving there directly from a long experience at the bar, I can say without qualification that I find the situation disquieting. Near the beginning of its Report, the Committee made this perceptive comment: "The indispensable condition for the discharge of the Court's responsibility is adequate time and ease of mind for research, reflection, and consultation in reaching a judgment, for critical review by colleagues when a draft opinion is prepared and for clarification and revision in light of all that has gone before." (p. 1)
>
> This indispensable condition simply does not exist. Petitions are filed with us on the average of 70/75 per week, 52 weeks in the year; each Justice is responsible for a personal judgment as to every petition, however much he may delegate to his clerks; these petitions vary in size from a few pages in a frivolous IFP to printed records of many thousands of pages, with multiple briefs; we will hear arguments in some 175 cases, write opinions for the Court (in addition to per curiams) in some 130, plus scores of concurrences and dissents; each Justice must review and take a reasoned position on all circulated opinions; we have all-day conferences vitually every Friday; and each of us has substantial responsibilities as a Circuit Justice. . . .
>
> But in all truth, my concern is not personal. As I said to our colleagues on the Fourth Circuit last summer, I have worked 6 to 6½ days per week throughout my professional career. My concern therefore is for the Court as an institution. It is one we all revere. Its problems, addressed by the Freund Committee, now merit the best thinking of our profession.[4]

And Chief Justice Burger, addressing the American Law Institute in May, 1973, was equally frank:

> Until someone perfects an eight- or nine-day week or a thirty-hour day, the enormous increase in the Court's work over the past twenty years must produce undue stress somewhere and ultimately affect the quality of the product. To wait to do something about this problem until someone can empirically demonstrate that three or four thousand cases cannot be processed as well as one thousand is not my conception of how we on the Court should fulfill our responsibility to the Court as an institution.[5]

The Court is, to be sure, abreast of its docket. We are all familiar with the two great crunches that help to keep it so. The first crunch is at the beginning of term, when 800 or 900 petitions and appeals, the summer carry-over, are disposed of in a few days. (Of course not all are actually considered at conference; only about 30 percent are put on the "discuss" list, the others being denied because no justice votes to consider them at conference. But every justice must make up his mind on every application and must presumably be prepared to discuss the 30 percent of 800 or 900 during the few days of conferences). The second crunch is at the close of term when in a

4. Address of Mr. Justice Powell before the Fifth Circuit Judicial Conference, El Paso, Texas, April 11, 1973.

5. Burger, *Retired Chief Justice Warren Attacks, Chief Justice Burger Defends Freund Study Group's Compilation and Proposal*, 59 A.B.A.J. 721, 723 (1973).

few weeks dozens of major decisions are handed down, usually with a spate of separate opinions, suggesting, to paraphrase Cicero, that if there had been more time there would have been, if not shorter, at any rate fewer opinions.

The Court has already taken a number of remedial measures, and so, incidentally, has confirmed the existence of a genuine problem. The time for oral argument has been reduced to a half hour. A third law clerk for each justice was provided, at the Court's request, in 1969. Records have been dispensed with on petitions for certiorari (making the inexorable weekly tide of paper in seventy-five cases look less formidable, but at a cost in less informed and even improvident actions by the Court). Recently four or five justices have pooled the law-clerk resource, using one law clerk to screen and write memoranda on petitions for the bloc of justices.

Another internal change that has been suggested, but not in fact adopted, is the use of panels for the consideration of petitions for certiorari. No longer would every justice pass upon every petition, pursuant to the assurance given to Congress at the time the Judiciary Act of 1925 was enacted. This has been a sensitive point, as Justice Holmes recognized four years after the act came into force, when he confided in a letter to Sir Frederick Pollock:

> We have to consider the *certiorari* because it was only after effort that we got a bill passed that makes an appeal to our court dependent upon our discretion in many cases in which until lately it was a matter of right. Let it ever be understood that the preliminary judgment was delegated, I should expect the law to be changed back again very quickly with the result that we should have to hear many cases that have no right to our time; as it is we barely keep up with the work.[6]

The use of panels composed of three justices for the purpose of dividing the task of examining petitions and jurisdictional statements would not, the Study Group believed, be acceptable to the profession or the public. Moreover, while some saving of time would be achieved, the gain would be all too slight. At the present level of filings, using the conservative figure of 3750, each panel (and therefore each justice) would consider about 1250 applications for review. It is assumed that where there was a division within the panel (two votes for or against a grant), and possibly where there was a solid vote of three to grant review, the case would be referred to the full Court and taken up at its conference. About 30 percent of all petitions now go to conference because at least one justice so votes. If anything, a panel procedure is likely to increase this percentage, since a justice serving on a panel would presumably be more liberal in his view of review-worthiness in order not to keep marginal cases from the attention of the other six justices. If we posit a rate of 40 percent of the total applications for referral to the full Court, we arrive at a number

6. 2 HOLMES-POLLOCK LETTERS 251 (M. Howe ed. 1942).

of about fifteen hundred that would require the attention of each justice, of which two-thirds, or one thousand, would be new to him, over and beyond his initial consideration of about 1250.

An alternative internal procedural change that has been advanced is the creation of a small senior staff that would do the preliminary screening. Such a measure is, I believe, the one most likely to be adopted if relief in the form of a National Court of Appeals is not provided. The effectiveness, or "success," of a senior staff would depend on the substantial acceptance of its recommendations, growing out of confidence in its judgment. Such a development—and, in some measure, the use of panels—would be the natural response of a bureaucracy to its increasingly heavy responsibilities: more and more delegation within the organization, the while clinging to the nominal responsibility at the top, thereby widening the gap between the function and its discharge.

That course, it is submitted, is exactly the wrong direction for the Supreme Court to take. Justice Brandeis in plain language explained the prestige of the Court by saying, "we do our own work." Some commentators on the Report of the Study Group have accused us of violating our own principle by proposing to "delegate," as they put it, part of the Supreme Court's work to another agency. But, with respect, that comment completely misses the point. The point is one of principle, even, it is not too much to say, of official morality. A National Court of Appeals would have its own authoritative responsibilities. It would be a visible, legitimated tribunal also "doing its own work," albeit work that would relieve the Supreme Court of some of its burden. Appearance and reality in decision-making would coincide. We would not be fostering an illusion of responsibility, as we are likely to be doing if a way out is sought through greater assignment of functions to a permanent senior staff.

The Study Group turned its attention, then, from internal procedural changes to the question: Of what functions could the Court most appropriately be relieved? The Group put aside the idea of specialized courts or appeals, not because in some fields (taxation, for example) a good case might not be made for them, but because they would have only a marginal effect on the Supreme Court's caseload. An exception would be a national court of criminal appeals, provided its denials of review were made final, since applications for direct and collateral review of criminal convictions now constitute a majority of the petitions for review on the Supreme Court's docket. The Study Group rejected a specialized criminal court for several reasons. Inasmuch as there is a high correlation between criminal cases and petitions *in forma pauperis*, to single out this category of cases for insulation from Supreme Court review would appear as an invidious classification based on, or coinciding with, the financial plight of the applicant. Moreover, while the absolute percentage of review-worthy cases in this category is low, the category does contain cases that present questions of fundamental law second to none in importance. Finally, there would be a particularly unfortunate risk, in a specialized court of criminal appeals, of the polarization of its members and the politicization of the appointing process around a single set of issues. A court of generalists is greatly to be preferred.

Another suggestion—to limit the Supreme Court to so-called constitutional cases—also seemed seriously objectionable: it would re-

quire new national courts for all nonconstitutional cases; it would be awkward to administer that bifurcation; it would deprive the Court of important issues of procedure and statutory construction; it would encourage counsel and perhaps justices to inflate issues to constitutional dimensions; and it would reinforce the idea of the Court as a superlegislature. Emancipated from the conventional tasks and constraints of lawyers and judges, who must rub their noses in matters of practice, of legislative history, and of the harmonious reading of complex codes, the justices would be led to reinforce the most free-wheeling impulses.

The Study Group focused then on two tasks whose transfer, in its judgment, would not sacrifice the Court's essential function: preliminary screening of applications for review and the resolution of conflicts between circuits that ought to be resolved but not necessarily by the Supreme Court. These are the basic functions of the proposed National Court of Appeals. The court would be expected to pass on to the Supreme Court some 400 to 500 petitions, from which the Supreme Court would take for argument about 150 to 175, as at present.

How much time would be saved to the Supreme Court? As Justice Rehnquist said in a recent address, he could not quantify it but he was satisfied that the proposal "would save the Supreme Court some of the time which it now spends in screening cases and that the time so saved could be devoted to deliberation and writing opinions. . . ."[7] Instead of the stack of 75 new cases pouring in every week, there would be perhaps ten—certainly a very large difference in psychological scatteration and oppressiveness.

While experience under the proposed plan will furnish the most reliable data on time saved, an approach to the question can be made by determining approximately how much time per week is now spent in the consideration of applications for review. Several of the justices who appeared before the Study Group were able to offer estimates.[8] One senior member estimated it at one-fifth of his working time. Another senior justice said fifteen hours a week. Still another said up to a third of his time. A newer member of the Court said two hours every evening. The time spent is, and should be, considerable. How much of it will be saved by having, say, six-sevenths of the petitions

7. Rehnquist, *The Supreme Court: Past and Present*, 59 A.B.A.J. 361 (1973).

8. See A. BICKEL, THE CASELOAD OF THE SUPREME COURT 23 (1973). The statement of Mr. Justice Douglas made in Tidewater Oil Co. v. United States, 409 U.S. 151, 176 (1972) (dissenting opinion), that the Court's time "is largely spent in the fascinating task of reading petitions for certiorari and jurisdictional statements," is perhaps not intended to be taken seriously.

screened out in advance cannot be foretold with any precision. While the more obviously unmeritorious petitions will have been screened out, leaving the more arguably review-worthy and time-consuming, among those surviving there will be found some that as clearly merit review as some that were screened out clearly did not merit it. And, of course, the saving in pressure, apart from hours and days, would be no less real for being incommensurable.

How busy or inactive would the National Court of Appeals be? It would have jurisdiction to grant review and decide on the merits of cases presenting a conflict of decisions among the circuits. It is very likely that the National Court of Appeals would decide more such cases than are now taken by the Supreme Court. If, as seems not improbable, the new court had time for the decision of still other cases, the Supreme Court could be empowered to send to it non-conflict cases that merit review by a national court but not necessarily by the Supreme Court. The new court might, at an estimate, decide on the merits some one hundred cases a year—surely an important contribution to a body of national law. I envisage an experimental period and an evolving relationship to the Supreme Court and perhaps indeed an evolving method of selection of the judges of the new court.

What should be the linkage of the National Court of Appeals to the Supreme Court? It is here that the greatest differences of opinion have arisen in response to the Study Group's report. Decisions on the merits by the National Court of Appeals could be made the subject of petitions for certiorari without too great an inroad on the plan as a whole. It would be expected that very few such petitions would be granted. If, however, petitions could be filed to review the denials of certiorari, numbering in the thousands, the plan would clearly be undermined. The Study Group recommended that denials be made final.

A countersuggestion has been advanced that the denials lie on the table of the Supreme Court for, say, sixty days, within which period the Supreme Court on its own motion might grant review. This suggestion has a certain plausibility as a compromise between finality and freedom to file a further petition. The difficulty emerges as a clear inquiry is made into the lying-on-the-table procedure. What would be the responsibility of the individual justices toward the several thousand cases thus open to inspection? Short of engaging in the present procedure, how would certain cases come to the attention of the justices? Would they resort to chance references, through press accounts, conversation, and the like? Would this ultimate screening

function be performed by a senior staff about which we have previously expressed reservations? These questions would require clarification as a matter of principle.

It has been argued by some commentators that to make denials of review final in the National Court of Appeals would destroy the time-honored image of the Supreme Court as the palladium of our liberties, to which the humblest person has ready access. With the annual filings in the Court approaching 4,000, it has to be asked how meaningful this access really is, and whether a widening breach between symbol and reality will not, so far from maintaining the prestige of the Court, produce disillusionment and cynicism. It should be asked, also, whether an arguably meritorious petition will not benefit from being highlighted through inclusion in the 400 or 500 cases that would survive the initial screening in the Court of Appeals. It must be added, with respect, that to see in this jurisdictional question an issue of safeguarding civil liberties is to lose perspective. If the vote of three out of seven members of the National Court of Appeals would suffice, as our Study Group proposed, to certify a petition to the Supreme Court so that five of seven judges would be required to deny a petition, it is at least as likely that sensitivity to issues of human rights will actually be enhanced by the process as that such sensitivity will be blunted.

It has also been argued that finality would prevent certain cases from reaching the Supreme Court that would serve as vehicles for important change of doctrine but would not be recognized by the National Court of Appeals as having this potential. But when the Supreme Court issues thunderbolts they rarely come out of a cloudless sky. The Supreme Court, through its rules, through expressions in its opinions and in dissents, would have abundant opportunity to signal the vitality of certain issues. Moreover, when the Supreme Court has made a somewhat unexpected re-examination of doctrine it has done so characteristically in a case that was one of a series reaching the Court. If the decision in *Erie Railroad Co. v. Tompkins*[9] was unexpected, still there would have been opportunities to overrule *Swift v. Tyson*[10] in the numerous cases that would have been certified to the Court by a National Court of Appeals if one had existed during the regime of a federal common law. Similarly, the new doctrine announced in *Gideon v. Wainwright*[11] could have been promulgated

9. 304 U.S. 64 (1938).
10. 41 U.S. (16 Pet.) 1 (1842).
11. Gideon v. Wainwright, 372 U.S. 335 (1963).

in any of the right-to-counsel cases that would have been certified to the Supreme Court under the pre-existing constitutional standards. Again, a vehicle for the *Miranda*[12] rules could have been found in any of the cases that would have reached the Supreme Court for review under the prior tests of voluntariness of confessions.

Since some suggestion has been made that there is a constitutional barrier to a preliminary screening process, brief note should be taken of the point. Since Article III of the Constitution mandates "one Supreme Court," the argument runs, the Supreme Court must be given final authority to review cases decided by lower federal courts; otherwise, they and not the Supreme Court would be "supreme." If this argument is seriously applied, all of the Judiciary Acts from the beginning to the present have been unconstitutional. For at no time has the full scope of the judicial power of the federal courts been linked to review in the Supreme Court. Congress has always exercised its power under Article III to confer appellate jurisdiction on the Supreme Court "with such exceptions, and under such regulations, as Congress shall make." At the beginning, for example, there was a higher jurisdictional amount for appeal to the Supreme Court than for access to the district courts. Even if the argument is tailored to apply only to constitutional and other federal questions it is undermined by history. For a hundred years, until 1891, federal criminal cases could not be appealed to the Supreme Court except where there was a certificate of division in the circuit court below. In all such cases it could be said that the lower court was "supreme," but Article III never received any such reading. The Supreme Court remained supreme in the pertinent sense: no other court had authority to overrule or reverse its decisions, and in the event of inconsistency a decision of the Supreme Court prevailed. But the scope of its appellate jurisdiction, in contrast to its original jurisdiction, has been set by Congress.

A somewhat modified form of the objection drawn from Article III is that a court, or at any rate the Supreme Court, must have power to decide what cases it chooses to decide, and that the preliminary decision cannot be "delegated." But this, with respect, begs the question. The Supreme Court has no authority or responsibility with re-

12. Miranda v. Arizona, 384 U.S. 436 (1966). In some ninety-five cases pending on the docket that raised the same issue, the Court, with Justices Black and Douglas dissenting, denied the petitions, thus indicating that concern for particular litigants was not a paramount consideration. *See, e.g.*, Johnson v. New Jersey, 384 U.S. 719 (1966).

spect to cases where a statutory condition precedent to its jurisdiction has not been met. Suppose that Congress, instead of conditioning criminal appeals for a century on a certificate of division, had required a certificate of probable cause from the circuit court. Then suppose that, to make the plan more just, Congress vested the certificating function in circuit judges other than those who decided the case. Would such a plan have been more vulnerable constitutionally than the one actually employed? Article III imposes no such imported limitations on the administration of the appellate system. The choice is in truth open.

The choice is really between two models for the Supreme Court. One model is that of a bureaucratic agency, which copes with a mounting work load by greater and greater separation of responsibility for a function and its actual performance, retaining nominal responsibility at the top while delegating actual judgment to others. The other model is that of a small community of thinkers, who keep themselves free for their central task by shedding ancillary and less essential responsibilities. If the Supreme Court is regarded as an assembly-line operation, a high-speed, high-volume enterprise, the bureaucratic model is appropriate. If its function is different, if its duty is to clarify and advance our highest law through the most deliberative of procedures, then the other model is the more appropriate.

Perhaps in a choice of models I have been unduly influenced by my introduction to the work of the Supreme Court through a clerkship with Justice Brandeis, underscoring as it did the deliberative side of the judicial process. Justice Brandeis spoke appreciatively of having been allowed the full time of a conference to lead a discussion on depreciation accounting. If a draft opinion was ready for circulation in the middle of the week he withheld it until the beginning of the next week, so that his colleagues would not be rushed in considering it before conference. When Justice Sutherland returned a draft opinion with a number of queries on the statement of facts and the law, Brandeis asked me to check the queries carefully. After doing so I reported somewhat condescendingly that they were all unfounded and that Justice Sutherland might have saved time by not raising them. Justice Brandeis cut me off, saying that he was very glad Justice Sutherland had written as he did, because it showed he was doing his job.

The caseload presents, in an ideal sense, an insoluble problem. Some sacrifices are involved in any solution, as was true when circuit-riding was abolished, when regional courts of appeals were established

in 1891, and when discretionary instead of obligatory review became the pattern in 1925. Vehement objections were raised to each of these reforms. It is important to keep one's perspective, to perceive what is most essential and to eschew the hyperbole of doom. What has been written about a reform enacted in 1731 in England, making English the language of court proceedings, strikes the right note:

> The nation at large needed it, some wise men predicted it would ruin England, some still wiser men seized upon minor inconveniences that resulted from it as quite sufficient to damn it, and succeeding generations wondered why it had not passed a century earlier.[13]

13. 1 P. WINFIELD, CHIEF SOURCES OF ENGLISH LEGAL HISTORY 13 (1925).

A Policy Assessment of The National Court of Appeals

By WILLIAM H. ALSUP*

MAJOR legislation to relieve the United States Supreme Court of its "overwork" has not been enacted since the Judges Bill of 1925.[1] Nor has such legislation been considered since the defeat of the President's Court reorganization plan of 1937.[2] Nevertheless, it continues to be suggested that the Supreme Court has too many duties to discharge all of them responsibly. For example, in 1959 Professor Hart attempted to demonstrate that the justices had to evaluate so many applications for review that they had little time left to decide the merits of the argued cases.[3] Most prominent among the recent alarms is the *Report of the Study Group on the Caseload of the Supreme Court*.[4] So much has been said about this report that it may be worthwhile to examine the battlelines forming around it.

The essence of this proposal is that a National Court of Appeals be created to screen the swelling docket of applications for review by the Court. The sponsors of the plan are among the most distinguished of our law faculties and practitioners, belonging to a commission appointed by the Chief Justice of the United States in the fall of 1971 to study the problem of the Court's burgeoning docket. The chairman of the study group is Professor Paul A. Freund of the Harvard Law School.[5] He and his colleagues, themselves familiar with the work of the Court, interviewed each of the justices and a few of their law clerks and, after their own deliberations, issued their recommendations on December 19, 1972.

In addition to a less controversial recommendation that direct appeals to the Supreme Court be abolished, the panel suggested that Congress create a new tier of the federal appellate courts to be known as the National Court of Appeals and to consist of seven seasoned judges drawn on a rotating basis from the existing courts of appeals. The new court would have two functions. It would sort through all the petitions for certiorari (and jurisdictional statements if appeals were continued) and would refer only the most "review-worthy" to the Supreme Court for its consideration. The remaining applications would then be denied without recourse to the Supreme Court. Additionally, the new court would retain for its own unreviewable

*Member of Bars of California and Mississippi. Reproduced from 25 HASTINGS L.J. 1313 (1974).

3. Hart, *The Supreme Court 1958 Term, Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 91 (1959). *See also* Griswold, *The Supreme Court 1959 Term, Foreword: Of Time and Attitudes—Professor Hart and Judge Arnold*, 74 HARV. L. REV. 81 (1960). *But see* Arnold, *Professor Hart's Theology*, 73 HARV. L. REV. 1298 (1960).

decision on the merits those cases in which the circuits were in conflict but the issues were not deemed to be "certworthy." In this way the justices—now said to be careworn with excessive duties—would gain more time to indulge in the collegial and deliberative processes of making and elaborating national law.

policy arguments advanced and omitted by both proponents and opponents of the plan. Neither the constitutionality of the new court nor the political motivations, if any, of its sponsors will be considered.[6]

I. *The Present Screening Process and How It Would Be Changed*

The present method and practice by which the Supreme Court selects cases for review is a combination of statutory requirement and tradition. In recent years about 3700 applications for review have been filed annually by litigants complaining of adverse judgments rendered in lower federal or state courts. These applications are either by way of appeals which the Court is obliged to decide, or by way of requesting the issuance of a writ of certiorari which the Court may deny in its discretion. Fewer than 200 of these cases are decided on the merits, the rest being denied review without opinion. Nonetheless, the process of choosing the select few is a vital aspect of the justices' work.

The document filed with the Supreme Court in most instances is called a petition for writ of certiorari. In the relatively rare cases for which Congress has provided for an "appeal," the litigant requests the review to which he is entitled by filing a timely "jurisdictional statement." When a petition for a writ of certiorari or jurisdictional statement is docketed, the clerk of the Supreme Court gives it a case number and all copies are stamped and then placed for storage in a large room. Usually within the next thirty days the opposing party files

6. For discussions of the constitutionality of the proposed court, compare Black, *The National Court of Appeals: An Unwise Proposal*, 83 YALE L.J. 883, 885-887 (1974) (There can be only *one* Supreme Court under Article III) [hereinafter cited as Black]; Comment, *The National Court of Appeals: Composition, Constitutionality, and Desirability*, 41 FORDHAM L. REV. 863, 865 (1973) (constitutionality is "open to question") and Address by Earl Warren, Meeting of the Association of the Bar of the City of New York, May 1, 1973, *reprinted in part* in 59 A.B.A.J. 721, 729 (1973) (unconstitutional under "the one Supreme Court" clause) [hereinafter cited as Warren], with A. BICKEL, THE CASELOAD OF THE SUPREME COURT 35 (American Enterprise Institute for Public Policy Research 1973) (argument that proposed court would be unconstitutional is a play on words) [hereinafter cited as BICKEL]; Note, *The National Court of Appeals: A Qualified Concurrence*, 62 GEO. L.J. 881, 887-891 (1974) (No precedent exists to support challenge based on "one Supreme Court" clause). For the suggestion that the chief justice handpicked a group of law teachers and practitioners known to favor narrowing the Supreme Court's role and authority and that the national Court of Appeals is simply their vehicle to accomplish that end, see Gressman, *The National Court of Appeals: A Dissent*, 59 A.B.A.J. 253 (1973) [hereinafter cited as Gressman]; Warren, *supra*, at 725-26; Westen, *Threat to the Supreme Court*, NEW YORK REVIEW OF BOOKS, FEB. 22, 1973, at 29.

a response, arguing that the petition should not be granted or that the appeal should be dismissed.[7] When a response is filed it is coupled with its corresponding petition and both are identified as ripe for circulation to the various chambers. If a respondent or appellee delays too long, the clerk will designate the petition or jurisdictional statement alone as ready for consideration. Each week a bundle of about seventy such cases is distributed by the clerk's staff.

Once these bundles are received in the various chambers, the method for their screening differs from office to office.[8] The traditional pattern has been for a justice's law clerks to divide the weekly bundle in equal stacks for each clerk to read and summarize with a separate memorandum for each case. Then the week's worth of petitions are delivered to their justice along with the "cert memos." After studying their analyses and supplementing their digests by consulting the applications and responses as he believes is necessary, a justice sends to the chief justice an enumeration of those cases which he believes may warrant review by the full Court.

Some of the present justices do not follow the traditional pattern of asking their law clerks to digest petitions for certiorari and appeals. Justice Brennan, for example, prefers, as did Justice Frankfurter, to scrutinize the applications himself without memoranda from his clerks. In addition, five of the justices (the four most recent appointees and Justice Byron White) have assigned their law clerks to a pooled effort for summarizing petitions.[9] Instead of five separate summaries of each case being prepared, only one memorandum is written, to be shared by all five justices. Regardless of the way in which a justice is exposed to the applications, however, every justice sends to the chief justice a listing of cases which he thinks warrants review.

Any case which attracts the attention of even one member of the Court is placed by the chief justice on the "discuss list." In addition to certiorari cases of interest, all appeals are routinely included on the discuss list even though many of them typically arouse no interest. All cases on the discuss list are mentioned in conference whereas those not on it are denied automatically without further consideration. In recent years about 1100 applications have been discussed in conference annually.[10]

After the discuss list is transmitted to each of the chambers, the papers and memoranda in all cases contained in the discuss list are gathered together and the remaining items are "dead listed" and culled. The assembled material is taken by the justice into the conference room during the session in which petitions for certiorari and jurisdictional statements are discussed. Usually this is the Friday conference. Each justice speaks his mind on each application on the agenda and under the traditional Rule of Four a petition is "granted" and will be scheduled for oral argument when four justices believe it presents a substantial question of national importance. Occasionally a justice who is relatively indifferent on a particular case will join two or three who feel strongly that it should be taken. Precisely what moves the justices to seize upon certain cases and to reject others is

something of a mystery and a matter for which one develops a "feel," as Justice Harlan put it.[11] Sometimes when further argument would be of little assistance in deciding the merits, a petition is granted and the Court disposes of the merits in the same conference, foregoing oral argument and acting without the benefit of full briefs, provided a majority so votes and fewer than four believe the issue warrants plenary consideration.[12]

The processing of appeals, which the Freund Committee would have screened by its National Court of Appeals, is part and parcel of this process. Some important differences remain, however, between the processing of appeals and petitions for certiorari. As noted above, all appeals are mentioned in conference, however briefly, whereas most petitions for certiorari are not. Moreover, by providing for appeals in certain situations, Congress has already decided that the issues raised thereby warrant review—pretermitting the Court's own judgment on the initial question of whether or not to take the case—and the only remaining question is whether plenary or summary review is more appropriate. It has been observed, however, that the two modes of review are gradually being merged for all practical purposes. For example, a great number of appeals are "dismissed" for lack of a substantial federal question on the theory that the congressional mandate does not require resolution of insubstantial matters.[13] It has been suggested that such dismissals are governed by the same discretionary factors which lead the Court to deny petitions for writ of certiorari, that is, once it is concluded that the issues presented are insubstantial, the application is "denied" if it is a petition for writ of certiorari and is "dismissed" or "affirmed" if it is an appeal.[14] Although there are precedential difference in these dispositions, it is plain that, as Justice Clark acknowledged, the procedures used in reaching them are the same.[15] It is important to remember that most of the discussed items are currently denied review, whether they are appeals or "certs," and that about two-thirds of the filings are denied without any discussion.

After the conference, the results are communicated by the chief justice to the clerk. In turn, he prepares an "order list," which states the cases in which review was finally denied or granted. The order list is made public at a subsequent session of the Court.

The establishment of a National Court of Appeals would not wholly eliminate this sifting process. Although applications for review would be filed with the Clerk of the National Court of Appeals rather than with the Clerk of the Supreme Court (which for convenience might be the same office), and although the proposed court would have the first opportunity to evaluate these applications and the absolute power to deny any of them, the National Court of Appeals would not have the authority to grant a petition. Rather, it would annually certify or pass on to the Supreme Court four or five hundred cases

which it believed to be worthy of the justices' attention. From this number the Supreme Court would select its usual 150 to 200 cases each term for plenary or summary consideration, using a selection procedure presumably similar to its present system, but involving only about ten to fifteen petitions each week rather than seventy. The important point is that the vast majority of certiorari petitions and jurisdictional statements would never reach the attention of the justices, for the Supreme Court would not have the power to overrule a denial by the judges of the National Court of Appeals.[16]

II. *Public Reaction to the Proposal*

The release of the Freund Committee report has drawn a wide variety of reactions from both the bench and the bar. First among the sitting justices to voice reservations was William O. Douglas. In *Tidewater Oil Co. v. United States*,[17] he observed without referring explicitly to the proposal (which at the time had not yet been made public) that the idea that the Court is overworked is "myth."[18] He pointed to the fact that the number of cases decided on the merits had remained constant over the decades, and remarked upon the number of separate opinions filed each term, which he said were the discretionary products of the "vast leisure time" of the justices.[19] The really surfeited judges, he suggested, were the circuit judges (with whom the new court would be staffed).[20]

Former Chief Justice Earl Warren, who has otherwise steered clear of controversies in his retirement, was more blunt.[21] Speaking before the Association of the Bar of the City of New York on May 1, 1973, he adamantly opposed the proposal, challenging not only the panel's reasons for it but the panel's procedure for interviewing the justices. On the latter score it was said that the very purpose of the study group was not made clear until the publication of its report and that the group never privately put their scheme to any of the justices prior to its promulgation; nor were the justices asked whether any structural changes in the federal judiciary system were desirable. Additional opposition has come from Justice William Brennan,[22] former

17. 409 U.S. 151 (1972); *accord*, Douglas, *Managing the Docket of the Supreme Court of the United States*, 25 RECORD OF N.Y.C.B.A. 279, 297-98 (1970); *California Dep't of Motor Vehicles v. Rios*, 410 U.S. 425, 427 (1973) (Douglas, J., dissenting.) Justice Douglas states in the preface to the first 493-page volume of his autobiography that "[i]f the Court work were as demanding as some make out, I would not have had time for this and other writing projects. But it has never demanded more than four days a week", W. Douglas, Go East, Young Man xii (1974).

21. Warren, *supra* note 6, at 724.

22. Brennan, *supra* note 8; *accord*, Brennan, *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473 (1973).

Justice Arthur Goldberg,[23] numerous law professors[24] and Supreme Court practitioners,[25] and law review commentaries.[26] Most of the foregoing have emphasized that the statistical rise in applications does not create a proportionate rise in demand on the justice's time in reviewing applications. Most of the increase, they say, is due to the *in forma pauperis* docket which is chiefly composed of petitions identifiable instantly as frivolous. Justice Potter Stewart felt it enough to remark that "the very heavy caseload is neither intolerable nor impossible to handle."[27] Circuit Judge Henry Friendly doubts that the new court would have the confidence of lower federal court judges and Judge David Bazelon, Chief Judge of the District of Columbia Circuit, believes the new court would conceal the injustices of our criminal justice systems by routinely denying prisoners' applications.[28] Less drastic steps than a new court have been urged by the *Wall Street Journal*.[29]

23. Goldberg, *One Supreme Court*, NEW REPUBLIC, Feb. 10, 1973, at 14 [hereinafter cited as Goldberg]. *See also* Letter from Arthur J. Goldberg to Editors of *The New Republic*, NEW REPUBLIC, March 24, 1973, at 31-32.

24. *E.g.*, Black, *supra* note 6; Blumstein, *The Supreme Court's Jurisdiction—Reform Proposals, Discretionary Review, and Writ Dismissals*, 26 VAND. L. REV. 895 (1973); Dershowitz, *No More Court of Last Resort?*, New York Times, Jan. 7, 1973, 34, at 6, col. 1 (city ed.); Letter from Professor Stanley Friedelbaum to the editors of The New York Times, Jan. 11, 1973, at 38, col. 3 (city ed.); Powe, "The Supreme Court, The Freund Committee and The Proposed New National Court of Appeals," Radio speech on KUT-FM, Austin, Texas, Spring, 1973; Ulmer, *Revising the Jurisdiction of The Supreme Court: Mere Administration Reform or Substantive Policy Change?*, 58 MINN. L. REV. 121 (1973); and Westen, *Threat to The Supreme Court*, NEW YORK REVIEW OF BOOKS, Feb. 22, 1973, at 29.

25. *E.g.*, Gressman, *supra*, note 6; Gressman, *The Constitution v. The Freund Report*, 41 GEO. WASH. L. REV. 951 (1973); Miller & Gressman, *National Appeals Court? Yes and No*, New York Times, April 11, 1973, at 47, col. 3 (city ed.); Lewin, *Helping the Court with Its Work*, NEW REPUBLIC, March 3, 1973, at 15 [hereinafter cited as Lewin]; Poe, Schmidt, and Whalen, *A National Court of Appeals: A Dissenting View*, 67 NW. U. L. REV. 842 (1973). *See also* Gressman, *Much Ado About Certiorari*, 52 GEO. L.J. 742, 745-49 (1964).

26. *E.g.*, Note, *The National Court of Appeals: A Qualified Concurrence*, 62 GEO. L. J. 881 (1974); Comment, *The National Court of Appeals: Composition, Constitutionality and Desirability*, 41 FORDHAM L. REV. 863 (1973); and Note, *The National Court of Appeals: A Constitutionally Inferior Court?*, 72 MICH. L. REV. 290 (1973). *See generally*, Stokes, *National Court of Appeals: An Alternative Proposal*, 60 A.B.A.J. 179 (1974); Stockmeyer, *Rx for the Certiorari Crisis: A More Professional Staff*, 59 A.B.A.J. 846, 849 (1973); and Woodlock, *Law and Justice Report/Exploding Caseload sets off debate over how Supreme Court handles its work*, 5 NAT'L J. 595 (1973).

27. Dershowitz, *No More Court of Last Resort?*, New York Times, Jan. 7, 1973, § 4, at 6, col. 1, 2 (city ed.); 55 HARV. L. REC., No. 8, at 1 (1972).

28. Dershowitz, *No More Court of Last Resort?*, New York Times, Jan. 7, 1973, § 4, at 6, col. 1 (city ed.).

29. Wall Street Journal, Jan. 2, 1973, at 20, col. 1 (editorial). For further statements in opposition, see letter from Professor Stanley Friedelbaum to the Editors of the New York Times, New York Times, Jan. 11, 1973, at 38, col. 3 (city ed.); New York Times, Feb. 4, 1973, § 4, at 14, col. 3 (city ed.) (letter to editor from Philip Weinberg). *See also* Blumstein, *The Supreme Court's Jurisdiction—Reform Proposals, Discretionary Review, and Writ Dismissals*, 26 VAND. L. REV. 895 (1973); Ulmer, *Revising the Jurisdiction of the Supreme Court: Mere Administration Reform or Substantive Policy Change?*, 58 MINN. L. REV. 121 (1973). For a discussion of the constitutionality and introduction to the policy aspects of the proposal, see Comment, *The National Court of Appeals: Composition, Constitutionality and Desirability*, 41 FORDHAM L. REV. 863 (1973), and Note, *The National Court of Appeals: A Constitutional Inferior Court?*, 72 MICH. L. REV. 290 (1973). For a further opposition on policy grounds, see Poe, Schmidt and Whalen, *A National Court of Appeals: A Dissenting View*, 67 NW. U.L. REV. 842 (1973).

Potentates of the American Bar Association were reportedly unimpressed with the proposal and its House of Delegates eventually endorsed a less drastic plan calling for a "National Division" of the United States Court of Appeals, which has also received the approval of The Advisory Council for Appellate Justice.[30]

Most vocal in defending the proposal, both in the television medium and in the press, has been Professor Alexander Bickel of the Yale Law School, a member of the Committee.[31] Professor Paul Freund has also authored several statements in his committee's defense.[32] Moreover, various justices have warmly received the report's diagnosis, if not its prescription. For example, although it is unclear whether Chief Justice Burger has actually endorsed the National Court of Appeals, his statements, such as his address to the American Law Institute in Washington on May 15, 1973, call for a lightening of the Court's burdens. In that address he rebutted various criticisms of the proposal, emphasizing that something must be done to stem the swelling tide of applications for review.[33] In a similar way, Justice William H. Rehnquist has surveyed the history of congressional reaction to those occasions when it was thought the Court was overworked, leaving "unanswered" whether or not the remedy prescribed by the Freund Committee was the most desirable one available. He insisted, however, that the Court is deluged at the present and that some remedy is necessary.[34] His colleague, Justice Lewis F. Powell, Jr., announced in a speech to the Fifth Circuit Judicial Conference on April 11, 1973, the same reserved judgment stating that the Court is now inundated and some plan of relief is sorely needed, although he refused to say whether the National Court of Appeals was the best one.[35] Justice Harry A. Blackmun has not issued a written position on the proposal but is believed to feel overwhelmed by his judicial responsibilities. Justices Byron White and Thurgood Marshall have carefully avoided making any public statements on the proposal.[36]

So far, the plan has not found its way into a legislative proposal and no committee in Congress is currently studying the matter.[37]

30. For a survey of generally negative opinions of ABA members and officials taken shortly after the release of The Freund Report, see New York Times, Feb. 17, 1973, at 13, col. 2 (city ed.). For details of the proposal to establish a National Division of the Court of Appeals to hear claims of state prisoners and to resolve conflicts among the circuits, see REPORT OF THE SPECIAL COMMITTEE ON COORDINATION OF JUDICIAL IMPROVEMENTS (1973); *House Favors National Division for Federal Courts of Appeals*, 60 A.B.A.J. 453 (1974); Hufstedler, *Courtship and Other Legal Arts*, 60 A.B.A.J. 545, 548 (1974); and New York Times, Jan. 21, 1974, at 11, col. 1 (city ed.). The Freund Report briefly considered and rejected the related idea of a court of criminal appeals. REPORT, *supra* note 4, at 12.

31. *See* Bickel, *supra* note 6. For a reply to Arthur Goldberg's statement, *supra* note 23, see Bickel, *The Overworked Court*, NEW REPUBLIC, Feb. 17, 1973, at 17.

32. See Freund, *Why We Need the National Court of Appeals*, 59 A.B.A.J. 747 (1973) [hereinafter cited as Freund]; New York Times, April 11, 1973, at 47, col. 2 (city ed.) (guest editorial by Professor Freund); Address by Paul Freund, American Bar Association meeting, in Washington, D.C., Aug. 7, 1973.

33. Burger, *Retired Chief Justice Warren Attacks, Chief Justice Burger Defends Freund Study Group's Composition and Proposal*, 59 A.B.A.J. 721, 724 (1973); *see* Burger, *The State of the Federal Judiciary—1972*, 58 A.B.A.J. 1049, 1053 (1972); Burger, *The State of the Federal Judiciary—1971*, 57 A.B.A.J. 855, 859 (1971).

34. Rehnquist, *The Supreme Court: Past and Present*, 59 A.B.A.J. 361 (1973).

35. Address by the Hon. Lewis F. Powell, Fifth Circuit Judicial Conference, in El Paso, Texas, April 11, 1973, at 3-12. For a reference by the chief justice ascribing a similar view to Justice Powell, see Burger, *The State of the Federal Judiciary—1973*, 58 A.B.A.J. 1049, 1053 (1972).

III. *An Appraisal of the Arguments*

This robust ventilation of views has identified a considerable number of policy arguments both supporting and opposing a National Court of Appeals. These views seem to be directly connected to the validity of one or more of the following propositions which are the essence of the Freund Committee's reasoning: (A) The ever-increasing task of reviewing applications for review has begun to compromise the quality of the decision-making process used for resolving cases on their merits; and such compromising would not be necessary if a National Court of Appeals were established to relieve the justices of reviewing petitions for writ of certiorari and jurisdictional statements. (These two propositions are so intertwined that they are best considered together.) (B) The creation of a National Court of Appeals would not, on balance, generate more new problems than it would solve. (C) All other remedies either are stopgap measures which would still leave the Court overwhelmed or are otherwise undesirable.

A. Compromising of the Decisional Process

In "inferring" that there has been a compromise of the Court's adjudicatory process, the Freund Committee offered the major premise that the more tasks the justices must personally do, the greater the chance that they will do some of them poorly. The familiar statistics showing such things as the fact that there were approximately three times as many filings in the 1971 term as in the 1951 term were also set forth. The following passages from the report deserve full quotation:

> Any assessment of the Court's workload will be affected by the conception that is held of the Court's function in our judicial system and in our national life. We accept and underscore the traditional view that the Supreme Court is not simply another court of errors and appeals. Its role is a distinctive and essential one in our legal and constitutional order: to define and vindicate the rights guaranteed by the Constitution, to assure the uniformity of federal law, and to maintain the constitutional distribution of powers in our federal union.
>
> The cases which it is the primary duty of the Court to decide are those that, by hypothesis, present the most fundamental and difficult issues of law and judgment. To secure the uniform application of federal law the Court must resolve problems on which able judges in lower courts have differed among themselves. To maintain the constitutional order the Court must decide controversies that have sharply divided legislators, lawyers, and the public. And in deciding, the Court must strive to understand and elucidate the complexities of the issues, to give direction to the law, and to be as precise, persuasive, and invulnerable as possible in its exposition. The task of decision must clearly be a process, not an event, a process at the opposite pole from the "processing" of cases in a high-speed, high-volume enterprise. The indispensable condition for the discharge of the Court's responsibility is adequate time and ease of mind for research, reflection, and consultation in reaching a judgment, for critical review by colleagues when a draft opinion is prepared, and for clarification and revision in light of all that has gone before.[38]

. . . .

> The statistics of the Court's current workload, both in absolute terms and in the mounting trend, are impressive evidence that the conditions essential for the performance of the Court's mission do not exist. For an ordinary appellate court the burgeoning volume of cases would be a staggering burden; for the Supreme Court the pressure of the docket are incompatible with the appropriate fulfillment of its historic and essential functions.[39]

The reaction to passages such as these has been a preoccupation with whether or not the justices really have substantially more to do nowadays than a decade or two ago. This is understandable since the report itself seems to take it for granted that in those halcyon days the Court's resources were appropriately allocated between reviewing petitions and its other functions. The reader is left with the impression that the study group is worried only about the impact of the statistical increase on what was once an optimum equilibrium of duties. The reference in Professor Freund's article in this issue[40] to Justice Harlan's statement in 1959 that the breaking point had not been reached, but that it might eventually be, reinforces this impression. It has been natural enough therefore for critics to begin with the same unspoken assumption and to address only the true effect of the increased filings. This approach is less productive than others (for reasons suggested later), but surveying the observations it has fetched is nonetheless illuminating.

First, there is the remarkable fact that the Court is presently current in its docket.[41] In an era when in many courts it is routinely taken for granted that the delay in disposing of cases is measurable in years, it is comforting to learn that the Supreme Court usually acts upon a new filing within three or four months of its being docketed. This phenomenon takes on additional significance in light of the fact that Congress has never sought to relieve the Court until there was clear and convincing evidence of a backlog. For example, prior to the creation of the circuit courts of appeals in 1891, the Supreme Court's backlog had created an interval of approximately four years between the docketing of cases and their disposition, and prior to the passage of the Judges Bill in 1925 there was a shorter delay.[42] In addition, there is the fact that the members of the Court manage a three month summer recess and a one month winter vacation, although they keep in constant communication with their offices during these breaks. And, there is more leisure time on weekends today than twenty years ago when arguments were heard on all weekdays with the conference on Saturday. Since 1955 weekends have rarely been used for conference and argument.[43] Justice Douglas, moreover, has reminded us that the number of decided cases each year has remained fairly constant over the decades, a fact which at least shows that the Court has not contracted the absolute number of issues considered on the merits despite the increase in applications for review.[44]

Furthermore, those justices who have served during the statistical climb believe that there has not been a degeneration of the Court's processes. Justice Stewart, on the Court since 1958, opines that the proposed court will not be needed within the next ten years even if the statistics grow at the present rate.[45] His colleague, Justice Brennan, states that he spent no more time reviewing the 3643 cases of the 1971 term than he did screening half as many in his first term in 1956. Experience, he posits, is unquestionably the "equalizer."[46] Former Chief Justice Earl Warren, who presided over a large part of the statistical increase, adds that there was no adverse effect on the quality of the adjudication process during his tenure.[47] Most critics of the proposal have been quick to observe that the great majority of all petitions are immediately identifiable as unlikely prospects for the writ and therefore only a small amount of time is really required to evaluate them and that most of the statistical increase has been in paupers' applications, which have more than their share of frivolous claims.

On the other hand, three members of the Court—Justices Rehnquist and Powell and the chief justice—have flatly stated their belief that there does not exist sufficient time for the reflection, research and collogue necessary for the proper elucidation of national law when applications for review must be assessed at a year-round clip of seventy per week.[48]

These three, however, are relatively new to the bench and its responsibilities, and it has been asked whether their complaint is a traditional one voiced by new Court appointees. It is perhaps relevant that when they were first appointed, both Justices Harlan and Stewart found occasions to comment on the heavy hours they were required to invest in their responsibilities.[49] Chief Justice Warren recounts new appointees have always felt overwhelmed by their new and tremendous responsibilities.[50] Justice Douglas suggests that ten years are required before a justice has adapted.[51] Of course, a decade is a long time to wait and it will be little comfort to the new justices that due to learning curve economies they will never have to spend more time on the certs than they do now.

Two different and reasonable conclusions may be drawn. Both are consistent with the foregoing evidence. The first is that the impact of the swelling certioraris has been overdone, that the newer justices would have been as overworked ten years ago and that their problems will eventually dissolve in experience. The second is that there has been a quantum jump in the responsibilities of the Court, that only experience has enabled the veterans of the Court to keep abreast of the heavier demands and that the job of freshman justices, always difficult, is becoming harder and harder.

The important point, however, is to recognize that there are substantial limitations on beginning with either set of conclusions. The problem with this entire approach is that neither of these findings lends itself to a ready assessment of the National Court of Appeals. For example, even if the Court is no more overworked or underworked than in days past, the new Court might still be an improve-

ment. Even if there has been no depreciation of the adjudication process perhaps more time would have enhanced it. Conversely, even if there has been a genuine strain caused by the increased certioraris, the new Court might be a cure worse than the illness. The approach is useful only if it is assumed that in years past the talents of the Court were optimally employed and it is found that the rising filings have not required an adjustment.

It is therefore regrettable that the idea of "overwork" has crept into the debate at all. A more useful issue is whether or not the proposed system has more advantages than the present one. The principal improvement of the new court is said to be that the justices would not be required to devote time to evaluating the vast majority of applications which tend to be less "reviewworthy." This time could be diverted to the process of making law. There are disadvantages of the proposal which will be considered hereafter, but, for the moment, it is worthwhile to explore the scope of the supposed economies.

Initially, it is important to remember that the Freund Committee would still have the justices examine the cream of the annual crop of applications for review, the very petitions on which they are presently spending the vast majority of their screening time in chambers and in conference. All that would be saved, therefore, would be the time normally accorded to those petitions which with experience the justices are able to recognize instinctively as ineligible candidates for review. Although the report expressly refrained from predicting how much time this would be, the point has become highly controverted.[52] Former Justice Arthur Goldberg asserts that an "astonishing number" of applications can be "immediately" identified as unworthy of review—even by a "third-year student."[53] Former law clerk Nathan Lewin agrees, recalling that Justice Frankfurter scanned a week's worth of petitions himself at bedtime in a single evening.[54] Judge Henry Friendly believes that a "good half" of the petitions can be denied on the basis of a short memorandum prepared by a law clerk.[55] Justice Brennan finds that in a "substantial percentage of cases" he need go no further than the "questions presented," citing as an illustration the following issue actually raised in a recent petition: "Is the Sixteenth Amendment unconstitutional as violative of the Fourteenth Amendment?"[56] In 1937 Chief Justice Hughes remarked that

> [a]bout 60 percent of the applications for certiorari [were] wholly without merit and ought never to have been made. There are probably 20 percent or so in addition which have a fair degree of plausibility but which fail to survive critical examination.[57]

Professor Bickel is irritated by estimates such as these and complains that "[n]o case can be regarded as trivial in any absolute sense [since] somebody's fate does hang in the balance in each case . . . ." Moreover, because the cases which reach the Court have been self-selected, he concludes that they already are the cream of the crop and care ought to be taken in choosing among them. He then turns to the question of how much time is adequate "on the average." He concedes that half an hour per case is an overestimate and settles on fifteen minutes, "perhaps less."[58]

Professor Bickel's response misses the point. First, even assuming that his average estimate of perhaps-less-than-fifteen-minutes is reasonably accurate, the fact remains that the "average" time for *all* petitions is wholly immaterial. What is relevant is the average time consumed by the petitions which would be culled by the National Court of Appeals. These will be less substantial by definition and will require far less time on the average than those certified by the new Court of Appeals. Second, the fact that someone's fate hangs in the balance of each case is not relevant, for the Supreme Court is not a last court of errors and appeals. Even a petition involving the fate of impoverished widows and orphans must be rejected out of hand if it raises no issues beyond state law questions. Whether or not a third-year law student would be able to spot many such cases, a justice of the Supreme Court learns to do so quickly. Justice Harlan recognized that a great many petitions fell into this category. He blamed the bar for not appreciating the nature of the questions decided by the Court and for yielding to the "understandable impulse of . . . solvent client[s] to carry a hard-fought cause to the highest tribune, forlorn as the hope of success may be."[59] That an attorney labors long on a petition of great human drama but of frail substance does not give him an assist in the Supreme Court. Nor should it.

On first blush, one minute per petition per justice may seem an outrageously short average time for denying the worst 3200 of 3700 applications. Of course, no petition is granted after only a minute's consideration. Yet a great many can be denied in even shorter time. It must be remembered that the Rules of the Supreme Court are aimed in part at requiring petitions and responses to be arranged so as to facilitate swift and accurate assessment. Rule 23(c), for example, requires each petition to have a section entitled "Questions Presented." When the question presented is absurd as framed by the petition itself a justice usually does not read further. Many applicants simply do not appreciate the caliber of problems the Supreme Court seeks. Even a case presenting a worthwhile problem is apt to be denied if it contains unilluminating questions presented, the assumption being that the inartful drafting reflects the quality of argument counsel would render. (When a petition is prepared by the litigant himself without the assistance of counsel the justices or their clerks have been known to read a little further. The Court is able to appoint counsel of its own choice if review is granted.) Another automatic ground for denial is a jurisdictional defect such as mootness or untimeliness. Since these usually occupy a prominent place in respondents' briefs, these are generally scanned first. Often this simple precaution pretermits all else counsel has to say. Only after hurdles such as these are passed must the importance of the issues presented be weighed, a sifting process for which justices acquire a "feel." A single reading is often enough to convince a justice, who is usually familiar with the cases cited, that although not frivolous a petition should be denied. Cases which survive this sifting process are those which make or come close to making the discuss list. These will take much more than a minute to assess. "Denys," however, are often casualties of the first few glances.

If one minute is about the average time required to deny the worst 3200 of 3700 petitions, then the National Court of Appeals would save a full week's working time over the course of a term.[62] If the average is higher the yearly saving will be proportionately higher. To be sure, this is an imposing block of judicial resources, but until the statistics grow substantially larger, this is about all that would be saved.[63] The Chief Justice recently reported that the caseload of the lower federal courts did not increase in 1973 for the first time in recent history.[64] Perhaps we may hope that the caseload of the Supreme Court will eventually stabilize.

In addition, it is worth pausing to consider what alternative use the justices would make of this time. It is hoped by the Committee that it would be applied to the process of collegial consultation used in elaborating our national law. While it is difficult to resist this hope, and although the extra time would probably be absorbed for the most part by the rigors of deciding cases on the merits, it remains unclear to what extent an additional week would result in a healthier dialogue, flushing out more of the nuances, the analytical difficulties, and the relationships of the immediate issues to analogous problems. The traditional extent of the justices' dialogue is the time devoted to each argued case in conference and the written drafts and redrafts of opinions circulated afterwards.[65] Occasionally, a vote will change due to a persuasive opinion but that is rare. It is no secret that the votes and theories announced at the outset in conference usually remain unaltered. For example, Nathan Lewin, who clerked for Justice Harlan in 1961-1962, recalls that he saw "precious little" collegial consultation in an era when the work load of the Court was somewhat less. He has challenged Professors Freund and Bickel, who clerked for Justices Brandeis and Frankfurter respectively, to represent that they observed a vibrant interchange of opinion among the justices.[66]

The problem, if there is one, is less a lack of time than the fact that the susceptibility of the Court to a "deliberate, reasoned, collegial declaration and elaboration of national law" is solely determined by the personalities appointed to the Court. Most have been men of fierce independence, strong notions, and their basic predilections and sensitivities are no longer amenable to change.

Yet the fact remains that on some occasions a justice will be genuinely unsettled on the proper resolution of a case and more time to reflect on the matter would be helpful. Justice Harlan, for example, confessed in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*[65] to having reversed his initial position on whether or not there should be a civil remedy for a violation of Fourth Amendment rights. Another example appears to have been the soul-searching in the recent obscenity cases in which all agreed that some clear rule should be fashioned to extract the federal courts from the quagmire of obscenity law.[66] As rumor has it, the end result was by no means marked from the outset and a genuine and fresh reexamination

of available alternatives was undertaken by many of the justices. Surely, the same trepidation has preceded many of the blockbuster pronouncements of the Court. Nathan Lewin himself recalls the story of Justice Harlan "rescuing" *Robinson v. California*[67] and convincing his colleagues to take the case in order to hold that a state may not punish one for merely being a narcotics addict.[68] Perhaps another example is the "Flag Salute Cases." After holding that laws requiring salutes by public schoolchildren were constitutional, the Court overruled the precedents in *Board of Education v. Barnette*.[69] Justices Black and Douglas voted with both majorities and voted to overrule after "[l]ong reflection."[70] Such occurrences suggest that some room for persuasion and consultation exists.

The point simply is that although the occasions for collegial consultation may be rare they are important and should be encouraged. This is especially true in a time of frequent 5-4 decisions when the indecision of a single justice may provide more than the normal incentive to put forward the most convincing arguments.

In any event, it would be desirable to have more time to devote to opinion writing and to understanding the more complicated factual cases such as those involving regulatory systems. Despite the fact that on the whole the work of the Supreme Court is well done, unfortunate and unintended dicta can occasionally spawn regrettable results in the lower courts or lead to uncertainty in the planning of the public and private sectors. To some extent this evil is already controlled by the canon of precedent which pays less heed to unnecessary comments of judges than the actual holdings of cases. But still it is an annoyance. Beyond the problem of articulation there is the responsibility of understanding the record in each case and how any regulatory system at issue is implicated.

Notwithstanding the fact that the extra week could be applied to improving opinions, however, a genuine possibility exists that a substantial amount of the additional time might be spent in writing even more opinions which otherwise would not have been attempted. This appears to be the trend. Precisely how the members of the Court would invest an additional week is strictly a matter of conjecture.

This all suggests that while there are those who doubt that the Court is presently any more overworked than in past years, the real issue is whether or not the new court would be an improvement. To be sure, the plan would free approximately one week of time for each of the members of the Court as filings now stand, and most of this time would probably be divided between reflecting over issues and writing better or more opinions. (There would also be a savings in

65. 403 U.S. 388, 398 (1971) (concurring opinion). For the observation by Justice Harlan that "[i]t is by no means unknown for the alignment of the Justices, or indeed the result of a case, to change after opinions have been written," see Harlan, *supra* note 8, at 116.

66. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); Miller v. California, 413 U.S. 15 (1973).

67. 370 U.S. 660 (1962).

the time of law clerks, although this is less important inasmuch as ways less drastic than a new court are available to provide such relief.) Standing alone, these benefits would surely be an improvement, but it is doubtful that there would be a dramatic change in the final products of the Court.

B. Weighing Disadvantages

Whatever the scope of its benefit, the Freund Committee's plan has been oppugned as being fraught with evils which, it is said, were apparently not taken fully into account by the study group.

The missed opportunity

Most prominent is the criticism that the National Court of Appeals is apt to deny cases which the Supreme Court would, if given the opportunity, take for either plenary or summary review. There is hard evidence to support this objection, for, as Justice Brennan has written, about 1100 cases make the "discuss list" and are examined in conference.[71] Since the Freund Committee would confine the discuss list to a maximum of 400-500 cases yearly, approximately 600-700 petitions each term, which would now be reviewed in conference, would be denied.

Although this statistic is an impressive one, it should be remembered that many items are discussed in conference even though none of the members of the Court thinks them worthy of review. All appeals, for example, are automatically discussed even though many of them are unanimously dismissed for lack of a substantial federal question. To the extent that the 600-700 cases barred from the Court would have fallen in this category it is safe to conclude that the Court would miss no opportunities it would regret. Moreover, the 600-700 cases would also include a fair number of "'olds," cases which are now mentioned in conference not as candidates for review themselves but as cases that present issues which might be controlled by other cases awaiting final decision. Once the principal case is decided, if the lower court might have reached a different result under the principal case, the "hold" is granted review and immediately remanded for further consideration. As is detailed hereafter, although it might be awkward for the proposed court to withhold action on applications pending the disposition by the Supreme Court of argued cases with common issues, such a procedure could probably be administered. Thus many of the 600-700 missed opportunities would simply be cases which could be "held" by the new court.

Even making allowances for holds and appeals, however, there would be several hundred instances each term in which a petition was denied by the new court even though at least one justice would find in it a substantial federal question warranting, in his opinion, review by the full Court. Of these, there would probably be 20 or so cases which eventually would attract the votes of at least four justices.

72. 372 U.S. 335 (1963).
73. 370 U.S. 660 (1962).

This prospect has caused critics to question whether or not under the proposed screening procedure the Court would have had the opportunity to decide cases such as *Gideon v. Wainwright*,[72] which extended the right of assistance of counsel at trial to indigents accused in state courts of felonies, *Robinson v. California*,[73] which held that punishment merely for being a narcotics addict was cruel and unusual, or *Brown v. Board of Education*,[74] or *Furman v. Georgia*.[75] Nathan Lewin's story about Justice Harlan rescuing *Robinson v. California* poses the spectre that the seven judges of the National Court of Appeals would, as eight of the justices themselves are prone to do, overlook the significance of a petition.[76]

Professors Freund and Bickel have replied that it is not remotely possible that a National Court of Appeals could have passed over such issues although they concede that those very cases might have been denied.[77] The signals that the Court was ready to consider the questions were there for the bench and the bar to see. Even the slightest possibility that four justices would grant a petition—even to overrule recent precedent—should be enough to warrant certification. This reply is somewhat reassuring but, unfortunately, leaves some points unanswered. In the term in which *Gideon* was decided, for example, dozens of petitions presenting the right-to-counsel issue were presented. The Court, having already decided to overrule *Betts v. Brady*,[78] set out to find the best vehicle for doing so. Petition after petition raising the issue was rejected as inappropriate for collateral reasons (unsympathetic defendant, other grounds could pretermit the question) until finally Gideon's case was found.[79] In such circumstances not all of the dozens of cases would be certified by the National Court of Appeals (since certification of so many would substantially cut into the 400-500 limit). The result would be a restriction of the Court's menu of vehicles for reviewing the issue, all of which the Court might think inappropriate for collateral reasons.

Assuming, however, that the new court were so perceptive that no "major" issue which the Supreme Court were ready to hear went uncertified, the fact remains that each term several hundred petitions would be denied even though all of them would have been discussed and some of them granted. Although many of these would be the seemingly less significant cases, there is no doubt that due to the ceiling of 400-500 cases, the new court could not be responsive to all of the subtleties, nuances and interests of the Court even if they were well-known. The committee report and Professor Bickel concede this. The casualties would include cases such as *Cohen v. California*,[80] a case reversing the conviction of one who wore a jacket bearing the words "Fuck the Draft" into a courthouse, and a case which Justice Harlan described as being one which at first blush seemed too inconsequential to find its way into the books of the Supreme Court but which presented an issue of "no small constitutional significance."[81]

74. 347 U.S. 483 (1954).
75. 408 U.S. 238 (1972).
80. 403 U.S. 15 (1971).

A related problem is the loss of many dissents from denials of the writ or from dismissals of appeals. In the past, these dissents have often signaled the interests of Court and encouraged the bar to continue to raise issues which ultimately have been taken by the Court. Such was true, for example, in the capital cases. In *Rudolph v. Alabama*,[82] Justice Goldberg dissented from the denial of the writ, suggesting that the death penalty might violate the Eighth and Fourteenth Amendments. Lawyers continued to raise the question, and finally in *Furman v. Georgia*[83] the Court decided the point. Justice Brennan worries that under the plan he would not be able to suggest through a dissent from the denial of certiorari that a substantial question exists as to the President's authority to prosecute a war in Indochina.[84]

Aside from presenting concrete cases on which to comment, the constant flow of petitions has the benefit of causing the justices to focus on issues which might not otherwise form in their minds. If a worthwhile issue crosses the screen it can be flagged in passing by a dissent from the denial of certiorari. Without this convenient procedure, there would be no such automatic indicator of the frontiers of the justices' thoughts and no efficient means of educating the justices about the nature of the issues being raised in the lower courts.

There would also be the loss of opportunities for a justice to place his imprimatur on the claim of a prisoner who may have been wronged in a way which does not warrant the Court's time but who, because of a short dissenting statement from the justice, will be able to get a second look when his conviction is brought before the lower courts on collateral attack. Because the vehicle for the collateral attack is likely to be a handwritten and inartful complaint prepared by the prisoner himself, masking the merit of the claim, the allusion to the fact that a member of the Supreme Court thought the matter worth inquiry may alert the habeas court that the prisoner's petition is not frivolous.

To all of this it might be answered that each term the National Court of Appeals could simply certify more than 400-500 cases to the Supreme Court and thereby reduce the number of instances in which these various opportunities would be lost. This would probably work but at the cost of reducing substantially the savings in time originally contemplated. With respect to these extra few hundred cases, it should be remembered that although they would require less time than the 400-500 thought to be most review-worthy, they would still require more time to assess than the frivolous cases. At some point all that would be barred from the Court would be the clearly insubstantial applications which literally occupy only a few seconds per case of each justices' time, and thus the proposal would lose all of its appeal.

Holds

A separate problem concerns "holds." As mentioned previously, a "hold" is a petition which is not acted upon until another pending decision is announced because both involve a common issue. For example, when the death penalty cases were handed down, several hundred other cases involving capital sentences had been accumulating in the files of the Court. None of these cases had been denied review even though only four were selected for testing the constitutionality of the death penalty. Until *Furman v. Georgia*,[85] these petitions were simply neither granted nor denied. Shortly after the death cases were announced, however, the conference reviewed all of the "holds for *Furman*" to determine if any other worthwhile issue was presented and if so, whether or not it was eclipsed by *Furman*. In the end, virtually all the judgments challenged by the holds were vacated and the cases were remanded for reconsideration in light of *Furman*. (Had the death penalty been sustained most of these petitions would have been simply denied.) The "hold" procedure is a salutory attempt to dispose of cases without breaking new ground and to supply a degree of uniformity which would be lacking if only a select few or a single case were taken to announce a new principle.

Critics of the Freund Committee have asked what its proposal would do to this meritorious aspect of Supreme Court procedure. So far the question has gone unanswered but one response would seem to be that, as mentioned before, a National Court of Appeals could administer a similar "hold" procedure of its own. If it appeared that a petition or appeal presented an argument already being tested either in a case awaiting decision by the Supreme Court or already presented in a petition previously forwarded to the Supreme Court, then the National Court of Appeals could postpone action until the Supreme Court acted. When the Supreme Court disposed of the principal issue or petition, then presumably the National Court of Appeals would review any held case for that decision and if the lower court had correctly decided the issue, deny the petition, and if not, remand the case for reconsideration in light of the new decision.

If Congress did not authorize the National Court of Appeals to grant, vacate and remand in light of new Supreme Court opinions, certification would be in order to permit the Supreme Court to remand. Such certification would consume more of the justices' time. This might be preferable, however, to granting the National Court of Appeals the power to reverse or vacate in light of the Supreme Court's current pronouncements, a power which would open the door to the seven judges' own predilections about how close in point a recent Supreme Court opinion actually was and which would extend the role of the National Court of Appeals beyond mere screening.

85. 408 U.S. 238 (1972).

Moreover, there would inevitably be imprecision in any hold apparatus not under the control of the Supreme Court. For example, there would be the problem of delay when the new court held a petition which under the present system the Supreme Court would deny immediately. This is illustrated by the fact that early in 1973 the Court refused to review the Memphis school desegregation case,[86] although at least one of the legal questions presented was seemingly similar to a question raised in the Denver school case then under submission.[87] Apparently, the Court believed the link between the two was too tenuous to warrant delaying the finality of the Memphis case. On the other hand, there might be error in the opposite direction. The new court might deny an application which the Supreme Court would now hold. The point is that a hold procedure inaugurated by the National Court of Appeals, while possible, could not be as precisely operated as the present hold procedure.

Drawbacks of the new court

Other objections concern the new court itself. It is said, for example, that it would be demeaning for judges accustomed to judging to be nothing more than "Glorified Law Clerks," in former Chief Justice Warren's phrase.[88] Various circuit judges have received the proposal unenthusiastically. It is said that the additional responsibility for resolving circuit conflicts would be a mere salve for the injured pride of members of the new court.[89] Perhaps this also explains the plan to rotate membership of the new court, although such changes in court personnel would surely sacrifice whatever proficiencies were attained in processing applications. To this Professor Bickel responds that we can assume that judges asked to serve would do so with the grace and dedication that is common to federal judges.[90] Undoubtedly we can. One important consequence of the plan, however, would be to shift the initial responsibility for reviewing applications from the law clerks of the justices to the law clerks of the members of the National Court of Appeals. At present at least the justices' assistants have the benefit of the justices' tutelage which lessens the risk that issues of interest are passed over. Moreover, there would be no collegial consultation among the members of the new court, at least face-to-face, inasmuch as they would be permitted to remain in their local chambers. Communications would be by mail or telephone.

Weakening the Authority of the Court

Finally there is the objection that it would no longer be true that the grievance of any man, however low his station in life, could receive the attention of the justices of the Supreme Court. Former Justice Arthur Goldberg has presented this argument quite forcefully, asserting that

> [t]here is the greatest value in citizens being able to believe that, as a matter of principle, every man and woman has a right to take a claim involving basic rights and liberties to the Supreme Court of the United States. It is this belief that in part inspires the great popular reverence for the Supreme Court in its role as a "palladium of liberty," and a "citadel of justice."[91]

To the idea that it is the birthright of Americans to have access to the Supreme Court, Professor Bickel recalls Ernest Hemingway's conclusion of *The Sun Also Rises*: "Isn't it pretty to think so." Without revealing how much value he places in the palladium concept, Professor Bickel offers the thought that at some point the right of access will become meaningless unless a new procedure for evaluating applications is developed. Using more clerks is undesirable, he says, because they are "invisible staff" whose use will ultimately foster disillusionment and cynicism because the public will know that the justices themselves will have time to give the applications only the most cursory and superficial consideration. Instead of preserving a symbol the bottom line will be a loss of confidence by all.[92] Moreover, in spite of the fact that the Supreme Court regularly waives fees and appoints counsel for indigents proceeding before it, Professor Bickel chides those paupers who daydream about being a contestant before the Supreme Court, citing the high costs of litigation.[93]

It is worth pausing over these conflicting views to identify some of their unspoken content and qualifications. One theme of former Justice Goldberg is preserving one legacy of the Warren Court: the faith of those with little influence in the other branches of government that the Supreme Court is willing to hear their grievances. Their belief need not depend, as Professor Bickel suggests it does, upon a fantasy of actually being a litigant before the Supreme Court, for an oppressed individual need only believe that if someone else similarly situated presents their common grievance to the Court that grievance will receive the same consideration given those of the more affluent and powerful. In the desegregation, reapportionment and criminal procedure areas, for example, millions were benefited who were not litigants. These persons and most liberals are the aficionados of the idea that the Supreme Court should be a guardian of liberties.

This idea is jeopardized in two ways by the proposed court. First, the establishment of a National Court of Appeals might lead to suspicion that these types of social protests were being systematically supressed, although suspicions are not inevitable. If the new court were staffed by judges such as David Bazelon, Shirley Hufstedler, John Wisdom and Skelly Wright, few would suspect that the door had been closed to the oppressed. Even when these judges were in the minority, their refusal to dissent from a denial of a petition would be evidence that it would not have been found review-worthy even by a more sympathetic court. Moreover, the utility of access to the Supreme Court is a function of how much relief can be garnered from the lower courts and how receptive the justices themselves would be. Nowadays the former may be more sensitive to the problems of the powerless.

86. Board of Educ. v. Northcross, 410 U.S. 926 (1973).
87. Keyes v. School Dist., 413 U.S. 189 (1973).

The second threat is the loss of opportunities for the Court to act summarily to correct manifest injustices in cases otherwise of no interest. These opportunities are reflected in the many short *per curiam* "grants and reversals." These are petitions which are granted and decided only on the basis of the certiorari petitions and without oral arguments or full briefs. Often they involve civil liberties claims which were mistakenly denied by the lower court. The National Court of Appeals would surely cull such cases because rarely are unsettled and important issues presented in them. In turn, the image of the Court as a dispenser of individual justice would be crippled.

It is easy enough to recognize that the cause of civil liberties would suffer but it is at least equally important to see the more fundamental point that the authority and legitimacy of the Court would be threatened. Unlike its sister institutions, the Supreme Court does not have periodic popular mandates from the polls to sustain its acceptability. Rather, its authority comes from other sources. One is undoubtedly the hope that its decisions are the inevitable dictates of neutral principles of law. It has also been suggested that the Court's acceptability derives from its image of being a guardian of liberties and and a doer of justice.[94] If this is so then a crumbling of the citadel of justice would in turn cause an erosion of the Supreme Court's authority. This would please some Court scholars because it might force the Court to adhere more frequently to the elusive neutral principles in order to shore up its respectability. It would delight still others who believe that the Supreme Court should have much less influence anyway, usually on the theory that in a democratic system the role of nondemocratic institutions should be minimized.

The degree of the Court's influence is implicated in still another way. The pace of judicial activism could be no faster than either the National Court of Appeals or the Supreme Court desired. For those who prefer that the judiciary not meddle so frequently in social and political affairs, the National Court of Appeals will supply a welcomed institutional check. It could deny important petitions on "collateral" grounds until it is "safe" to certify them. Or, it might hold and remand such petitions if they involve other issues seemingly analogous to other questions recently decided by the Supreme Court. To avoid the appearance of being too selective the new court might occasionally certify blockbuster issues but only in cases in which surrounding circumstances make them inappropriate vehicles for breaking new ground, indulging disingenuously in the aphorism that hard cases make bad law. Even if the sympathies of the two courts were identical, there would doubtlessly be unintended interference with the Supreme Court's orchestrating the chronological order in which it chooses to take and decide issues. Even though the right issues might be certified

94. Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169 (1968).

by a hopeful National Court of Appeals, the cases presenting them might be less appropriate environments for deciding them than other cases which were not certified. For those who believe it is essential that the Supreme Court remain free to choose the precise moments when it will dictate improvements in the political or criminal processes the National Court of Appeals will simply be a grave institutional flaw.

There would be recurring occasions for problems such as these to become visible. For example, the new court might certify a case presenting issue X and the Supreme Court might deny it. The next time a case involving that issue arose the judges would be caught in a dilemma. If the issue were again forwarded to the Supreme Court, suspicion among the justices and the public might arise that certain questions were being favored to the exclusion of others. If, on the other hand, the case were denied, the Supreme Court might be deprived of a vehicle for exploring an issue it passed over the first time only for collateral reasons.

The Goldberg-Bickel exchange implicates the traditional cosmic issues concerning the Supreme Court. Once it is appreciated that the palladium of liberty image is endangered one must ask whether public acceptability of the Court's decisions will also be weakened and, if so, whether that is desirable or undesirable. Apart from perceptions about the Supreme Court, there will be practical problems such as interference, perhaps unintended, with the Court's arrangement of the chronological order in which it prefers to decide various issues. Should the politics of the two courts diverge, such interference might intensify and even become contrived through subtle devices. This would result in an internal check on the third branch of government. Reasonable minds may differ on the question of whether or not such restraints on the judiciary are desirable and on the question of whether or not the Supreme Court's acceptability should derive from its image as a doer of justice. These are philosophical questions which will require deep constitutional thought by congressmen when they turn to the Freund proposal.

C. Alternatives

The study group arrived at its recommendation by the process of elimination, finally concluding that of all the alternatives (including the present system) its own was the least of evils. It was said, for example, that limiting the Supreme Court to constitutional issues would prevent it from deciding statutory issues which often are questions of national prominence. Moreover, this limitation would render awkward the process of construing statutes whose constitutionality is challenged.[95] A series of administrative courts of last resort would sacrifice the advantages of the big picture and would permit inconsistencies in the administration of justice by various independent tribunals.[96]

Other possible alternatives were rejected but one of them—more staff—has caught the eye of a number of the committee's critics. Justice Goldberg, for example, states that "additional personnel to assist the Court in the handling of its caseload would obviate the need for drastic change in our fundamental system of Supreme Court review

. . . ."[98] Eugene Gressman offers the same suggestion along with the idea that a page limitation on petitions be established.[98] A research director of the Michigan court of appeals has suggested that a group of senior staff be formed in the Court to help digest applications. Such "commissioners," he states, have been used with regular success in many state courts of last resort. Unlike law clerks, members of such staffs would not leave yearly but would continue to accumulate experience.[99]

Whether or not the justices would want such a senior staff to make recommendations, such an office could supply certain economies and still not propose dispositions for petitions for certiorari. One such function would be to prepare summaries of the lower courts' holdings, to restate the questions raised and to indicate whether or not the applications were timely or subject to jurisdictional doubts. These digests could be prepared by the clerk's office in much the same way as the Reporter of the Court presently prepares official syllabi of its work. These summaries could be circulated to the chambers at the same time as the petitions. Each would be free to use the digests or to supplement them as necessary to tailor the memoranda to a particular justice's viewpoint and interests. Although this procedure would be of less aid to justices who read the petitions themselves, it would be welcome relief for the staffs of those justices who prefer to read summaries. The preparation of additional memoranda could be avoided where the clerk's digest was satisfactory. This would be but a slight extension of the law clerks "pool" now shared by five of the justices.

Yet it remains a "given" that a justice's time is finite and that he must personally make a decision on each petition. Once a justice has been on the bench long enough to identify a pattern of information he believes is relevant to these decisions and so long as he does not compromise that pattern, the time a justice must personally spend on the applications will rise as the filings mount from term to term. Although staff may distill and present the information a justice seeks, they cannot make the final decision.

Professor Black proposes that each justice use permanent staff to prepare summaries and recommendations. Although he seems to suggest that the justices would be more willing to rely exclusively on such documents than on the summaries and recommendations now prepared by law clerks, the fact is that many justices already rely heavily on law clerks' "cert memos." Thus, except to the extent that the justices would be more willing to rely exclusively on more exhaustive memoranda the idea would probably not save much time of the justices.[100]

If the day comes when such relief becomes imperative then serious consideration might be given to three simpler alternatives not examined by the Freund Committee in its report. The first is to post-

99. Stockmeyer, *Rx for the Certiorari Crisis: A More Professional Staff*, 59 A.B.A.J. 846, 849 (1973).

pone any major surgery on the Supreme Court until after Congress addresses the serious "overwork" problem of the lower federal courts. It may well be that solving the latter problem will in turn cause the Supreme Court's docket to stabilize.[101] Judge Friendly has recently stated that the justices' time which could be saved by a rethinking and narrowing of federal jurisdiction would be "substantial."[102]

A second alternative is a delegation by the conference of the responsibility for prescreening applications to a rotating panel of justices. The panel would select those cases which any of its members believe would be of interest to *any* member of the Court and those cases would then be circulated to all of the chambers for analysis by each justice and for nominations to the discuss list, as now. Those cases rejected by the panel would not be reviewed by the other justices but automatically would be denied.

Although the Freund Committee is unimpressed with "panels" in its report, the reference appears to have been to the different idea of panels deciding cases on their merits, such as now is done by the Courts of Appeals. A panel to draw up a "circulation list" is an entirely different plan. It would provide part of the savings in time to be gained by a National Court of Appeals but would avoid at least some of its drawbacks. It would eliminate or at least substantially reduce the risk of denying a petition which should have been granted. The justices know one another's viewpoints and interests fairly well. Even now each justice is occasionally called upon to predict how his colleagues will vote on petitions for writ of certiorari when in chambers he is asked to grant a stay of a lower court's judgment pending disposition of the applicant's certiorari petition.[103] That the justices have performed this task with remarkably little controversy suggests that a panel of several justices could identify virtually all of the cases which would be of any interest whatsoever to their colleagues. Certainly predicting the concerns of a member of the Court is easier for three or so of his day-to-day intimates than for the judges of the Courts of Appeals. Moreover, such a panel would avoid altogether the problem of what to do with "holds" because the justices would easily recognize them and refer them to the circulation list. It would also avoid a new layer of judicial bureaucracy, an institutional check, and the chagrin of judges serving as glorified law clerks. And, it would not disturb the belief that the Supreme Court should be required to consider every man's grievance. It would, in a word, leave the present system almost intact while achieving a fair portion of the economies offered by the Freund Committee. Finally, this counterproposal leaves it up to the justices themselves to decide when, if ever, the pressures of the petitions have reached the breaking point.

Four possible objections come to mind. First, it would still be possible for an application to be denied even though under the present system it would be granted. As mentioned, however, the risk that the panel would fail to recognize a case which would be of interest to a colleague is remote in light of the intimate relationships enjoyed by the justices. Only in the period following a new appointment when these relationships have not yet formed would there be a substantial

risk that the new appointee's concerns might be overlooked (or that he would overlook the interest of a colleague). Yet this risk would be ever present in the National Court of Appeals. Second, due to rotation off of the panel, the justices would not be exposed to as many of the worries and concerns of the American people as they presently are. This would be a loss but at least it would be less of a loss than that occasioned by the Freund Committee's plan. Moreover, the conference would be free to decide when full exposure was worth the candle. Third, panels would not conserve as much time as would a National Court of Appeals and therefore would be merely a "stopgap" measure. At least three justices would review all applications and all nine would review all applications placed on a circulation list—which might be as many as 1500 cases per term. All that would be spared would be six justices' time in reviewing the 2000 to 2500 cases which are relatively insubstantial. Under the assumptions used in calculating the time the National Court of Appeals would save, the use of panels would save approximately one-third of the savings of the new court.[104] Until more time is needed, however, less drastic measures will be satisfactory. Indeed, the failure to exhaust available stopgaps may suggest major relief is not needed. Fourth, panels would abrogate the Rule of Four because fewer than six justices could deny a petition. To some extent this would be true, although there would be no change in the rule that four votes are necessary to grant a petition. The rule had its origin in a promise to Congress in 1925 that in exercising its certiorari jurisdiction the Court would not take too few cases.[105] Accordingly, four votes rather than a majority are enough to require the full Court to hear argument. The spirit of this rule would not be offended so long as the panels acted in good faith in attempting to identify frivolous cases which would be of no interest to any justice. Presumably there would still be at least 1100 cases (and probably more) referred to the full Court annually from which the discuss list could be compiled. Any four votes could then elevate any case on this menu to the argument calendar. The possibility that a rotating panel would intentionally and in bad faith deny a case of interest to a colleague is unthinkable. The promise made in 1925 would not be watered down.

A third alternative is to trim the number of cases taken for review. Each year 150-200 cases are decided on the merits. Although all of these decisions are important in the sense that the issues resolved have two or more reasonable points of view, many of them are not so important as to require an immediate and authoritative answer from the Supreme Court. By chopping a dozen or so cases each term, approximately a week could be saved for each justice. The extra time could be applied to the same collegial deliberations and other activities which would follow the establishment of the National Court of Appeals. Its only drawback would be a fewer number of final decisions each term. Of course, at some point further reductions would be undesirable, but today many would view a slight reduction in the decided cases as a viable option.

The conference already has the authority to deny close cases so long as it abides by its representation to Congress that it will continue

to decide approximately 150-200 cases annually. When the argument calendar begins to fill up too rapidly or slowly the conference has been known to adjust its generosity in granting review. If Congress were to make plain its approval of a small reduction—perhaps in an appropriate Committee Report—then the conference might adopt an informal plan designed to hold down the number of "grants" to allow freshman justices time to adjust. Such a statement might be part of the legislative history accompanying passage of a law eliminating appeals by right to the Supreme Court, legislation which would permit a reduction in the argument calendar.

Conclusion

1. The threshold question is what approach should be employed to evaluate the proposal to create a National Court of Appeals. So far their attention has been riveted to the significance of ascending statistics, an inquiry which is satisfactory only if it is assumed that in an earlier day the resources of the Supreme Court were optimally allocated among its functions and it is concluded that the rising filings have had a negligible impact on that equilibrium. A more comprehensive and preferable approach is to contrast the advantages of the present and the proposed (and other) systems.

2. There is also a factual problem. An understanding of how the existing procedures work and a prediction of how they would be changed is required. Because the internal processes of the Supreme Court are shrouded in mystery, all the facts are hard to gather and reasonable minds may differ on some of the critical conclusions. One reasonable conclusion, however, is that the establishment of a National Court of Appeals would free about one week of each justice's time each year (and some time of the law clerks) and this time would probably be diverted to improving opinions or writing separate opinions that would otherwise have not been issued.

It is also reasonable to conclude that the National Court of Appeals would serve as a check on the pace of judicial activism. There will inevitably be times when the proclivities of the two courts will diverge. Moreover, even when the two courts are in step there will be an inevitable twenty or so cases each term which will be denied but would be granted by the Supreme Court if given the opportunity. At times the disadvantaged (or other groups at various times) will believe that their claims are being viewed with disfavor by the new court, the extent of the feeling depending upon the predilections of the two courts. The Supreme Court will also lose a convenient procedure for keeping abreast of the business of the lower courts as well as for signaling the emerging interests of various justices. Finally, the hold system used by the National Court of Appeals would be workable but less desirable than the present hold system.

3. There remains the question of values. With one exception, all of the contrasts between the existing and the proposed system are

pretty clearly either advantages or disadvantages, as the case may be. More time, for example, is undeniably a benefit. Professors Freund and Bickel have exalted this advantage by emphasizing that the Supreme Court should not be a mere switching station for efficient disposition of cases but rather a forum for the thoughtful and wise elucidation of national law and policy. Few would disagree. The problem is that even this model is threatened by the proposed court. There would be, for example, the abandonment of a facile means of advising the justices of the trends and business of the lower courts and of the justices communicating to the public the horizons of their interests. True, these advantages could be supplied in alternative ways. The justices could do more reading and give more speeches. But these are more time-consuming and less convenient than the orderly if swift review of applications for review. The result would be decisions which are less cognizant of related problems in analogous areas and a composition of argued cases different from those which would be heard were the Court better able to express its interests and be better informed. These also affect the quality of the adjudication process. Reasonable minds can surely agree that a collegial court is imperative yet differ over which set of consequences is the greater threat to it.

Were this all of the problem, all that would remain to the analysis would be the task of assigning values to the competing considerations. There is, however, the additional complication of the institutional check posed by the National Court of Appeals. Unlike the preceding factors, the issue of the institutional check does not involve how well the Supreme Court will perform its collegial role. Rather, it implicates the more enduring question of how pervasive a presence the Supreme Court should have. And, unlike each of the preceding considerations, there will be no consensus on the question of whether a less prominent Supreme Court is desirable or undesirable. On the one hand, many eminent scholars and statesmen have supported a strong Court because of a distrust of the states and the political process. Other constituents have been its fair-weather friends, those who hail the momentary trend of its decisions. A rein on the judiciary's ability to forge new policies and law cuts against these sentiments. On the other hand, opposite yet reasonable views are plain. There are those who believe that in a democratic republic the role of nondemocratic institutions should be minimized. This basic policy choice must be faced once it is concluded that the image of the Supreme Court as a citadel of liberty is threatened or once it is concluded that the National Court of Appeals could serve as a check on the Supreme Court by adroit manipulation of procedure. To consider a National Court of Appeals Congress will have to lay bare these difficult and fundamental questions.

4. Finally, regardless of whether one prefers the present system or the National Court of Appeals, alternatives must be compared. Perhaps there is a change that would avoid many of the failings of both. Two not considered by the study group are suggested in this article. Furthermore, if it is likely that Congress will narrow the jurisdiction of the lower courts in the reasonably near future, then it might be best to compare alternatives for the Supreme Court after the effect of such reform can be measured.

E. MULTI-PURPOSE REVISION

ACCOMMODATING THE WORKLOAD OF THE UNITED STATES COURTS OF APPEALS*

Over the longer term, it is appropriate to observe that growth brings change; the question is not whether we can preserve all of the present attributes of the existing system as the caseload grows, but rather in what respects they are to be changed. The basic problem already being created by the continuing growth in the number of appeals and of judges is the diminishing effectiveness of existing devices for holding the federal judiciary together as a single enterprise. In particular, the function of the Supreme Court as an agency for harmonizing and unifying federal law is spread ever more thinly.

If and when the appointment of additional judges within the limits set forth above is inadequate to permit a circuit to keep abreast of its business, one alternative is to put the division system within a circuit on a more far-reaching basis. Use of the division system could permit a circuit to consist of up to 30 active judges or thereabouts. A second alternative is to split some of the present circuits. In particular, before long choice will have to be made between thus expanding the Fifth Circuit and the Ninth Circuit, or splitting them. These Courts of Appeals in these two Circuits will be unlikely, even with 15 active judges, to stay abreast of their work for very long.

At some point, perhaps less distant than commonly supposed, some circuits will have to be split, even if they have first been increased to 30 judges. When additional circuits are created, and perhaps before then, structural changes will have to be made to facilitate guidance and harmonization of federal law decided by the Courts of Appeals. This task is now performed by the Supreme Court by review of decisions of the Courts of Appeals. The recent rapid growth in federal judicial business in the Circuits, with the added burden created by enlargement of the number of circuits, will make it even more difficult, if not physically impossible, for the Supreme Court to perform this monitoring function in the future. That being so, it will be necessary at some point to provide mechanisms by which at least part of this function can be performed in some other way. The possibilities appear to include:

A. Creation of an "appellate division" of the Courts of Appeals, consisting of either of regional panels--presumably three in number—or of a single panel with nationwide jurisdiction.

*A concluding segment of a report of a project of the American Bar Foundation in 1968. Paul D. Carrington was Project Director and Bernard G. Segal Chairman of the Project Advisory Committee.

B. Creation of new appellate tribunals, either parallel with existing circuits or as appellate divisions of them, whose jurisdiction would be defined in terms of the subject matter involved. Such courts could provide unitary and therefore authoritative determinations in their areas of subject matter authority. Specialization of the judges could be avoided by rotation of the judges on these courts.

C. Creation of a "national circuit," a court functioning generally like an appellate division of Courts of Appeals but manned on a rotating basis by judges from the Circuits. This court would hear cases where conflict within or between Circuits was presented and could be authorized to take cases either before or after ordinary panel consideration at the circuit level. Decision by the national circuit would be reviewable by the Supreme Court but such review would be expected to be the exception rather than the rule. It could thus be anticipated that large areas of federal law would be settled by the national circuit.

All of these recommendations, whether essentially conservative or relatively radical, will work some change in the nature of the judicial process and the judicial office in the Courts of Appeals. There is no way in which adjustment to new workload conditions can be made that will leave intact all present characteristics of the Courts of Appeals. These Courts were an innovation themselves. Since their creation, they have been in constant process of transformation as the amount and kind of their work has changed. The problem at hand is to make further adjustments substantial enough to achieve the desired results, with minimum transforming effects on the system as a whole. Reasonable minds differ as to what changes, minor or major, would be most congenial. There is no question, however, that the need for such changes confronts us.

A NATIONAL DIVISION
AMERICAN BAR ASSN.*

IN ANOTHER important action the House of Delegates went on record in favor of the creation of a National Division of the United States Court of Appeals. The House action means that the proposal will be made to the Commission on Revision of the Federal Court Appellate System, which has the mission of studying and reporting recommendations for change in the "structure or internal procedure" of the courts of appeals by September 21 of this year. (The commission has completed the first part of its assignment—recommendations for changes in circuit boundaries. See this *Journal* for February, page 209.)

The text of the resolution adopted, which was moved by the Special Committee on Co-ordination of Judicial Improvements, is:

> That the American Bar Association recognizes the urgent need for and supports the creation by Congress of a National Division of the United States Court of Appeals for the purposes of (1) affording relief to the individual circuit courts of appeals, (2) affording relief to the Supreme Court of the United States, (3) affording prompt resolution of legal issues of a national concern which the Supreme Court lacks the time to deal with, and (4) promptly eliminating conflicts in the decisions by federal courts below the level of the Supreme Court.

While paying tribute to the work done by the Federal Judicial Center Study Group on the Caseload of the Supreme Court, under the chairmanship of Paul A. Freund of the Harvard Law School faculty, the committee's report stated that it had kept in mind seven principles, which it described as "virtual articles of faith," and had avoided some of the features for which the Freund study group's plan has been criticized. The seven principles are: "1. Access to the Supreme Court must not be cut off. 2. The Supreme Court must continue to control its own docket. 3. A 'fourth tier' of courts should be avoided if at all possible. 4. No class of litigations should be disparaged or given a 'second-class' status. 5. Specialized tribunals should be avoided. 6. The federal judiciary should not be expanded unnecessarily. 7. No one president or political party should dominate the selection of judges to the national division."

The report went on:

*Reproduced from 60 A.B.A.J. 453 (1974).

. . . The key features of the proposed national court of appeals are these: (1) Congress creates a national court of appeals, (2) the judges of which are selected from active United States circuit judges with not less than a specified number of years service, (3) it grants power to the Supreme Court, by Supreme Court rules, to confer jurisdiction on the new court, (4) within boundaries set by Congress, (5) to hear and to decide classes of litigation, or individual cases referred to it by the Supreme Court, and to recommend to the Supreme Court hearing or denial of hearings in such cases, (6) subject to the continuing power of the Supreme Court to accept or to reject any case for hearing, and further subject to the requirement (7) that no decision of the national court shall become final until the elapse of a specified period of time after the records, decisions, and recommendations of the national court have been received by the Supreme Court, and the Court has not taken active action thereon. (8) Congress creates new circuit judgeships to replace the circuit judges who will be assigned to the national court.

RECOMMENDATION FOR IMPROVING THE FEDERAL INTERMEDIATE APPELLATE SYSTEM

Advisory Council for Appellate Justice

On January 19, 1974, in New Orleans, the Advisory Council for Appellate Justice adopted the following resolution:

For more than two years the Council has devoted substantial energies to exploring and developing proposals to improve the capability of the intermediate federal appellate courts to discharge more effectively their heavy responsibilities.

The Council recommends that the Congress enact legislation establishing as part of the system of intermediate federal courts a new nationwide, or multicircuit, division having the following key features:

(1) Congress shall prescribe the outer bounds of jurisdiction of the nationwide tribunal and confer upon the Supreme Court, under a Rules Enabling Act, power to specify the functions and the procedures of the tribunal;

(2) In the exercise of the jurisdiction thus conferred, the nationwide tribunal shall be empowered to hear and decide classes of litigation, or individual cases, referred or directed to it by the Supreme Court, including:

(a) Review of state court criminal convictions, particularly to resolve issues that might otherwise be later raised by collateral attack;

(b) Resolution of conflicts between a court of appeals and another court of appeals or the Court of Claims.

(3) The decisions and recommendations of the nationwide tribunal shall be:

(a) Subject to the continuing power of the Supreme Court on its own motion to accept any case, and

(b) Further subject to the provision that a decision of the tribunal will not become final until the records, decisions and recommendations have been received by the Supreme Court and a specified period of time has elapsed without the Court's taking action on the matter.

(4) The final decisions of the tribunal will be precedents of nationwide effect;

(5) The judges shall be assigned to the new tribunal for a substantial term of years. They are to be active United States Court of Appeals judges, agreeable to serving, who have had not less than a specified number of years service as United States circuit judges. When a circuit judge is assigned to the new tribunal, the vacancy in the judge's circuit will be filled by appointment of a new circuit judge.

(6) The Council emphasizes that an essential element in solving the problems of the federal appellate courts is an appreciable and proper reduction of the intake of the federal courts.

* * * *

PARTICULAR POSITIONS OF CERTAIN COUNCIL MEMBERS

Judges Feinberg and Gibson support this resolution only if the jurisdiction of the new tribunal is limited to (1) review of state court convictions, particularly to resolve issues that might otherwise be later raised by collateral attack; (2) resolution of intercircuit conflicts; (3) tax cases; and (4) patent cases.

PLANNED FLEXIBILITY

Maurice Rosenberg*

GOALS

The task is to develop a plan which heeds a number of injunctions rooted in convictions that are as widely shared as possible. Because of the fragile quality of efforts at court reform, even modest opposition can be fatal; and opposition seems certain to come forth against any plan violating the following constraints. To be acceptable a plan should:

A. *Preserve Channels of Access to the Supreme Court for All Citizens*

Whether vain or improbable, the hope must be allowed to flicker that every person has a right to approach the Supreme Court for redress. This imperative does not require that all Justices actually read and pass upon each and every petition, as long as the channel to the Justices remains visibly open.

B. *Preserve the Supreme Court's Control*

The public apparently holds the Court in awe, whether or not universally in esteem. It opposes "tampering" with the Court. Among those who help shape the public's reaction, some attach great importance to the phrase of the Constitution which commits the federal judicial power to "one supreme Court." Although those who embrace this phrase as a credo agree it does not require the Court to exercise direct authority over each decision in each case, they insist it does require the Court to retain general control over all subordinate institutions.

C. *Give Equal Treatment to Criminal Appeals*

Persons accused or convicted of a crime must be given the level of consideration and procedural opportunity open to civil litigants. This does not require that the treatment of civil and criminal cases be precisely the same. It does imply that any plan that sets up a court to hear solely criminal appeals will be regarded with suspicion if it appears to stamp criminal cases as requiring only second-class treatment.

D. *Preserve the Dignity of Lower Courts*

Although some observers disagree, many are convinced of the importance to our system of maintaining a highly esteemed corps of federal judges who find challenge and fulfillment in their work. Even to those who do not share this view, it must be clear that powerful resistance will be aroused by any changes which demean federal judges by lessening their responsibilities, making their work dull, bureaucratic, or inconsequential, or vastly expanding their numbers. The risk of debasing the currency of judicial office does not require placing a freeze on the number of judgeships, but it does suggest parsimony in creating new judgeships.

---

*Medina Professor of Law, Columbia University. Reproduced from Planned Flexibility to Meet Changing Needs of the Federal Appellate System, 59 CORN. L. REV. 576, 586-589 (1974)

E. *Not Elongate the Appellate Process*

Any revamping of the federal judicial hierarchy must be designed to avoid multiplicity of appeals. It will be most difficult to justify a revision which exposes litigants to the costs, tensions, and other burdens of an additional level of review.

F. *Avoid Jurisdictional Bickering*

Few legal disputes are less productive than those over whether this court or another is the appropriate one to decide an issue. Any revision should minimize jurisdictional disputes, not generate them.

G. *Avoid Specialization of Appellate Judges*

An appellate judge should not be assigned duties so narrow that they will repel the ablest judges, or foster a narrow, slit-viewed approach. Moreover, new judicial posts should be furnished safeguards against efforts of special interests to control the process of selecting the judges.

Flexibility

Besides observing the constraints just outlined, a workable plan for revising federal appellate structures and procedures must have the support of the Justices of the Supreme Court—or, at least, must avoid their opposition. This complicates our task because not all the Justices have stated their views (to say nothing of their votes) on several pivotal matters that will make or break any plan affecting the Court's work. Even if their views were expressed, a court plan should not be hewn in granite, for the Justices' attitudes are subject to revision as experience unfolds and, of course, the membership of the Court will change. These considerations underline the unwisdom of inflexible "solutions." The same concerns argue against adoption of measures to expand lower court judgeships or alter structures by measures that would be hard to recall. A strategy that allows maximum responsiveness not only to presently perceived but to inevitably changing needs seems essential. If flexibility is built into the program, any faulty move can be swiftly corrected.

A flexible approach is exemplified in the well-known and well-used legislation which enables the Supreme Court to make

rules of procedure. The Rules Enabling Act of 1934[22] is the primary antecedent; it authorizes the Court to promulgate rules which are subject to congressional disapproval within a specified period.

In the present context, because of the extraordinary importance of the stakes, it is neither wise nor appropriate for Congress to make an open-ended delegation of power over judicial structure and organization, even if there is provision for congressional disapproval. The area within which delegated power to revise structures and procedures may be exercised must be clearly delineated. This power might be assigned to the Supreme Court in the manner of the Enabling Act, perhaps assisted by a standing commission.

Additional flexibility can be achieved through the use of creative methods of court administration. Differential treatment of cases which make differing demands on the diverse functions of appellate courts is possible by utilizing advanced methods of administration. As an example, some state courts have developed effective new means of utilizing professional appellate staffs to reduce administrative burdens on the judges.

Without converting the courts into bureaucracies, the possibility exists that the services of appellate commissioners can be utilized to relieve judges in ways that avoid doing violence to cherished values. Appellate courts can certainly make more effective use of data-retrieval technology to provide better information on which to base the sorting or screening of cases.

Congress must have a role in the flexible program that is urged here. The congressional role should come into play at both ends of the process: at the start, by constructing the basic framework of the revised court structure; at the end, by approving or disapproving the Supreme Court's exercise of its rule-making power in the course of conferring or retrieving jurisdiction in the way it sees the need to do.

FEDERAL APPELLATE CASELOADS AND JUDGESHIPS: PLANNING JUDICIAL WORKLOADS FOR A NEW NATIONAL FORUM

by

Paul D. Carrington*

The memorandum is hastily prepared. It is therefore cast in quite tentative form. Some pertinent data may have been overlooked. The data that are presented can be made more useful by means of a few inquiries which the Commission could easily conduct. Any appraisal of the number of judgeships required depends on the nature and quality of the judicial service expected to be performed; hence, the conclusions tendered here are open to dispute by those who expect more or less of the appellate process. Despite these limitations, the author consents to the circulation of this memorandum in the hope that it will not only facilitate the understanding of members of the Commission, but that it will also attract some useful criticism.

I. GENERAL ASSUMPTIONS

In general, the number of judgeships required to handle a particular responsibility for a group of cases depends on

(1) the nature of the dispositions to be made, e.g., whether the court is to exercise discretionary review, review only on a finding of probable cause for appeal, or full review on the merits;

(2) the nature of the procedure to be followed, e.g., whether the court is expected to make many or few summary dispositions without argument, or without opinions, by oral and informal opinions, or by authorized and published opinions;

(3) the number of judges expected to be involved in the procedure used; and

(4) the degree of difficulty of the particular cases to be assigned.

It will be helpful to make some initial assumptions about some of these matters, which will serve as a basis for more particular calculations.

A general question which must be decided is the degree of care which appellate judges are expected to exercise personally with regard to matters coming before them. Thus, in 1962, the Courts of Appeals were making about 35 dispositions after submission per judgeship per year. In 1972, they were making almost 100 dispositions after submission per judgeship per year. In part, this reflects harder work by judges. In part, it reflects a change in the nature of the caseload, with criminal litigation increasing from about 30% to about 46% as a percentage of the number of filings in the

*Professor of Law, University of Michigan. This is a slightly revised version of a working paper prepared for the Commission on Revision of the Federal Court Appellate System, and was submitted on April 1, 1974.

Courts of Appeals; being of a lesser order of difficulty, criminal cases are somewhat less time-consuming. In part, also, the increased number of dispositions per judgeship reflects an increased reliance on staff work, and increased efficiency resulting from differential treatment of cases or "screening". But, in part, almost surely, it reflects a diminution in the amount of scrutiny given to appellate cases. This last fact may be confirmed by a general decline in the reversal rate, even in civil cases, in the last three years.

A decade ago, Charles Wright suggested 80 filings per judgeship as an appropriate maximum to be used in planning for the Court of Appeals. Professor Wright assumed that dispositions would be made by three-judge panels, on the full merits, after argument, and with opinion. He also assumed that about one filing in four would not require disposition by court action. Thus, his 80 filings per judgeship would require about 180 dispositions after submission for each three-judge panel. This would be a little less than one decision per work day, and about 60 opinions a year. Not a leisurely schedule, but one that would allow some time for reading, reflection, collegial discussion, and maintenance of an active private life. A judge on such a schedule could make good use of staff work by young law clerks, but he would not be heavily dependent on it. Infrequently would the job require him to make a less than fully informed decision, based on the impulses of others or on data that has not yet been fully understood.

The Courts of Appeals are now functioning at a ratio of 165 filings per judgeship, more than twice the maximum proposed by Professor Wright. Many are disposed of without court action, but each panel must make nearly two decisions per day. This would require an impossible 110 opinions per judge per year, if opinions were to be written in every case. In order to recover the judicial environment described by Professor Wright we would require the appointment of about ninety Circuit Judges. While the goal may be desirable, it is surely unrealistic. A number of new appointments about half of that would seem to be within the range of imagination. Thirty new judgeships would bring down the filings ratio to about 125 per judgeship. For three-judge panels, this would mean about 250 dispositions after submission, each year, or about one and one-quarter decisions per work day, and an improbable 83 opinions a year. At a rate of 125 filings per judgeship, it would not be unreasonable to expect a three-judge panel to hold at least a brief argument in each case (by closed circuit television, if necessary), and to make some statement of reasons for virtually all of its dispositions, at least orally from the bench. There would still be time for some amenities such as reading and collegial debate, and for a reasonably active private life, without sacrificing the sense of personal responsibility for each disposition. Without accepting such a low level of judicial energy investment, we can acknowledge it as the best available at the present time, for purposes of planning.

Accordingly, this memorandum will present calculations which are based on a judicial life style which is fairly quantified in that relationship, of 125 filings per judgeship. Those who may, and do, reasonably differ from the assumptions which underly that ratio are invited to make the appropriate adjustments, either to increase the level of personal involvement of judges by enlarging the judicial personnel, or by economizing judicial efforts by spreading the staff more thinly.

Another general assumption pertains to the level of difference in the degree of difficulty of different kinds of cases. While it is clear that criminal cases, for example, are, on the average, much simpler than, say patent cases, there is very little basis at the present time for quantifying that difference. This is a subject on which the Commission may well want to gather more data. Meanwhile, we do have the Third Circuit time study. Unfortunately, it is not very finely tuned to the problem of planning for different subject matters of cases. But it does clearly indicate a fairly wide difference. State prisoner habeas corpus appeals required only 30% of the Third Circuit's average effort per case. It is reasonable to assume, and is indicated, that more complex groups of cases might require at least as much as twice the average effort per case. With no more basis than this study, this memorandum will presume to take account of some weight differentials. While each assumption will be carefully identified, the reader should be cautious about regarding these estimates as less tentative than they are. The assumptions are made only because the alternative, of treating each class of appeals as fungible for this purpose, seems even less supportable.

One last general assumption should be made explicit. Most of those thinking about a new inter-circuit or nationwide court assume that it will generally sit in panels larger than the customary three. This will be somewhat costly of personnel. But intuition suggests that a five-judge panel is not 66% more costly of judge time than a three-judge panel, because there is still only one opinion of the court to be prepared in each case. The Third Circuit Study confirms that about half of the judges' case time is invested in the opinion. On the basis of this data, it is assumed that a five-judge panel is only 33% less efficient than a three-judge panel. Where a three-judge panel might be expected to handle 125 filings per judgeship, a five-judge panel might be expected to handle 94. This would mean, roughly, 315 dispositions after submission for each of the five judges, about one and a half decisions per working day, as compared with one and one-quarter for the comparable three-judge panel. But the 63 opinions of the court per year for each judge is significantly lower than the 83 required for the comparable three-judge panel.

II. REVIEW OF STATE COURTS: ENFORCING CONSTITUTIONAL RIGHTS

One function proposed for a new inter-circuit court of appeals would be to review state criminal convictions prior to the Supreme Court. The insertion of a court of appeals between the Supreme Court and the state courts is not proposed at this time for civil matters, because it would elongate the litigation process by putting another step in the ladder. But, it is contended, economies may be achieved and justice improved by providing for better means of direct federal appellate review of state criminal litigation. It would be hoped and expected that such review would promote better enforcement and adherence to federal constitutional rights in the state court systems, and thereby obviate the need for the prolonged and unwieldy process of collateral attack in the lower federal courts which is now the principal line of defense of federal constitutional standards of criminal procedure. Indeed, a provision for direct

review of state convictions in a federal appellate court might be accompanied by, or conditioned on, the availability of improved methods of enforcing federal rights in state criminal courts, and on the re-establishment of res judicata as a means of recognizing the dignity of state enforcement and of protecting the federal courts from an excess of hopeless litigation.

(a) Measures of State Convict Litigation in Federal Court

The number of state convictions to be reviewed cannot be measured with certainty. It may be useful to begin by trying to estimate the number of contested felony convictions entered in state courts in a year. Data is not complete in most states, but an estimate can be based on the recent totals in New Jersey (1,798 convictions), Illinois (1,226 convictions), California (8,555 contested trials, and perhaps 6,500 convictions), Michigan (9,185 contested trials, including 6,687 non-jury trials in the Detroit Recorder's Court and perhaps 7,000 convictions), and New York (1,114 convicted by verdict). A rough estimate based on such data is that there are not more than 50,000 contested convictions a year in all state courts which involve penitentiary sentences. This number is very substantially influenced by the availability of manpower in prosecutorial offices, which, in the largest sense, controls the level of plea bargaining. The number is not, therefore, likely to be measurably influenced by any improvement in state court enforcement of federal constitutional rights.

The number of first-level criminal appeals to state appellate courts in these cases is substantially smaller, but impressive and probably growing rapidly. The California Courts of Appeals entertain about 2,000 criminal appeals a year; the Michigan Court of Appeals, 1,200; the Appellate Court of Illinois, about 1,000; New Jersey Superior Court, Appellate Division, about 1,000. It is reasonable to conclude that there are not more than 25,000 criminal appeals per year, at the present time. But increased availability of appointed counsel suggests continued growth of the number. Moreover, it seems probable that the number would increase further, if federal procedural issues were included within the scope of review. These issues are, of course, all that would concern the new federal court in performing its review function.

The best available data for estimating the number of state convicts who would seek to use the nationwide circuit is the count of state convicts who now seek access to the federal courts, through certiorari petition to the Supreme Court, or by petition for habeas corpus to the District Courts. An overwhelming percentage of these convicts now proceed pro se and in forma pauperis. The number petitioning to the Supreme Court is now approaching 1,000 a year; about 800 seek Supreme Court review of state court affirmations of convictions, and the remainder seek Supreme Court review of state court denials of habeas corpus. Less than 1% of those who petition directly to the Supreme Court are successful; the Court relies on the lower federal courts for the bulk of the work of scrutinizing state convictions through the federal habeas corpus proceedings. The latter group now number, rather regularly, about 8,000 per year. There is much duplication between these two groups, and some duplication within each, as some prisoners are prone to try every possible forum, and some forums several times. In any event, the numbers must be used very cautiously in predicting the demand on the new forum.

The proposal for the new forum would make the federal system of review more accessible to state convicts; every convict losing on appeal in the highest state court would be counseled of the possible federal forum, and many would be represented by the same counsel in seeking federal appellate relief. This fact would tend to stimulate federal remedy-seeking by some state convicts who do not now participate in federal litigation. On the other hand, the availability of counsel may tend to constrain some of the more frivolous petitioners. Thus, most of the petitions presently addressed to the Supreme Court are quite hopeless, given the limited capacity of that institution. Many would not be perfected by counsel as appeals to the nationwide circuit. And David Shapiro's study of Massachusetts petitioners reveals that about half of the District Court petitions suffer summary dismissals for failure to exhaust state remedies. Indeed, it would be the intended and probable effect of creating the new forum that state procedures for handling federal issues would be improved, with the result that considerably fewer substantial federal issues can arise. These factors suggest the probability of substantial diminution in the number of state convicts seeking a federal remedy, perhaps well below the existing level. Although the estimation is inevitably very soft, it seems that a reasonable range within which the number might fall is 3,000 to 10,000, with the probabilities favoring a lower number within that range, rather than a higher one.

(b) Scope and Process of Federal Review

The amount of judicial time and energy required to handle this burden depends on the nature and quality of the procedure expected. Some of the proponents of the plan to create the jurisdiction may be contemplating that the review would be discretionary, with the new court taking only a small number of cases. But this would offer little contrast with the existing role of the Supreme Court. It is the insufficiency of direct review in the Supreme Court that gives rise to the need for the prolonged litigation in lower federal courts. It seems obvious that if the proposal is to have one of its intended effects, of obviating the need for proliferating post-conviction litigation, a very substantial quantity of direct review will have to be provided.*

On the other hand, it seems equally certain that a full hearing, with oral argument and opinion in every case, is hardly necessary. One advantage that the new court would have over the Supreme Court is its ability to use different and more efficient methods of disposition without violating its traditions. It could use a substantial non-judicial staff to advantage in making preliminary evaluations or identifications of issues for decision. And the overwhelming bulk of the appeals will be amenable to summary disposition. Thus, the Shapiro study reveals that state convict petitioners are now successful in only 4% of their efforts, even when many are represented by counsel. Therefore, it seems reasonable to plan on the assumption that the number of plenary proceedings required for the new court to perform its function will be considerably smaller than the 3,000 to 10,000 filings it must anticipate.

*Screening of state certiorari petitions would be a part of the function assigned to the new court by the Supreme Court Study Group. This would save some time for the Justices, but would do nothing for the condition of the lower courts. The approach will be considered more fully in connection with possible review of federal appellate decisions.

There are two bases for estimating the number of state convict appeals which ought to receive more than summary disposition. One datum is that about 300 state convictions are now set aside each year by federal courts. The other is that certificates of probable cause for appeal are now issued in about 1,100 cases. The latter figure seems to be a reasonable planning base. A smaller number would be indicated by the fact that a unified institution such as the new forum will surely develop more coherent standards of what is worthy of full consideration by federal judges, so that substantially fewer hopeless cases will be filtered through the screen. But this will be offset to some degree by an increase in the number of convicts who, because of continuation of counsel, are well advised in their search for issues deserving of federal attention. If these two forces were to balance, then 1,100 would be the correct number of state convict appeals to be given full hearing in the new court of appeals.

It is reassuring to note that a system which did give full appellate hearings before five circuit judges to as many as 1,100 state convicts would be giving the more meritorious of the cases much more judicial attention than they now receive. Certainly such a forum would find itself easily able to reverse as many state convictions as the present system, and thus give at least as much protection to federal constitutional rights. Especially so because the review would be more direct, quicker, and more influential in shaping the behavior of state courts as agents of enforcement of constitutional standards. It is perhaps also significant, in appraising the requisite level of review, that the purpose of federal post-conviction proceedings, in almost every instance, is not to protect the innocent from false verdicts, but to protect the public generally from abusive practices. In this light, it can be seen that primary importance should be assigned to ferreting out the worst state abuses, not to giving infinite legal satisfaction to restless prisoners. While the proposed system could possibly be less satisfactory in the eyes of some individual prisoner litigants, it would almost surely be more effective at attaining the primary purpose by getting at the worst abuses quickly.

Thus, it is tentatively suggested that, if the new forum is to undertake the task of reviewing state convictions, it should be staffed to dispose of several thousand appeals summarily and to hear about 1,100. All of those heard would not require full opinions. Probably, the court should attempt to dispose of a good many with oral opinions from the bench, in the tradition of the old English courts and according to the present practice of the Second Circuit, and to dispose of many more with per curiam opinions.

(c) Manpower Allocation

Even with the highest concentration of significant cases, it seems certain that the new forum will be able to dispose of the 1,100 cases with substantially less than the average effort per case. The Third Circuit Time Study reports that that court disposed of state prisoner cases with 30% of the normal effort. This seems intuitively sound. Making allowance for the burden of screening the thousands of summary affirmations, it would seem to be prudent to plan on a 40% effort per state convict case in the new forum.

At the rate of 315 average dispositions after submission per year, suggested as the norm for a five-judge panel, five judgeships in the new forum might be expected to handle a workload of about 750 state conviction appeals. Or, in other words, it would seem to be necessary to assign approximately 7.5 judgeships to the new court in order to manage the business of state conviction review.

This would not be a loss of judicial manpower. There would be significant savings at all three levels of the federal courts. Thus, in addition to the 900 state convicts petitioning to the Supreme Court each year from state courts, another 400 or so are petitioning from denials of post-conviction relief in the United States Courts of Appeals. These 1,300 petitions would be reduced in number. Five circuit judges would have identified all but 1,100 or fewer petitioners as lacking sufficient substance to merit a hearing. Only those coming from the population who had achieved some recognition of possible worth in the court of appeals would receive attention from the Supreme Court. And few, indeed, would present unreadable petitions prepared without some prior assistance from federal counsel. While no one would be denied the right to petition the Court, the state conviction review workload of the Court would be very substantially reduced.

At the Court of Appeals level, it would be expected that the 1,100 state post-conviction appeals now heard in the Court of Appeals would disappear from the docket. Using the rate, suggested earlier, of 250 dispositions after submission per three-judge panel this would amount to a personnel saving of about 4.5 judgeships. This saving would accrue gradually, state by state, as the process of federal constitutional enforcement improved to the point of permitting the elimination of post-conviction remedies.

Meanwhile, however, all of the state post-conviction appeals could be transferred to the docket of the new forum. This would have the advantage of levelling off its workload in this sphere from the beginning; otherwise, it would acquire its jurisdiction state by state. And it would have the advantage of giving the new forum full control of the state conviction review business from the beginning, eliminating the confusion and inefficiency of shared responsibility. On the assumption that such an immediate transfer of business is planned, the saving of 4.5 judgeships to the regional circuits would accrue immediately.

Finally, by the same token, there would accrue a substantial saving in the District Courts. This would inevitably accrue state by state, as it became possible to eliminate the collateral proceedings. Ultimately, this would mean a saving of about 8,000 filings a year. Doubtless, these filings require much less than the average effort to dispose of. But the present average ratio at the District Court level is about 250 filings per judgeship; even assuming only a 20% effort on state post-conviction cases, the saving would amount to at least 3.0 District Judgeships. As John Frank has observed, however, there is a small residue of habeas corpus that cannot be fairly eliminated because the issues they present could not have been raised in a more timely manner.

III. REVIEW OF FEDERAL APPELLATE COURTS

Both the American Bar Association and the Advisory Council on Appellate Justice have approved plans for an inter-circuit tribunal which would have as one of its functions the harmonization of the decisions of the regional circuits. It is said that the need for this service has been greatly stimulated by the large increase in the number of federal appellate court decisions and by the reduction in the amount of effort that can be invested by the regional circuits in coordinating their own efforts.

It is generally agreed that there is no need for the nationwide circuit to perform this function with regard to constitutional litigation in the federal courts, which is now well supervised by the Supreme Court, and which ought to remain the primary function of the Court. Attention is generally drawn to fields of litigation conducted pursuant to federal legislation, particularly those statutes which receive sparse and episodic attention in the Supreme Court. It is generally a feature of these proposals that the functioning of the nationwide circuit in this arena would be subject to the direction of the Supreme Court through its rulemaking power, with the enabling legislation providing only a list of possible functions which the Supreme Court might assign to the nationwide circuit. In a sense, the purpose would be to relieve the Court of some of its marginal duties.

(a) Certiorari Screening

There is some obscurity as to the role and procedure to be employed by the nationwide circuit in reviewing the decisions of sister circuits. The Supreme Court Study Group, concerned only with the needs of the Supreme Court, proposed that such a forum might be a referee of certiorari petitions denying most and returning only a limited number to the Supreme Court for its selection. The purpose of this proposal was to relieve the alleged overburden of responsibility on the Supreme Court Justices. The proposal has encountered great difficulty with many observers who are concerned that citizens seeking to enforce or develop constitutional rights will be cut off from the Court. A less objectionable function might be to assign the inter-circuit court the duty of making only provisional or recommended dispositions of certiorari petitions, with some brief articulation of reasons for denials. While this would be less objectionable in leaving final power in all cases with the Court, it would be less helpful in saving the time of the Justices and would require more effort by the judges of the nationwide circuit.

The Supreme Court Study Group fixed the amount of manpower needed to make dispositions of all 4500 certiorari petitions at about five judgeships. This calculation rested upon an assumed premise, that such petitions should receive more attention from judges that the Justices can now give them.

If the new court hears appeals from state convictions, it would not perform any further cert-screening function with reference to these cases. Using the Study Group's assumption as a base, 3.5 judgeships would be needed to screen the remainder. If the new court is also to provide a form statement of reasons for each recommendation to the Court, perhaps another judgeship should be allotted. This investment of energy might provide some relief for the Supreme Court, but there would be no corresponding saving of effort in any lower federal court.

(b) Conflict Resolution

With respect to both the quality and quantity of litigation in the intermediate courts, it would be a more promising venture if the nationwide circuit not only screened but decided some statutory cases for the Supreme Court. The most frequent suggestion, included in the Supreme Court Study Group proposal is that the inter-circuit court decide cases, at least some cases, involving conflicts between the circuits. This would be intended to have the effect of stabilizing the law and reducing the amount of litigation on recurring issues. In this way, the nationwide circuit might save more than enough litigation in the lower and intermediate courts to compensate for the manpower invested in the making of its decisions.

One problem with the circuit-conflict resolution approach is the difficulty which inheres in the task of identifying genuine conflicts. Many of the certiorari petitions filed with the Court are supported by allegations of conflict which may or may not be genuine, depending on one's view of the authorities cited. My rough count indicates that there may be as many as 300 allegations of conflict a year, but a more precise count should be possible. The Study Group contemplated that only 30 or so of these would be decided by the nationwide circuit, these being unworthy of Supreme Court consideration. My data suggests that this number may, in fact, be larger than the number of direct and absolutely irreconcilable conflicts to reach the Court in an average year. The sorting problem is further complicated if the nationwide circuit is to decide only "unimportant" conflicts, or non-constitutional conflicts. Presumably, the latter should be left for the Supreme Court, but it is not always easy to sort constitutional from legislative issues.

An additional problem with the conflicts-resolution approach is that it postpones the resolution of recurring issues until there has already been a substantial volume of litigation, sufficient to produce at least two appeals on the same issue. This is likely to involve a substantial time lag, leaving litigants and legal planners in uncertainty for an unnecessary and sometimes long and costly time. And, moreover, the conflicts resolution approach has the disadvantage of making the participation of the nationwide circuit very episodic, lacking continuity. This may impair the quality of decision, if the judges are too long between encounters with the controlling body of legislation.

Nevertheless, despite these disadvantages, it would be possible to cast the new forum in the role of conflict-resolver. In appraising the amount of judicial manpower required for this purpose, it would be necessary to make a rather arbitrary decision as to the number of "conflicts" which the tribunal is intended to resolve. Assuming that the cases would be of a high order of difficulty, it seems wise to plan one judgeship for each 40 plenary dispositions. It seems reasonable to assume that each judgeship in the nationwide circuit devoted to this work will, up to a point, relieve the regional circuits of equivalent burdens by eliminating recurrent litigation. But the point of diminishing return is beyond speculation.

(c) Supreme Court Overflow

An alternative approach to the review of federal appellate decisions would be to authorize the Supreme Court to refer specific cases to the new forum. I believe that I was the first to propose this relationship some years ago; I now see it as disadvantageous. The idea would be to give the Supreme Court a third option in reviewing certiorari petitions, of granting certiorari to the nationwide circuit as referee. The Supreme Court Study Group would have authorized the Court to do this in a limited number of cases. This system would be efficient in using the new forum most effectively to complement the effort of the Supreme Court. The difficulty with it is that it increases the burden on the Supreme Court by substantially complicating the certiorari decision; it would therefore mis-allocate the energies of the Justices to serve as screeners for the lower court. Moreover, it casts the new court in the role of mini-Supreme Court, being subject to the high court not merely for its general jurisdiction, but for its jurisdiction case by case. Not only would the court lack independence, but its role would be less predictable. Finally, as with the conflict-resolving function, there would be a lack of continuity in the nationwide circuit's contact with the legal issues with which it would deal.

Despite these disadvantages, the overflow device could be viewed as a useful element in a larger system. To the extent that it is used, manpower planning would proceed on the same basis as for the conflict-resolving function, at a rate of 40 such references per judgeship per year. No circuit judge manpower would be required for screening. It would be reasonable to expect that the added coherence in the national law would be sufficient to have some modest prophylactic effect, enough probably to compensate for the investment of manpower in the inter-circuit tribunal by reduction in the strain on the regional circuits.

(d) Categories of Federal Specialty Appeals

A third approach to the review of federal appellate decisions is categorical. The Advisory Council and American Bar Association resolutions clearly contemplate the use of this approach. The idea would be to empower the Supreme Court to refer certiorari petitions to the new court by categories, according to subject matter. Presumably, all categories of petitions having a high constitutional content would be retained by the Supreme Court. So would other categories which the Supreme Court deemed sufficiently important to merit its continuing attention, and a general category of miscellany which are not easily classified for the purpose of making the reference to the nationwide circuit. A list of referrable categories of cases would be set forth in the enabling legislation, but the Court would make the selection by its role. A considerable list of categories might be considered for reference.

It would be an almost essential feature of any such plan that the Supreme Court severely limit the possible bases for rehearing a case decided by the nationwide circuit on reference. As Henry Friendly has emphasized, episodic interventions by the Supreme Court would unsettle the work of the inter-circuit tribunal and deprive it of its intended

effect. Moreover, frequent review would place the new forum in the position of a fourth tier; the repetitious review would be uneconomic. Accordingly, the Court would be obliged to limit rehearings of nationwide circuit cases to issues of constitutional rights, or apparent conflict between the decision of the nationwide circuit and a decision of the Supreme Court.

1. FEDERAL CRIMINAL LAW. The largest possible category would be petitions of federal convicts. If the court is to be assigned responsibility for review of state court convictions, it is plausible to contend, as Clement Haynsworth has, that it should also serve to harmonize the administration of federal criminal justice. At the present time, there are about 1,200 federal criminal certiorari petitions and 400 federal post-conviction certiorari petitions. If all of these were referred, they would pose a considerable task of screening. But, using the Supreme Court Study Group's projection, the work could be handled with 2.0 judgeships, and perhaps less, in light of the low order of difficulty of the cases. If the court were then to consider some of these cases fully on the merits, additional manpower would be needed. If the federal cases were no more difficult than the state, they could be handled at a rate of about 750 dispositions per year for a panel of five judges, or 150 per judgeship. But, there are differences between state and federal criminal cases which suggest a different calculation. The federal petitioners have already received the attention of two federal courts; there is much less need for the kind of individualized review for correctness which would be the bulk of the nationwide circuit's work in reviewing state convictions. The function to be performed would be more one of harmonizing standards, of reviewing the few federal criminal cases that present unsettled issues of law. Thus, many fewer federal cases would be reviewed, but they would be more difficult, although not generally highly complex. These cases could probably be handled much more efficiently than the conflict-resolving cases; where 40 plenary dispositions per judgeship per year was the planning figure for those cases, 60 would seem the more appropriate figure for the criminal and post-conviction petitions. If even one judgeship were allotted for this purpose, the 60 plenary dispositions of criminal and post-conviction petitions would be a substantial increase over the present number supplied by the Supreme Court.

Thus, if 7.5 judgeships are to be allocated to the review of state convictions, 10-11 judgeships could also assume responsibility for the upper level review of all criminal litigation.

Two problems make this an unlikely extension. One is that such a hefty load of criminal work would have to be offset by an equally heavy load of non-criminal work. The other is that most observers will want to retain the primary responsibility for oversight of enforcement of federal constitutional standards in the Supreme Court. And if the Supreme Court is going to decide a substantial number of these cases in any event, there is insufficient advantage in assigning them to the nationwide circuit for prior disposition. For these reasons, the Advisory Council proposal does not appear to include a possible reference of federal criminal and post-conviction petitions to the inter-circuit court of appeals. A third reason for not making such a reference, if it were needed, would be

that such a reference seems unlikely to provide any relief for the lower federal courts; the number of primary criminal appeals is not likely to be significantly reduced by any action taken at the upper level. While such a plan might provide some relief for the Supreme Court (in an area in which relief seems unwelcome), the assignment of judicial manpower to the new forum would not be compensated by savings in the regional circuits.

2. FEDERAL TAXATION. A quite different appraisal might be made of other categories of petitions which might be referred to the new court for disposition. Perhaps the most attractive reference would be a reference of tax petitions. There is little doubt that the area of taxation is one of great interest to many citizens, that it is involved in much public and private planning, and that the law is constantly unsettled by legislation, administrative change, and private invention. Providing adequate harmonization of the tax laws has been beyond the reach of the Supreme Court for many decades. Tax petitions are easily identified and sorted. It would be a simple matter to refer them all to the nationwide circuit for disposition, subject to rehearing in the Supreme Court only in the very remote event of a substantial constitutional issue or conflict arising.

In recent years, the number of paid tax petitions has been less than 75. The number would increase significantly if a new forum were opened, because the United States, and private litigants to a lesser extent, are inhibited at the present time by the obvious inability of the Court to deal with many of the issues which they would like to present to a higher court. For planning purposes, it seems wise to assume that the number would rise possibly as high as 150; this would be 20-25% of the tax cases decided in lower federal appellate courts.

Arbitrarily, it might be assumed that the new court might make as many as 25 plenary dispositions in tax cases each year; this would be about five to ten times as many as the Supreme Court is now able to decide. Such a number would probably suffice to eliminate substantially all of the present difference among the circuits and the Court of Claims. The workload thus contemplated would be well within the reach of a single judgeship. It is very possible that such an allocation of a single judgeship would achieve a net saving of judicial effort. My data from the Solicitor General's memoranda suggest that as many as 50-75 tax appeals, and a larger number of trial court proceedings, might be eliminated if there were greater predictability and stability in the administration of the tax law.

3. LABOR RELATIONS LAW. Although the benefits might be somewhat more speculative, a similar arrangement could be made with respect to labor relations litigation. This would include petitions from courts of appeals decisions reviewing the National Labor Relations Board, or federal district court judgments in cases arising under the Labor Relations Act, the Reporting and Disclosure Act, perhaps the Railway Labor Act, and perhaps the Labor Standards Act. The number of petitions in such matters is now about 100, and could be expected to rise as high as 150; this would be about 15% of the decisions of the courts of appeals. If the new court decided 25 cases a year by full opinion, this would triple the present output, and suffice to eliminate most of the perceptible differences amongst circuits. This category, too, would be well within the reach of a single judgeship.

4. TRADE PRACTICES LAW. Another possible category would include private antitrust cases, cases arising under the patents, trademarks, and copyright laws, and cases involving the Federal Trade Commission. Presently, there are about 75 petitions a year in this category; coming up from about 450 such decisions made each year in the Courts of Appeals, the Court of Customs and Patent Appeals, and the Court of Claims. These cases tend to be of considerable economic importance to the litigants, and are vigorously contested. But it seems reasonable to expect that the effort required to decide 15-30 such cases a year at the national level would be more than compensated by a corresponding decrease in the litigating activity at lower levels. This task, as well, seems to be well within the reach of a single judgeship.

5. CREDIT AND INVESTMENT LAW. A somewhat less congruous package might be assembled from the petitions in cases arising under the banking, bankruptcy, consumer credit and securities laws. It would be plausible and feasible to include within the category, also, litigation involving the Small Business Administration, the Department of Housing and Urban Development, the Department of Agriculture, and perhaps other agencies frequently concerned with credit transactions. The forthcoming bankruptcy revision, and the current developments in the field of securities and exchanges law suggest that these are areas of litigation which could benefit substantially from more national attention than the Supreme Court can reasonably be expected to supply. The number of petitions now received in such cases does not exceed 75, but the underlying decisions of the courts of appeals must number at least 750. Again, a range of 15-30 plenary decisions a year at the national level would seem to be as many as might reasonably be expected to provide compensatory relief at the lower levels. And, again, this jurisdiction would seem well within the reach of a single judgeship.

6. ADDITIONAL RELIEF FOR SUPREME COURT. There are a number of other identifiable categories of certiorari petitions which might be referred to the nationwide circuit simply for the purpose of relieving the Supreme Court of some of the screening work. These would be categories of cases in which the chance that a cert-worthy issue will arise is very low. Because certworthiness is so rare in these cases, the screening burden on the Supreme Court is probably pretty light, so that the saving would not be great; on the other hand, their bulk, together, is considerable, and it may be that some significant questions are not now resolved because they are lost in the Court's process of refining from low grade ore.

One such category of cases includes those involving the United States or a federal officer in a contract, property, or torts dispute. Another includes cases in which federal jurisdiction is based on diversity of citizenship, or on the federal location of the events in dispute. A third includes cases in which the only issue raised in the petition challenges an exercise of the original jurisdiction of the courts of appeals, or raises only a question of federal civil procedure. A fourth includes industrial accident litigation, arising in admiralty, or under the Jones Act, the F.E.L.A., or the Longshoremen and Harbor Workers Act. Each of

these categories now includes about 50-75 paid petitions, plus an unknown number of in forma pauperis petitions. Perhaps the total number is 250-300. The burden on the nationwide circuit in screening these petitions, and in deciding 5-10 cases on the merits would be minor. If two or more of the categories described above (tax, labor, trade, investment) were to be referred to the new forum, these four categories could be absorbed by the available manpower.

7. THE REMAINDER. If the nationwide circuit were assigned jurisdiction over state conviction litigation, and if the Supreme Court referred most of the foregoing categories of petitions to it, the remaining certiorari burden on the Supreme Court would be substantially reduced, largely on the civil side.

For the reasons stated earlier, it seems likely that the Court would continue to receive the federal criminal and post-conviction petitions, now about 1,800 in number. Perhaps as many as 700 of the 1,100 state convicts whose appeals would merit the attention of the inter-circuit court would pursue the last resort in the Supreme Court. Thus, on the criminal side, the screening burden on the court would not be greatly reduced.

But, on the civil side, where the issues raised by certiorari tend to be more complex and time-consuming, about 600 petitions might be eliminated. This would be about one third of the total in number, but a much higher fraction of the work.

The remaining miscellany of civil petitions reaching the Supreme Court would include about 600 paid petitions which raise constitutional issues. About 250 of these come from state courts, the others from lower federal courts. There would be about 200 other paid petitions involving sundry administrative programs. Among these would be those which involve individual interests of ordinary citizens, such as social security, veterans' benefits, and immigration and naturalization. Finally, there would be a group of about 300 unpaid civil petitions, probably including a substantial percentage of individual interest cases of the last-named types.

This relief for the Supreme Court would be obtained without cutting off access to any individual asserting a constitutional right, or a right to benefit from a public program. It would require the assignment of about four judgeships to the nationwide circuit; but it seems probable that the change would result in a saving of litigation in the lower courts that would more than compensate for the four judgeships.

In appraising the impact of the categorical approach on the regional circuits, we should also take account of the effect on en banc proceedings in the regional circuits. The availability of a nationwide circuit would substantially reduce the need for such proceedings. They are exceptionally costly of judicial manpower, and a far less effective means of coping with the kinds of problem which the nationwide circuit would handle. There are

now somewhat more than 20 such proceedings a year; categorical use of the nationwide circuit should be expected to reduce this number greatly. Moreover, it should substantially reduce the time spent by circuit judges in considering the possibility of en banc proceedings in those categories of cases which are subject to nationwide review. It seems conservative to estimate the overall saving to the regional circuits at the equivalent of one half of a judgeship.

IV. REVIEW OF ADMINISTRATIVE AGENCIES

(a) In General

The objective of national harmonization, or stability in the national law, might be pursued more directly in administrative litigation by diverting some of the business of reviewing administrative agencies to the nationwide circuit. The "inverse pyramid" of review which features decentralized review of a centralized agency has long been decried as an irrational feature of our judicial system. The nationwide circuit could be used to correct it. And this is a feature suggested by both the American Bar Association and the Advisory Council.

There is, of course, no necessity that all agencies be lumped together for the same treatment in this regard. The manpower requirements for the review of the several agencies are quite different. Rough estimates are as follows:

	Annual Filings (70-73)	Order of Difficulty (Fil/j-ship)	Judgeships Required
Labor Relations Board	650	94 (ave)	6.9
Tax Court	250	94	2.7
Immigration and Naturalization	250	125	2.0
Federal Power Commission	80	47	1.7
Federal Communications Commission	75	70	1.1
Interstate Commerce Commission	60	47	1.3
Civil Aeronautics Board	25	47	0.5
Securities Exchange Commission	20	47	0.4
All other	200	94	2.1
TOTAL	1,610		18.7

A transfer of nineteen judgeships' worth of work from the regional circuits to the nationwide circuit would involve a considerable administrative problem in the inter-circuit tribunal. Selectivity would therefore seem to be in order.

The Labor Board appeals are a large bulk. Many of the cases are small, localized, and involve largely factual issues. This group would therefore seem to be a prime candidate for omission from the jurisdiction of the nationwide circuit. Although less bulky, the Immigration and Naturalization Service cases also tend to be largely factual in content, and they involve only single litigants whose needs for harmonious administration are minimal. The Tax Court cases would seem to be more frequently of general importance, but there is little point in centralizing the review of these appeals unless other tax appeals are also to be diverted to the nationwide circuit. This would require a substantial change in the jurisdiction of the Court of Claims, and would also make the tax load of the nationwide circuit much larger, perhaps the equivalent of seven judgeships. The Communications Commission appeals are already very substantially restricted to the Court of Appeals for the District of Columbia; there seems to be no strong reason for disturbing the repose of that arrangement, especially since that circuit is one of the few whose workload is under control.

(b) Transportation Regulation

But the other major agencies may provide a more attractive jurisdiction for the inter-circuit tribunal. The leading candidate, rather clearly, is the group of cases involving review of the Interstate Commerce Commission. Because of the compelling need for even-handedness in the field of transport rate regulation, the I.C.C. has long been reviewed by three-judge courts with direct appeal to the Supreme Court. It is now universally agreed that the Supreme Court should be divested of responsibility for reviewing so many I.C.C. cases (about 25 a year). But the occasion for the old procedure still exists, and it would seem to be quite desirable, in repealing the old Urgent Deficiencies Act, to divert review of all I.C.C. matters to the new court. Although air and marine transport rates are economically less significant, it would be appropriate to consolidate the function of reviewing the I.C.C. with that of reviewing the C.A.B. and the Maritime Commission. Such a complete jurisdiction of reviewing transportation rate-making would involve less than 100 filings a year, and, despite their great complexity, would require a little less than two judgeships.

(c) Power Regulation

A fairly strong case can also be made for assigning to the new court the primary responsibility for the review of the Federal Power Commission. Many of that Commission's decisions are of national, rather than regional, import. Contrary rulings on similar issues in different parts of the country can obstruct the agency program. Delay in the resolution of issues, while multiple circuits opine, can cause extensive delay in the development of new energy sources. And the cases are often sufficiently complex that they get less attention than they merit from regional circuit judges. This jurisdiction, also, would require less than two judgeships, involving only 80 or so filings a year.

The development of the new court as a transportation and power appeals court would serve to take a little pressure away from the Supreme Court. It would have an even more benign effect on the dockets of the regional circuits. Most circuit judges find their episodic adventures into the field of rate-making extremely time-consuming, as well as quite troublesome. Significant gains in both efficiency and quality could reasonably be expected.

V. REVIEW OF DISTRICT COURTS

It has already been suggested that if the nationwide circuit is to review state convictions, it should assume immediately the responsibility for reviewing federal district courts in state post-conviction cases. The purposes of this diversion would be to assure a reasonable stability in the workload of the new court, and to promote a coherent approach to the problem of enforcing the federal constitution in state criminal litigation. There are other special situations in which a case can be made for diverting business from the regional circuits to the nationwide circuit.

(a) Tax and Patent Litigation

Prominently mentioned in this connection have been tax appeals. As noted above, the diversion of all tax appeals to the inter-circuit court would require seven judgeships, and would involve a restructuring of the Court of Claims. A second rather bulky possibility would be patent appeals. These cases, like tax cases, are often of fairly general interest; indeed, each patent is a potential national monopoly affecting a wide range of interests. And the cases are sufficiently complex that the improved understanding that might result from some concentration of experience would be fairly welcome. On the other hand, the 200 patent appeals, difficult as they are, would require as many as four judgeships; and it would be necessary to cut into the jurisdiction of both the Court of Claims and the Court of Customs and Patent Appeals in order to secure jurisdiction over all of the business.

(b) "Emergency" Litigation

Smaller segments of jurisdiction may be more attractive. One obvious candidate is price control litigation. If there is to be a national court capable of handling the work of the Temporary Emergency Court of Appeals, there is no reason not to use the more permanent institution. The new forum could provide unified administration of the law with the same dispatch as the T.E.C.A., with less dislocation to its ordinary routine. It is not possible to weight this item of work with any confidence, and one hopes the need for the work will not continue at all. But, at the present rate of 30 cases a year, this business could be absorbed by the new court.

On examination, it would appear that there are a number of other small categories of civil cases which might be given similar "emergency" treatment. Thus, there are many examples of fairly comprehensive modern legislation replete with uncertainty borne of legislative compromise. Not infrequently, the efficacy of the legislation is delayed or impaired by this uncertainty; enforcement programs may be obstructed by prolonged litigation in multiple circuits. With a suitable national forum available, it might be very helpful to concentrate the litigation arising under such legislation, at least for a sufficient period of time to permit the major litigative issues to become settled. A number of contemporary examples might include the Selective Service Act, the Environmental Protection Act, the Occupational Safety and Health Act, and the Freedom of Information Act. Only the latter three, of course, are of current interest.

The number of cases in the three categories last mentioned is uncertain, but my data from the Justice Department would confirm that the total is less than 100, probably not more than 75. Assuming that these novel cases are also difficult and doubly time-consuming, they could nevertheless be handled with a manpower allocation of less than two judgeships.

If this approach is to be utilized, it would seem wise to make the system flexible in allowing the Supreme Court, by rule, to transfer aging statutes to the regional circuits, in order to make room for new ones as the need arises.

(c) Ancillary Matters

Finally, there are a few small classes of appeals from District Court decisions which might be deemed ancillary to some of the new court's possible jurisdiction over administrative agencies. Illustrative are appeals in cases involving claims by the United States for civil penalties for violations of I.C.C. or C.A.B. rules, or under the Railway Labor Act. So far as appears no such problem would cause difficulty with respect to manpower needs.

CONCLUSION

All of the foregoing calculations are soft. Readers are again warned of the pervasively speculative nature of the inferences drawn from incomplete data and projected upon a future that is distorted with political uncertainties. Nevertheless, it seems fair to conclude that the available data tend to confirm the judgment that a new court of reasonable size could perform a variety of useful services. It could help to restore the traditional qualities of federal appellate justice, and to improve the enforcement of the national law.

JOINT STATEMENT

to

COMMISSION ON REVISION OF THE

FEDERAL COURT APPELLATE SYSTEM

Maurice Rosenberg*
Paul D. Carrington

Our purposes in appearing before the Commission are to present the views of the Advisory Council for Appellate Justice relating to the work of the Commission and to present our own joint ideas. These go beyond the general precepts of the Advisory Council and advance a specific model for the revision of the federal court appellate system.

The model we present emerges today for the first time; it has not been considered by the Advisory Council. It reflects what we have derived from earlier discussions of other models that from time to time were advanced before the Advisory Council. Also, we have taken heed of the work of the Study Group on the Caseload of the Supreme Court and of the American Bar Association's Special Committee on the Coordination of Judicial Improvements, as well as comments by the critics of the proposals those groups have presented.

The Council Recommendation is brief and does not undertake a full explication of the positions of the members. We two do not presume to speak for the membership of the Council in elaborating unexpressed details of the plan. Although nearly all members of the Council unqualifiedly supported the Recommendation, varied sets of reasons naturally moved each member. A precise statement of collective views about details is therefore impossible.

It can be said unreservedly that the Advisory Council was animated initially and primarily by the present condition of the United States Courts of Appeals. The huge increase in caseload, steadily aggravating the demands on each of the judges, has vastly transformed those institutions in the last decade. Of all the data that have been displayed for the purpose of illuminating the condition that exists, two items especially dramatize the concerns that were generally shared within the Council.

---

*Professor Rosenberg is Medina Professor of Law at Columbia University. Professor Carrington is Professor of Law at the University of Michigan. This statement was submitted to the Commission on April 1, 1974.

One fact is that a decade ago the Courts of Appeals were making fewer than thirty-five plenary dispositions per judgeship each year; they are now making about one hundred.

The second fact is that a decade ago the Supreme Court fully reviewed about one Court of Appeals decision in thirty; and now the Court can give plenary attention to fewer than one in a hundred.

The twin consequences are that the intermediate courts are pressed to rush to judgment more and more hastily in most of their decisions, while more and more of those decisions are the last resort for litigants. Perforce, their process as a whole is becoming less humane in its feel and less harmonious in its effect.

Two special aspects of the situation have received extended consideration by the Advisory Council. One is the grave problem that exists with regard to state post-conviction litigation in the federal courts. The problem is both a cause and a manifestation of the system's plight. Thousands of state prisoners petition each year to federal courts at all levels, usually appearing pro se and in forma pauperis, for the purpose of obtaining relief from their convictions. A not inconsiderable number prevail, securing their release because of a failure of state systems to have given effective protection to their constitutional rights. The number runs to perhaps one half of the 300 state convictions set aside each year by the federal courts. Most of this small but significant number is released after extended imprisonment on grounds which should have been litigated at the time of trial or immediately thereafter, but were not. In lieu of a speedy determination of their constitutional rights, they were placed in prison, to join the large throng of petitioners who weave their weary ways through the maze of state and federal post-conviction proceedings. Because there is no federal forum which can offer prompt and final assurance that the state courts gave due heed to constitutional standards in the initial convictions proceedings, thousands of prisoners must be allowed to petition repeatedly.

The frequency of these sallies into the federal courts is great, but their number is more than matched by their perfunctory dispatch. At the level of the federal District Courts, these petitioners are often shunted to a magistrate, who is asked to pass judgment on the validity of a conviction already reviewed, sometimes twice, by the highest state court. At the Court of Appeals level, the petitioners are generally accorded the briefest attention by the hard-pressed circuit judges. Although exceedingly tedious and many-tiered, the process is not effective in securing the cooperation of state courts and authorities. In short, the Advisory Council found the present system of enforcing the federal constitution in state criminal litigation inhumane to petitioners, invidious to the state courts, ineffective in its purpose, and wasteful of the resources of the federal courts, particularly at the level of the Courts of Appeals. A sensitive portrayal of the situation would reveal injustice of Dickensian proportions.

What the Advisory Council contemplates as an appropriate response to this deplorable situation has antecedents in earlier proposals by Judges Henry Friendly and Clement Haynsworth. The purpose of the Council is to move towards a solution that will take most of this litigation out of the lower federal courts by assuring a full, fair and opportune consideration of all federal constitutional issues and defenses in the state courts, preferably within the framework of the criminal conviction proceeding itself. In order to insure that the state court proceeding is fair and effective, it is clearly essential that there be an adequate federal appellate remedy. The federal appellate courts must be in a position to review a large number of state conviction appeals in which federal issues are raised. Once this capability exists, we can reasonably expect that most of the issues will be laid to rest in a just and timely manner in the state courts, thus relieving the petitioners and the federal courts of the unseemly and wasteful situation which now exists. Whether this approach succeeds will depend on the perception of the Supreme Court of the United States as to the adequacy of the federal appellate remedy to protect constitutional rights and assure them in state proceedings. If the Supreme Court deems the new appellate remedy adequate, the withering of today's patently inadequate post-conviction procedures can be expected to follow. Because of the importance of the Supreme Court appraisal of the procedure, it seems prudent to repose in the Court itself the final decision as to the extent of its use. If the Court finds the proposed process irredeemably inadequate, it can terminate it and return to the existing system; if the Court were able, by rule of court, to fashion an adequate procedure, the system would be maintained. If success were achieved, state prisoners would be assured of a fuller, fairer, and more timely hearing of their claims, most of these matters would be brought to repose, and the other federal courts would be relieved of a burdensome and troubling workload.

The second problem which has drawn much attention from the Advisory Council has been the problem of stability in the administration of the national law. The problem is an old one. For decades, observers have decried the balkanizing effect which the circuit system has on the application of the national law. Members of the Council differed widely in their assessment of the gravity of this problem. But no one would deny that there is a real difficulty to be encountered by a group of judges seeking to administer the same body of law even-handedly, when they must sit in small, isolated, and randomly selected panels, or that the difficulty is magnified by an increase in the number of judges and cases. Moreover, many members of the Council were concerned about the difficulties which the resulting disharmony poses for those who must plan legal transactions, public and private. A single panel decision of a Court of Appeals is simply no longer effective, if it ever was, to lay a legal issue to rest. Even a very restrained litigant, such as the Justice Department, will continue to urge its preferred interpretation of a federal statute in the face of a contrary decision, or even two or three such decisions. Like the problem of prisoner

petitions, this problem is both a cause and a manifestation of the plight of the federal appellate courts. The more decisions the Courts of Appeals make, the less definitive they are.

This second problem is one that affects different classes of federal litigation diversely. It is more serious in areas which involve extensive legal planning, in which transactions and programs may be thrown into confusion by legal uncertainty. It is less serious in areas which involve heavier emphasis on individual rights and where subtle differences in factual circumstances leading to different inferences by triers of fact are more important in determining dispositions. And it is less serious in areas which are within the primary range of visibility of the Supreme Court; the Court is, of course, an effective harmonizing force in areas of the law to which it can give its primary attention.

Thus, the Advisory Council contemplates a response to the situation which focuses on categories of appellate cases in which national harmony and predictability are most important. The Council suggested the field of taxation and administrative agency review as most amenable to the revised approach. The Recommendation proposes that cases in those categories might be transferred by the Supreme Court to the new nationwide circuit. We believe that some chosen categories of cases should go directly from district courts or administrative agencies to the inter-circuit court and not ascend three rungs of the appellate ladder before approaching the Supreme Court.

Implementation

The Council in its work has been absorbed primarily with the plight of the Courts of Appeals. We expect that the nationwide circuit can provide relief for the regional circuits in discharging their single most onerous task--reviewing state prisoners' post-conviction claims. It should also reduce somewhat the demand on the regional circuit courts for numerous decisions that in practice unfortunately do not have a stabilizing effect upon some of the agitated issues of national law they address. The nationwide circuit would be able to moderate the adverse consequences of growth in substantive areas where disharmony and unpredictability are most harmful. It would thus bring about an increase in the effectiveness of judges of the regional circuits by deflecting some cases and stabilizing other issues. By these means, we would hope to reinforce the traditions of openness and personal responsibility of judges which have been valued features of the federal appellate process. The quality of appellate justice can be strengthened when the oppressive burden of volume is better managed.

It was with these considerations in mind that the Advisory Council produced the Recommendation now before you. In our view, added factors reinforce the logic of the Council's approach. Of these, the paramount advantage of the recommended plan is that it deliberately builds in a capacity for responsiveness to the swiftly changing demands upon the federal judicial system.

Although the Council's Recommendation does not expressly refer to another potential function of the nationwide tribunal, we believe it would present the Supreme Court with an optional method of handling part of its heavy docket of petitions for certiorari. If the Justices saw advantage in doing so, they could adopt a rule of Court requiring specified types of petitions to go to the nationwide circuit. This tribunal, acting through its panels of five judges, would review the petitions assigned to it and, without finally granting or denying any, aid the Supreme Court in this branch of its responsibilities.

As we see it, the nationwide circuit panels should have the delegated duty of analyzing the assigned groups of petitions for the purpose of stating briefly as to each: (1) the precise issues urged by the petitioner as warranting Supreme Court review; and (2) a recommendation as to whether review ought to be granted, with reasons, again briefly expressed.

The judges of the nationwide circuit would not be doing the work of "glorified law clerks". Their certiorari-recommending function would be but one of their important duties. Their recommendations would rest upon large experience and a long view of the needs of the federal system. In reviewing petitions they would have whatever guidance the Justices thought useful to impart.

If over time this proved a worthwhile delegation of function, the Supreme Court could continue and modify it as need might dictate. If the arrangement did not work well, the duty could be terminated. The Supreme Court would always be in control and could manage the assigning of certiorari petitions as it saw fit.

Assuring Flexibility to Meet Changing Needs

One of the most constant and dependable elements of the problem is that the appellate system's needs and burdens will change rapidly and drastically from this day forward. The lead time for determining the dimensions and causes of pathologies in the system; devising measures that respond to these; and putting these measures into effect by legislation, is a very considerable one. It will consume several years, at least. One way of avoiding the frustrations this breeds, as the Commission is so well aware, is to create a flexible mechanism that has the capability of monitoring the system's problems on a continuing basis and of anticipating tomorrow's needs instead of merely responding to yesterday's.

A flexible approach can be exemplified in the well-used legislation which enables the Supreme Court to make rules of procedure. The Rules Enabling Act of 1934 is the primary antecedent; it authorizes the Court to promulgate rules; these are subject to congressional disapproval within a specified period. Here, because of the vital importance of the issues presented, it is neither wise nor appropriate for Congress

to make an open-end delegation of power over judicial structure and organization, even with the proviso for congressional disapproval. The area within which delegated power to revise structures and procedures may be exercised must be clearly delineated. This power might be assigned to the Supreme Court, in the manner of the 1934 Act, perhaps assisted by a standing Commission.

Additional flexibility might be achieved through use of creative methods of court administration. Differential treatment of cases which make differing demands on the diverse functions of appellate courts is possible, if advanced methods of administration are made available. As an example, some state courts have provided leadership in developing new means of utilizing professional staff to reduce administrative burdens on judges of appellate courts. Senior professionals, though lacking the incandescence of younger clerks, can maintain a systematic familiarity with particular facets of a court's work and can thus provide perspectives otherwise unavailable to busy judges. Without converting the courts into bureaucracies, the possibility exists that the services of appellate commissioners can be utilized to relieve judges in ways that avoid doing violence to cherished values. Appellate courts can certainly make more effective use of data retrieval technology to provide better information on which to base the sorting or screening of cases.

To repeat, the key need appears to be to build in responsiveness to changing needs. How this characteristic of the system can best be achieved is a question deserving the most careful attention. In its wise resolution lies the instrument for dealing, come what may, with the structural and operational needs of the federal appellate system, whichever values are deemed ascendant and whichever needs are most urgent at any given time.

Essentials of Acceptable Revision

Efforts to revamp the structures and procedures of the federal appellate system will fail or at least stimulate vigorous opposition unless they are rooted in values that command very wide consensus. Six of these values, some imperative, some injunctive, warrant mention.

First, the system adopted must preserve channels of access to the Supreme Court for all citizens. Perhaps the hope is illusory, as some have suggested, but whatever its vitality it must be allowed to persist. Every person is entitled to believe that a right exists to petition the Supreme Court for redress of wrongs within its purview.

Second, the Supreme Court's control over its docket must be preserved. "Tampering" is unacceptable--whether because it is thought to violate the constitutional commitment of the federal judicial power to "one supreme Court" or because of general awe. The tempest that arose over the suggestion that a special tribunal made up of circuit judges

block about 90% of the certiorari petitions addressed to the Supreme Court persuades us that the Court itself must at all events retain control of its docket, making the ultimate decision as to which cases to hear and which to reject.

Thirdly, criminal appeals must not be relegated to second-class status; and any court that hears only criminal appeals will be so stigmatized. This does not mean that criminal and civil cases must be treated precisely the same in all respects, but it does mean that they must mingle in the same court before the same judges, or suspicions of second-class treatment will be aroused.

Fourth, an essential of a revision plan is that it command the interest of a highly esteemed corps of able federal judges who find challenge and fulfillment in their work. A severe objection to the plan to create a certiorari-screening tribunal was that it appeared to many circuit judges to consign them to work that was inconsequential, dull and demeaning. A corollary is that the number of appellate court judges ought not be expanded prodigally, to the point that a dilution in power or status ensues.

Fifth, in revamping the judicial hierarchy, an abiding concern must be to avoid elongating the appellate process by creating a new level or tier of courts through which cases must pass en route to final disposition. A revision which exposes litigants to the added costs, tensions and other burdens of an additional layer of review will be difficult or impossible to justify.

Sixth, the revised system should avoid requiring judges to specialize. This precludes assigning them duties so narrow that the ablest judges will be repelled and those who serve will see only a narrow, slit-like sector of the law. Related to this is the need that new judicial posts contain safeguards against possible efforts of special interests to control the mechanism of selecting judges. By the same token, the designation of judges of the nationwide tribunal should not fall under the domination of one administration or one philosophical or political viewpoint.

Costs

It would be disingenuous to suggest that even the most careful balancing of the considerations outlined above can achieve the goals sought without paying a price; or that nothing in addition to structural and procedural revision is needed to attain substantial betterment of the federal appellate system. We do not for a moment minimize the importance of relieving the appellate courts of substantial numbers of appeals by measures other than those we have suggested. The needed relief undoubtedly requires deflecting some classes of cases from the federal courts at the entry gate, as Judge Henry J. Friendly has suggested. Consideration should be given to measures making it more difficult to appeal, for example by creating disincentives to "insubstantial" appeals.

If volume is not reduced, we shall have to pay the price in such currency as: more and more judges, more and more bureaucratization of the appellate courts, more and more screening, a reduction of oral argument and a further shrinkage in the number of explained decisions.

There seems no escape from the distasteful prospect of moving some judges from their home circuits to Washington, D.C. Some judges may find the prospect unbearable. This leads us to condition the assignment of eligible judges upon their individual acquiescence, a process not without dangers of its own.

The device to avoid specialist panels of the nationwide tribunal exacts a cost we must bear, namely, surrendering the value of expertise in some classes of cases in which expert knowledge would be highly desirable. Moreover, the selection of judges for the nationwide circuit raises delicate, complex problems--political, personal and logistical. The prospect of paying an extra stipend to judges who agree to move to the nation's capital is not free from difficulty.

Finally, the procedures for presenting to the Supreme Court the decisions and recommendations of the nationwide circuit require most careful thought. On the one side, we want to preserve accessibility to the Supreme Court and assure that the Justices retain control over the cases the Court reviews. On the other side, we want to give the Justices the flexibility that is critical to the vigorous functioning of the federal appellate system, so that relief can be given where needed and the virtues that have won such high esteem for the institution can be strengthened.

Proposed Nationwide Circuit Model

In the interests of concreteness, we have attached to this statement a rough illustrative draft of a plan that fleshes out the skeletal outline the Council transmitted to the Commission. Again, we absolve colleagues of blame--even by association--for the features of the model that go beyond the Recommendation.

To bring the plan to realization, Congress would authorize creation of the "Nationwide Circuit of the United States Court of Appeals" and enact enabling provisions to invest the Supreme Court with the powers required to render the model operational.

PDC
MR
3/27/74

One Way to Design the PROPOSED NATIONWIDE CIRCUIT MODEL

I. JURISDICTION

The nationwide circuit will exercise three kinds of jurisdiction:

A. Federal Review of State Convictions. In conjunction with the Supreme Court this will be the federal court responsible for the enforcement of federal constitutional procedural standards in state criminal proceedings; that is:

(1) Appeal of right will lie from judgments of highest state courts to the nationwide circuit to review federal constitutional claims, provided that the state has met minimum standards prescribed by Congress to assure full and fair opportunity to litigate those claims within the state proceedings.

(2) Pursuant to legislation, appeals from judgments of United States District Courts disposing of post-conviction petitions of state prisoners will be addressed only to the nationwide circuit.

(3) By rule of court promulgated by the Supreme Court, all certiorari petitions from judgments of highest state courts upholding convictions or denying post-conviction relief may be referred to the nationwide circuit for provisional disposition subject to the approval of the Supreme Court.

(4) All petitioners will retain access to the Supreme Court, by petition for certiorari through the nationwide circuit as regards items (1) and (2), and by petition for rehearing by the full Court as regards item (3).

B. Decision of Selected National Specialty Cases. Subject to the general supervisory power of the Supreme Court, the nationwide circuit will assume responsibility for harmonizing the articulation and application of the national law with respect to subjects of federal legislation deemed by the Supreme Court to warrant assignment to a court of national jurisdiction; that is:

(1) By rule of court, the Supreme Court may refer to the nationwide circuit for provisional decision cases in the following categories:

(a) cases arising under the internal revenue code;
(b) cases arising under the national labor relations laws;

(c) cases arising under the federal trade practices laws (as further defined);
(d) cases arising under the bankruptcy, credit, and investment laws (as further defined).

(2) By rule of court, the Supreme Court may direct that appeals from the following federal administrative agencies be directed to the nationwide circuit, for example:

(a) Interstate Commerce Commission;
(b) Civil Aeronautics Board;
(c) Federal Maritime Commission;
(d) Federal Power Commission.

(3) By rule of court, the Supreme Court may direct that appeals from United States District Courts be routed to the nationwide circuit in cases arising under existing federal legislation and under new statutes that so provide. Among existing categories the following are illustrative:

(a) The Economic Stabilization Act;
(b) The Environmental Protection Act;
(c) The Occupational Safety and Health Act;
(d) The Freedom of Information Act.

(4) All litigants should retain an opportunity for review by the Supreme Court of decisions or recommendations of the nationwide circuit pursuant to provisions of a Rule the Court might promulgate. With regard to petitions for certiorari referred to in sub-paragraphs (2) and (3), the nationwide circuit could be authorized to recommend grant or denial under the guidelines and procedures prescribed by the Supreme Court. With regard to provisional decisions referred to in sub-paragraph (1), the Rule might provide that such a decision will not become final until 60 days after it has been docketed with the Supreme Court.*

---

*There are obviously various options. We believe the Supreme Court would do well to provide that when the nationwide circuit has rendered decisions in areas of national legislation committed to its jurisdiction, there be no further review by the Supreme Court except in most extraordinary cases, such as those interwoven with constitutional issues.

Another set of alternatives would be constructed as follows:

C. Over Assigned Categories of Certiorari Petitions

(1) To relieve its docket of certiorari petitions of types deemed least needful of its own attention, the Supreme Court may by rule refer to the nationwide circuit for recommended dispositions certiorari petitions arising from:

(a) suits by or against the United States or its officers in matters of contract, property or tort;

(b) cases arising under the industrial accident laws; (e.g., FELA, Jones Act);

(c) cases in which federal jurisdiction is based on the citizenship of the parties;

(d) cases in which federal jurisdiction is based on the federal location of the events in dispute.

(2) Every petitioner will retain the opportunity of addressing the Supreme Court by petition for rehearing, as the Court may by rule provide.

(footnote continued)

(a) either by the losing litigant's filing with the Supreme Court a "Suggestion for Review" attaching the loser's motion for re-hearing previously submitted to the nationwide circuit. The motion will be a prerequisite for seeking Supreme Court review. It will consist of a statement assigning errors in the nationwide circuit's decision;

(b) in the alternative, the Supreme Court may require its staff to recommend for or against consideration of a provisional decision; and may provide that such a decision will be set for discussion at conference on the request of one or more Justices;

(c) in the absence of action by the Supreme Court within 60 days after filing of the provisional decision, the decision will be effective throughout the nation (in the same way as a decision of the Court of Custom and Patent Appeals). A decision of the nationwide circuit is not deemed to have been "affirmed" after elapse of the prescribed 60 days. The Supreme Court will not be inhibited by stare decisis from deciding the issue differently should it thereafter arise.

II. ORGANIZATION AND PROCEDURE

A. Membership. The court will consist of fifteen judges, one of whom shall be the Chief Judge.

B. Divisions. The court will be divided into two divisions of seven judges each; the Chief Judge will not be regularly assigned to either division.

C. Assignment of Business to Divisions. The review of state convictions, by whatever means, will be equally divided between the two divisions. The review of selected national specialties will be divided by categories between the two divisions by Supreme Court rule, with the object of maintaining equality in the burden of work.

D. Sittings. Sittings will be conducted in panels of five judges. With respect to national specialties business, each division will be authorized to sit en banc. The business of the court will be conducted at its seat in Washington, D.C., except as to cases in which pragmatic considerations require otherwise.

E. State Conviction Appeal Procedure. State conviction matters will be screened with the help of staff, but all appeals which raise a substantial issue will be given a hearing. Dispositions may be made orally, or by unauthored opinions.

III. JUDICIAL STAFF

A. Eligibility for Assignment. Assignments to the nationwide circuit will be made from among active circuit judges, agreeable to serving and less than 64 years of age who have served as circuit judges for at least 4 years.

B. Assignment Procedure. Vacancies will be filled promptly by a Special Commission on the Nationwide Circuit. The Commission shall consist of two Supreme Court Justices, the Chairman and ranking minority members of the Senate Judiciary Committee, and three persons appointed by the President. The Justices shall be those who have served the second and eighth longest terms on the Supreme Court at the time of the meeting at which a vacancy is filled. The Presidentially-appointed commissioners shall serve staggered nine-year terms.

C. Term. The term of each assignment will be eight years.

D. Assignment to Division. Each judge will be assigned, from the first, to a single division of the court, and will remain a member of that division unless named Chief Judge.

E. Place of Duty. All members of the nationwide circuit will maintain their chambers in the District of Columbia; an appropriate stipend will be provided to defray the added expenses of moving.

F. Chief Judge. The first Chief Judge will be appointed by the Commission. A vacancy in the office will be filled by the judge senior in service on the nationwide circuit who has at least two years remaining of his term.

A MULTI-CIRCUIT COURT OF APPEALS

Harold Leventhal*

As a member of the Advisory Council on Appellate Justice, I voted in support of its Recommendation.

But there are differences in emphasis and outlook of the members of the Council. Here are some highlights of my own thinking.

A. In my view, the most important reason for a multi-circuit court of appeals arises from the need to provide an early authoritative national ruling on matters that will affect nationwide planning of resources--by government agencies, private institutions or both.

1. The ACAJ Recommendation refers to "resolution of conflicts" between circuits. This is shorthand. The term should include substantial divergences in approach to a common legal problem as well as outright conflict of holding.

2. The work of the tribunal should go beyond conflicts in circuit decisions already rendered--to reach the problem of litigation pending in multiple circuits.

At the present time there is multiple litigation on, say, validity of FPC modification of its natural gas area rate programs. A newer topic--FPC's exercise of its allocation authority--is bubbling in a number of cases. There is a value in early authoritative ruling.

This concern was identified by the Ash Report a few years ago, but it proposed a specialized, statutory court. The Multi-Circuit Court would provide constitutional judges, who avoid the evils of specialization in terms of steering selection of judges at the outset, or producing excessively case-hardened judges. I am basically opposed to specialized appellate courts. Apart from other evils, they put walls around areas of the law that would benefit from trends and developments elsewhere. I think particularly of the "administrative law" concepts evolving procedures and principles for accountability of government officials; these may have applicability even for private decision-making, by use of fiduciary principles.

B. I suggest it would be desirable for the multi-circuit court of appeals to avoid as much as possible the characteristics of a fourth tier--a mezzanine between the ordinary courts of appeals and the Supreme Court.

1. The extra tier would be appropriate in a limited number of cases--on Supreme Court reference to the court.

---

*Circuit Judge, United States Court of Appeals for the District of Columbia Circuit. From a letter to A. Leo Levin, April 1, 1974.

2. Otherwise, the basic orientation of the multi-circuit court should be as one stepping into certain cases in lieu of the courts of appeals. Otherwise, it may increase rather than diminish the Federal appellate workload.

C. Flexibility in setting jurisdiction should permit ready changes in light of evolving court workloads and outside problems, and should not require exclusive jurisdiction of large categories of designated Federal specialties, but permit designation of sub-categories and particular cases.

1. There may be merit in specialized appellate courts for certain national specialties--e.g., tax cases and patent cases. If so, they might be established as such. If they are put into a nationwide circuit, they should be assigned to specific specialized divisions where a judge would stay for a minimum period, probably on rotation. The division handling, say, tax cases might also be assigned other cases, if workload permits, but all tax cases should be assigned to this division.

2. In a number of regulatory programs, the primary need for early authoritative ruling may not extent to all, say, FTC, NLRB, SEC or FPC cases, but to those sub-categories or instances that really merit elevation to the multi-circuit court for special handling.

a. Take NLRB cases. Some of these involve searching questions of approach under the Act, and are cases where circuits seem to have different approaches. But a large number of NLRB cases are relatively simple--cases where the employer or union is playing out a feeble string, whether passively waiting for the NLRB to file its petition for enforcement, or filing a petition for review, perhaps to seek a favorable forum. To the appellate court, such cases are easy, amounting to no more than finding whether there is evidence to support a jury verdict. They do not merit early elevation to a multi-circuit court.

b. The same can be said for FTC cases. Or even FPC cases which may involve issues of accounting, filing, details of abandonment.

D. Flexibility in management must be the hallmark of the multi-circuit court, if it is to succeed in its objectives. This applies also to the flow of the cases.

The model would not be exact, but I suggest that in planning for the flow of cases we can take heart from the success of the Judicial Panel on Multi-District Litigation, 28 U.S.C. § 1407, for consolidated pretrials of civil action pending in different districts. Let me suggest one model: The administrative committee of the court (say three judges) should review petitions for reference to the multi-circuit--which would be filed by counsel for the government, or private parties.

The court would be unlikely to reach out excessively. (a) There would be "controls" by the Supreme Court and anguished cries of other Federal judges. (b) Its membership would be held down at the outset--and expanded only on a showing of real need. Perhaps start as a court of 7, 9, or 11 (2 panels of 5 plus the chief judge).

E. Quantitative Measurements would not be a sound index to the work or effectiveness of the multi-circuit court. It would not be taking the average case, but the complex and sensitive cases.

If the multi-circuit court had, say, 10% of the appellate judges, it would likely decide much less than 10% of the number of cases even assuming use of 3-judge panels. With probable use of 5-judge panels, its output would further decline--to, say, 3% of total appellate decisions.

NATIONAL COURT DEVELOPMENT*

The primary objective to be gained if stability is to be secured is that each important class of decisions on national law be brought within the effective authority of a single court of last resort.

One way in which this result could be secured is to enlarge the jurisdiction of existing national courts to make them national courts of last resort for limited purposes. Such a plan need not be implemented at once, but could be staged.

Thus, we might begin by making fuller use of the United States Court of Appeals for the District of Columbia. Venue legislation might be revised to give this circuit exclusive jurisdiction over litigation reviewing certain administrative agencies. Most attractive candidates would be the utility and transportation agencies. Such a limitation on venue to the D.C. Circuit is now the law with respect to certain matters involving licensing decisions of the Federal Communications Commission, and was not unusual in earlier times. The complaint would be heard that proceedings in the District of Columbia are not as convenient for many litigants. Convenience to litigants could be served by authorizing, or even requiring, the Court of Appeals for the District of Columbia to hold hearings in several other cities in different corners of the continent.

Almost certainly, this scheme would produce several advantages. It would divert troublesome business from the overloaded regional circuits. It would eliminate forum shopping and reduce repetitive, conflict-generating litigation. And it would largely eliminate the Supreme Court's responsibility for the evolution of national law administered by the agencies so reviewed. Petitions for review in the highest Court would receive scant attention unless significant constitutional questions were raised.

If this plan were successful, or as an alternative first step, a similar plan might be developed for the United States Court of Claims. That court might be given exclusive jurisdiction to review not only decisions of claims commissioners, but also of the Tax Court. In addition, all appeals from United States District Courts in cases involving the federal fisc, including such matters as taxation or tort claims, would be diverted away from the regional circuit to the Court of Claims. As with the present Commissioners, or the proposed Court of Appeals for the District of Columbia, the court would be permitted, or perhaps required, to hold hearings in several cities. It would be a court of last resort for matters involving government finance.

---

*Reproduced from a memorandum of January 10, 1973 to Advisory Council for Appellate Justice from its Committee on Appellate Structure and Implementation. Justice Albert Tate, Jr. was Chairman; Professor Paul Carrington was Reporter to the Committee.

A third possible plan would be to enlarge and develop the present Court of Customs and Patent Appeals. Its jurisdiction could be increased to include review of the Federal Trade Commission and all District Court decisions in cases arising under the antitrust, patent, trademark, and copyright laws. It would then be a court of last resort for trade practices laws.

If all three of these plans were pursued, what jurisdiction would be left for the regional circuits? These courts would be left with a substantial range of jurisdiction tending to be of greater relative importance to individuals or local governments. This would include appeals in criminal and diversity litigation, the whole arena of civil rights, labor and welfare law. This jurisdiction would be in the main field of vision of the Supreme Court, which would be better equipped to supervise and harmonize regional courts so organized, in part because of the Court's ability to leave less important matters of national law to the other national courts. To the extent that the regional circuits were unable to achieve harmony, little would be lost because the kinds of issues which they would be deciding disharmoniously would not be the kinds of questions having wide national significance. There would be little or no reason for the regional courts to sit en banc.

The regional circuits could develop a process which would emphasize the assurance of justice in the individual case. Such a process would be speedy and open, as gratifying to individual litigants as possible. Such a process might be more oral than that employed by the national courts. The national courts would rely more heavily on technical briefing by counsel, and would be less concerned with the personal elements of the process in dealing with the industrial litigants who would be their usual clientele.

Perhaps some would see this series of proposals as demeaning to the circuit judges, because the scope of their jurisdiction would be reduced. If this be so, it might satisfy the objection to provide for the rotation of regional circuit judges through the national courts. This would be tolerable only if the duty assignments in the national court were for a substantial period of years; otherwise the rotation would be too unsettling.

END