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**Commission on Revision of the
Federal Court Appellate System**

**Structure and Internal
Procedures:
Recommendations
for Change**

WASHINGTON, D.C.

JUNE 1975



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**COMMISSION ON REVISION OF THE
FEDERAL COURT APPELLATE SYSTEM**

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Judge J. EDWARD LUMBARD, *Vice Chairman*
A. LEO LEVIN, *Executive Director*

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Senator HIRAM L. FONG
Senator ROMAN L. HRUSKA
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**COMMISSION ON REVISION OF THE
FEDERAL COURT APPELLATE SYSTEM**

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JUNE 20, 1975.

Honorable GERALD R. FORD,
President of the United States,
Washington, D.C.

Honorable NELSON A. ROCKEFELLER,
President of the Senate,
Washington, D.C.

Honorable CARL B. ALBERT,
Speaker of the House of Representatives,
Washington, D.C.

Honorable WARREN E. BURGER,
Chief Justice of the United States,
Washington, D.C.

GENTLEMEN: In accordance with the provisions of section 6, paragraph (2), Public Law No. 489, Ninety-second Congress, as amended by Public Law No. 420, Ninety-third Congress, the Commission on Revision of the Federal Court Appellate System herewith submits its report of recommendations for change in the structure and internal procedures of the Federal courts of appeal system.

Respectfully yours,

Roman L. Hruska

Senator ROMAN L. HRUSKA,
Chairman.

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of a prompt and definitive determination of that rule by the National Court of Appeals outweigh any potential disadvantages of transfer; or

(3) the case turns on a rule of federal law which has theretofore been announced by the National Court of Appeals, and there is a substantial question about the proper interpretation or application of that rule in the pending case.

The National Court would be empowered to decline to accept the transfer of any case. Decisions granting or denying transfer, and decisions by the National Court accepting or rejecting cases, would not be reviewable under any circumstances, by extraordinary writ or otherwise. (Pp. 34-38.)

4. Any case decided by the National Court of Appeals, whether upon reference or after transfer, would be subject to review by the Supreme Court upon petition for certiorari. (Pp. 38-39.)

II. INTERNAL OPERATING PROCEDURES

5. *Mechanism for circuit procedures.* Each circuit court of appeals should establish a mechanism for formulating, implementing, monitoring, and revising circuit procedures. The mechanism should include three essential elements:

- (a) publication of the court's internal operating procedures;
- (b) notice-and-comment rule-making as the normal instrument of procedural change; and
- (c) an advisory committee, representative of bench and bar. (Pp. 44-46.)

6. *Oral argument.* Standards for the grant or denial of oral argument, and the procedures by which those standards are implemented, are appropriately dealt with through the rule-making process. We recommend the following as an appropriate minimum national standard for inclusion in the Federal Rules of Appellate Procedure:

(1) In any appeal in a civil or criminal case, the appellant should be entitled as a matter of right to present oral argument, unless:

- (a) the appeal is frivolous;
- (b) the dispositive issue or set of issues has been recently authoritatively decided; or
- (c) the facts are simple, the determination of the appeal rests on the application of settled rules of law, and no useful purpose could be served by oral argument.

(2) Oral argument is appropriately shortened in cases in which the dispositive points can be adequately presented in less than the usual time allowable.

Because conditions vary substantially from circuit to circuit, each court of appeals should have the authority to establish its own standards, so long as the national minimum is satisfied, and to provide

procedures for implementation which are particularly suited to local needs. (Pp. 46-49.)

7. *Opinion writing and publication.* The Commission recommends that the Federal Rules of Appellate Procedure require that in every case there be some record, however brief and whatever the form, of the reasoning which underlies the decision.

The Commission strongly encourages the use of memoranda, *per curiam* opinions, and other alternatives to the traditional, signed opinion in cases where they are appropriate.

The Commission strongly encourages a program of selective publication of opinions. (Pp. 49-53.)

8. *Central staff.* The Commission, recognizing the contribution which central staff can make to the effective functioning of the courts of appeals, recommends that Congress provide funds adequate for optimal utilization of such staff. Duties appropriate for central staff include research, preparation of memoranda, and the management and monitoring of appeals to assure that cases move toward disposition with minimum delay. Central staff attorneys should not draft opinions, nor should they screen cases for denial of oral argument. To minimize the risk of undue delegation of judicial authority, or even the appearance thereof, the published internal operating procedures of each court should carefully define the responsibilities assigned to central staff attorneys. (Pp. 53-54.)

III. ACCOMMODATING MOUNTING CASELOADS: JUDGESHIPS, JUDGES AND STRUCTURE

9. *Creation of needed judgeships.* The creation of additional appellate judgeships is the only method of accommodating mounting caseloads without introducing undesirable structural change or impairing the appellate process. Accordingly, the Commission recommends that Congress create new appellate judgeships wherever caseloads require them.

As the Commission recognized in its report on circuit realignment, an appellate court composed of more than nine judgeships loses in efficiency and in the collegiality essential to the optimum functioning of the judicial process; the principles stated in that report should guide the Congress in considering circuit realignment. (Pp. 55-57; 59.)

A. Managing a Large Circuit

10. *En banc hearings in large circuits.* In order to make possible the effective functioning of large circuits, the Commission recommends that participation in *en banc* hearings and determinations should be limited to the chief judge and the eight other active judges of the

circuit who are senior in commission but not eligible for senior status, subject to the following qualifications:

(a) Judges eligible for senior status may continue to participate so long as, and to the extent that, the total number of participants does not exceed nine.

(b) When the nine-judge en banc court becomes a minority of the authorized judgeships on any court of appeals, the method of selecting judges for the en banc court should be reconsidered by the Congress.

Regardless of the size of the en banc court, all of the active judges of the circuit would be eligible to vote on whether to grant hearing or rehearing en banc. (P. 60-62.)

11. *Amendments to the en banc statute.* Section 46(c) of the Judicial Code should be revised to provide that:

(a) En banc consideration would be granted upon the affirmative vote of a majority of the active judges of the circuit who are not disqualified from sitting in the matter, rather than a majority of all active judges; and

(b) Judges who sit on a panel should not be eligible, for that reason alone, to sit on the en banc court in the rehearing of the case. (Pp. 61; 62.)

B. Assuring Judges of Superior Quality in Adequate Numbers

12. *Filling of vacancies.* The Executive and Legislative branches should act expeditiously to fill all judicial vacancies. (P. 63.)

13. *Inter-circuit assignments.* The procedure for making inter-circuit assignments of active judges should be simplified. Specifically, the judiciary should return to the simple procedure established by Congress: certification of necessity by the borrowing court, consent by the lending court, and designation by the Chief Justice. (Pp. 63-64.)

14. *Easing of senior status requirements.* The requirements for taking senior status should be eased; a judge should be eligible for retirement when the number of years he has served on the bench, added to his age, equals eighty, as long as the judge has served a minimum period of ten years and has attained age sixty. (Pp. 64-65.)

15. *Adequate judicial salaries.* Federal judicial salaries should be raised to a level that will make it possible for outstanding individuals to accept appointment to the bench and adequately compensate those now serving. (P. 65)

IV. OTHER RECOMMENDATIONS

16. *Commission on the federal judicial system.* The Commission recommends that Congress consider the desirability of creating a stand-

ing commission to study and to make recommendations with respect to problems of the federal courts. (P. 67.)

17. *District court judges of high quality in adequate numbers.* The Commission recommends that the Congress assure to each of the districts courts judges of superior quality in sufficient numbers and with adequate support facilities, not only because of the importance of their function, but because of the resultant significant impact on the work of the appellate courts. (Pp. 67-68.)

18. *Tenure of chief judges.* The Judicial Code should be amended to provide for a maximum term of seven years for the chief judge of a circuit, who would continue to be selected on the basis of seniority. (P. 68.)

19. *Selection of the presiding judge of a panel.* Congress should amend section 45(b) of the Judicial Code to provide that the presiding judge on a panel shall be the active judge of the circuit who is senior in commission. (P. 68.)

20. *Adequate staffing and support.* Congress should provide adequate staff and support facilities for each of the courts of appeals as well as for all of the judges. (P. 69.)

21. *Discipline of judges.* The Commission recognizes that a mechanism for handling allegations of judicial misconduct and incapacity is an important matter and recommends that Congress turn its attention to this subject. (P. 69.)

22. *Availability of court of appeals documents.* The Library of Congress should serve as a national depository for briefs and other appropriate documents in cases in the federal intermediate appellate courts. The Library of Congress should micro-copy such materials and make them available to the public at cost. (P. 69.)

* * *

A substantial majority of the Commission supports each of the recommendations set forth above. We are not, however, of one mind on all issues. We have neither sought nor achieved unanimity with respect to all of our recommendations nor with respect to the reasoning underlying them. Though we have not attempted to submerge our differences, we have not thought it useful to articulate all of them in our report, since we are convinced that the larger purpose of furthering discussion and debate will be adequately served by the recommendations that a substantial majority of our membership approve. We are, moreover, unanimous in our recognition of the serious problems presently besetting the federal courts and of the need for sustained concern to the end that appropriate and enduring solutions be achieved.

I. Introduction

Our society imposes great demands upon the federal judicial system. History, congressional policy, and the preference of litigants have all contributed to the growing mass of complex and difficult litigation in the federal courts. As societal needs become more varied and more urgent, the courts are inevitably called upon to do more. The federal judiciary is asked to adjudicate conflicting rights and competing demands in areas relatively unknown to the law a few short years ago: preservation of the environment, occupational safety, consumer protection and energy conservation. Meanwhile, society rightfully expects that the federal courts will attend as always to a wide spectrum of traditional concerns. The need to protect individual rights and basic liberties is no less urgent today than yesterday. Litigants continue to present, and to expect reasoned resolution of, difficult issues affecting the financial structure and commercial life of the country. The courts must continue to meet these obligations even as they undertake new obligations imposed upon them in response to the needs of the contemporary scene.

No part of the federal judicial system has borne the brunt of these increased demands more than the courts of appeals. Since 1960 the number of cases filed in these courts has increased 321 percent, while the number of active judges authorized by the Congress to hear these cases increased only 43 percent. (The data are detailed in Appendix C.) The experience of the past five years is particularly instructive: Filings increased by more than 60 percent, yet not a single judgeship was added. Serious backlogs might have been expected; instead, median time from filing of the complete record to disposition was reduced by nearly one-fifth.

This dramatic increase in judicial productivity was achieved, in the main, by fundamental changes in the process of adjudication: widespread curtailment of oral argument, frequent elimination of the judges' conference from the decision-making process, and, in hundreds of cases, decision without any indication of the reasoning impelling the result. These were measures designed to cope with what might otherwise have been an overwhelming caseload. The goal is worthy, the procedures innovative, and the efforts prodigious. Yet, many responsible voices have expressed concern that efficiency has

been gained at too great a cost to the overall quality of the appellate process.

That new problems are given to the federal courts for resolution reflects in part the nation's confidence in a judicial system which has performed so well for so long. To maintain that confidence the courts must preserve, and must be seen to have preserved, the integrity of the process. To do so in the face of rising caseloads is no easy matter. Creativity in judicial administration and dedication to the task of judging have made possible the impressive record reflected in the data already presented, but there are limits to what should be expected of judicial productivity and increased efficiency, and, as has been suggested, the limits have already been exceeded.

Solutions are hard to come by. There are those who would deny the right of appeal in every case, substituting a discretionary procedure of one variety or another. To do so, however, would fail to recognize the widespread and deeply held view that any litigant who considers himself wronged below is entitled to one appeal as of right. Nor will it do, without more, simply to add judgeships to burdened circuits. Sound institutional considerations have counseled restraint in expanding the number of judgeships, and the judges of more than one of these courts have refused such relief, preferring to add to their own burdens rather than sacrifice qualities of collegiality in the court and stability and harmony in the law of the circuit.

In broadest terms, there are two alternative approaches to alleviating the burdens of the federal appellate system. One seeks to accommodate rising caseloads by providing the courts of appeals with the means of disposing of greater numbers of cases. The other seeks to reduce the caseloads themselves.

Congress may indeed restrict access to the federal courts; legislation with impressive sponsorship, designed to achieve this purpose, is pending at this time. Congress has, however, directed that the Commission exclude from its deliberations issues of district court jurisdiction, and we have been obedient to that mandate. Accordingly, no negative inference should be drawn from our silence, either with respect to recommendations concerning the abolition of diversity jurisdiction or of three-judge district courts, or with respect to a wide variety of other proposals, which would ease appellate burdens by curtailing federal court jurisdiction.

We take note of the number of witnesses who, mindful of our mandate, nevertheless urged that our task was made the more difficult by the unambiguous limitation thus imposed. Yet, it would be wrong to leave the impression that limitations on trial court jurisdiction are in themselves likely to prove an adequate remedy for appellate problems, particularly in the light of the modest reach of pending legislation. Unless change is far more sweeping than can now be foreseen, the net effect is likely to be little more than to slow or to stop

the rate of growth. At the least, it would appear unwise, for planning purposes, to act on the assumption that the caseload will diminish or even that it will cease to grow. We should rather plan to provide the courts of appeals with a measure of flexibility adequate to accommodate whatever additional demands upon them may be considered wise. It would be intolerable if proposals sound on their merits had to be rejected solely for lack of capacity in the system.

Problems of process and of volume are not the only sources of the concern which has focused on the federal courts of appeals. These courts have a unique role in the governance of the nation; they are charged with declaring and defining the national law, subject only to Supreme Court review. The multiplicity of such courts, however, invites diversity within the system, since the Supreme Court alone is available to assure consistency and uniformity, and its capacity to do so is limited by the sheer volume of adjudications, not to speak of its other major tasks. It has been urged upon the Commission that inter-circuit conflict and disharmony have proliferated to the point where "jurisprudential disarray" threatens to become "an intolerable legal mess." Where differences in legal rules applied by the circuits result in unequal treatment of citizens with respect to such matters as their obligations to pay federal taxes, their duty to bargain collectively or their liability to criminal sanctions, solely because of differences in geography, the circumstance is admittedly an unhappy one. Actual conflicts, however, are not the measure of the total problem; potential conflicts, the persevering possibility of differences developing, often have a broader impact. The absence of definitive decision, equally binding on citizens wherever they may be, exacts a price whether or not a conflict ultimately develops. That price may be years of uncertainty and repetitive litigation, sometimes resulting from the unwillingness of a government agency to acquiesce in an unfavorable decision, sometimes from the desire of citizens to take advantage of the absence of a nationally-binding authoritative precedent. These conditions suggest the need for change which would increase the system's capacity for definitive adjudication of issues of national law by the creation of a new national court.

Perhaps because the literature of judicial administration has for decades been written in the vocabulary of crisis and emergency—anything less tended not to command the attention of those with power to effect change—recent statements pointing to the need for a new tribunal are couched in similar terms. The decision to recommend a new national court should not, however, be made to turn on whether present conditions have reached crisis proportions, although in the opinion of many a crisis clearly exists. A state of emergency should not be viewed as a prerequisite to the consideration of improvements in the federal judicial system. Rather, we should ask whether the system is operating as well as it could and should.

Our society relies heavily on the federal courts and has an interest in assuring that its demands be met as effectively and efficiently as possible. Are they today being met in optimal fashion? Is the present structure of the federal intermediate appellate courts adequate to the needs? Might they be better met by the creation of a new tribunal? These are questions relevant to an understanding of the problems of the federal judiciary as an indispensable component of our federal system of government.

In recognition of the problems faced by the federal courts of appeals, the Congress created the Commission on Revision of the Federal Court Appellate System (P.L. 92-489). The Commission was given two major assignments, each with its own time table. In Phase I, the Commission was to "study the present division of the United States into the several 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." On December 18, 1973, the Commission filed its report pursuant to that mandate.

In Phase II, the Commission was "to study the structure and internal procedures of the Federal courts of appeal system, and to report . . . its recommendations for such additional changes in structure or internal procedure as may be appropriate for the expeditious and effective disposition of the caseload of the Federal courts of appeal, consistent with fundamental concepts of fairness and due process," and under the statute as amended (P.L. 93-420), to file its report by June 21, 1975. Obedient to that mandate, we file this report.

The Commission has held twelve days of hearings in various cities; a preliminary report was widely circulated. The Commission has received ideas and opinions from the bench and bar of every section of the nation. We are greatly indebted to the hundreds of individuals and organizations who have contributed to our work. Many of their ideas are reflected in this final report.

A substantial majority of the Commission supports each of the recommendations in this report. We are not, however, of one mind on all issues. We have neither sought nor achieved unanimity with respect to all of our recommendations nor with respect to the reasoning underlying them. Though we have not attempted to submerge our differences, we have not thought it useful to articulate all of them in our report, since we are convinced that the larger purpose of furthering discussion and debate will be adequately served by the recommendations that a substantial majority of our membership approve. We are, moreover, unanimous in our recognition of the serious problems presently besetting the federal courts and of the need for sustained concern to the end that appropriate and enduring solutions be achieved.

II. A National Court of Appeals

The Commission recommends the creation of a new national court of appeals, designed to increase the capacity of the federal judicial system for definitive adjudication of issues of national law, subject always to Supreme Court review. Such a tribunal will help assure that differences in legal rules applied by the circuits do not result in unequal treatment of citizens with respect, for example, to their rights under the social security laws, their liability to criminal sanctions, or their immunity from discrimination in employment. It will assure consistency and uniformity by resolving conflicts between circuits after they have developed, and it will, by anticipating and avoiding possible future conflicts, eliminate years of repetitive litigation and uncertainty as to the state of the federal law. It will, in short, contribute to that stability in the law which makes it possible for the courts and the bar to serve society more effectively.

Consistent with its Congressional mandate, the Commission has focused its studies on those areas in which deficiencies have been demonstrated and for which a more effective and efficient structure can be designed. A close and careful study of the considerations discussed below has led to the conclusion that a National Court of Appeals is needed today, and, if the demands of society continue to grow, will be indispensable in the years ahead.

THE NEED FOR A NEW COURT

Current Capacity: Numbers

The United States Supreme Court is today the only court with the power to hand down judgments which constitute binding precedents in all state and federal courts. It is charged with maintaining a harmonious body of national law through its power of review of the judgments in cases brought before it by way of certiorari and appeal. As the number of cases brought to the Supreme Court for review has burgeoned, the number disposed of on the merits after argument has remained relatively constant. Obviously, the major variable has been in the number of cases not accorded plenary review.

The figures are dramatic. In 1951 about 1,200 cases were filed in the Court. Twenty years later the number had tripled to about 3,600.

The volume continues to rise: in the most recent complete term over 4,000 cases were filed. By contrast, as Erwin N. Griswold observes, the Court was "hearing about 150 cases on the merits in 1925; it was hearing about 150 cases on the merits twenty five years ago. It hears about 150 cases on the merits today."¹ Elaborating on the same point, he continues:

The number of cases argued orally in 1951 was 128. The number of cases argued orally at the 1973 Term was 170. But there were a considerable number of occasions when two or more cases were heard at a single argument. Thus, there were approximately 150 oral arguments, and this number has been more or less constant for a number of years. It is, in fact, the maximum number that the Court can be expected to hear on the merits.²

The significance of these figures is summarized by Griswold as follows:

. . . Putting it another way, about eighteen percent of paid cases (appeals and certiorari) were heard on the merits twenty years ago, while about six percent of paid cases were heard on the merits during the 1973 Term. What became of the other twelve percent of paid cases? . . . they were lost in the 1973 Term simply because of inadequate appellate capacity to hear cases on a national basis.³

The figures discussed above do not include summary dispositions of cases within the Court's appeal docket. While these dispositions are binding on lower courts, a dismissal or a summary affirmance with bare recitation of result and without citation cannot be considered the equivalent of plenary disposition for purposes of providing an adequate body of precedents on recurring issues of national law. The Court itself has recognized as much. Mr. Justice Rehnquist, speaking for the Court, observed last year that "obviously, they [summary affirmances] are not of the same precedential value as would be an opinion of this Court treating the question on the merits."⁴ More recently the Chief Justice in a concurring opinion wrote: "When we summarily affirm, without opinion, the judgment of a three-judge District Court we affirm the judgment but not necessarily the reasoning by which it was reached." He emphasized that "upon fuller consideration of an issue under plenary review, the Court has not hesitated to discard a rule which a line of summary affirmances may appear to have established."⁵

¹ Griswold, *Rationing Justice—The Supreme Court's Caseload and What the Court Does Not Do*, 60 Corn. L. Rev. 335, 339 (1975) (originally delivered as an Irvine Lecture in 1974). In a footnote Griswold analyzes and explains the statistics, focusing on the 1973 term.

² *Id.* 340.

³ *Id.* 341.

⁴ *Edelman v. Jordan*, 415 U.S. 651, 671 (1974).

⁵ *Fusari v. Steinberg*, 419 U.S. 379, 391-92 (1975) (Burger, C. J., concurring). In this case the district court had relied on the summary affirmance in *Torres v. New York State Department of Labor*, 405 U.S. 949 (1972). The opinion of the

Supreme Court filings may already be an inadequate measure of the real needs of the country for definitive adjudication of national issues. As the needs increase and the proportion of cases accorded review decreases, the number of filings becomes even less likely to reflect the real need accurately. Fewer litigants will seek review, not necessarily because their cause is unimportant by traditional criteria, but rather because there is so little chance of persuading the Court to hear the case. Professors Casper and Posner make the point effectively in their recently-published *Study of the Supreme Court's Caseload*: "[T]he value of filing an application for review with the Supreme Court," they write, "is a function of the probability that review will be granted, and as that probability declines over time due to increases in the number of cases filed coupled with the Court's inability to increase significantly the number of cases it accepts for review, the value of seeking review will fall, and, other things being equal, the number of cases should decline."⁶

The implication of this analysis is clear. In the words of the authors: "[S]hould the Court's caseload level off or even decline in the coming years, this would *not* refute the existence of a serious workload problem—the caseload might simply have become so large in relation to the Court's ability to decide cases that litigants were discouraged from seeking review by the low probability of obtaining it."⁷

There is evidence that this phenomenon has already had its impact and that the data we have discussed may in fact understate the problem today. We know that in cases which the Solicitor General considered "cert-worthy," he has refused to request review because of a sensitivity to the Court's workload and a concern that review would be jeopardized in cases of even greater importance. Similarly, private practitioners refer to what has been termed the "hidden docket," those cases in which counsel chose not to seek review only because the probability of a decision on the merits is too low to warrant the expense.

The pressure of this increased competition for the attention of the

Supreme Court characterized the district court's interpretation of *Torres* as "plausible" but "not one that we can endorse." The Court stated:

By reading our summary affirmance in *Torres* at its broadest, the District Court heightened the tension between that judgment and our more considered [plenary] disposition of [a 1971 case]. A narrower interpretation of *Torres* would have been appropriate.

. . . We do not undertake to identify the combination of factors that justify the *Torres* decision. Having once decided the case summarily, we decline to do so again. We only indicate that the District Court should not have felt precluded from undertaking a more precise analysis of the statutory issue than it felt empowered to do in this case. [*Id.* at 388-89 n. 15.]

⁶ Casper & Posner, *A Study of the Supreme Court's Caseload*, III *Journal of Legal Studies* 339, 361 (1974).

⁷ *Id.* 362.

Supreme Court is not distributed equally in all categories of cases. Understandably, an increasing proportion of the Court's decisions have involved constitutional issues. Since the total number of decisions has remained constant, the result is that the number dealing with non-constitutional issues has been decreasing. Prior to 1960, the Harvard Law Review reported in 1971, non-constitutional holdings "almost uniformly" made up two-thirds to three-quarters of the Court's decisions. In more recent years, the proportions have almost been reversed: constitutional cases have comprised between one-half and two-thirds of the Court's plenary decisions.⁸ Congressional enactments have imposed federal standards in such areas as occupational health and safety, protection of the environment, product safety, and economic stabilization, to name but a few. Thus, while the scope of federal regulatory legislation—typically including provisions for judicial review—has been steadily broadening, the number of definitive decisions interpreting that legislation has been diminishing. What this means, in absolute figures, is that in each term the Supreme Court can be expected to hand down no more than 80, and perhaps as few as 55, plenary decisions in all areas of federal non-constitutional law. The question is whether this number of decisions is adequate to meet the country's needs for authoritative exposition of recurring issues of national law.

No single conclusion follows inexorably from the raw statistics discussed above. We do not know the minimum number of cases which must be decided each year by a court of nationwide authority in order to maintain a stable and harmonious law. The data suggest either that there were many cases decided by the Supreme Court a quarter of a century ago which need not have been decided by that Court then; or that there are many cases deserving decision by a national tribunal today which are not being decided in such a forum; or that conditions have changed in a way which reduces, rather than increases, the proportion of cases which must be decided by a national tribunal in order to assure a stable, harmonious and authoritative national law.

⁸ In an effort to determine what effect, if any, there has been on Supreme Court review of state court decisions, we commissioned a study by Professor Preble Stolz of the University of California School of Law. He observed that "the Supreme Court is far less likely than it was 10 or 20 years ago to decide a case that started in the state courts," and concludes:

The effect is unmistakable: . . . It is not today possible for the United States Supreme Court to maintain more than token supervision of the resolution of federal law questions in the state courts.

It is, of course, difficult to prove this proposition with objective data and subjective assessments will differ. For this reason we have chosen not to emphasize the probable lack of federal court review of state court decisions on federal issues. If a new national court is established, it could and should produce additional review of state court decisions on issues of federal law referred to it by the Supreme Court of the United States.

At the least, the data raise serious questions about the future. They provide no basis for confidence that the Supreme Court can be expected adequately to satisfy the need for stability and harmony in the national law as the demands continue to increase in the decades ahead.

There are those who suggest that the solution lies in persuading the Supreme Court to accept a greater number of cases each year for decision on the merits. Specifically, it has been urged that the Supreme Court increase its capacity for decision, particularly with respect to the resolution of inter-circuit conflicts, by resorting to truncated procedures. Rather than accord the litigants a full scale hearing, the Court should simply choose, as one witness put it, "the most appealing opinion among [those] of the courts of appeals." We reject any approach which would call upon the Court to increase the number of cases decided on the merits without full briefing or oral argument. In our view, a solution to the lack of capacity should not be sought by resort to measures which would adversely affect the Court's processes or the public's confidence in them. To do so would be a disservice to the judicial system and litigants alike; it would incur the risk of permanent damage for what may well prove the ephemeral benefit of temporary relief.

More basically, we cannot recommend any solution which would increase the Court's burden. There is ample evidence that the workload of the Justices is such that they are already subject, in the words of Mr. Justice Blackmun, to "greater and more constant pressure" than busy practitioners or hard-working appellate judges, pressure which "relents little even during the summer months."⁹ The issue is not whether the Justices find it possible to keep abreast of present work. The evidence is that more than one does so by giving up the "normal extracurricular enjoyments of life"; six or seven days of work a week are not unknown as a regular pattern. Whether or not such burdens should be viewed as an appropriate norm, it hardly seems a desirable solution to increase the number of cases which the Court should be expected to decide. On the contrary, given the complexity and significance of the issues which only the Supreme Court can decide, it may be appropriate to reduce the number of cases which the Court must decide. Both Mr. Justice White and Mr. Justice Rehnquist have invited consideration of this alternative.¹⁰

It should be emphasized that the primary focus of our inquiry has not been the burden on the Supreme Court. It has rather been to determine whether the need for definitive declaration of the national

⁹ Letter of Mr. Justice Blackmun, published in the Appendix.

¹⁰ Rehnquist, *Whither the Courts*, 60 A.B.A.J. 787 (1974); Letter of Mr. Justice White, published in the Appendix. See also letter of Mr. Justice Powell, published in the Appendix.

law in all its facets is being met, and, if it is not being met, how best to assure that it will be met. As Mr. Justice Rehnquist puts it:

[T]he desirability of a national court of appeals turns not on the workload of the Supreme Court but rather on the sufficiency of judicial capacity within the federal system to review issues of federal constitutional and statutory law. While the adoption of the Commission's proposal might enable the Supreme Court to make some changes in the way it exercises its discretionary jurisdiction, the principal objective of the proposal is not "relief" for the Supreme Court but "relief" for litigants who are left at sea by conflicting decisions on questions of federal law.¹¹

At the least it must be clear that we cannot seek solutions by requiring the Court to assume the added burden of an increased caseload. We cannot do so today; assuredly, we cannot expect to do so as the need increases in the years ahead.

The Experience of Participants in the System

The perceptions of participants in the federal judicial system are valuable in assessing the extent to which the present structure of the federal courts is adequate to meet the needs of the country. Particularly significant are the views of the Justices of the Supreme Court of the United States.

Mr. Justice White is convinced that there are cases "which should be decided after plenary consideration but which the Supreme Court now either declines to review or resolves summarily," and that they exist in substantial numbers, sufficient "to warrant the creation of another appellate court."¹² After expressing agreement with Mr. Justice White, Mr. Justice Powell adds:

[T]he burgeoning caseload of the federal courts is not likely to diminish, and this Court can hardly serve the national appellate needs of our country as adequately today as it could when petitions filed here were about 1,000 per year as contrasted with the present 4,000 plus.¹³

Mr. Justice Blackmun has put the matter in another way. He refers to the cases "that almost assuredly would have been taken twenty years ago," but which are now denied review, and to the "worry" occasioned the Justices themselves by the need to deny.¹⁴ The concerns expressed by Justice White, Justice Powell, and Justice Blackmun are elaborated by Mr. Justice Rehnquist:

Conflicting views on questions of federal law remain unresolved because of the Supreme Court's unwillingness, which is reflected

in the exercise of its discretionary jurisdiction each year, to undertake to decide more than about 150 cases on the merits during each Term. This reluctance reflects the institutional view that thorough and deliberative decision-making, and not quantity of output, is the Court's primary consideration. A generation ago, when I was a law clerk to Justice Jackson, this order of priorities imposed no hardship to litigants. The Supreme Court's capacity to decide important issues of federal constitutional and statutory law was adequate for the needs of the country.

I think the Commission's report documents the case that the capacity of this Court is no longer adequate for that purpose. While the number of unresolved conflicts between courts of appeals which were not resolved by this Court is not numerically large, it is significant and, I think everyone would agree that it is bound to increase. Congressional action that would constrict this Court's appellate jurisdiction and thereby increase our ability to resolve direct conflicts through exercise of our discretionary jurisdiction would affect only the immediacy of the need for a national court of appeals, and not the ultimate need for expanded capacity.¹⁵

A somewhat different problem is underscored by the Chief Justice:

[O]ne element of the Court's historic function is to give binding resolution to important questions of national law. Under present conditions, filings have almost tripled in the past 20 years; even assuming that levels off, the quality of the Court's work will be eroded over a period of time.¹⁶

The risk of an erosion of quality must be of particular concern at a time when the importance of the issues presented to the Supreme Court is undiminished and the volume increased. As the Chief Justice states:

The changes brought on in the 20th century and the new social, political, and economic developments have surely not diminished the importance of the questions presented to the Supreme Court and have vastly increased the volume of important questions which can have an impact of great significance on the country.¹⁷

¹⁵ Letter of Mr. Justice Rehnquist, published in the Appendix.

¹⁶ Letter of the Chief Justice, published in the Appendix.

¹⁷ *Id.* In 1973, Chief Justice Burger, in an address to the American Bar Association, said:

The cases presented to district and circuit judges in the past few years, and consequently those coming to the Supreme Court, contrast sharply in content and difficulty with those of 25 or even 10 or 15 years ago. Courts have always had "new" problems and difficult problems, but never in such profusion as today. Courts are being called on to interpret, construe and apply hundreds of statutes, some loosely drawn in terms of desirable objectives but without the traditional standards and guidelines of earlier days. These statutes create important claims and rights, and often present grave problems affecting the functioning of state and federal governments.

Address of the Chief Justice to the American Bar Association, *Report on the Federal Judicial Branch—1973*, reprinted in 59 A.B.A.J. 1125, 1129 (1973).

¹¹ Letter of Mr. Justice Rehnquist, published in the Appendix.

¹² Letter of Mr. Justice White, published in the Appendix.

¹³ Letter of Mr. Justice Powell, published in the Appendix.

¹⁴ Letter of Mr. Justice Blackmun, published in the Appendix.

The Chief Justice "conclude[s] by saying that if no significant changes are made in federal jurisdiction, including that of the Supreme Court, the creation of an intermediate appellate court in some form will be imperative."¹⁸

The perspective of other participants in the system is also instructive. Erwin Griswold served as Solicitor General of the United States for six terms of the United States Supreme Court, from 1967 until June 1973. One of his responsibilities was to pass on nearly every case in which any officer or agency of the Federal Government had lost in a lower court and wanted to take the case to the Supreme Court, either by appeal or by certiorari. Reviewing the experience of those six terms, Griswold elaborated on the need for the Solicitor General to refuse to recommend Supreme Court review in a substantial number of cases because of the workload of the Court. There are, he concluded, "at least twenty government cases every year which are fully worthy of review by an appellate court with national jurisdiction and . . . the Government and the legal system suffer . . . from the lack of authoritative decisions which would come from such review and would serve as a guide to government agencies and the lower courts."¹⁹ This statement, made by one in a unique position to observe the flow of cases and the trends of the law in the federal courts, is important evidence that a problem exists.

Judge Shirley Hufstедler of the Ninth Circuit has spoken in even stronger terms. The Supreme Court, she observes, "now hears fewer than 1 per cent of the cases decided by the federal courts of appeals." Courts of appeals, she continues, "can be neither right nor harmonious 99 per cent of the time. One per cent supervision is patently inadequate."²⁰ Views may differ on the importance to be attributed to the precise percentage of cases receiving Supreme Court review. The basis of Judge Hufstедler's conclusion is what is most significant. As she herself notes, it is the experience of adjudicating federal cases appealed to a busy court, and the "informed intuition" which derives from that experience.

Not all judges may be expected to share Judge Hufstедler's views, and indeed there is evidence of dissent. It may be, too, that the Court of Appeals for the Ninth Circuit has been beleaguered more than most. But it is indisputable that if the present growth pattern should continue, the percentages of cases accorded review by the Supreme Court will continue to diminish. It seems clear that at some point the percentage of cases accorded review will have dipped below the minimum

¹⁸ Letter of the Chief Justice, published in the Appendix.

¹⁹ Griswold, *supra* note 1, at 344.

²⁰ Hufstедler, *Courtship and Other Legal Arts*, 60 A.B.A.J. 545, 547 (1974).

necessary for effective monitoring of the nation's courts on issues of federal statutory and constitutional law.

The Consequences of Inadequate Capacity

The studies of the Commission show four major consequences of the failure of the federal judicial system to provide adequate capacity for the declaration of national law. In a very real sense, however, each of the four is but a different facet of the same phenomenon: unnecessary and undesirable uncertainty. For the judge, uncertainty is the lack of a body of precedents adequate for confident decision; for the practitioner, it is a lack of stability sufficient to provide predictability adequate for effective service to clients and society.

Some uncertainty is, of course, inevitable. No lawyer steeped in the tradition of case-by-case development of the law, or sensitive to the inevitable problems of applying even a settled rule to a given fact situation, would pursue the chimera of certainty as an absolute. Moreover, we would not, if we could, accept certainty at the price of stifling new wisdom and needed change. Yet, to recognize the inevitability of some uncertainty does not require that subordination of clarity and stability which results in wasteful proliferation of litigation and threatens public as well as private interests. A prudent balance must be struck.

Clarity and stability are, of course, conclusory terms. It is helpful to identify specifically and to describe briefly the four major consequences referred to above, with fuller treatment in the sections which follow and in the Appendix to this report. First is the unresolved inter-circuit conflict: two contradictory statements of the same rule of national law, each of equal force within specified territorial limits. Imposing, as it does, different obligations for the payment of taxes, or for environmental control, or occupational safety standards, by reason of the accident of geography, the direct conflict is perhaps the most visible of the consequences of inadequate appellate capacity; certainly it is the most frequently discussed in the literature.

A second consequence of inadequate appellate capacity for definitive decision on a national basis is delay, which is significant and substantial in terms of its impact. The fact that a conflict is ultimately resolved does not eliminate the cost exacted by the delay; a fortiori, it cannot mean that the system is working in optimal fashion. Resolution may come only after years of uncertainty, confusion and, inevitably, forum shopping by litigants eager to take advantage of the situation. Even where the Supreme Court acts expeditiously to resolve conflicts which have been brought to its attention, a decade or more may have passed from the time the conflict first began to develop.

A third consequence of the lack of adequate capacity for declaration of national law is the burden upon the Supreme Court to hear cases

otherwise not worthy of its resources. The Supreme Court alone can provide definitive answers on issues which have divided the circuits. Although no longer convinced that, as the leading authorities put it in 1951, "it is required to grant certiorari where a conflict exists," the existence of a conflict remains an important reason for granting plenary review. The result is that, each year, the Justices hear and consider a number of cases which, in terms of their intrinsic importance, might well be thought unworthy of the time and effort which they demand of the Court. Inevitably, opinions will differ as to the importance of particular issues and the desirability of their resolution by the United States Supreme Court. Issues which some may consider trivial will appear to others to be quite significant in terms of the human values which the Court must be alert to protect. Moreover, as long as the Court remains the only tribunal empowered to resolve conflicts among the circuits or among state courts on federal questions, no one would fault it for granting review solely for that purpose. The elimination of conflict is, in itself, an important value in our federalism, even if the issue is conceded to be relatively unimportant in terms of development of national law. The question, however, is whether, in light of the other demands placed upon the Court, and considering the interests of the system as a whole, some issues might better be decided by another tribunal empowered to hand down precedents of national effect. An alternate forum for resolving conflicts would allow the Supreme Court greater freedom to hear, or to refuse to hear, such cases, relieved of the pressure to adjudicate solely because two courts have disagreed.

Finally, the lack of capacity for definitive declaration of the national law frequently results in uncertainty even though a conflict never develops. The possibility of conflict, not knowing whether a potential conflict will mature into an actual conflict, is yet another consequence of our present system. In many cases there are years of uncertainty during which hundreds, sometimes thousands, of individuals are left in doubt as to what rule will be applied to their transactions. Moreover, such uncertainty breeds repetitive litigation as (for instance) successive taxpayers, or employers, or producers litigate the identical issue in circuit after circuit, encouraged by the hope of developing a conflict. Whether or not their hope is ever realized, the relitigation is costly both to their adversaries and to the system as a whole. By the same token, the United States frequently persists in enforcing a policy despite adverse rulings in several circuits, not only in tax cases, but also in other areas of federal regulation.

A caveat is in order. There are some issues as to which "successive considerations by several courts, each re-evaluating and building upon the preceding decisions" will improve the quality of adjudication. As to these, there may be reason to avoid premature adjudication by a tribunal whose decisions are nationally binding. In discussing the

consequences of inadequate capacity, we do not speak of such cases. We speak here of those cases as to which, to borrow Erwin Griswold's words, "the gain from maturation of thought from letting the matter simmer for awhile is not nearly as great as the harm which comes from years of uncertainty." In short, we have endeavored throughout to put to one side cases in which delayed adjudication is appropriate; we would not sacrifice the quality of either process or product for speed or for the appearance of efficiency. However, we find no value in a system which fosters prolonged uncertainty and delay because the design of the system cannot accommodate more rapid resolution.

The focus of the preceding discussion has been on conflicts, both real and potential, with respect to a rule of law. Even where there is neither disagreement nor uncertainty about the governing rule of law, in some situations litigation will continue to arise, focusing instead on whether the facts put a case on one side of the line or the other. In such situations, the greater the number of nationally authoritative decisions pricking out the contours of a rule, specifying whether it does or does not apply to the facts of a particular record, the easier it is to achieve predictability and consistency throughout the country in still other factual settings.

The problem has been particularly acute in the field of patent law. The Commission's consultants, Professor James B. Gambrell of New York University and Donald R. Dunner, Esq., confirmed what has long been asserted: the perceived disparity in results in different circuits leads to widespread forum shopping. "[M]ad and undignified races," Judge Henry Friendly describes them, "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."²¹

Such forum shopping, write Professor Gambrell and Mr. Dunner, "demeans the entire judicial process and the patent system as well." At the root of the problem, in their view, is the "lack of guidance and monitoring by a single court whose judgments are nationally binding." The Supreme Court has set, and can be expected to continue to set, national policy in the area of patent law as in other areas of federal law. However, the Court should not be expected to perform a monitoring function on a continuing basis in this complex field. The additional appellate capacity for nationally binding decisions which a national court of appeals would provide can be expected to fulfill this function.

A final point. In a number of the cases set forth in the Appendix, Supreme Court review was not sought at all, or was sought only at an early point in the development of inter-circuit differences. A litigant's failure to seek Supreme Court review, however, does not indicate that a national resolution may not have been desired or desirable.

²¹ H. Friendly, *Federal Jurisdiction: A General View* 155 (1973).

The stakes for any one litigant may not have justified pursuing a case beyond the first level of appeal. Counsel may have concluded that the chance of obtaining Supreme Court review was too small to be worth the expense of filing a petition for certiorari. The prospect of further delay in the resolution of the particular controversy may have loomed large. The persevering uncertainty with respect to the venue provisions governing a corporate plaintiff is one example.²² Today, there is no alternative to Supreme Court review but under the transfer provision, of the Commission's national court proposal, it would be possible, in an appropriate case, to obtain a definitive resolution without requiring the parties to litigate in three levels of courts. This provision would thus permit the federal system to provide final answers to issues that are recurring and that affect numerous cases, yet are not of sufficient significance in any one case to induce the losing litigant to seek a second level of review.

These, in broad outline, are the major consequences of inadequate capacity for definitive declaration of the national law in the present system. A more detailed consideration of the Commission's studies and conclusions follows.

Inter-circuit Conflicts

The need for additional appellate capacity to maintain the national law is most starkly manifested by the existence of unresolved conflicts between different courts of appeals (or between a court of appeals and a state court or between state courts) on an issue of federal law. Often the conflicts are direct and frontal, arising because two or more courts have come to opposite conclusions in cases which cannot be distinguished. Less direct conflicts, however, can also produce uncertainty and confusion in the national law. The term conflict is "shorthand," a federal judge wrote to the Commission. It "should include substantial divergences in approach to a common legal problem as well as outright conflict of holding." Such divergences have also been termed "sideswipes," and it is clear that they exist in substantial numbers, and are often of great practical importance.

The resolution of inter-circuit conflicts is widely regarded as a primary function of our one national court, and it was not so long ago that the leading treatise on the jurisdiction of the Supreme Court could declare unequivocally that where there is a direct conflict between two courts of appeals on an issue of federal law, "the Supreme Court grants certiorari as of course, and irrespective of the importance of the question of law involved." If a substantial number of conflicts are not being resolved by the Supreme Court today because of the press of more urgent business, that fact would provide a strong argu-

²² See discussion in Appendix at 88.

ment for the creation of a new tribunal with the judicial capacity and authority to fill the vacuum.

In June 1974, the Commission launched a major project to determine the extent to which the Supreme Court is denying review despite the existence of a conflict. Professor Floyd Feeney, of the University of California at Davis, agreed to undertake the project for us.

The study encompassed approximately two-thirds of all paid applications for review in the 1971 and 1972 terms, including both petitions for certiorari and appeals summarily disposed of. Considering only cases denied review, Professor Feeney found the number of direct conflicts—those "in which the decisions deal with the same explicit point and reach contradictory results"—to be about five percent of the total sample studied, 98 in all. Taking the ratio of conflicts to not-argued cases in the cases reviewed, and applying it to the number of not-argued cases in the 1971 and 1972 terms, between 65 and 70 direct conflicts per term could be projected. If the ratio is applied to the 1973 term, Professor Feeney states, the number of direct conflicts would be 77. To put this figure in perspective, we note that it is about one-half of the total number of cases given plenary consideration by the Supreme Court each term.

The figures remain impressive even when duplicate issues, cases resolved at the time review is denied, and serious procedural problems are taken into account. The total number of projected conflicts is then 45 per year, based on the 1971 caseload, or 48 per year, based on the 1972 caseload. If we apply the same ratios to the number of direct conflicts projected for the 1973 term, the total is 55 or 56—the equivalent of about one-third of the number of cases given plenary consideration each term.

Some witnesses at Commission hearings have suggested that the data on conflicts are heavily weighted by constitutional issues which the Supreme Court Justices felt were not yet ripe for definitive adjudication. In fact, fewer than half of the actual direct conflicts studied by Professor Feeney involved constitutional issues. What is more significant, when Professor Feeney studied the persistence of conflicts he found that conflicts on constitutional issues were much more likely to be resolved than those involving statutory or other issues. Specifically, about one-half of the constitutional conflicts in the sample of cases denied review had been resolved at the time of the study, while less than one-fifth of the conflicts on non-constitutional issues had been resolved.

Moreover, the proportion of conflicts that were duplicated in the sample, or were resolved at the time of denial of certiorari, or arose in cases with serious procedural problems, was much higher among the constitutional cases than among other cases. Specifically, although statutory and other non-constitutional issues constituted little more than one-half of the total number of direct conflicts found (54%),

they constituted almost exactly two-thirds of the total number when duplications, issues resolved at the outset, and serious procedural problems are taken into account. Thus, if we take the ratio derived from the actual figures revealed by the sample, and apply it to the projections, we find that the number of direct non-constitutional conflicts not duplicated, not resolved at the outset, and without serious procedural problems would be 30 in the 1971 term, 32 in the 1972 term, and 36 in the 1973 term.

In the time available, Professor Feeney was able to review some but not all of the "strong partial conflicts" verified by his student associates. He estimates that there would be about 50 strong partial conflicts per term in the cases denied review, in addition to the direct conflicts. (The figures are 47 for the 1971 term and 50 for the 1972 term.)

The significance of these strong partial conflicts as indicators of uncertainty in the national law should not be minimized, as some of the examples cited by Professor Feeney will demonstrate. If one takes the strong partial conflicts—either 47 or 50—and reduces them to take account of duplications, immediate resolution, and serious procedural problems, and if one assumes the same proportion of non-constitutional issues as in the direct conflicts, the total number of non-constitutional strong partial conflicts remaining in cases denied review would be between about 22 to 24 per term. Adding these to the direct conflicts in the same category (*i.e.*, non-constitutional, not duplicated, not resolved at the outset and without serious problems), the total would be between 50 to 60 per term. Professor Feeney also found a substantial number of conflicts which he characterized as "weak partial conflicts"; none of these have been included in these projections.

Crucial to evaluating the significance of inter-circuit conflicts is the expectation level of the observer. How much conflict should be tolerated? At what point do we consider the national law to be in a state of disarray? For instance, if one studies the existence of conflicts with a view to inquiring whether the Supreme Court has been justified in repeatedly denying review, it may be appropriate to apply an exceedingly rigorous standard to the definition of conflict. Only the direct, undistinguishable case of conflict need command the attention of the Court, at least if the issues presented do not appear for other reason to be of great national interest. Yet, if the same cases are examined from a different point of view, not for the purpose of inquiring whether the Supreme Court is fulfilling the obligations it assumed when it sought the power of discretionary review, but rather for the purpose of ascertaining whether a taxpayer in Georgia will in fact be treated differently from one in Oregon, the definition of conflict might appropriately be a broad one.

The point is well illustrated in a debate in the literature which began with the publication by Robert Stern of an article entitled

Denial of Certiorari Despite a Conflict,²³ the first to point out what subsequently became well known, that the Court was denying certiorari despite the existence of a conflict. In it he described seven cases in which certiorari was denied despite the fact that there was an acknowledged conflict among the circuits. Edward and Sheila Roehner responded with an article in which they denied that a conflict existed in the cases listed by Mr. Stern.²⁴ To illustrate, the Roehners did not find a conflict to exist when two circuits interpreted the identical statutory language differently, because the two circuits were interpreting different provisions of the same statute. Nor did they find a conflict when two circuits disagreed over whether the choice of a method of computation of income for excess profits tax purposes was an election to compute corporation surtax net income by the same method, because the taxpayers had made their elections under different subsections. The Roehners recognized that "there is a disturbing conflict in principle between the two cases at which the tax practitioner cannot blink,"²⁵ but this alone, in their view, did not create an inter-circuit conflict.

Dissents from the Denial of Certiorari

On October 21, 1974, the Supreme Court denied certiorari in *Bailey v. Weinberger*, 419 U.S. 953 (1974), a case raising an issue of the reviewability of certain agency decisions involving Social Security benefits. Three Justices dissented from the denial of certiorari. Justice White, writing for himself and Justices Douglas and Stewart stated:

It is a prime function of this Court's certiorari jurisdiction to resolve precisely the kind of conflict here presented Perhaps the state of our docket will not permit us to resolve all disagreements between courts of appeals or between federal and state courts, and perhaps we must tolerate the fact that in some instances enforcement of federal law in one area of the country differs from its enforcement in another. These situations, it is hoped, will be few and far between.

This statement by three of the Justices, implying that the state of the Court's docket has made it impossible for the Court fully to perform one of its "prime function[s]"—that of resolving inter-circuit conflicts—reflects a certain concern over the inability of the Court to maintain a coherent, consistent body of national law.²⁶ It suggested

²³ Stern, *Denial of Certiorari Despite a Conflict*, 66 Harv. L. Rev. 465 (1953).

²⁴ Roehner & Roehner, *Certiorari—What is a Conflict Between Circuits?* 20 U. Chi. L. Rev. 656 (1953).

²⁵ *Id.* 662.

²⁶ See also *Alligator Co., Inc. v. La Chemise Lacoste*, 95 S.Ct. 1666, 1667 (1975) (White, J., joined by Blackmun and Powell, JJ., dissenting) which concludes:

I would grant certiorari in this case to resolve the conflict among the circuits. and *Demarrias v. Poitra*, 95 S.Ct. 1664 (1975) (White, J., dissenting).

to the Commission the desirability of a detailed study of dissents from the denial of certiorari. Such a study, seeking to ascertain the number of such dissents, the reasons given, and the extent to which the dissents bear upon the need for additional appellate capacity to maintain the national law, was conducted by the Commission staff. The results, reported in detail in the Appendix, are summarized briefly here.

Preliminarily, we note that our study focused in major part on the four score cases in the 1972 and 1973 terms in which one or more Justices felt impelled not only to record his dissent from the denial of certiorari, but also to write an opinion explaining his reasons for believing that review should have been granted. There are literally hundreds of other cases in the two most recent terms alone in which one or more Justices noted a dissent but did not write an opinion. Even the noted dissents, however, do not fully measure the volume of cases which, in the judgment of one of the Justices, were appropriate for national decision. Some Justices are reluctant to note a dissent under any circumstances; others may be reluctant to note a dissent unless they are prepared to write or to join an opinion. In this regard, it is significant that, as Justice Brennan has informed us,²⁷ approximately 30 percent of all cases docketed annually—more than 1,100 in the 1972 term—are thought by at least one Justice to be worthy of discussion at conference. We learn also that of the cases granted review in the 1972 term, “approximately 60 percent received the votes of only four or five of the Justices. In only 9 percent of the granted cases were the Justices unanimous in the view that plenary consideration was warranted.”²⁸ It would be surprising if unanimity was the usual pattern when the Court denied review in those cases deemed worthy of discussion at conference, even if the dissents are not always recorded publicly. Moreover, the absence of dissent provides no affirmative evidence that the Justices are satisfied that the federal judicial system as presently structured is adequate to assure consistency and uniformity in the national law. All of these decisions are made against the background of an awareness of the Court’s limited capacity for plenary adjudication, and must be considered to reflect a judgment based on a comparative, rather than an absolute scale.

In short, we believe that the dissents accompanied by opinions represent no more than a small sample of a larger whole. It seems likely that there are a substantial number of cases in which the denial of review is motivated in whole or in part by a judgment—perhaps not fully articulated—that, given the limited number of cases which the Court can decide, the importance to the nation of resolving a particular

²⁷ Brennan, *The National Court of Appeals: Another Dissent*, 40 U. Chi. L. Rev. 473, 479 (1973).

²⁸ *Id.* 481.

case simply does not rise to a level high enough to justify plenary consideration.

Turning first to the statistics, we find that the number of noted dissents from the denial of plenary review increased threefold during the four most recent complete terms of the Court. Compared with the figures of a generation ago, the increase is even more striking. Much of the increase is attributable to a single Justice, but, as the detailed analysis in the Appendix indicates, this hardly explains the general phenomenon. Perhaps even more significant is the increase in dissents expressed in a written opinion rather than by simple notation. We recognize, of course, that conclusions from these data must be drawn with great care. Many reasons may lie behind the decision of the Court to deny review, and it can never be clear in any given case that the Justices voting against review do so out of a concern for the size of their docket. It may well be too that the attitude of the Justices towards recording their dissents from denials, whether by notation or opinion, has changed over the years, with the result that only the publicity, not the frequency, of dissents has risen.

Analysis of the dissenting opinions, however, suggests that whatever the force of these other considerations, the dissents do point to a need for additional appellate capacity. Sixty percent of the dissenting opinions handed down in the 1972 and 1973 terms stated that a national decision was needed for one or more of the following reasons: (1) the existence of conflicts among the lower courts on issues of national law; (2) the existence of conflicts with Supreme Court decisions; (3) the existence of important questions for decision; and (4) the existence of statutory questions appropriate for definitive resolution. The cumulative effect of these opinions urging review for reasons implicating the institutional role of a national court supports the hypothesis, suggested initially by the statistics, that the maintenance of national law could be significantly furthered if the federal appellate system included another tribunal with power to hand down decisions of nationally binding effect.

Further Studies: Relitigation, Uncertainty and More Conflicts

The three remaining sections of Appendix B contain (1) analysis of and excerpts from reports by the Commission’s consultants on the frequency with which private practitioners in four areas of the law and general counsels of the federal administrative agencies have encountered conflicts, unsettled issues, and delays in the resolution of questions of federal law; (2) a study of relitigation as government policy: a consideration of the extent to which the federal government relitigates an issue notwithstanding one or more adverse decisions; and (3) a presentation of cases which have come to the Commission’s

attention either from the staff or from outside sources and which illustrate the presence of delay, uncertainty, and conflict in the present appellate system.

These materials provide significant and substantial evidence of the need for improvement in the system. Many of the attorneys surveyed expressed, with good reason, their general satisfaction with the overall functioning of the appellate system. But they pointed to serious deficiencies and demonstrated that there are both considerable need and potential for improvement. This much these sections of the Appendix, alone and in support of each other, make clear. There is, after all, no reason for the system to tolerate infirmities which can be cured without adverse side effect. The overall impact of the sources now to be discussed indicates that conflicts, uncertainties, and delays in the resolution of questions of federal law characterize the system to a far greater extent than is desirable, or than should be allowed to continue.

It is useful to consider a few cases taken from the Appendix, each of which illustrates one or more of the consequences which may result from the absence of a nationally binding decision.

1. *Recovery by third parties under the Federal Tort Claims Act.*²⁹ The issue is whether the exclusive remedy provision of the Federal Employee's Compensation Act bars the claim of a third party under the Federal Tort Claims Act for indemnity or contribution against the Federal Government for damages paid to an injured government employee. Two 1963 decisions of the Supreme Court have given rise to what one court calls "hopeless conflict" among the lower federal courts. At least four circuits have now held that recovery is precluded; a 1969 Fourth Circuit decision holds otherwise. The issue has been unresolved for ten years, with at least one denial of certiorari since the conflict arose, and it was the subject of a detailed Third Circuit opinion in 1974.

2. *Jurisdiction over plaintiff's claim against a third-party defendant.*³⁰ The issue is whether an independent basis of jurisdiction is necessary to support a plaintiff's assertion of a claim against a third-party defendant who has been impleaded under Fed. R. Civ. P. 14(a), or whether such a claim is within the ancillary jurisdiction of the court. This question has been litigated in at least three circuits and in numerous district courts since 1950. While every court of appeals which has considered the issue has held that an independent basis of jurisdiction is required, the question remains the subject of widespread litigation. As one judge stated in 1971, "there is still much disagreement on this point" among the district courts. Moreover, because of the strong policy considerations in favor of avoiding "multiplicity of suits and

piecemeal litigation," the commentators have argued forcefully against requiring an independent basis of jurisdiction, and have called for re-examination of the issue by the courts. Continued litigation can therefore be expected.

3. *Non-obviousness as jury question in patent validity case.*³¹ The validity of a patent depends on several components, including novelty, utility, and non-obviousness (invention). The first two are customarily held to present issues of fact. However, the circuits are divided on whether the element of non-obviousness is a factual question that may be submitted to a jury, or an issue of law to be decided by the judge alone. The question turns in large part on the proper interpretation of the relevant Supreme Court decisions. At least three circuits have held that non-obviousness is an issue of law, while the Tenth Circuit has adhered to its view that non-obviousness is a factual question. The issue is litigated frequently, as a review of the decisions in a recent Fifth Circuit opinion makes clear. In the most recent Tenth Circuit case, in which the court acknowledged the conflict, the Supreme Court denied certiorari. Justice Douglas, in an opinion dissenting from the denial, took note of the differing views among the circuits.

4. *Jurisdiction of bankruptcy court to require telephone company to provide continued service to debtor.*³² Under the Bankruptcy Act, the district court sitting in bankruptcy has summary jurisdiction over property that is in the possession of the debtor or his trustee. The issue is whether the right to use a telephone number constitutes "possession" of that number. If it does, the bankruptcy court, in a summary proceeding, may enter an injunction compelling the telephone company to provide continued service to the debtor. In 1961, the Second Circuit held that the right to use a telephone number does not constitute possession of that number, so that the bankruptcy court did not have summary jurisdiction of the dispute between the debtor and the telephone company. This decision was followed by the Ninth Circuit in 1971. In 1975, the Fifth Circuit, noting that the two earlier decisions "are extremely brief discussions of the issue," concluded that "they should not be followed," and upheld the summary jurisdiction of the bankruptcy court. A recurring issue thus remains unsettled and subject to further litigation in the lower courts, 15 years after the first appellate decision.

5. *Valuation of mutual fund shares in decedent's estate.*³³ A pair of Treasury Regulations issued in 1963 ruled that mutual fund shares in a decedent's estate should be valued, for estate and gift tax purposes, at the public offering or "asked" price at the date of death, rather than at the redemption or "bid" price. The validity of the regulations

²⁹ See discussion in Appendix at 78.

³⁰ See discussion in Appendix at 90.

³¹ See discussion in Appendix at 90.

³² See discussion in Appendix at 89.

³³ See discussion in Appendix at 83-48.

was tested in the Tax Court, four courts of appeals, and a district court in yet a fifth circuit. The first two circuits to pass upon the issue held the regulations to be valid, and the Supreme Court denied certiorari in one of the cases. Thereafter, two other circuits held the regulations invalid, and the Supreme Court "granted the Government petition for certiorari . . . because of the conflict among the circuits." Ten years after the regulations had been promulgated, the Supreme Court held that they were not valid, and that mutual fund shares should be valued for estate tax purposes at the redemption price. In the interim, as Erwin Griswold put it, "thousands of cases [were] held in abeyance, and much bootless administrative conference and litigation . . . engendered."

6. *Priority of payment for withholding taxes under Bankruptcy Act.*³⁴ Section 64(a) of the Bankruptcy Act governs the priorities to be accorded the debts of a bankrupt. The issue is the priority to be given to withholding taxes on pre-bankruptcy wage claims against a bankrupt employer. "The choice lies between the first priority (costs and expenses of administration), . . . the second priority (wages and commissions, limited as the statute specifies), . . . the fourth priority ('taxes which became legally due and owing by the bankrupt'), . . . and no priority at all." In 1947 the Eighth Circuit held that withholding taxes were to be given first priority. In the succeeding years the issue arose in at least three other circuits, with one following the Eighth in holding that the taxes were entitled to first priority, one holding for the second priority, and one holding for the fourth priority. In 1974 the Supreme Court granted certiorari, "primarily because the circuits [were] in disarray" on the issue, and held that the taxes were entitled to second priority. Thus the issue was settled—after more than 25 years of appellate litigation.

We should ponder seriously the cost to litigants and courts when narrow, technical questions take six to ten years for resolution. We should certainly consider alternatives to present patterns when the period is two to four times that long.

Another recent example concerns the tax treatment of insiders who are obliged to disgorge shortswing profits realized in violation of the Securities and Exchange Act of 1934.³⁵ Specifically, the question concerns the deductibility of such payments as ordinary and necessary business expenses. Five years have passed; three circuits have spoken; and the issue is not yet determined.

A further example is provided by a recent case on net operating loss carrybacks,³⁶ characterized by Griswold in the following terms:

This is another case of no world shaking importance, clearly not worthy of the time of the Supreme Court. Yet, it is a recurring

³⁴ See discussion in Appendix at 84.

³⁵ See discussion in Appendix at 86-87.

³⁶ See discussion in Appendix at 136-37.

question, and is one which should be settled quickly on a national basis.

The decision of the Tax Court in *Chartier Real Estate Co.*, 52 T.C. 346, was rendered in 1969, more than five years ago. It was affirmed by the First Circuit in 428 F. 2d 474 on May 29, 1970. It will, in all likelihood, be a full five years after that date before the matter can be decided by the Supreme Court—and it still is not worthy of the time and energy of the Supreme Court. All in all, I think it is a poor way to run a railroad.³⁷

The American Bar Association House of Delegates, in a February 1974 resolution calling for creation of a new national court, recognized the problem and pointed to the need for "prompt resolution of legal issues of national concern which the Supreme Court lacks the time to deal with." As we have already emphasized, the need is not limited to situations of actual conflict. Issues may become pressing, and require national answers long before circuit disagreements have arisen.

Some have attempted to identify the kinds of issues which particularly deserve early decision on a national basis. There is need, one jurist wrote the Commission, "to provide an early authoritative national ruling on matters that will affect nationwide planning of resources—by government agencies, private institutions or both." A possible example was provided by attorneys for the Environmental Protection Agency who were interviewed by Professors David P. Currie of the University of Chicago, and Frank I. Goodman of the University of Pennsylvania in connection with a study authorized by the Commission. The attorneys expressed concern about the uncertainty engendered by conflicting court of appeals decisions on the basic procedures the agency must follow in passing upon state implementation plans.

The problems under consideration can be attributed in part to the litigation policies of the United States Government. Professor Paul Carrington of the University of Michigan, who conducted an empirical study of appeals by the United States in civil cases, described the views of the Government concerning what is, and what is not, an authoritative ruling. He wrote:³⁸

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 quite 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

³⁷ Griswold's prediction has been proved correct. Certiorari was granted, 95 S. Ct. 1443 (1975), and the case will be heard late in 1975 or early in 1976.

³⁸ Carrington, *United States Appeals in Civil Cases: A Field and Statistical Study*, 11 *Houston L. Rev.* 1101 (1974).

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.

It should be observed that under the Justice Department's house rule three adverse rulings by courts of appeals do not necessarily suffice to constitute an authoritative ruling in which the Department will acquiesce. The rule as stated requires unanimity on the part of each panel. Obviously, a conflict may never develop and yet the repetitive litigation will continue.

A particularly striking example is a recent case in which the NLRB lost successively in five circuits, only to succeed, at long last, in creating a conflict on the sixth try.³⁹ That the sequence may be repeated in reverse when private parties litigate and relitigate in the hope of finding a hospitable forum compounds rather than mitigates the loss involved.

Some witnesses before the Commission urged that this problem be dealt with by limiting the Government's right to relitigate an issue after a certain number of defeats. The Commission concluded, however, that it would not be wise to recommend that the Government be penalized for not seeking, or not obtaining, a definitive decision when the appellate system lacks the capacity to provide it. The solution is rather to increase the capacity, and this, in our view, requires a new court.

Reference has already been made to the surveys of private practitioners and government general counsels. We do not propose to recapitulate or to condense all of the material in the Appendix. However, several responses to the questions put by our consultants merit mention. A Los Angeles practitioner, commenting on a conflict between a Second Circuit decision on the one hand and the view of the Tax Court on the other, observes:

The result is that a routine, garden-variety business transaction, the incorporation of a cash basis business, is plagued by significant tax uncertainties.

A second respondent, this one from Washington, D.C., comments on the problem created when competing firms in a single industry receive different tax treatment because they are situated in different circuits:

Because our practice involves representation of a number of clients in the same industry, we frequently feel it is unfair where similarly situated clients receive different treatment because the court of appeals in their Circuit is not inclined to follow the decision or line of reasoning of another Circuit. This is particularly bothersome on "industry" types of issues because the same set of facts and circumstances generally surround the legal issue when

it applies to a whole industry resulting in unfairness, unnecessary and costly litigation, and a certain amount of disrespect of the courts.

The Judge Advocate General of the Air Force commented as follows:

Insofar as the effect of inter-circuit conflict on the efficiency of the agency, it can be stated that a significant adverse impact on the administration of military justice is evident in those circuits in which pre-court-martial intervention by a Federal Court is permitted. We have also encountered difficulties in the administration of the conscientious objector program as a result of inter-circuit conflict.

For the Navy, the Judge Advocate General reported:

... The existence of inter-circuit conflict has affected the Department of the Navy's operation, e.g., in certain circuits it has been decreed that Reserves have a right to wear wigs during active-duty training, whereas other circuits have said they have no such right; also, the right to military lawyer counsel at a summary court-martial has been at variance within the several circuits. These conflicting holdings have caused variances in Navy operations from circuit to circuit.

The Bureau of Alcohol, Tobacco and Firearms reported:

A conflict in the circuits prevents the uniform and consistent administration of the laws which the Bureau is charged with enforcing. For example, the Ninth Circuit in *United States v. Hoctor*, 487 F. 2d 270 (9th Cir. 1973), held that a defendant who had pleaded guilty to a felony and subsequently had his conviction expunged pursuant to Washington law was not a person under disabilities under 18 U.S.C. § 842(i) (transporting or receiving explosives in interstate or foreign commerce, after having been convicted of a felony). It is the Bureau's position that the Federal statutes in their relief and pardon provisions contain the exclusive method by which Congress intended Federal firearms and explosives disabilities to be removed. Thus, we do not issue licenses or permits to persons who have been convicted of felonies under the firearms and explosives statutes (such persons not entitled to licenses or permits under these laws) who have had their convictions expunged. The issue is in litigation in District Courts of two other circuits and we hope to have the issue ultimately decided by the Supreme Court.

The responses quoted are not selected as typical; the present system could hardly remain viable for long if problems as serious as these permeated all the agencies or pervaded every aspect of private practice. They do, however, reflect deficiencies which we view as both serious and remediable. They underlie our conclusion that a need for additional national appellate capacity has been demonstrated and that, consistent with the mandate of the Congress, we should recommend a change in structure to meet that need.

³⁹ See discussion in Appendix at 138.

Specialized Courts

Some have suggested that the lack of capacity to declare the national law should be remedied by the creation of specialized courts, specifically a court of tax appeals and a court of patent appeals.⁴⁰ The suggestions are, of course, familiar: proposals for a court of tax appeals and for a court of patent appeals have been raised periodically at least for the past twenty-five years. More recently there have also been proposals for a court of administrative appeals, a court of environmental appeals and what would basically be a court of criminal appeals. The debate over the desirability of such courts has spawned a rich literature, focusing on the special needs of the respective specialties on the one hand, and, on the other, on broader concerns with the factors which make for the highest quality of appellate adjudication.

After extensive discussion the Commission has concluded that, on balance, specialized courts would not be a desirable solution either to the problems of the national law or, as noted elsewhere, to the problems of regional court caseloads.

Our conclusion rests in part on the disadvantages which we perceive as inherent in the creation and operation of specialized courts. A number of the witnesses testifying before the Commission have echoed the views of Simon Rifkind, first presented in an oft-cited 1951 article, that the quality of decision-making would suffer as the specialized judges become subject to "tunnel vision," seeing the cases in a narrow perspective without the insights stemming from broad exposure to legal problems in a variety of fields. Much the same point was made by the Chairman of the Section of Taxation of the American Bar Association, in testimony before the Commission opposing a proposal for a specialized tax court of appeals:

Tax cases are difficult and time consuming for generalist judges; yet those judges do bring a judgment and experience which produce decisions that integrate the development of tax law with contemporaneous legal developments. Without this leavening, tax law might become even more esoteric and arbitrary than it sometimes appears to many to be.

Other objections to specialized courts also have force. Judges of a specialized court, given their continued exposure to and great expertise in a single field of law, might impose their own views of policy even

⁴⁰ Specialized courts and a National Court of Appeals are not mutually exclusive. As Donald C. Alexander, Commissioner of Internal Revenue, and Meade Whitaker, Chief Counsel, Internal Revenue, wrote the Commission, expressing their individual views:

We do not mean to infer by our advocacy of a National Court of Tax Appeals that the proposed National Court of Appeals would not be needed or that it should not have the same jurisdiction over cases decided by the specialist court as over any other appellate court. To the contrary, there is a place for both in our judicial system.

where the scope of review under the applicable law is supposed to be more limited. Vesting exclusive jurisdiction over a class of cases in one court might reduce the incentive, now fostered by the possibility that another court will pass on the same issue, to produce a thorough and persuasive opinion in articulation and support of a decision. Furthermore, giving a national court exclusive jurisdiction over appeals in a category of cases now heard by the circuit courts would tend to dilute or eliminate regional influence in the decision of those cases. Our nation is not yet so homogeneous that the diversity of our peoples cannot be reflected to some advantage in the decisions of the regional courts. Excluding these courts from consideration of particular categories of cases would also contract the breadth of experience and knowledge which the circuit judges would bring to bear on other cases; the advantages of decision-making by generalist judges diminish as the judges' exposure to varied areas of the law is lessened. Finally, concern has been expressed about the quality of appointments to a specialized court, not only because of the perceived difficulties in finding truly able individuals who will be willing to serve, but also due to the fear that because the entire appointment process would operate at a low level of visibility, particular seats or indeed the court as a whole may be "captured" by special interest groups.

In analyzing the advantages and disadvantages of specialized tribunals, the Commission gave particular attention to the proposal for centralizing in a single national tribunal appellate review of decisions involving patent related issues. The problem of forum shopping in this area has already been described. The Court of Customs and Patent Appeals is presently current in its docket and, if additional judgeships were added to the existing five, would offer additional capacity for decision of patent appeals on a national basis.

Nevertheless, substantial objections to the proposal were presented. A survey of the patent bar by the Commission's consultants, Professor James Gambrell and Donald R. Dunner, Esq., demonstrated that the practitioners themselves are sharply divided on the issue. The Commission also heard testimony expressing the strong preference of a majority of the judges of the Court of Appeals for the Seventh Circuit for retaining appellate jurisdiction over patent cases in the circuit courts. This view was particularly noteworthy, coming as it did from the circuit with the heaviest patent caseload.

Under all these circumstances, the Commission concluded not to recommend diverting patent appeals from the generalized circuit courts to a special court of patent appeals. As is more fully developed in another section of this report, the proposed National Court of Appeals, if implemented, is expected to increase the national capacity for appropriate monitoring of patent decisions in the circuits, and thereby to reduce the forum shopping which, in light of perceived

attitudinal differences among the various circuits, today characterizes the patent field.

Quite apart from the undesirable consequences of creating specialized tribunals, however, the Commission's studies show that the problem of inadequate appellate capacity is not limited to one or two areas of the law. For instance, of 90 direct conflicts studied by Professor Feeney, only three were on issues of tax law and three in the area of patents. It may well be that the relative rarity of tax and patent cases in Professor Feeney's study is a function of the phenomenon already discussed: the low probability of review on the merits deters lawyers from filing petitions for certiorari. Whatever the extent of the problem in the areas of tax and patents, however, there certainly exists a serious problem of lack of capacity for definitive adjudication of issues of national law in other areas of the law, as the wide range of subject matter in the illustrative cases of Section I of Appendix B demonstrates.

In short, we reject the creation of specialized courts as an alternative to the National Court of Appeals, not only because of the disadvantages inherent in specialized courts, but also because this alternative would be unequal to the task of meeting the demonstrated need.

STRUCTURE

To meet the needs that have been demonstrated to exist and those that can be anticipated in the foreseeable future, the Commission proposes that Congress create a new tribunal, to be called the National Court of Appeals. Decisions of the National Court would be precedents of nationwide effect, unless modified or overruled by the United States Supreme Court, binding upon the district courts, the regional courts of appeals, and the state courts on questions of federal law.

The National Court would consist of seven Article III judges appointed by the President, subject to confirmation by the Senate, and holding office during good behavior. It would sit only en banc.

The court would have its headquarters and keep its records in Washington, D.C. Ordinarily its hearings would be in Washington, but it would be authorized to sit elsewhere in the country at its discretion.

We have considered a wide variety of alternative proposals for selection and tenure of the judges, but we have concluded that on balance it would be unwise to depart from the procedure utilized for the appointment both of Supreme Court Justices and of court of appeals judges. The function of the court is such as to require continuity and stability in its membership and a process of selection designed to achieve the highest level of quality in its incumbents.

It is imperative, of course, to have a diversity of background and viewpoint both in the initial membership of the court and in later

appointments, and there are special problems in establishing a new tribunal with the full complement to be appointed at one time. We are confident, however, that the President, the Senate, and the organized bar will act responsibly and in accordance with their institutional obligations to assure a bench which is both diverse and of high quality. It would, of course, be entirely appropriate and indeed desirable if the new court could draw upon the experience of sitting federal judges, especially in the initial period of its work. Thus, both the appointing authority, the Executive, and the confirming authority, the Senate, may well wish to place particular weight on such experience in considering the first appointments to the new court. Some of us would provide this much in the enabling legislation. A substantial majority, however, would not want formally to restrict the selection process so as to preclude the appointment of highly qualified persons from whatever branch of the profession they may come.

Temporary service on a rotating basis by federal appellate judges sitting on assignment from their respective courts would, in the Commission's view, be even more undesirable. A court so composed would lack the stability and continuity that are essential to the development of national law. Moreover, the judges of the National Court ought not to be put in a position of reviewing the judgments of colleagues on a court on which they would retain membership and to which they would return. We note, too, the difficulty of devising a satisfactory process for selecting the judges to be assigned. Finally, should the rotation be relatively rapid, the circuits would be asked to bear the burden of vacancies and other deterrents to the smooth functioning of those courts.

The Commission has carefully considered the suggestion that the National Court of Appeals be established initially as a temporary, frankly experimental, tribunal. In one sense any legislatively-created court is temporary; it exists subject to the pleasure of Congress. If the need for the new court proves ephemeral, or if the experience proves otherwise disappointing, Congress has power under Article III to abolish the tribunal and designate its judges for service elsewhere in the judicial system, as was done with the Commerce Court. Moreover, as developed in another section of the report, we recognize the utility of a continuing commission charged with systematic review of the federal judicial system and obligated to report to the Congress. The issue, then, is whether the legislation establishing the court should provide for a specified term. In our judgment the new court would be significantly handicapped in performing its important function if its decisions lacked the authority and credibility of an independent tribunal, the position of which was secured by a permanent charter. To bring the National Court into existence under sentence of death or dismemberment, however conditional, would unnecessarily weaken

the court's prospects for gaining the confidence of other courts, of the bar, and of the country at large.

JURISDICTION

The court's jurisdiction has simplicity as its keynote. Cases could be brought to it under either of two heads of appellate jurisdiction:

First, a "reference jurisdiction," under which the Supreme Court could refer to the National Court any case within its appellate jurisdiction.

Second, a "transfer jurisdiction," under which the regional courts of appeals could transfer cases that would otherwise be heard by those courts.

The Commission believes that the legislation creating the new court need not and should not spell out detailed procedures or standards for the reference and transfer jurisdictions. Rather, the operation of the National Court of Appeals should be governed by rules of court that would make it possible to accommodate to changing circumstances, to respond to newly perceived needs, and above all to benefit from the lessons of experience.

Reference Jurisdiction

The essence of our proposal is that the Supreme Court be empowered to refer any case within its appellate jurisdiction to the National Court of Appeals. The Court could refer as many cases as it chose—hundreds or even thousands; the National Court would then select those cases which it would decide on the merits, and decline review in the others. The Supreme Court would also have the authority to designate any case as requiring disposition on the merits by the National Court. The reference power would extend to any case before the Supreme Court on petition for certiorari or on jurisdictional statement; we specifically intend to include cases from the highest state courts, as well as appeals from the decisions of three-judge courts over which the Supreme Court now has obligatory jurisdiction. In cases within the obligatory jurisdiction, however, referrals would always be for decision on the merits.

Thus, with respect to any case before it on petition for certiorari, the Supreme Court would be authorized to take any one of four actions:

- (1) to retain the case and render a decision on the merits;
- (2) to deny certiorari without more, thus terminating the litigation;
- (3) to deny certiorari and refer the case to the National Court of Appeals for that court to decide on the merits;
- (4) to deny certiorari and refer the case to the National Court,

giving that court discretion either to decide the case on the merits, or to deny review and thus terminate the litigation.

With respect to any case before it on appeal, the Supreme Court could take either of two actions:

- (1) to retain the case and render a decision on the merits; or
- (2) to refer the case to the National Court for decision on the merits.

The Commission would not presume to instruct the Supreme Court on the procedures and standards that should govern the exercise of the reference jurisdiction. Rather, we envision a process of rule-making, with the Supreme Court benefiting from the recommendations of an advisory committee, as was done at the time of the substantial revision of the Court's rules in 1952. However, the Commission has recognized the importance of assuring that the availability of the reference option and its exercise in particular cases do not impose an undue burden on the Court.

Implicit in our recommendation, described above, is the premise that the rules for the grant or denial of certiorari would remain as they are. Given that premise, the Supreme Court could exercise the reference power in a number of ways. It could, for instance, refer all cases in which certiorari had been denied; or it could refer all such cases except those which were clearly without merit. It could refer all cases in particular categories in which certiorari had been denied. It could choose to refer only individual cases; or it could refer all cases in some categories along with selected individual cases, always assuming that certiorari had been denied.

Regardless of the approach taken, the Court would be free not to refer any case in which the Court determined that a nationally-binding decision should not be made at that time. This would allow for continuing "percolation through the circuits" where this process is considered desirable. It would also allow for complete discretion on the part of the Supreme Court in choosing appropriate cases in which to adjudicate important issues.

This system of open-ended reference would impose no undue burden on the Supreme Court. Indeed, its net effect, as Mr. Justice White has pointed out, would be to provide relief to the Court.

Both from the perspective of the Supreme Court and from the perspective of the National Court, open-ended reference will strengthen the ability of the judicial system to maintain a stable, coherent national law. We share the view of Mr. Justice White that

the proposed new court would not only permit the decision of a good many cases that are not now being decided at all by this Court, but would also (1) permit plenary consideration in selected cases which are within our compulsory appellate jurisdiction but which are presently being summarily disposed of here; (2) permit this Court to decline full consideration of and refer to the new

court a substantial number of cases the issues in which are not unusually important or complex but which are now reviewed here because of existing conflicts among the circuits or among the federal and state courts; (3) enable this Court, if it was so minded, to reduce the total number of cases in which it now hears oral arguments and writes full opinions, perhaps to the yearly average of approximately 100 that obtained for 15 years prior to the 1970 Term; and (4) present the opportunity for this Court to review some cases that it would not now otherwise hear because of docket pressures.

In sum, as Mr. Justice Powell states, "the availability of a National Court of Appeals could present constructive options to this Court that are not presently available."

From the standpoint of the national law, the open-ended reference procedure would be most valuable in areas of the law—notably tax and patents—where the need for more appellate supervision is widely acknowledged, yet which do not and probably should not command extensive attention from the Supreme Court. The National Court would have the responsibility of selecting those cases in which decisions could add usefully to the body of national law.

Transfer Jurisdiction

In certain kinds of cases it will be highly desirable to obtain a nationally binding decision at the first level of appellate review. A majority of the Commission believes that when this situation obtains, it should be possible to invoke the jurisdiction of the National Court of Appeals without requiring a decision on the merits by one of the regional courts of appeals. The transfer procedure is designed to serve this purpose. It may well be that relatively few cases would be transferred, at least in the early years of the National Court; but the Commission believes that as long as the transfer procedure can be made to operate swiftly and efficiently—as we believe it can—it should be made available for utilization in those situations where it would be beneficial.

The transfer jurisdiction would operate as follows: If a case filed in a court of appeals, the Court of Claims or the Court of Customs and Patent Appeals⁴¹ is one in which an immediate decision by the National Court of Appeals is in the public interest, it could be transferred to the National Court provided it falls within one of the following categories:

(1) The case turns on a rule of federal law and federal courts have reached inconsistent conclusions with respect to it; or

⁴¹ The provision for transfer would apply to any case that might be heard by a court of appeals (or by the Court of Claims or the Court of Customs and Patent Appeals)—appeals from reviewable decisions of district courts, petitions for review of administrative agency orders, applications for enforcement of agency orders, and original proceedings, including, for example, petitions for mandamus.

(2) The case turns on a rule of federal law applicable to a recurring factual situation, and a showing is made that the advantages of a prompt and definitive determination of that rule by the National Court of Appeals outweigh any potential disadvantages of transfer; or

(3) The case turns on a rule of federal law which has theretofore been announced by the National Court of Appeals, and there is a substantial question about the proper interpretation or application of that rule in the pending case.

The National Court would be empowered to decline to accept the transfer of any case, either for reasons having to do with the nature of the case itself or for reasons of docket control.

Under our plan, decisions of the regional courts of appeals granting or denying motions for transfer, and decisions by the National Court accepting or rejecting cases, would not be reviewable under any circumstances, by extraordinary writ or otherwise. We intend by this provision to preclude wasteful and unnecessary litigation either over "jurisdiction" or over the exercise of discretion. The Commission expects, however, that rules would be promulgated that would serve both to guide the regional courts in passing upon transfer motions and to govern the National Court in the exercise of discretion in accepting or rejecting cases after transfer. Such rules would be promulgated in the manner now provided in 28 U.S.C. § 2072. In conformity with the normal practice, they would be drafted with the aid of an advisory committee which should include members of the bar and judges of the regional courts of appeals.

A case would be transferred only if it satisfies one or more of the three criteria listed above, and even then only if an immediate decision by the National Court would be in the public interest.

Two examples of transfer cases may serve to illustrate the utility of this head of jurisdiction.

(1) Suppose that a case turns on a narrow technical question of tax law on which two circuits are already in conflict. No decision by yet a third circuit court can resolve the issue on a national basis. It would save time and expense in the long run if the court of appeals were relieved of the burden of decision and the case promptly transferred to the National Court.

(2) In a case involving regulations promulgated under one of the statutes concerned with protecting the environment, the record may be long and complex; the issue may be one which in the interest of efficient allocation of national resources should be promptly resolved on a national basis; and the plaintiff may be a public-interest organization with a national constituency. Unless the case involves broad policy questions which only the Supreme Court should resolve definitively, prompt transfer

would both relieve the regional court of appeals and serve the national interest without placing any additional burdens on the litigants.

In passing upon transfer motions, the regional courts would be expected to give appropriate weight to the need for allowing difficult issues to mature, and to take account of the benefits to be gained from allowing the lower courts to consider a variety of approaches to difficult legal problems before a nationally binding decision is reached. At some point, however, the benefits of further "percolation" become marginal, and will be outweighed by the desirability of putting an end to repetitive litigation and uncertainty. Moreover, there will be occasions when the efficient, even-handed operation of a governmental program will call for definitive adjudication, especially of procedural issues, early in the life of a statute or regulation.

Of course, the regional courts should give due consideration to the interests of the parties. Unless the public interest is compelling, transfers should not be granted where the result would be substantially to delay the disposition of the case or to increase the cost to the litigants.

Details of the Transfer Procedure

The Commission is confident that the transfer mechanism can be made operational through a variety of procedures that would be both effective and efficient. The national interest would be well served, at least initially, if transfers were ordered only in cases readily identified as appropriate and, in addition, in those complex cases, otherwise appropriate, where transfer would permit a substantial saving of time to the regional court. Neither is it critical if the regional courts err on the side of either under- or over-utilization of transfer, provided that in the latter case the National Court is not put in the position of having to send back any significant number of cases.

In short, what is crucial is that the motion practice occasioned by transfer requests not consume any substantial amount of judge time; that it not delay significantly the disposition of individual cases; and that it not require elaborate administration or "overhead." Achieving efficiency and dispatch in the process is far more important than precision in the application of the criteria. Indeed, a wide range of discretion can be tolerated in the operation of the transfer process without threatening the success of the new court, but extensive new burdens upon the judges or the litigants cannot.

We have referred to the use of the rule-making process to define the procedures for transfer. While the rules should be promulgated at the national level, they should allow for variations among the circuits to reflect local conditions. However, the decision as to what matters should be regulated at the circuit level is one that should be made on a national basis.

In light of these considerations, we suggest the following as procedures which appear to be especially promising and should be considered by the rule-making authorities.

1. *Initiative for transfers.* In the ordinary course, the initiative for transfer would come from one of the parties, although the court of appeals would be empowered to transfer on its own motion.

To request a transfer, the litigant would file a motion, accompanied by a brief memorandum indicating why the case meets the criteria for transfer to the National Court set forth in the rules. This memorandum would include a concise statement of the issue believed to be appropriate for decision by the National Court; citations to earlier cases or pending proceedings raising the same issue; and a brief explanation of any circumstances tending to show that the issue is a recurring one ripe for resolution in the particular case. In many cases this will be sufficient to allow the court to act on the request for transfer.

In testimony before the Commission it was pointed out that the district courts can play an important role in identifying cases appropriate for transfer. When it appears to the district court that a case falls within one or more of the criteria for transfer, the judge could so indicate in a brief statement that would be included in the order from which an appeal would be taken.

2. *Timing of transfers.* A regional court of appeals would be empowered to transfer a case to the National Court at any time as long as the case remains within its jurisdiction. However, the further a case has progressed in the regional court, the stronger the showing that would have to be made to justify a transfer.

The question of timing is of course related to the kind of case involved. With complex cases that have large records (for example, many environmental cases and antitrust cases no longer appealable to the Supreme Court), the effort required to identify an issue appropriate for the National Court is likely to be small compared with the total amount of work that the regional court would have to put into the case to decide it on the merits. Thus, the regional court may find it desirable to transfer such a case at a later time than would ordinarily be appropriate, and the judges of that court may indeed achieve a substantial saving of time by doing so.

3. *Authority to transfer.* The Commission recommends that the procedures to be followed by the court in passing upon transfer motions and effecting sua sponte transfers be fashioned on an individual basis by the several courts of appeals. Of course, the procedures should be designed to minimize both the burdens on the judges and the delay for the litigants. In the ordinary case the transfer decision might well be lodged with a panel of the court—for example, the court's regular motion panel, or, in those circuits which screen cases, a screening panel. Some circuits may choose to follow the procedures

now utilized in deciding whether to grant en banc consideration. As noted above, the court ordinarily would not have full briefs; however, the parties' memoranda, perhaps supplemented by a statement from the trial judge, should provide adequate information on which to make the decision, whether the responsibility be assigned to all of the active judges or to a lesser number.

4. *Transfer in lieu of en banc rehearing.* The Commission suggests that the rules permit the regional courts to transfer a case to the National Court in lieu of en banc rehearing following a decision by a panel of the regional court. In some instances the appropriateness of a transfer to the National Court will become clear only after the panel has rendered its decision, as, for example, when the decision creates a clear conflict or when a litigant learns that one or more cases raising the same issue are pending in other circuits. In such a situation, the losing party should be able to request transfer as an alternative to en banc rehearing, and, where a petition for rehearing is filed, other parties should be able to suggest transfer instead. The regional court should then have the power to transfer the case to the National Court. Three levels of review might result from such a procedure (panel, National Court, Supreme Court), but such might be the case without transfer (panel, en banc, Supreme Court), and immediate disposition by the National Court could afford a nationwide precedent which an en banc decision by any regional court could not.

We emphasize, however, that transfer in lieu of en banc rehearing should be at the discretion of the regional court. Rehearings are often granted in cases which would not be appropriate for transfer—for example, when a majority of the active circuit judges believe that the panel wrongly decided a question of importance, when the court takes a case en banc in the exercise of its supervisory powers over the district courts within the circuit, or when there is need to clarify the law of the circuit. Moreover, a regional court may wish, by sitting en banc, to resolve an issue for itself well before the issue is ripe for a decision that will be binding throughout the country.

SUPREME COURT REVIEW

We contemplate that any case decided by the National Court, whether transferred by a regional court of appeals or referred by the Supreme Court, would be subject to review by the Supreme Court upon petition for certiorari.⁴² Access to the Supreme Court would not be cut off in any individual case or class of cases.

⁴² We recommend that the Supreme Court's existing power to grant certiorari before judgment in cases pending in the courts of appeals, 28 U.S.C. § 1254(1), be made applicable to cases pending in the National Court of Appeals.

We anticipate, however, that few decisions of the National Court in cases which came to it from the Supreme Court would in fact be reviewed thereafter by the Supreme Court. To avoid prolonging the appellate process any more than absolutely necessary, the Commission recommends that in such cases the Supreme Court give expedited consideration to requests for review of the National Court decision, and that such requests take the form of brief statements of the reasons why the Supreme Court should now hear a case it has already once decided not to review.

CONCLUSION

The proposed National Court of Appeals would be able to decide at least 150 cases on the merits each year, thus doubling the national appellate capacity. Its work would be important and varied, and the opportunity to serve on it could be expected to attract individuals of the highest quality. The virtues of the existing system would not be compromised. The appellate process would not be unduly prolonged. There would not be, save in the rarest instance, four tiers of courts. There would be no occasion for litigation over jurisdiction. There would be no interference with the powers of the Supreme Court, although the Justices of that Court would be given an added discretion which can be expected to lighten their burdens.

The new court would be empowered to resolve conflicts among the circuits, but its functions would not be limited to conflict resolution alone: It could provide authoritative determinations of recurring issues before a conflict had ever arisen. The cost of litigation, measured in time or money, would be reduced overall as national issues were given expedited resolution and the incidence of purposeless relitigation was lessened. The effect of the new court should be to bring greater clarity and stability to the national law, with less delay than is often possible today.

III. Internal Procedures of the Several Courts of Appeals

Change in the procedures of the federal courts of appeals has come at a rapid pace in recent years, and continuing change appears to be inevitable. To say this much is neither to praise nor to condemn, but rather to recognize that what might once have been considered basic ingredients of the appellate process—oral argument, written opinions, a conference of the judges—are absent in great numbers of cases. For example, in several circuits one-half of all appeals are being decided without any oral argument. In at least one circuit, less than ten percent were afforded the half-hour per side contemplated as the norm by the Federal Rules of Appellate Procedure. The trend is national. Over the last half-decade, the number of cases terminated in all circuits increased at a rate more than four times as great as the increase in hearings.

Opinion writing practices have changed no less dramatically. A signed opinion is no longer the norm, even for cases decided after hearing or submission. In the Third Circuit in the last fiscal year only 30 percent of the decisions in such cases were explained in signed opinions. Other courts follow similar patterns. Of greater significance is the extent to which decisions are rendered without any indication of the reasoning impelling the result. In the Fifth Circuit, Local Rule 21, a relatively recent innovation, provides the judge with a form opinion, appropriate for use without variation or modification. It reads, in its entirety, "Affirmed [Enforced]. See Local Rule 21." Hundreds of opinions during fiscal 1974 contained no more, save for citation of an opinion announcing the rule and explaining its purpose.

Where the judges have been less disposed to initiate new procedures in the face of overwhelming caseloads, change has taken a different form, one which is perhaps far more traumatic in its impact on the litigants than expedited procedures: years of delay on the appellate level alone. That much was clearly demonstrated at the Commission's hearings in the Ninth Circuit and, again, in various submissions since that time. In short, the patterns of the past are gone, not to return, and those of the present offer no promise of permanence. Faced with these realities, the Commission has pursued its Congres-

sional mandate to study the internal procedures of the courts of appeals and to make recommendations for change. Several recommendations, closely related to one another, are discussed in this section. They concern openness, accountability and flexibility in the formulation of circuit court procedures, and the establishment of minimum national standards relating to oral argument and written opinions.

A SURVEY OF ATTORNEY ATTITUDES

From the first, the Commission has heard, in testimony at its hearings and in written submissions, the views of individual members and organized groups of the bar concerning oral argument and opinion writing. It became apparent, however, that if the Commission were to give substantial weight to such opinions, some more systematic effort was needed to assure reliability; a scientifically selected representative sample was indicated. In addition, there was much in the record to suggest that attorney attitudes, as well as appellate procedures, may vary from circuit to circuit. For this reason, it appeared highly desirable to compare the judgments of attorneys in circuits with diverse practices. Finally, it was clear that to complete its assignment satisfactorily, the Commission needed more than ultimate conclusions, whether in support of, or in opposition to, traditional procedures. We needed to determine, for instance, the specific values which attorneys see in oral presentation of a case, or the specific purposes to be served by some recorded reason for a decision.

With these considerations in mind, the Commission enlisted the aid of the Federal Judicial Center which, in turn, commissioned the Bureau of Social Science Research, Inc., to undertake an extensive survey of attorney attitudes in three circuits.¹ Three thousand questionnaires, designed to assess in detail the respondent's views concerning the importance of oral argument and opinion writing, were mailed to a sample of one thousand attorneys of record in cases which had been filed in each of three circuits: the Second, Fifth, and Sixth. After follow-up inquiries, the rate of return in each circuit equalled or exceeded 60 percent—a response especially noteworthy given the length of the questionnaire and the detailed nature of the questions, many of which called for careful comparative evaluation of various procedural combinations.

It should occasion no surprise that the respondents were emphatic in affirming the importance of both oral argument and written opinions. Details of the data, and a description of the values which the attorneys found important and those which they ascribed to their

¹ Copies of the report of the survey are available on request addressed to the Federal Judicial Center, Dolley Madison House, 1520 H Street, N.W., Washington, D.C. 20005.

clients, are provided in the discussion of our recommendations of minimum national standards. At this juncture, however, we describe several findings of the study for the light they shed on a number of preliminary questions: What flexibility should be allowed individual circuits in devising their own procedures? If there are to be local rules which vary in important ways, how shall they be fashioned? What process or procedure shall be utilized to insure an appropriate role for all who are concerned? Specifically, shall the bar itself be involved in the process, and, if so, to serve what ends?

The survey is replete with evidence of fine distinctions which the respondents were both able and willing to draw. There was no demand for the preservation of traditional procedures whatever the circumstance, but rather a series of discriminating choices obviously rooted in careful analysis. Thus, one of the more striking disclosures of the survey was that, despite the strong affirmation in each circuit of the value of oral argument and written opinions, a large percentage of the bar recognized that when an appeal borders on frivolity as determined by the court, denial of oral argument is acceptable, and that when issues are clear and can be decided by reference to precedent, it is acceptable for the court to do no more than refer to such precedent.

The attorneys in the survey were unwilling to sacrifice the quality of the process to relieve court congestion or to expedite cases. This was true in every circuit. Denial of oral argument for "avoidance of extreme delay" was unable to command the approval of a majority in any of the three circuits.

A major finding warranted by the survey is that differences among the three circuits with regard to the acceptability of abbreviated procedures, when there are differences, appear to be related to attorneys' familiarity with or exposure to them. Affirmance from the bench after oral argument, for example, is much more acceptable to lawyers in the Second Circuit—where it happens frequently—than to those in the Fifth and Sixth, where the practice is not common.

This is not to say that acceptability depends exclusively on experience: Different conditions prevalent in different circuits may also make appropriate in one what would be unacceptable in another. For example, to cut short oral argument after the first five minutes is less objectionable in the Second Circuit, where typically attorneys' offices are a subway ride from the courthouse, than in the Fifth Circuit, where the attorney may have flown hundreds of miles to present his client's argument. In short, it appears that some of the procedures in use among the circuits reflect conditions peculiar to each, and that acceptance of these procedures depends in part upon the lawyer's familiarity with them and in part on their suitability to the circuit.

A MECHANISM FOR CIRCUIT PROCEDURES

Testimony at the Commission's hearings and the insights provided by the attorney survey suggest that there is a value in permitting the several circuits to respond independently to the needs of the bar with solutions tailored to their own particular problems. The Commission finds no reason why each of the eleven courts of appeals need march in procedural lockstep with each other. Rather, in areas where uniformity among all the circuits is not necessary, the Commission perceives an advantage in retaining flexibility in the system, in allowing each circuit to function as a crucible of experimentation, and in leaving to each court the freedom to adopt or reject the experiences and procedures of another.

The thoughtful distinctions revealed by the individual responses to the survey suggest that the bar can play a creative and constructive role in fashioning circuit procedures. Indeed, this discriminating approach evidenced by the respondents may be more significant than their judgments with respect to specific procedural innovations. As has already been noted, far from condemning expedited procedures indiscriminately, the responding attorneys showed themselves thoughtful and responsible in assaying the desirability of particular procedures in particular circumstances. The survey responses suggest, too, that attorneys may be able to bring to the court's attention considerations and values that might otherwise be slighted in the rulemaking process. Finally, the very fact that members of the bar have participated in the process is likely to increase the acceptability of the changes that are made.

These two considerations—that all procedures in each circuit need not be the same, and that the bar has a creative and constructive role to play in fashioning the procedures most appropriate—lead the Commission to recommend that each circuit court of appeals institute a mechanism for formulating, implementing, monitoring and revising circuit procedures.

To operate effectively, such a program should in our view include three essential elements: publication of the court's internal operating procedures; notice-and-comment rule-making as the normal instrument of procedural change; and creation of an advisory committee to provide input from the bar and others who may be affected by procedural change.

The Commission believes that the institution in the several circuits of such a rule-making mechanism, operating in the manner described, would have a number of significant advantages. Preliminarily, it should be noted that the idea is premised in part upon a general principle of accountability. The Commission believes that the manner in which the federal judiciary operates need not and ought not be hidden from view. Openness, to the extent that it does not interfere with the

functioning of the judicial system or impair other values, will foster respect for the law and the judiciary. On a purely pragmatic plane, the Commission believes that in such a rule-making mechanism, charged with and capable of responding to the needs and ideas of the broader community, lies the potential for substantial and meaningful contribution to the procedures and, ultimately, to the quality of the product of the federal appellate court system.

We turn to the specifics, beginning with publication of the court's internal operating procedures. Of course, all circuits publish their rules on such matters as the form and distribution of briefs and the preparation and content of the record. The Commission suggests that the court also publish its internal operating procedures stating the criteria for denying oral argument, and describing local practices concerning such matters as the conference of the judges. Indeed, the Third Circuit has already done as much and has been commended for doing so. Publication of these procedures is designed to serve several purposes. It has been suggested that a lawyer cannot know how to argue effectively before an appellate court without knowing the practice of the judges with respect to reading briefs and conferring. Certainly, in some situations such information would prove helpful. Dean Dorothy W. Nelson of the University of Southern California Law Center has suggested a rather different end to be served. "Writing a manual [of procedures] forces one to consider reasons for engaging in certain practices," she observes, adding, "many of the informal practices . . . in the circuits, if put in writing and thoroughly examined, would be revised." Finally, publication of a court's internal procedures can help to maintain public confidence in the soundness and integrity of the process by which federal appellate judges reach their decisions.

The last point merits more extended discussion. Recent changes in decision-making procedures have aroused concern among many attorneys and other citizens. In part, this may be because circuit court practices—not to mention the process by which those practices are formulated—have remained largely hidden from the view of those who, as members of the bar, as litigants, or as citizens, have a legitimate interest in them. These concerns are particularly acute where procedural changes, in combination, have resulted in appellate decisions without oral argument, or a conference of the judges, or any expression of the ground of decision. Open discussion of the various differentiated procedures and the way they operate should provide assurance that the decision-making process is a fair one; that the judges remain in control of judicial decisions; that no type of case is given "second class status"; in short, that the judicial function is being conscientiously and independently exercised by those who were appointed to exercise it, and that neither efficiency nor fairness has been sacrificed.

In urging the adoption of notice-and-comment rule-making, we do not mean to suggest that the courts of appeals be confined to rigid

requirements or burdensome formalities in fashioning their rules. Rather, we seek to initiate a mechanism that will assure that lawyers and others who may be interested are informed of proposed changes in court procedures, and that, except in emergency situations requiring immediate action, they have an opportunity to submit comments and suggestions on the merits of the proposals and of alternatives which may be considered preferable. As already noted, the survey responses provide strong evidence that attorneys will often be able to provide fresh insights, to draw attention to values which would not otherwise be perceived, and to express preferences concerning alternatives which they are in a unique position to evaluate.

Creation of advisory committees within the circuit is recommended for much the same reasons that have led to the advisory committees that now work within the Judicial Conference. First, such committees provide a forum for continuous study of internal operating procedures. Second, the committees can serve as a conduit between members of the bar who have suggestions for change and the judges who retain ultimate responsibility for effectuating change. It is important that there always be, so to speak, an address to which an attorney can direct suggestions and comments—an entity with a continuing interest in, and responsibility for, the procedures of the court. Finally, we emphasize the utility of such an advisory committee in promoting flexibility, responding promptly to felt needs as they develop, and drafting new rules and amendments to old rules for the consideration of the promulgating authority. The committees should include all segments of the profession: judges, practitioners, and those engaged in teaching and research.

Much of our discussion has focused, as has the bar itself, on oral argument and written opinions. But these are not the only procedures subject to local rule-making. Development of procedures for expediting appeals, the operation of central staff, and other innovations which may from time to time commend themselves to the individual circuits—all these are legitimately within the purview of an advisory committee. In short, we expect that the committee would deal with a broad range of questions, assuring that those with an interest in the operation of the court are able to play a useful and effective part in the formulation and implementation of circuit procedures.

ORAL ARGUMENT ²

Over the years, a rich literature has developed on the role of oral argument, providing valuable insights of persevering value. Distinguished jurists, some of whom served in less pressured times, have

² The Commission has had the benefit of the work of the Advisory Council for Appellate Justice and the American Bar Association Commission on Standards of Judicial Administration on this subject.

contributed significantly to that literature, providing the perspective of the bench. Some comments simply state a conclusion based on long experience; some are couched in striking rhetoric reflecting deeply held views. Twenty years ago Chief Judge John Biggs, Jr., expressed the hope that "the day will never come when oral argument is dispensed with," adding that if that day were to come, "I personally should have the feeling that I was sitting in the rear of those dispensing slots in the cafeteria, dispensing some kind of cafeteria justice."

No argument is more compelling than the fact that many judges find that the opportunity for a personal exchange with counsel makes a difference in result. Mr. Justice Brennan observed at the Third Circuit Judicial Conference in 1972: "I have had too many occasions when my judgment of a decision has turned on what happened in oral argument, not to be terribly concerned for myself were I to be denied oral argument." Some have tried to explain why this should be so. For Judge Herbert F. Goodrich it is a function of the particular judge. "Some people," he wrote, "get ideas better by hearing than by reading," a thought echoed some years later by Mr. Justice Harlan. The latter went on to describe the process in greater detail:

[O]ral argument gives an opportunity for interchange between court and counsel which the briefs do not give. For my part, there is no substitute, even within the time limits afforded by the busy calendars of modern appellate courts, for the Socratic method of procedure in getting at the real heart of an issue and in finding out where the truth lies.

To a great degree, these perceptions are reflected in the attitudes of the practicing attorneys. An impressive 90 percent of the attorneys in each of the three circuits agreed that judges are better able to avoid erroneous interpretations of the facts or issues in the case if they can direct questions to counsel, and that oral argument permits the attorney to address himself to those issues which the judges believe are crucial to the case. At the same time attorneys evidenced a willingness to discriminate in their appraisal of the need for oral argument. A large majority in each circuit believed oral argument to be essential in cases involving matters of great public interest, despite the absence of substantial issues, and also in cases involving the constitutionality of a state statute or state action. By contrast, a substantial number of the respondents in each circuit felt that oral argument might be dispensed with in appropriate cases.

There has been a sharp difference of opinion on the need for oral argument in cases originally heard by a panel, but later accepted by the court for en banc determination. Contrary to the point of view espoused by some judges in testimony before the Commission, a

majority of the attorneys in each circuit considered oral argument "essential" in cases considered en banc even though oral argument had previously been heard by a panel.

In the light of these data and of extensive testimony before the Commission, the Commission recognizes the importance of safeguarding the right to oral argument in all cases where it is appropriate. Oral argument is an essential part of the appellate process. It contributes to judicial accountability, it guards against undue reliance upon staff work, and it promotes understanding in ways that cannot be matched by written communication. It assures the litigant that his case has been given consideration by those charged with deciding it. The hearing of argument takes a small proportion of any appellate court's time; the saving of time to be achieved by discouraging argument is too small to justify routinely dispensing with oral argument.

Standards for the grant or denial of oral argument, and the procedures by which those standards are enforced, are appropriately dealt with through the rule-making process. The extent to which the opportunity to present oral argument is denied litigants in a number of the circuits argues for a minimum national standard, one phrased in terms sufficiently specific to be effective in assuring the availability in fact of oral argument in all appropriate cases. To mandate oral argument in every case would clearly be unwarranted; neither is it appropriate to ignore the risks to the process of appellate adjudication inherent in too-ready a denial of the opportunity orally to present a litigant's cause.

The following formulation is recommended for inclusion in the Federal Rules of Appellate Procedure as an appropriate national standard:

1. In any appeal in a civil or criminal case, the appellant should be entitled as a matter of right to present oral argument, unless:
 - (a) the appeal is frivolous;
 - (b) the dispositive issue or set of issues has been recently authoritatively decided; or
 - (c) the facts are simple, the determination of the appeal rests on the application of settled rules of law, and no useful purpose could be served by oral argument.
2. Oral argument is appropriately shortened in cases in which the dispositive points can be adequately presented in less than the usual time allowable.

The Commission recognizes that conditions vary substantially from circuit to circuit. Each court of appeals should therefore have the authority to establish its own standards, so long as the national minimum is satisfied, and to provide procedures for implementation which are particularly suited to local needs. In exercising such authority each court shall have the benefit of the participation of an advisory

committee, as described earlier. Each circuit's advisory committee would also participate in a periodic review of the practical impact of the applicable rules, their interpretation and implementation.

OPINION WRITING

The most dramatic evidence of the importance which attorneys attach to a written record of the reason for a decision can be found in the view expressed by more than two-thirds of the attorneys surveyed that the due process clause of the Constitution should be held to require courts of appeals to write "at least a brief statement of the reasons for their decisions." Quite consistently, the respondents rejected the proposition that reducing the number of opinions issued is the most acceptable way to avoid long delays. As was the case with oral argument, attorneys were unwilling to buy speed with what appeared to them to be a sacrifice in the quality of the judicial product or the integrity of the process.

The specific values which the attorneys found in opinion writing help explain the significance which they attach to opinions. Some values are a function of the role of the court of appeals in the judicial system: the necessity for a reasoned disposition to furnish a guide for district court judges and the bar in future cases, and the need to provide the Supreme Court with insight into the court of appeals' reasoning when the Justices consider petitions for certiorari.

Particularly striking is the fact that more than three-fourths of the attorneys questioned agreed that it is important for the courts at least to issue memoranda so that they do not give the appearance to litigants of acting arbitrarily, and so that litigants may be assured that the attention of at least one judge was given to the case. If the lawyers' perceptions are to be credited, the risk of harm to public confidence in the judicial system from unexplained decisions could become serious.

Despite the impressive affirmation of the need for some statement of the reasoning which impelled the court's decision, the attorneys were unwilling to insist either on publication or on a formal opinion in the traditional mold. Majorities in each circuit were of the view that in many cases it is not necessary to issue a written opinion for publication. Furthermore, in each of the three circuits more than 75 percent of the respondents agreed that in some cases the result is so obvious as to need only an affirmance with a citation of precedent.

These distinctions assume particular significance in light of the fact that the writing and clearing of opinions is exceedingly time-consuming. In the Third Circuit Time Study, conducted in 1971-1972, the judges found that virtually one-half—48.2 percent, to be exact—of all the time they spent on cases was devoted to the writing and clearing of opinions. This was in addition to the time spent on a given case

prior to the time of oral argument—or if the case is submitted on briefs, prior to conference—(32.3 percent), conferring on a tentative disposition (5.7 percent), and on the bench hearing argument (7 percent). As noted, these are percentages of case-related time, time attributable to the consideration and decision of the litigation before the court. There are, of course, many other demands on appellate judges, each with its cost in hours: service in the Judicial Council, participation in judicial conferences, lectures and addresses, and the inevitable committee assignments.

It is not surprising that opinion writing should be so time-consuming. There is need to formulate carefully the reasoning of the court, to review the opinions of one's colleagues, to edit and re-edit draft manuscripts in the effort to achieve consensus in the panel. The price of careless words in a judicial opinion can be high.

Under these circumstances it is clear that a change in opinion-writing practices offers a court beleaguered by ever-mounting caseloads the possibility of significant relief. One widely adopted approach is to reduce the proportion of opinions which are published. There is evidence that a program of selective publication will, in and of itself, provide a measure of savings, for the judges no longer sense quite the same need to polish the prose and to monitor each phrase as they do with opinions which are intended for general distribution. Moreover, there are other advantages to not publishing opinions which have no precedent value. When large numbers of such opinions find their way into the reports, they create logistical problems in terms of sheer space and library maintenance expenditures, and the burden of fruitless research is compounded.

A program of selective publication is, of course, but a modest change. The savings in judicial time become truly dramatic when, for example, judgments are announced from the bench, with the reasoning of the court tape-recorded and available to the litigants and to the public in written form on request. Even more dramatic economies can be effected by decision without any explanation, but in our view this provides the litigants and their counsel with less than their due. Saving of judicial time cannot be the sole criterion of any rules governing opinion writing. The Commission is keenly aware of the high cost and marginal utility of the preparation and publication of traditional, signed opinions in every case. Yet, we also recognize the need for reasoned decision and for a record of the reasoning which impelled the decision. These considerations lead us to embrace two basic propositions.

First, we recommend that the Federal Rules of Appellate Procedure require that in every case there be some record, however brief, and whatever the form, of the reasoning which impelled the decision. In an appropriate case, citation to a single precedent would suffice. In other cases informal memoranda, intended for the parties them-

selves, would serve the purpose intended. Opinions can be signed or unsigned, published or unpublished, but in each case the litigants and their attorneys would be apprised of the reasoning which underlies the conclusion of the court. The decision would be available to the public. Many cases, of course, will continue to require a full exposition in the traditional manner, and both the decision and the law itself are likely to benefit from the process, time-consuming though it may be. The attorney survey provides persuasive evidence that the bar appreciates and accepts a diversity of forms which may be appropriate for announcing the result in different cases. There is every reason to believe that both lawyers and litigants can appreciate that while some cases require elaborate explanation, in others brevity better serves the cause of justice.

Second, the Commission strongly encourages the use of memoranda, brief per curiam opinions and other alternatives to the traditional, signed opinion in cases where they are appropriate. A majority of the Commission strongly encourages selective publication of opinions. For some members, it should be noted, this would involve problems with the theory of *stare decisis*. However, the advantages of publishing fewer opinions than was the practice in the past has already been widely recognized. Acting on a recommendation of the Federal Judicial Center, the Judicial Conference of the United States has already embarked on a program designed to realize the benefits which such a policy offers, and the progress of that program remains under active study by a committee of the Conference.

The Commission is, of course, aware of the problems which result from non-publication. Perhaps the thorniest involves the question whether or not to allow unpublished opinions to be cited as precedent. To allow litigants to cite opinions which the court has designated as "not for publication" invites publication by private publishers, thus defeating the basic purposes of the program. Where opinions are in fact not published, access to such opinions may be unequal, favoring those members of the bar with the resources to monitor, acquire and file them.

More fundamental problems have been perceived by some. Whether or not unpublished opinions may be cited by litigants, judges may feel the obligation to maintain consistency between cases presenting essentially the same legal issues. For the judges to attempt consistency by examining their own prior judgments, while denying counsel the right to cite such cases compounds the difficulties, whether counsel's purpose is to distinguish the cases or to urge that they be followed. In addition, there are some who consider it undesirable and indeed improper for a court to deny a litigant the right to refer to action previously taken by the court. For some there is a middle ground: a rule which does not attempt to prohibit citation, but which makes clear that the court will accord such prior decisions no value

as precedents. Others, however, do not view this as a satisfactory resolution of the problems of even-handedness and consistency in a common law system. It may be that wiser selection of the cases which are decided without formal opinion or in which opinions are not published will minimize the difficulties. In a perfect system cases with value as precedent would have been decided with opinion and those opinions would have been published; and there would be no loss in prohibiting citation of unpublished opinions because those cases would have no precedent value.

We have not attempted to exhaust the range of solutions, nor to choose between them. The Judicial Conference of the United States retains a continuing interest in the resolution of these problems; experimentation in the various circuits is continuing; empirical data are being collected; a range of alternatives is being explored. We recognize the Judicial Conference as an appropriate forum and do not believe that it would serve a useful function for the Commission to attempt, by specific recommendation, to foreclose that further study which the problem deserves.

The recommendations which the Commission does make, previously discussed, are not fully self-implementing nor would they, in and of themselves, solve the range of problems connected with opinion writing. We note again, however, our prior recommendation for the creation within each circuit of an appropriate mechanism for the monitoring of local procedures, for suggesting change and for evaluating the practices which result. The use of alternatives to the traditional opinion, for example, is an appropriate subject for the consideration of a broadly based advisory committee within a given circuit; so, too, are rules governing selection of opinions for publication and citation of those which have not been published. The conditions prevailing within one circuit may be different than those prevailing in another; the ready availability and relative utility of a depository or depositories, providing easy access to unpublished decisions, may be one example of such difference. Again, the attorney survey supports the inference that, in opinion writing as in oral argument, increased familiarity with a particular practice leads to increased acceptance. The willingness of the lawyers to discriminate carefully between the conditions under which a practice is found acceptable, and the purpose which it is intended to serve, is again in evidence.

Affirmance in a two-page memorandum of decision not to be published or cited is heavily endorsed when the case "borders on frivolity as determined by the court"; we find a lesser, but still noteworthy, measure of support when the issues are clear and can be decided by reference to precedent. These are factors which underscore again the desirability of local involvement in the fashioning and monitoring of the relevant rules. Moreover, experimentation would be fostered and enhanced in value by the active participation of all segments of the

profession. The immediate end is a rule which better serves the interests of the court and of the litigants who come before it. In the ultimate, and the point bears reiteration, the goal is not only to assure continued acceptance of the rule of law in a democratic society, but also general satisfaction with its administration and operation.

CENTRAL STAFF

Adequate staff support is widely recognized as necessary if judges are to achieve maximum judicial efficiency, consistent always with the integrity of the judicial process. The law clerk selected by, and working for, an individual judge has become a familiar and valued aid. A relatively recent innovation is the utilization of the staff attorney, defined by Professor Daniel Meador as "a lawyer employed by an appellate court to assist the court as a whole." Typically, a central staff is composed of several staff attorneys who work under the supervision of an experienced lawyer, the staff director.

Staff attorneys are already serving the federal courts in a variety of ways. Every circuit, with the exception of the First, presently employs staff attorneys to consider pro se motions and petitions. In addition, several circuits rely upon staff attorneys for the preliminary processing of various motions, substantive and procedural, and preparation of memoranda concerning them. In some circuits staff attorneys are involved in screening procedures. In the Second Circuit, central staff is used to help in the scheduling of all appeals and, in civil cases, to narrow issues and to explore the possibility of settlement. Preliminary reports credit these procedures with reducing the workload of the court. Yet the use of staff attorneys in most of the courts of appeals has been on a modest scale compared to their use in some state court systems.

Utilization of central staff has been credited with dramatic increases in the productivity of a number of state appellate courts. For example, in the Superior Court of New Jersey, Appellate Division (one of the four courts studied in an Appellate Justice Project of the National Center for State Courts, of which Professor Daniel Meador served as project director),

the project year . . . saw an increase in dispositions. During the year prior to the Project the Appellate Division decided 1,931 appeals. During the project year the court decided 2,300 appeals, an increase of 369 . . . While there is no precise measure of the staff's contribution, "the fact of some contribution is incontestable." [D. Meador, *Appellate Courts—Staff and Process in the Crisis of Volume 104-05 (1974)* (footnotes omitted).]

In the California Court of Appeals, First Appellate District, there was a 51 percent increase in judicial productivity between 1969, the year before the adoption of central staff, and 1974, after the staff had been in operation for several years.

The duties assigned to central staff in some state courts go beyond what the Commission believes appropriate. We recognize that limiting the functions of central staff will serve to limit the gains in productivity to be anticipated, but surely productivity is not the sole, nor even the primary, criterion by which to measure their utility. In our view, central staff attorneys should not draft opinions, nor should they identify cases for disposition without oral argument. Duties appropriate for central staff include research, preparation of memoranda, and the management and monitoring of appeals to assure that cases move toward disposition with minimum delay.

Subject to these limitations, the Commission recommends the development and optimal utilization of central staffs by the courts of appeals; we further recommend that the Congress provide adequate funds for such staffs in addition to the judges' personal law clerks.

The Commission makes its recommendation aware that the gains to be anticipated are not altogether free of risk: there is some risk of undue delegation of judicial authority, and perhaps a greater risk of the appearance of undue delegation. Judicial reliance on staff is a matter of concern to members of the legal community and the public who fear dilution of the judge's ultimate responsibility in the decision-making process. The members of the Commission are confident that federal appellate judges will exercise an independent judgment, irrespective of communications from a central staff attorney, and that there is a potential for gain yet to be realized.

Additionally, we believe that two recommendations previously discussed are relevant to allaying the concerns which have been expressed. First, we have recommended that each court publish its internal operating procedures. Such a publication would make clear what staff attorneys do and what they do not do, and the procedures which are followed by the court in utilizing their services. Second, the advisory committee should play an important role in fashioning local rules governing the operations of central staff, and in recommending change in the light of experience.

IV. Accommodating Mounting Caseloads: Judgeships, Judges and Structure

Experience with steadily rising caseloads suggests that it is improbable that the federal appellate system will be able adequately to serve the country for another generation without substantial change to accommodate the workload.

Prestigious and respected authorities have recommended that the Congress deal with the problems of the courts of appeals by reducing the jurisdiction of the district courts: "averting the flood by lessening the flow," to borrow Judge Friendly's apt phrase. Whether or not this view will prevail, it assuredly calls attention to the price of unfettered growth in the federal system. However, an unambiguous statement by the Conference Committee, in explanation of the statute which authorized creation of the Commission, made it clear that the Commission was neither to study nor to make "recommendations with respect to the basic jurisdiction, civil or criminal, of the district courts."

A large number of witnesses have pointed out the difficulties inherent in this constraint. For example, many members of the federal judiciary, while recognizing the limitation on the Commission's mandate, nevertheless took occasion to emphasize that elimination of diversity jurisdiction and three-judge district courts would provide a measure of immediate relief to the federal courts. Other types of cases, it has also been argued, might beneficially be removed from the federal courts.

Beneficent as changes in the jurisdiction of the district courts may be, it would be imprudent in light of recent history to assume that the growth in caseloads will in fact stop. The rate of appeal in criminal cases has more than tripled over the past two decades, a major portion of the increase coming as a result of Congressional enactments which removed indigency as a practical barrier to appellate review. In civil cases the increase has been smaller, but still

substantial. While predicting the future caseloads of the courts of appeals is a hazardous endeavor, prudent planning requires the awareness that new and different wellsprings of federal judicial business are likely to develop. The demands of federal programs to protect the environment were hardly foreseen a brief decade ago; the dimensions of new programs developed to meet needs relating to consumer protection, energy, or the economy, and the judicial business to be anticipated from them, can only be dimly perceived at this juncture.

Our task is to fashion a model to cope with future growth, not only in the system as a whole, but also in each of the individual circuits. That structure must be adequate to accommodate the unforeseen, and the unforeseen may make demands which are large indeed.

There are a limited number of alternatives which can prove effective in accommodating mounting caseloads. There are essentially three approaches: diverting cases to specialized tribunals, fashioning new procedures for the rapid disposition of large numbers of cases, or creating additional judgeships. The Commission recommends the creation of additional judgeships, confident that this is the solution to be preferred.

We turn to an analysis of the alternatives.

One possible response to the increased caseloads of the courts of appeals is to divert certain classes of cases to one or more centralized courts—"specialized" courts, as they are sometimes called. The debate over the desirability of such courts is not new; proposals for a court of tax appeals and for a court of patent appeals have been raised periodically at least for the past twenty-five years. More recently, thoughtful and innovative proposals for what would basically be a court of criminal appeals have been made, generating much interest and controversy. After extensive discussion, however, the Commission has concluded that on balance the disadvantages of diverting specified classes of cases from the regional courts of appeals to centralized or specialized courts outweigh the advantages. The reasons prompting this decision have been described in an earlier section of this report.

One further point, however, deserves mention in this context. Creating specialized courts for the purpose of draining off cases would have an immediate impact on every circuit, whatever the state of its docket or the need to provide it relief. To be specific: If the Commission were to recommend, and the Congress to approve, a Court of Administrative Appeals or a Court of Tax Appeals for relief of the regional courts of appeals, cases from all over the country would be diverted there immediately, including cases from the three-judge First Circuit as well as from the Second, Fifth and Ninth, regardless of the relative needs or capacities of those several courts. On the other hand, the Commission's recommendation for more judges, accom-

panied by our proposal for managing the large circuit, discussed below, will affect circuits differentially, only to the extent necessary to accommodate their caseloads.

A second possible response to the mounting caseloads, utilized with noteworthy success by the judges of the courts of appeals in recent years, is the development of procedures for the more rapid disposition of large numbers of cases. The story is a familiar one, and we need not pause here to gauge precisely the savings which can be achieved by further reducing the number of lengthy opinions, denying or curtailing oral argument, and adopting other expedited procedures. The short of the matter is that there is a limit to the savings which can be accomplished without adverse impact on the quality of the judicial process and the resulting product. When that limit is reached—and there are indications that in some circuits it has already been exceeded—there can be no alternative to additional judges.

A. THE LARGE CIRCUIT: PROBLEMS AND ALTERNATIVES

Any recommendation for the creation of additional judgeships requires consideration of the problems already faced by our larger courts. Two of the eleven judicial circuits currently have more than nine active judgeships: the Ninth Circuit with thirteen and the Fifth with fifteen. The experience of these courts, particularly that of the Fifth Circuit, is instructive. The Fifth is not only the largest circuit in terms of case filings and active judgeships, but it was also the first circuit to go beyond nine judgeships and thus has had the most experience with the problems which concern us. As the caseload of the Fifth has continued to grow, there have been proposals for further increases in the size of the court. The active judges of the circuit, however, acting unanimously, have repeatedly rejected added judgeships as a solution to the court's problems. To increase the number beyond fifteen would, in their words, "diminish the quality of justice" and the effectiveness of the court as an institution. Indeed, a majority of the active judges of the circuit, in a statement submitted to the Commission, asserted that even fifteen is too large a number of judges for maximum efficiency, particularly with respect to avoiding intra-circuit conflicts and to resolving them when they arise.

Nine has often been referred to as the optimal, or even the maximum, number of judges for circuits. Others have argued to the contrary, insisting that no magic inheres in that figure. On the basis of experience, however, we can point to specific disadvantages of the large court and assess their significance. The collegiality of the court is impaired. Most obvious, however, is the cost in judge power in any en banc determination when, as in the Fifth Circuit, fifteen judges

sit to hear oral argument, and thereafter participate in conference, to decide a single case. A court of fifteen is the immediate equivalent of five three-judge panels. Not only is the conference more cumbersome and time-consuming, but the process itself is adversely affected: a convention rather than a court, a legislative committee meeting and not a judicial deliberation—these are the pejorative characterizations used by judges.

To this must be added the logistical problems of assuring the presence of all active judges of the court at a single place at a given time, the cost in travel time, and the inefficiencies resulting from scheduling difficulties, whether by delay of the en banc proceedings or by disruption of normal routines.

To minimize these penalties of size, some larger circuits have undertaken en banc determinations without oral argument before the full court. The practice has been defended in Commission hearings on various grounds. However, the attorney survey showed that a clear majority of the bar of each of the circuits studied believed that oral argument before all of the judges sitting en banc was indispensable, notwithstanding previous argument before a panel. And the Commission appreciates that there is a substantial basis for this view in light of the importance and difficulty of the cases likely to be decided en banc. Even so, given existing caseloads, it is not hard to understand the considerations which may prompt a large and beleaguered circuit to deny oral argument before the full court en banc. Which-ever option is chosen, the cost is substantial.

Less intrusive on day-to-day operations, but less to be preferred for other reasons, is the continued refusal to decide cases en banc. During the two years fiscal 1971 and 1972, the Ninth Circuit did not decide a single case en banc. In part this may be said to reflect the perception of the judges of the cost involved in assembling all thirteen active judges. The record does show a dramatic increase in en banc determinations in the Ninth Circuit since 1973, a change which appears responsive to concern for the stability of the law of the circuit.

The simple duty of determining whether or not a case should be heard en banc itself constitutes an added burden to a large court. Determining whether an intra-circuit conflict does or does not exist, evaluating whether the issues presented are ripe for resolution by the circuit as a whole: these can be difficult questions which, however preliminary, require substantial judicial attention.

A related problem is the obligation felt by many judges to keep current with all decisions handed down by each of the panels in their court. The effort to avoid intra-circuit conflicts, rather than merely to resolve them, and to remain familiar with the evolving law of the circuit, is commendable. Yet, as the court increases in size, the obligation to remain current would eventually impose burdens of impossible

magnitude. Even under more favorable conditions many circuits no longer undertake to have each active judge review decisions before they are handed down, and in larger circuits there is already evidence that all of the judges may no longer be able to remain current with the law of the circuit as it develops.

In sum, an increase in the size of the court guarantees an increase in its problems, and under present procedures greatly increases the burden of complying with the letter and the spirit of the provisions of the Federal Rules of Appellate Procedure governing en banc hearings. The number of possible panels rises as the circuit grows; the opportunity for intra-circuit conflict increases; and the cost in judge power to resolve each of the conflicts which develops parallels the other two. Any acceptable solution to the problem of managing a large circuit must provide some satisfactory resolution of these problems.

Circuit Realignment

As the Commission recognized in its prior report, circuit realignment may be an appropriate alternative to the creation of large circuits. Fashioning new circuits whenever the number of judgeships grows to thirteen, fourteen or even fifteen offers the twin advantages of simplicity and familiarity. By refusing to countenance large circuits we avoid their problems.

The Commission adheres without reservation to its previous report calling for immediate relief to the Fifth and Ninth Circuits by way of creating new circuits or, as indicated in its later statement, independent divisions.

Nevertheless, the Commission is aware that circuit realignment is not a solution which can be adopted automatically wherever caseloads grow. New courts and new circuits bring different problems in their wake. Undue proliferation of circuits increases the potential for inter-circuit conflict even though it enhances unity within each circuit. The Fifth and Ninth Circuits each extends over a geographical area so vast that, even after realignment, the territory covered will be far from minuscule. The situation would be quite different if the creation of additional circuits should lead, for example, to a United States Court of Appeals for the southern tip of Manhattan.

The creation of even a one-state circuit invites the loss of important elements of our federalism. Although the judges in a single state may differ widely in any number of respects, the "pool" from which nominees are likely to be chosen, as well as the processes which lead to an appointment, would inevitably be narrower in a single state than in several. On a less tangible but perhaps ultimately more important level, there is the risk that a single-state circuit would no longer be perceived as a national court in quite the same way and to

the same degree as a court which draws its judges from several states. There is reason to believe that judges from different states reinforce one another's perceptions that they are judges of a national court.

The principles stated in our prior report should guide the Congress in considering circuit realignment.

Specialized Panels Within the Courts

The Commission has heard the suggestion that the law of the circuit as it relates to particular specialized fields, such as taxation, labor law or admiralty, be entrusted to a designated rotating panel of the judges of the court. Only members of the panel would speak for the circuit on cases within their area of specialization. It is argued that the adoption of this proposal would make possible en banc hearings of manageable size, almost without regard to the number of active judges on a given court. We are, however, unpersuaded. Central to the proposal is the identification and assignment of a given case to a particular panel, convened to decide cases of a certain type. But many cases do not lend themselves readily to such pigeonholing. There are, for example, considerable grey and overlapping areas between the fields of patent law and antitrust law. More basically, tax cases may require resolution of constitutional issues which would thereafter be applicable in labor law cases. It is doubtless feasible to provide some administrative system for allocation, but it must be recognized that the power to characterize and to allocate may well evolve into the power to direct not only the ultimate result on the merits of a given case but also the law of the circuit. With judicial philosophies known and with the law of the circuit determined by a majority of the judges, the power to assign can be the power to decide.

The Commission's Proposal: Managing a Large Circuit

The major problems of managing a large circuit arise primarily in connection with en banc proceedings. A variety of solutions are possible.

After much consideration of the alternatives, the Commission recommends that participation in en banc hearings and determinations be limited to nine judges: the chief judge and the eight other active judges of the circuit who are senior in commission but not eligible for senior status. However, judges eligible for senior status may continue to participate so long as, and to the extent that, the total number of participants does not exceed nine. Thus, for example, in a circuit with ten active judges, three of whom (including the chief judge) are eligible for senior status, the chief judge would participate

in en banc deliberations and decisions, as would the seven not eligible for senior status; of the remaining two judges, both of whom are eligible for senior status, only the most junior would sit en banc.

A simpler proposal would be to provide that the en banc court be composed of the nine most senior active judges, without qualification. The major disadvantage of such a proposal is that it makes the law of the circuit less responsive to new appointments. There is also a question of the image of a court whose most important decisions are made by the most senior judges, particularly if several non-participating juniors had taken a contrary position in panel decisions. A seniority system, modified as we have proposed, can be expected, in light of the patterns of appellate court appointments, to assure change at a relatively rapid rate.

Under the Commission's recommendation, judges who sat on the original panel would not, for that reason alone, be eligible to sit en banc. This would apply equally to active judges not yet eligible for the en banc court, to judges eligible for senior status who for that reason do not sit en banc, and to senior judges. With respect to the last mentioned category, this would represent a change in the law. We believe, however, that this change follows from the need to maintain stability in the law of the circuit.

The essence of the Commission's proposal is an en banc court of no more than nine. There are a wide variety of possible methods for selecting the nine. We have set forth that proposal which commended itself to most of us; there was, however, substantial sentiment for random selection. Some preferred that each of the randomly selected judges serve on the en banc for a specified and limited period; others preferred random selection on a case-by-case basis. Either of these methods would avoid the unhappy collateral effects of election by one's peers. However, to the majority of the Commission "the luck of the draw" seems an inappropriate method of selection for so important an assignment. With the power to bind all the judges of the circuit entrusted to what may be a minority of the court, the risk of repeated random exclusion of some of the ablest judges is, for some, a source of concern. This risk would, of course, be minimized by random selection on a case-by-case basis. However, that procedure has the potential for serious difficulties in maintaining stability and consistency in the law of the circuit.

The impact of the Commission's recommendation will vary substantially from circuit to circuit; for instance, it will not make a great deal of difference to a court of ten or eleven. Indeed, the Commission has heard testimony urging that the proposal for a limited en banc not take effect until a court has grown to some larger number. We are not unmindful of the concerns that motivate the suggestion. But in the interest of simplicity, and because of our view that an en

banc of more than nine does indeed have substantial disadvantages, a majority of the Commission has found it unpersuasive.

At the present time there is no federal appellate court so large that the nine who would sit en banc would constitute a minority of the full court. With circuit realignment, the probability of a court so large would be remote and certainly the many disadvantages of such a tribunal make it clear that this is an eventuality to be avoided. Should this eventuality occur, it would only be after a period of experience with the limited en banc and with whatever method of selection is authorized by the Congress. We therefore recommend that Congress reconsider the method of selection of the nine judges who constitute the en banc court, when the nine no longer constitute the majority of the court. Until this point is reached, the proposal put forth by the Commission should achieve the advantages of rotation, neither too rapid for stability nor too long delayed to allow for change.

Whatever method of selection is utilized, the chief advantage of the limited en banc is that it makes possible effective management of a large circuit, thus providing a practicable means of increasing the number of judgeships, if circuit realignment is delayed or deemed undesirable. In contrast to programs for diverting cases to specialized courts, this approach would be implemented only as, and to the extent that, the need was clear. Thus, it would have no impact whatever on those circuits that have only nine active circuit judges and only slight impact on those somewhat larger.

A further advantage of the smaller en banc is the flexibility in scheduling which it affords. The larger the circuit, the more demanding the task of maintaining intra-circuit harmony, and the larger the number of en banc hearings which will be required. Where the burden of en banc determinations becomes onerous, it would be possible to assign fewer panel hearings to the judges charged with the responsibility. Moreover, greater use might be made of the practice of designating cases for initial hearing, rather than rehearing, en banc, where there is a perceived need for fashioning a coherent body of law in a particular area. The resultant economy could be significant, not only for the court, but for the litigants as well.

The power of decision to set a case for en banc hearing should be retained in the entire court. To allow this initial determination to be made by all the active judges of the circuit assures every judge an important added measure of active participation in fashioning the law of that circuit.

We recommend one revision of 28 U.S.C. § 46(c), which now requires for en banc consideration the majority vote of all the active judges. The effect of this requirement is to prevent en banc consideration of a case in which one or more of the active judges are disqualified and a majority of the active judges remaining is not enough to constitute a majority of all the active judges. It should instead be sufficient for

en banc consideration if a majority of the active circuit judges who are qualified (in the traditional sense) to sit in a matter so vote.

B. ASSURING JUDGES OF SUPERIOR QUALITY IN ADEQUATE NUMBERS

The heart of the Commission's proposal is the creation of additional judgeships to meet developing needs. A newly created judgeship which is not filled provides no help; by the same token, a vacancy in an existing judgeship exacerbates the need. The Commission recommends that judicial vacancies be filled expeditiously. Such a recommendation may appear superfluous, but the fact remains that in the last five fiscal years, vacancies in the courts of appeals have caused a combined loss of twenty-eight years of judicial service. In a system with only 97 active judgeships, the effective dispensation of justice must suffer from a loss of this magnitude.

The details are provided by the Court Management Statistics of the Administrative Office of the United States Courts. During this five-year period, the Second Circuit sustained 48 vacant judgeship months; the Third Circuit, a staggering 78 vacant judgeship months; 46 in the Sixth Circuit; 45 in the Seventh Circuit; and 48 in the Ninth Circuit. A substantial proportion of the accrued vacant judgeship months during this period was attributable to a few long-standing vacancies. For instance, 32 of the vacant judgeship months in the Second Circuit are attributable to the single vacancy left by the retirement of Judge J. Joseph Smith, a vacancy filled only after a delay of more than three years. In the Third Circuit, a single vacancy which existed between the death of one judge and the effective date of service of his successor accounted for more than 24 lost months. An even more striking example is the period of 44 vacant judgeship months between the retirement of another Third Circuit judge in fiscal year 1967 and the appointment of his successor in fiscal 1971. In the face of the needs of the courts of appeals, it is difficult to imagine any responsible basis for permitting such extended vacancies to persist.

It is sometimes thought that the harmful effects of judicial vacancies are avoided when a judge retires but continues to sit as a senior judge. Senior judges, however, are not obligated to hear as many cases as those in active status. More fundamentally, the service of senior judges does not confer unanticipated benefits: On the contrary, the system operates on the assumption that many judges will, upon retirement, continue to bear a substantial portion of their court's workload. Indeed, virtually all do. Thus, delay in the appointment process actually deprives the judicial system of the fully expected service of an active judge. In short, we reiterate that there is no substitute for filling vacancies as they occur.

No matter how quickly vacancies may be filled, illnesses or other exigencies may result in one circuit's needing temporary assistance from other courts. The Commission therefore recommends a simplification in the procedure for making intercircuit assignments of active judges. Although the Congress has required only certification of necessity by the borrowing court, consent by the chief judge or circuit council of the lending court, and designation and assignment by the Chief Justice, present practice also requires the approval of the Intercircuit Assignment Committee of the Judicial Conference. This additional requirement may well reflect a sensitivity to the financial implications of assignments. However, a member of the Intercircuit Assignment Committee, in testimony before the Commission, estimated that it ordinarily takes "a minimum of three months from the time a judge agrees to accept an outside assignment to the time he starts to serve." We have heard other testimony that greater flexibility may be desirable. Certainly, the judiciary should be in a position to respond rapidly to calls for assistance. Accordingly, the Commission recommends that the judiciary return to the simple procedure established by statute.

The major proportion of inter-circuit assignments involve senior judges who have a greater flexibility in accepting such assignments. They also have a unique role while serving on the home circuit. They are knowledgeable in the law of the circuit and familiar to the members of the bar as well as to their colleagues. They are relieved from participation in the affairs of the judicial council and from en banc sittings. In short, for the home circuit, senior judges offer the potential for significant contribution to the judge power of the court without the attendant disadvantages which typically accompany use of district court judges or an increase in the number of active judges on the court. That contribution is in fact a significant one: Approximately ninety percent of the judges who accept senior status "continue to perform substantial judicial work," despite the fact that they have already earned retirement.

The Commission recommends a modest easing of the requirements for taking senior status. We do this in light of the considerations just stated, and because of the desirability, especially at this point in the history of the federal judiciary, of assuring that judgeships are made as attractive as practicable to men of high quality. Today, by statute, a judge may take senior status on the completion of fifteen years of service at age 65 or ten years service at age 70. These particular provisions would remain in effect, but we would provide additional circumstances under which judges might take senior status. As matters now stand, a judge aged 70 may retire with ten years of service while another aged 69 with fourteen years of service may not. A third judge with nineteen years of service at age 62 must wait three more years. We recommend that the statute be revised to allow retirement after

twenty years of service on the bench at age sixty. In addition, we would provide that a judge may qualify under what has been colloquially referred to as the "rule of eighty." That is, a judge should be eligible for retirement when the number of years he has served on the bench, added to his age, equals eighty, assuming always a minimum period of one decade of service and a minimum age of sixty. By this revision a judge who has given substantial service to the judicial system, and who is likely to continue to carry a heavy caseload even on retirement, would not need to defer taking senior status beyond what we consider the equitable equivalents of the present statutory scheme.

Considerations of fairness also compel us to add our voice to those who are calling for an increase in judicial salaries. More, however, is at stake: It is imperative that the opportunity for service on the federal courts attract lawyers of the highest quality. Despite rampant inflation, the salaries of federal judges have not been adjusted since 1969. We recommend that federal judicial salaries be raised to a level that will not deter outstanding individuals from accepting appointment to the bench and that will adequately compensate those now serving.

The Commission has studied our proposals and provided a study of the implications of the largest component of the federal judicial system, the district courts. In addition, the practical effects of implementation of any of our recommendations deserve our careful study and periodic evaluation.

The Commission recognizes that the Congress, acting through its legislative Committee on the Judiciary, maintains a continuing concern for the federal courts as a whole. Yet there would be advantage in a continuing body broadly representative of the legal profession which would report to the Congress and, in addition, to the President and to the Chief Justice.

The Commission therefore endorses the recommendation of the Chief Justice that the Congress consider the desirability of creating a standing commission to study and make recommendations with respect to the problems of the federal courts, according priority to matters excluded from the jurisdiction of this Commission.

B. DISTRICT COURT JUDGES OF HIGH QUALITY IN ADEQUATE NUMBERS

The work of the courts of appeal is affected significantly by the quality of judicial performance on the part of the district courts whose judgments they review. Clearly, the system will operate best with trial judges of superior quality in sufficient numbers to avoid the undue pressure which invites error. They should be afforded the time necessary to explicate their rulings by adequate findings and opinions when

V. Other Recommendations

A. A CONTINUING COMMISSION ON THE FEDERAL JUDICIAL SYSTEM

The demands upon the federal judicial system are constantly in the process of change. It is prudent to provide a mechanism which can anticipate problems and develop suitable solutions before crises and emergencies preclude the opportunity for needed study and thoughtful response.

Moreover, the recommendations of the Commission do not purport to meet even the present needs of the entire system. As pointed out earlier, the Congress has limited our mandate and precluded study of the jurisdiction of the largest component of the federal judicial system, the district courts. In addition, the practical effects of implementation of any of our recommendations deserve continuing study and periodic evaluation.

The Commission recognizes that the Congress, acting through its respective Committees on the Judiciary, maintains a continuing concern for the system as a whole. Yet, there would be advantage in a continuing body, broadly representative of the legal profession, which would report to the Congress and, in addition, to the President and to the Chief Justice.

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appropriate, for these serve to ease the burdens of the appellate courts. There is, of course, a broader perspective: The sheer volume of district court adjudications and the resultant impact on the society of the quality of justice at the trial level are of paramount importance. Accordingly, the Commission recommends that the Congress assure, for each of the district courts, judges of superior quality in sufficient numbers and with adequate support facilities to perform the functions assigned to them in our system of justice.

C. TENURE OF THE CHIEF JUDGE

Although the present method of selecting the chief judge of the various courts of appeals, selection by seniority, takes no account of the administrative abilities of the judges, the Commission has concluded that the alternatives to seniority would create more problems than they would solve. Election of the chief judge by the members of the court or selection by the members of the court above would politicize the selection process. The Commission therefore recommends that the present method of selecting the chief judge be retained. At the same time we recommend that the Judicial Code be amended to provide for a maximum term of seven years for the chief judge of a circuit, with tenure limited to one term. In this way, we would hope to minimize the impact of a chief judge who lacks administrative abilities, while allowing the chief judges who are good administrators sufficient time to have a beneficent effect on the functioning of their circuits.

We note that the chief judge of the Court of Claims and the chief judge of the Court of Customs and Patent Appeals are appointed by the President. We recognize that each is a court of nationwide jurisdiction. Whether this difference is sufficient to justify a different method of selecting the chief judges of these courts is a matter appropriately to be considered by Congress.

D. SELECTION OF THE PRESIDING JUDGE OF A PANEL

Under present law (28 U.S.C. § 45(b)), a senior judge presides over any panel on which he sits, unless he voluntarily relinquishes this responsibility or the chief judge is a member of the panel. Several judges, testifying before the Commission, have suggested that selecting the author of the panel opinion is a decision most appropriately made by an active judge of the circuit. To this end, the Commission recommends that Congress amend section 45(b) of the Judicial Code to provide that the presiding judge on a panel be the active judge of the circuit who is senior in commission.

E. ADEQUATE STAFFING AND SUPPORT

The difficult business of judging can be done only by the judges themselves. It is unwise and imprudent to deprive judges of the basic aids which can contribute to their efficiency, their productivity and the quality of their judicial efforts. The Commission recommends that Congress provide adequate staff and support facilities for each of the judges of the courts of appeals. Each judge should be provided with as many law clerks as he can profitably use and with adequate secretarial assistance for his chambers. Similarly, the courts themselves should be provided with support services which will assure maximum efficiency.

F. DISCIPLINE OF JUDGES

Public confidence in the courts is an essential ingredient of our system of government. Allegations of judicial misconduct threaten that confidence. Judicial incapacity inevitably affects the efficient functioning of the courts.

The Commission recognizes that a mechanism for handling allegations of misconduct and incapacity is an important matter and recommends that the Congress turn its attention to this subject.

G. AVAILABILITY OF COURTS OF APPEALS DOCUMENTS

At present there is no single depository where the briefs and related documents of cases heard in each of the courts of appeals are available. In addition, there is evidence of some needless duplication of effort where a number of law libraries bind and store voluminous material from the same circuit. In the interest of efficiency and to assure ready availability of a complete set of these materials, the Commission recommends that the Library of Congress serve as a national depository for the briefs and other appropriate documents of the federal intermediate appellate courts. The Library of Congress should micro-copy such materials and make them available to the public at cost.

The annual cost of such a program has been estimated at approximately \$50,000, with savings in excess of that amount to be anticipated as a result of economies which various law libraries could then achieve.

It would be appropriate for the Library of Congress to consult with the various courts of appeals to define the documents to be recorded and the procedures which would prove most convenient.

Appendix A

GOVERNING STATUTES

Public Law 85-917, H.R. 7378

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The President of the United States is authorized to appoint a Commission to study the structure and internal procedure of the Federal courts of appeal, and to report to the President, the Congress, and the Chief Justice its recommendations for such additional changes in structure or internal procedure as may be appropriate for the expeditious and efficient disposition of the business of the Federal courts of appeal, consistent with fundamental concepts of fairness and due process.

(b) Any vacancy in the Commission shall be filled in the same manner as the original appointment.

Appendix A

GOVERNING STATUTES

PUBLIC LAW 92-489, 92ND CONGRESS, H.R. 7378,
OCTOBER 13, 1972

AN ACT To Create a Commission on Revision of the Federal Court Appellate System of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is hereby established a Commission on Revision of the Federal Court Appellate System (hereinafter referred to as "Commission") whose function shall be—

(a) to study the present division of the United States into the several judicial circuits and to report to the President, the Congress, and the Chief Justice 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.

(b) to study the structure and internal procedures of the Federal courts of appeal system, and to report to the President, the Congress, and the Chief Justice its recommendations for such additional changes in structure or internal procedure as may be appropriate for the expeditious and effective disposition of the caseload of the Federal courts of appeal, consistent with fundamental concepts of fairness and due process.

SEC. 2. (a) The Commission shall be composed of sixteen members appointed as follows:

- (1) four members appointed by the President of the United States;
- (2) four Members of the Senate appointed by the President pro tempore of the Senate;
- (3) four Members of the House of Representatives appointed by the Speaker of the House of Representatives, and
- (4) four members appointed by the Chief Justice of the United States.

(b) Any vacancy in the Commission shall be filled in the same manner as the original appointment.

(c) The Commission shall elect a Chairman and a Vice Chairman from among its members.

(d) Nine members of the Commission shall constitute a quorum, but three may conduct hearings.

SEC. 3. (a) Members of the Commission who are officers, or full-time employees, of the United States shall receive no additional compensation for their services, but shall be reimbursed for travel, subsistence, and other necessary expenses incurred in the performance of duties vested in the Commission, but not exceeding the maximum amounts authorized under section 456 of title 28, United States Code.

(b) Members of the Commission from private life shall receive \$100 per diem for each day (including traveltime) during which he is engaged in the actual performance of duties vested in the Commission, plus reimbursement for travel, subsistence, and other necessary expenses incurred in the performance of such duties, but not in excess of the maximum amounts authorized under section 456 of title 28, United States Code.

SEC. 4. (a) The Commission may appoint an Executive Director who shall receive compensation at a rate not exceeding that prescribed for level V of the Executive Schedule.

(b) The Executive Director, with approval of the Commission, may appoint and fix the compensation of such additional personnel as he deems necessary, without regard to the provisions of title 5, United States Code, governing appointments in the competitive service or the provisions of chapter 51 and subchapter III of chapter 53 relating to classification and General Schedule pay rates: *Provided, however*, That such compensation shall not exceed the annual rate of basic pay for GS-18 of the General Schedule under section 5332, title 5, United States Code.

(c) The Director may procure personal services of experts and consultants as authorized by section 3109 of title 5, United States Code, at rates not to exceed the highest level payable under the General Schedule pay rates, section 5332, title 5, United States Code.

(d) The Administrative Office of the United States Courts shall provide administrative services, including financial and budgeting services, for the Commission on a reimbursable basis. The Federal Judicial Center shall provide necessary research services on a reimbursable basis.

SEC. 5. The Commission is authorized to request from any department, agency, or independent instrumentality of the Government any information and assistance it deems necessary to carry out its functions under this Act and each such department, agency, and independent instrumentality is authorized to provide such information and assistance to the extent permitted by law when requested by the Chairman of the Commission.

SEC. 6. The Commission shall transmit to the President, the Congress, and the Chief Justice—

(1) its report under section 1(a) of this Act within one hundred and eighty days of the date on which its ninth member is appointed; and

(2) its report under section 1(b) of this Act within fifteen months of the date on which its ninth member is appointed.

The Commission shall cease to exist ninety days after the date of the submission of its second report.

SEC. 7. There are hereby authorized to be appropriated to the Commission such sums, but not more than \$270,000, as may be necessary to carry out the purposes of this Act. Authority is hereby granted for appropriated money to remain available until expended.

Approved October 13, 1972.

PUBLIC LAW 93-420, 93RD CONGRESS, S. 3052,
SEPTEMBER 19, 1974.

AN ACT To amend the Act of October 13, 1972.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act of October 13, 1972 (86 Stat. 807) is amended as follows:

(a) Section (2) of section 6 of such Act is amended by striking out "fifteen months" and inserting in lieu thereof "twenty-four months".

(b) Section 7 of such Act is amended by striking out "not more than \$270,000" and inserting in lieu thereof "not more than \$606,000".

Approved September 19, 1974.

Appendix B*

THE NEED FOR A NATIONAL COURT: SUPPORTING STUDIES

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I. ILLUSTRATIVE CASES: CONFLICTS, UNCERTAINTY AND RELITIGATION

While direct, unresolved inter-circuit conflicts are perhaps the most visible evidence of the need for additional national appellate capacity, such conflicts constitute only a small aspect of a broader problem: the absence of authoritative decisions on recurring issues of national law. Other consequences of that problem may be equally if not more serious, at least in terms of their impact upon the "consumers" of the system—not only attorneys and the litigants whom they represent, but all who are affected by the application of rules of federal law. The various consequences may be summarized briefly as follows:

Currently unresolved inter-circuit conflicts. We recognize, of course, that the concept of a conflict is not an exact one,¹ but we believe that the conflicts described in these pages would be regarded as such under any of the accepted definitions.

Delay in the resolution of conflicts. That the Supreme Court ultimately resolves a conflict does not demonstrate that the system is working in an optimum fashion. Resolution may come only after years of uncertainty, confusion, and, inevitably, forum shopping by

*Copies of the reports of the consultants whose work is reflected in this Appendix are on file with the Federal Judicial Center, Dolley Madison House, 1520 H Street NW., Washington, D.C. 20005.

¹ Forty years ago, Professors Frankfurter and Hart wrote, "What constitutes a 'conflict'? The answer to this question . . . imports into the matter the whole of the lawyer's traditional technique of analysis and distinguishing of cases . . . [M]any questions of degree inevitably remain." Frankfurter & Hart, *The Business of the Supreme Court at October Term, 1933*, 48 Harv. L. Rev. 238, 268-69 (1934).

litigants eager to take advantage of the situation. Even where the Court acts expeditiously to resolve conflicts which have been brought to its attention, development of the conflict may have taken so much time that the total period of uncertainty may be a decade or more.

Conflicts which prompt the Supreme Court to hear cases otherwise not worthy of its resources. Although the Supreme Court no longer holds the "conviction," as the leading authorities put it in 1951, "that it is required to grant certiorari where a conflict exists,"² the existence of a conflict remains an important reason for granting plenary review. The result is that, each year, the Justices hear and consider a number of cases which, in terms of their intrinsic importance, might well be thought unworthy of the time and effort which they demand of the Court. Inevitably, opinions will differ as to the importance of particular issues and the desirability of their resolution by the United States Supreme Court. Issues which some may consider trivial will appear to others to be quite significant in terms of the human values which the Court must be alert to protect. Moreover, as long as the Court remains the only tribunal empowered to resolve conflicts among the circuits, no one would fault it for granting review solely for that purpose, even if the Court itself regarded the issue as trivial. The question is whether, in light of the other demands placed upon the Court, and considering the interests of the system as a whole, some issues might better be decided by another tribunal empowered to hand down precedents of national effect—with the Supreme Court always retaining the power to review that tribunal's decisions upon certiorari.

Uncertainty even in the absence of a conflict. Even if a conflict never develops with respect to a recurring issue, there may be years of uncertainty during which hundreds or thousands of individuals may be left in doubt as to what rule will be applied to their transactions. Moreover, such uncertainty breeds repetitive litigation as (for instance) successive taxpayers, or employers, or producers litigate the identical issue in circuit after circuit, encouraged by the hope of developing a conflict. Whether or not their hope is ever realized, the relitigation is costly both to their adversaries and to the system as a whole. By the same token, the Government may persist in enforcing a policy despite adverse rulings in several circuits, not only in tax cases, but also in other areas of federal regulation.

When one views the problem in this light, the development of an actual conflict becomes almost irrelevant, unless it be to expedite Supreme Court intervention—which, as noted above, may not make the best use of the Supreme Court's limited resources. To be sure, there will be some issues as to which "successive considerations by several courts, each reevaluating and building upon the preceding

² R. Robertson & F. Kirkham, *Jurisdiction of The Supreme Court of the United States* 631 (Wolfson & Kurland ed. 1951).

decisions”³ will improve the quality of adjudication; but we are speaking here of questions as to which, in Erwin Griswold’s words, “the gain from maturation of thought from letting the matter simmer for a while is not nearly as great as the harm which comes from years of uncertainty [with respect to] questions which are essentially ones of statutory construction.”⁴

Each of the case histories in this section—selected from among those which have come to the attention of the Commission during the past year—illustrates one or more of the consequences which may result from the absence of a nationally binding decision. In some of the situations described, Supreme Court review was sought only at an early point in the development of the litigation, or was not sought at all. The cases remain relevant, however, because the various considerations which might have dissuaded a litigant from pursuing a controversy through three levels of courts would not necessarily preclude the utilization of a transfer provision that would result in a nationally binding decision at the first level of review.

1. *Recovery by third parties under Federal Tort Claims Act.* The issue is whether the exclusive remedy provision of the Federal Employee’s Compensation Act bars the claim of a third party under the Federal Tort Claims Act for indemnity or contribution against the Federal Government for damages paid to an injured government employee. Two 1963 decisions of the Supreme Court⁵ have given rise to what one court calls “hopeless conflict” among the lower federal courts.⁶ At least four circuits have now held that recovery is precluded;⁷ a 1969 Fourth Circuit decision holds otherwise.⁸ The issue has been unresolved for ten years, with at least one denial of certiorari since the conflict arose,⁹ and it was the subject of a detailed Third Circuit opinion in 1974.¹⁰

2. *Penalties under the bank robbery statute.* The issue is whether the Federal bank robbery statute, 18 U.S.C. § 2113(a)–(e), creates a

³ C. Summers, Report on Labor Law Cases in the Federal Appellate System 22 (1974).

⁴ Hearings Before the Commission on Revision of the Federal Court Appellate System, Washington, D.C., April 2, 1974, at 201.

⁵ *Weyerhaeuser S. S. Co. v. United States*, 372 U.S. 597 (1963); *Treadwell Constr. Co. v. United States*, 372 U.S. 772 (1963).

⁶ *Travelers Ins. Co. v. United States*, 493 F. 2d 881, 885 (3d Cir. 1974).

⁷ *Id.*; *Newport Air Park, Inc. v. United States*, 419 F. 2d 342 (1st Cir. 1969); *Murray v. United States*, 405 F. 2d 1361 (D.C. Cir. 1968); *Wien Alaska Airlines, Inc. v. United States*, 375 F. 2d 736 (9th Cir.), *cert. denied*, 389 U.S. 940 (1967). *Accord*, *Sheridan v. DiGiorgio*, 372 F. Supp. 1373 (E.D.N.Y.), *aff’d mem.*, 505 F. 2d 727 (2d Cir. 1974).

⁸ *Wallenius Bremen G.m.b.H. v. United States*, 409 F. 2d 994 (4th Cir. 1969), *cert. denied*, 398 U.S. 958 (1970).

⁹ *Id.*

¹⁰ *Travelers Ins. Co. v. United States*, 493 F. 2d 881 (3d Cir. 1974). *See also* Annot., 12 A.L.R. Fed. 616 (1972).

single offense with various degrees of aggravation or, on the contrary, creates separate offenses for which separate penalties may be imposed; specifically, whether the crime of kidnapping in the course of the robbery or to avoid apprehension (§ 2113(e)) is separate and distinct from the crime of robbery (§ 2113(a)–(d)). The relevant provisions have been included in the statute since its initial enactment in 1934, and the issue has been litigated in the courts of appeal for more than 30 years.¹¹ The Seventh Circuit adopted the single-offense rule in 1957;¹² the Tenth Circuit held to the contrary in 1960.¹³ In 1968 the Eighth Circuit followed the single-offense rule, and certiorari was denied.¹⁴ Within the last two years the Ninth and Fifth Circuits have taken the same view.¹⁵

3. *Standard of proof in suit for civil penalties for nonpayment of withholding taxes.* Under 26 U.S.C. § 6672, civil liability is imposed on a corporate officer who willfully fails to pay over withheld payroll funds when due. The issue is whether “reasonable cause” is part of the test to be used in determining whether the failure to collect, account for, and pay over was willful. The Fifth Circuit has recognized an exception for “reasonable cause”;¹⁶ other circuits have explicitly rejected the exception.¹⁷ The issue has been litigated in the courts of appeals at least since 1956,¹⁸ and the Supreme Court denied certiorari despite the conflict in 1970.¹⁹

4. *Deductibility of legal expenses of corporate liquidation.* This is an issue of statutory construction which was first litigated in 1964²⁰ and which remains unresolved today, in part because of the Solicitor General’s concern in 1970 to spare the Supreme Court the burden of deciding an issue which in his judgment might well evaporate without further intervention by that Court.

The issue is whether, in a corporate liquidation made pursuant to the provisions of section 337 of the Internal Revenue Code, “legal expenses incurred by a corporation in the sale of its capital assets may

¹¹ *See, e.g., Dimenza v. Johnston*, 130 F. 2d 465 (9th Cir. 1942).

¹² *United States v. Drake*, 250 F. 2d 216 (7th Cir. 1957).

¹³ *Clark v. United States*, 281 F. 2d 230 (10th Cir. 1960).

¹⁴ *Jones v. United States*, 396 F. 2d 66 (8th Cir. 1968), *cert. denied*, 393 U.S. 1057 (1969). *Accord*, *United States v. Delay*, 500 F. 2d 1361 (8th Cir. 1974).

¹⁵ *United States v. Faleafine*, 492 F. 2d 18 (9th Cir. 1974) (*en banc*); *Sullivan v. United States*, 485 F. 2d 1352 (5th Cir. 1973).

¹⁶ *Newsome v. United States*, 431 F. 2d 742 (5th Cir. 1970).

¹⁷ *E.g., Harrington v. United States*, 504 F. 2d 1306 (1st Cir. 1974) (referring to a “split of authority among the circuits . . . [with] two clearly identifiable positions . . .”); *Monday v. United States*, 421 F. 2d 1210 (7th Cir.), *cert. denied*, 400 U.S. 821 (1970).

¹⁸ *Gray Line Co. v. Granquist*, 237 F. 2d 390 (9th Cir. 1956).

¹⁹ *Monday v. United States*, 421 F. 2d 1210 (7th Cir.), *cert. denied*, 400 U.S. 821 (1970).

²⁰ *Pridemark, Inc.*, 42 T.C. 510 (1964), *rev’d*, 345 F. 2d 35 (4th Cir. 1965).

be deducted as ordinary and necessary business expenses.”²¹ In 1964 the Tax Court held in the *Pridemark* case²² that such fees were not deductible, but the Fourth Circuit reversed: “Having found a liquidation, we approve Pridemark’s deduction of these fees as ordinary and necessary business expenses incurred in liquidation.”²³ In 1966 the Tenth Circuit adopted the Fourth Circuit rule.²⁴ One year later, however, the Seventh Circuit held that the fees were not deductible;²⁵ this holding was then followed by the Eighth Circuit²⁶ and the Sixth Circuit.²⁷ A petition for certiorari was filed in the Sixth Circuit case. The Government filed a Memorandum in Opposition admitting that there was a conflict among the circuits but nevertheless recommending that the petition be denied. The Government pointed to two recent decisions of the Supreme Court and asserted that although the questions involved in those cases were “not the same,” they were “closely related,” and “it seems clear that [the two decisions] will have a considerable impact on the approach which will be taken by the lower courts in other cases in this area.”²⁸ The Supreme Court thereupon denied certiorari. Two years later, the issue arose in the Third Circuit, which found the view of the Seventh, Eighth, and Sixth Circuits to be more persuasive than that of the Fourth and the Tenth.²⁹

Later in 1972, the Tax Court was confronted with the same issue in a case involving a Maryland taxpayer. Since an appeal from the Tax Court’s decision lay solely to the Fourth Circuit, the Tax Court was required, under its *Golsen* rule,³⁰ to follow the Fourth Circuit’s decision. The Tax Court did so, but expressed disagreement with the Fourth Circuit and stated that the Supreme Court’s denial of certiorari in the Sixth Circuit case in 1970 “in the face of a square and admitted conflict would appear to be persuasive that the Court regarded [the two decisions cited by the Government in its Memorandum in Opposition] in the circumstances as having a strong bearing on the issue.”³¹ On appeal to the Fourth Circuit, the Commissioner conceded that *Pridemark* supported the result reached by the Tax Court, but

²¹ *Of Course, Inc.*, 59 T.C. 146 (1972), *rev’d*, 499 F. 2d 754 (4th Cir. 1974).

²² *Pridemark, Inc.*, 42 T.C. 510 (1964), *rev’d*, 345 F. 2d 35 (4th Cir. 1965).

²³ 345 F. 2d at 45.

²⁴ *United States v. Mountain States Mixed Feed Co.*, 365 F. 2d 244 (10th Cir. 1966).

²⁵ *Alphaco, Inc. v. Nelson*, 385 F. 2d 244 (7th Cir. 1967).

²⁶ *United States v. Morton*, 387 F. 2d 441 (8th Cir. 1968).

²⁷ *Lanrao, Inc. v. United States*, 422 F. 2d 481 (6th Cir.), *cert. denied*, 398 U.S. 928 (1970).

²⁸ Respondent’s Memorandum in Opposition at 3 (No. 1346, O.T. 1969).

²⁹ *Connery v. United States*, 460 F. 2d 1130 (3d Cir. 1972).

³⁰ *Jack E. Golsen*, 54 T.C. 742 (1970), *aff’d*, 445 F. 2d 985 (10th Cir.), *cert. denied*, 404 U.S. 940 (1971).

³¹ *Of Course, Inc.*, 59 T.C. 146, 152 (1972), *rev’d*, 499 F. 2d 754 (4th Cir. 1974).

argued that *Pridemark* was against the decided weight of authority and represented an inadmissible application of section 337. The case was initially heard by a panel, but when doubt developed as to the correctness of *Pridemark*, the appeal was certified for en banc consideration. In mid-1974, the en banc court overruled *Pridemark* and held that the legal fees were not deductible.³²

Thus, more than ten years after the first decision in the Tax Court, this recurring issue remains unsettled, and four circuits disallow a deduction which one circuit permits. (In this regard, it should be noted that under the *Golsen* rule the Tax Court would be required to follow the Tenth Circuit decision in cases appealable to that court.) The practical effects were described in one practitioner’s response to the Commission’s survey of tax attorneys: “This conflict makes the resolution of this question, from a planning standpoint, significantly less certain, with the consequence that some effort is made to allocate expenses, as much as possible, to transactions other than the sale of the assets.”

Given the competing demands on the Supreme Court’s limited resources, one cannot fault the Court for denying certiorari in 1970, or the Solicitor General for urging it to do so; but neither can one regard the continued uncertainty and the repetitive litigation, with the resulting burdens on taxpayers and the courts, as indicators of a healthy system.

5. *Standing to sue motion picture distributor for violation of antitrust laws.* Under section 4 of the Clayton Act, “[a]ny person who shall be injured in his . . . property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained . . .” Block booking is a practice under which a motion picture exhibitor, as a condition of obtaining a license from a distributor to exhibit one movie, agrees to accept other movies from the distributor. It is clear that block booking violates section 1 of the Sherman Act. The unsettled issue is whether the producer whose pictures have been block-booked has standing under section 4 of the Clayton Act to sue the distributor responsible for the block booking. In 1970 the Second Circuit held that a producer did not have standing;³³ later in the same year the Ninth Circuit, explicitly rejecting the Second Circuit decision, held that a producer does have standing.³⁴ The Supreme Court denied certiorari in both cases, with Justices Brennan and White voting to review the Second Circuit decision.

³² *Of Course, Inc. v. Commissioner*, 499 F. 2d 754 (4th Cir. 1974).

³³ *Fields Productions, Inc. v. United Artists Corp.*, 432 F. 2d 1010 (2d Cir. 1970), *cert. denied*, 401 U.S. 949 (1971).

³⁴ *Mulvey v. Samuel Goldwyn Productions*, 433 F. 2d 1073 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971).

The conflict between the Second and the Ninth Circuits is part of a broader area of disagreement among the courts of appeals. During the last twenty years the issue of standing to sue under section 4 of the Clayton Act has engendered decisions in ten circuits.³⁵ Professor Louis B. Schwartz of the University of Pennsylvania Law School, who conducted a survey of the views of antitrust practitioners for the Commission, found that this issue was the one about which practitioners were most concerned. Recently the Ninth Circuit reviewed the decisions and concluded that "essentially two disparate analytical techniques" are employed by the various courts, although the opinion noted that there are actually many more than two approaches.³⁶ The Supreme Court denied certiorari in the Ninth Circuit case.³⁷ Although a persuasive argument was made that the same result would have been reached under any of the tests, it should be noted that certiorari was also denied in several of the earlier cases.

6. *Standard for determining whether "bad debts" are business or non-business obligations.* A taxpayer may use a business debt to offset ordinary income and for carryback purposes under section 172 of the Internal Revenue Code. Nonbusiness debts may not be so used. In determining whether a bad debt is a business or a nonbusiness obligation, the regulations focus on the relation the loss bears to the taxpayer's business. If, at the time of worthlessness, that relation is a "proximate" one, the debt qualifies as a business debt. The issue is whether the required proximate relation necessitates a "dominant" business motivation on the part of the taxpayer, or whether a "significant" motivation is sufficient. The Second Circuit approved a significant motivation standard in 1963.³⁸ Six years later the Seventh Circuit held that the "dominant" motivation was determinative.³⁹ In 1970 the Fifth Circuit followed the Second.⁴⁰ The Supreme Court granted certiorari in the Fifth Circuit case to resolve the conflict. The decision, adopting the dominant motivation standard, came down in 1972, three years after the conflict had developed and nearly a decade after the first appellate decision on the issue.⁴¹

7. *Proof of intent in prosecution for threatening harm to President.* Does the statute making it unlawful to make threats against the President of the United States, 18 U.S.C. § 871(a), require proof that the defendant had a present intention to carry out the threat? The

³⁵ See *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F. 2d 122, 126-27 (9th Cir.), cert. denied, 414 U.S. 1045 (1973).

³⁶ *Id.* at 127 n. 7.

³⁷ *Morgan v. Automobile Mfrs. Ass'n*, 414 U.S. 1045 (1973).

³⁸ *Weddle v. Commissioner*, 325 F. 2d 849 (2d Cir. 1963).

³⁹ *Niblock v. Commissioner*, 417 F. 2d 1185 (7th Cir. 1969).

⁴⁰ *United States v. Generes*, 427 F. 2d 279 (5th Cir. 1970), rev'd, 405 U.S. 93 (1972).

⁴¹ *United States v. Generes*, 405 U.S. 93 (1972).

District of Columbia Circuit held in 1968 that proof of intent is not required.⁴² The U.S. Supreme Court reversed that decision on other grounds, but expressed "grave doubts" about the correctness of the D.C. Circuit's interpretation.⁴³ In the succeeding years, the Second,⁴⁴ Sixth,⁴⁵ Ninth,⁴⁶ and Tenth⁴⁷ Circuits agreed with the D.C. Circuit, while the Fourth Circuit, sitting en banc, held to the contrary.⁴⁸ Certiorari was denied in three of the cases. In early 1974, the Fifth Circuit adopted the D.C. Circuit's interpretation. On October 29 of that year, the Supreme Court agreed to review the Fifth Circuit decision.⁴⁹ A resolution of the issue can thus be expected in 1975—after seven years of appellate litigation and decisions by six circuits.

8. *Valuation of mutual fund shares in decedent's estate.* A pair of Treasury Regulations issued in 1963 ruled that mutual fund shares in a decedent's estate should be valued, for estate and gift tax purposes, at the public offering or "asked" price at the date of death, rather than at the redemption or "bid" price. The validity of the regulations was tested in the Tax Court,⁵⁰ four courts of appeals,⁵¹ and a district court in yet a fifth circuit.⁵² The first two circuits to pass upon the issue held the regulations to be valid, and the Supreme Court denied certiorari in one of the cases.⁵³ Thereafter, two other circuits held the regulations invalid,⁵⁴ and the Supreme Court "granted the Government's petition for certiorari . . . because of the conflict among the circuits."⁵⁵ Ten years after the regulations had been promulgated, the Supreme Court held that they were not valid, and that mutual fund shares should be valued for estate tax purposes

⁴² *Watts v. United States*, 402 F. 2d 676 (D.C. Cir. 1968), rev'd on other grounds 394 U.S. 705 (1969).

⁴³ *Watts v. United States*, 394 U.S. 705, 708 (1969).

⁴⁴ *United States v. Compton*, 428 F. 2d 18 (2d Cir. 1970), cert. denied, 401 U.S. 1014 (1971).

⁴⁵ *United States v. Lincoln*, 462 F. 2d 1368 (6th Cir.), cert. denied, 409 U.S. 952 (1972).

⁴⁶ *Roy v. United States*, 416 F. 2d 874 (9th Cir. 1969).

⁴⁷ *United States v. Hari*, 457 F. 2d 1087 (10th Cir.), cert. denied, 409 U.S. 861 (1972).

⁴⁸ *United States v. Patillo*, 438 F. 2d 13 (4th Cir. 1971) (en banc), aff'g 431 F. 2d 293 (1970).

⁴⁹ *United States v. Rogers*, 488 F. 2d 512 (5th Cir.), cert. granted, 419 U.S. 824 (1974).

⁵⁰ *Estate of Wells*, 50 T.C. 871 (1968), aff'd sub nom. *Ruehlmann v. Commissioner*, 418 F. 2d 1302 (6th Cir. 1969), cert. denied, 398 U.S. 950 (1970).

⁵¹ Cases cited notes 53 and 54, *infra*.

⁵² *Hicks v. United States*, 335 F. Supp. 474 (D. Col. 1971), aff'd on other grounds, 486 F. 2d 325 (10th Cir. 1973), cert. denied, 416 U.S. 938 (1974).

⁵³ *Ruehlmann v. Commissioner*, 418 F. 2d 1302 (6th Cir. 1969), cert. denied, 398 U.S. 950 (1970); *Howell v. United States*, 414 F. 2d 45 (7th Cir. 1969).

⁵⁴ *Davis v. United States*, 460 F. 2d 769 (9th Cir. 1972); *Cartwright v. United States*, 457 F. 2d 567 (2d Cir. 1972), aff'd, 411 U.S. 546 (1973).

⁵⁵ *United States v. Cartwright*, 411 U.S. 546, 550 (1973).

at the redemption price. In the interim, as Erwin Griswold put it, "thousands of cases [were] held in abeyance, and much bootless administrative conference and litigation [was] engendered."⁵⁶

9. *Priority of payment for withholding taxes under Bankruptcy Act.* Section 64(a) of the Bankruptcy Act governs the priorities to be accorded the debts of a bankrupt. The issue is the priority to be given to withholding taxes on pre-bankruptcy wage claims against a bankrupt employer. "The choice lies between the first priority (costs and expenses of administration), . . . the second priority (wages and commissions, limited as the statute specifies), . . . the fourth priority ('taxes which became legally due and owing by the bankrupt'), . . . and no priority at all."⁵⁷ In 1947 the Eighth Circuit held that withholding taxes were to be given first priority.⁵⁸ In the succeeding years the issue arose in at least three other circuits, with one following the Eighth in holding that the taxes were entitled to first priority,⁵⁹ one holding for the second priority,⁶⁰ and one holding for the fourth priority.⁶¹ In 1974 the Supreme Court granted certiorari, "primarily because the circuits [were] in disarray" on the issue, and held that the taxes were entitled to second priority.⁶² Thus the issue was settled—after more than 25 years of appellate litigation.

10. *Reservists' eligibility for readjustment payments.* On May 28, 1974, the United States Supreme Court handed down a decision in companion cases arising out of the following statutory provisions:⁶³

Congress has provided in 10 U.S.C. § 687(a) that an otherwise eligible member of a reserve component of the Armed Forces, who is involuntarily released from active duty, "and who has completed, immediately before his release, at least five years of continuous active duty, is entitled to a readjustment payment computed by multiplying his years of active service . . . by two months' basic pay of the grade in which he is serving at the time of his release." It is further provided that "[f]or the purposes of this subsection . . . (2) a part of a year that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded"

The question to be decided by the Court was

whether the "rounding" provision set forth in § 687(a)(2) is to

⁵⁶ Griswold, *The Supreme Court's Case Load: Civil Rights and Other Problems*, 1973 U. Ill. L.F. 615, 630 (1973).

⁵⁷ *Otte v. United States*, 419 U.S. 43, 55-56 (1974).

⁵⁸ *United States v. Fogarty*, 164 F. 2d 26 (8th Cir. 1947).

⁵⁹ *Lines v. California Dept. of Employ.*, 242 F. 2d 201 (9th Cir.), cert. denied, 355 U.S. 857 (1957).

⁶⁰ In re *Freedomland, Inc.*, 480 F. 2d 184 (2d Cir. 1973), aff'd sub nom. *Otte v. United States*, 419 U.S. 43 (1974).

⁶¹ In re *Connecticut Motor Lines, Inc.*, 336 F. 2d 96 (3d Cir. 1964).

⁶² *Otte v. United States*, 419 U.S. 43, 47 (1974).

⁶³ *Cass v. United States*, 417 U.S. 72, 73-74 (1974).

be applied in determining eligibility for readjustment pay, as well as in computing the amount of readjustment pay to which an eligible reservist is entitled, so that involuntarily released reservists who have completed four years and six months or more, but less than five years, of continuous active duty prior to their release are nonetheless entitled to a readjustment payment.

The Court of Claims held in 1971 that the rounding provision is applicable in determining eligibility for, as well as computation of, readjustment payments under § 687; the Supreme Court denied certiorari.⁶⁴ Two years later the Court of Appeals for the Ninth Circuit held that the rounding clause applied only to computation of readjustment payments. The Supreme Court granted certiorari "to resolve the conflict" and in 1974 adopted the Ninth Circuit view.⁶⁵

11. *Effect of intervening valid election on pending unfair labor practice proceedings.* When a National Labor Relations Board order sets aside a representation election because of an employer's unfair labor practices and proscribes such conduct in the future, are judicial proceedings to enforce the order rendered moot by an intervening valid election? This was the issue which received plenary consideration by the United States Supreme Court in the spring of 1970.⁶⁶ In 1962 the Ninth Circuit had held that an intervening valid election does moot the proceedings arising out of the earlier election.⁶⁷ Within the next four years two circuits explicitly refused to adopt the reasoning of the Ninth Circuit case.⁶⁸ When, in 1969, the Ninth Circuit adhered to its position,⁶⁹ the Supreme Court granted certiorari and after oral argument reversed the Ninth Circuit decision.

12. *Applicability of gun control statute to pawnor's redemption.* Under federal gun control legislation, 18 U.S.C. § 922(a)(6), it is unlawful knowingly to make a false statement "in connection with the acquisition . . . of any firearm . . . from a . . . licensed dealer." The issue is whether this provision covers the redemption from a pawnbroker of a firearm pawned by the defendant himself. The Ninth and Tenth Circuits held that the statute was applicable;⁷⁰ the Fifth Circuit held that it was not.⁷¹ The Supreme Court granted certiorari, heard argu-

⁶⁴ *Schmid v. United States*, 436 F. 2d 987 (Ct. Cl.), cert. denied, 404 U.S. 951 (1971).

⁶⁵ *Cass v. United States*, 417 U.S. 72, 74 (1974), aff'd 483 F. 2d 220 (9th Cir. 1973).

⁶⁶ *NLRB v. Raytheon Co.*, 398 U.S. 25 (1970).

⁶⁷ *General Engineering, Inc. v. NLRB*, 311 F. 2d 570 (9th Cir. 1962).

⁶⁸ *NLRB v. Metalab-Labcraft*, 367 F. 2d 471 (4th Cir. 1966); *NLRB v. Marsh Supermarkets, Inc.*, 327 F. 2d 109 (7th Cir. 1963), cert. denied, 377 U.S. 944 (1964).

⁶⁹ *NLRB v. Raytheon Co.*, 408 F. 2d 681 (9th Cir. 1969), rev'd, 398 U.S. 25 (1970).

⁷⁰ *Huddleston v. United States*, 472 F. 2d 592 (9th Cir. 1973), aff'd, 415 U.S. 814 (1974); *United States v. Beebe*, 467 F. 2d 222 (10th Cir. 1972), cert. denied, 416 U.S. 904 (1974).

⁷¹ *United States v. Laisure*, 460 F. 2d 709 (5th Cir. 1972).

ments, and wrote a full opinion "to resolve an existing conflict among the circuits."⁷² On the basis of an elaborate analysis, the Court affirmed the Ninth Circuit decision.

13. *Tax treatment of bad debt reserves in nonrecognition transactions.* The issue, in the words of the Harvard Law Review, is "the tax treatment of bad debt reserves when accounts receivable are transferred to a controlled corporation as a part of a section 351 nonrecognition transaction."⁷³ Under section 351 of the Internal Revenue Code, gain or loss is not recognized "if property is transferred to a corporation . . . by one or more persons solely in exchange for stock or securities in such corporation and immediately after the exchange such person or persons are in control . . . of the corporation." The Commissioner argued that under the "tax benefit" rule the transfer of the bad debt reserves resulted in taxable income. The Fifth Circuit agreed,⁷⁴ rejecting a Ninth Circuit decision of three years earlier.⁷⁵ The Supreme Court granted certiorari "to resolve the conflict"⁷⁶ and in 1970 adopted the view of the Ninth Circuit.

14. *Tax treatment of repayments under section 16(b) of the Securities Exchange Act.* When a corporate insider is required to disgorge short-swing profits realized in violation of section 16(b) of the Securities Act of 1934, how should those payments be treated for income tax purposes? The Commissioner of Internal Revenue maintains that repayments under § 16(b) should be treated as long term capital losses, while taxpayers argue that these payments are ordinary and necessary business expenses and thus should be allowed as deductions. Two judges have contended for yet a third approach.⁷⁷ In a series of decisions dating to 1956,⁷⁸ the Tax Court of the United States has sustained the taxpayer position. In 1970 the Sixth Circuit Court of Appeals rejected the taxpayer position and upheld the Commissioner.⁷⁹ The Tax Court has continued to adhere to its view; the Second and Seventh Circuits have now joined the Sixth in agreeing with the Commissioner.⁸⁰ A case raising the same issue is now pending in the Tenth Circuit.⁸¹ Thus, five years have passed since the issue was

⁷² *Huddleston v. United States*, 415 U.S. 814, 818 (1974).

⁷³ *The Supreme Court, 1969 Term*, 84 Harv. L. Rev. 1, 241 (1970).

⁷⁴ *Nash v. United States*, 414 F. 2d 627 (5th Cir. 1969), *rev'd*, 398 U.S. 1 (1970).

⁷⁵ *Estate of Schmidt v. Commissioner*, 355 F. 2d 111 (9th Cir. 1966).

⁷⁶ *Nash v. United States*, 398 U.S. 1, 3 (1970).

⁷⁷ *Cummings v. Commissioner*, 506 F. 2d 449, 454 (2d Cir. 1974) (Smith, J., concurring), *cert. denied*, 95 S. Ct. 1571 (1975), *rev'g on other grounds, Nathan Cummings*, 61 T.C. 1, 4 (1973) (Drennen, Jr., dissenting).

⁷⁸ *Laurence M. Marks*, 27 T.C. 464 (1956).

⁷⁹ *Mitchell v. Commissioner*, 428 F. 2d 259 (6th Cir. 1970), *cert. denied*, 401 U.S. 909 (1971).

⁸⁰ *Cummings v. Commissioner*, 506 F. 2d 449 (2d Cir. 1974), *cert. denied*, 95 S. Ct. 1571 (1975); *Anderson v. Commissioner*, 480 F. 2d 1304 (7th Cir. 1973).

⁸¹ Appeal in *Charles I. Brown*, T.C. Mem. 1973-275, 32 CCH T.C. Mem. ¶32.258 (1973).

first litigated in the courts of appeals; four circuits will soon have passed upon the matter; yet the question has not been resolved, and the litigation continues.

Prolonged uncertainty on an issue of this kind is an invitation to forum shopping as is illustrated by the response of a Washington, D.C., attorney to the questionnaire of Professor Gersham Goldstein, the Commission's consultant on tax law:

I can think of one situation where a client maintained two residences; had been filing his tax returns in Chicago; but had a reasonable option of filing them in New York instead. We had an issue of the deductibility of the return of "short-swing" profits under section 16(b) of the Securities Exchange Act. The Seventh Circuit decisions were adverse; there were no controlling Second Circuit decisions. The issue had been raised by revenue agents and a petition was filed in the Tax Court of the United States, where we expected and received a favorable decision. We anticipated that the government would appeal and, in order to make sure that the case was heard in the Second Circuit, we had the taxpayer firmly establish his residence in New York and file his income tax returns with the Service Center for that region. As anticipated the government finally did appeal the case to the Second Circuit.

As noted earlier, the Second Circuit ultimately followed the Seventh Circuit and adopted the Commissioner's position, thus frustrating the taxpayer's forum shopping.

15. *Applicability of compulsory license provision of Copyright Act to unauthorized tape duplicators.* Under the compulsory licensing provision of the Copyright Act, 17 U.S.C. § 1(e), a composer may select the licensee who will originally produce a record of his musical work, but thereafter any other manufacturer can also record the composition, provided that he pays a royalty of two cents per record; files a notice of intent to use; and makes a "similar use of the copyrighted work." In recent years there has been a proliferation of unauthorized duplication of recordings by so-called "tape pirates" who have sought to invoke the compulsory licensing provision as a defense to copyright infringement suits. The issue is whether "similar use" under that provision applies to those who make duplicates from authorized recordings. Four circuits have now held that making an identical copy of a recorded version of a copyrighted musical composition does not come within the compulsory licensing provision.⁸² In each case there was a dissent; in three of the cases the court of appeals was reversing the district court. Certiorari was sought and denied in three of the

⁸² *Fame Pub. Co. v. Alabama Custom Tape, Inc.*, 507 F. 2d 667 (5th Cir. 1975); *Jondora Music Pub. Co. v. Melody Rec., Inc.*, 506 F. 2d 392 (3d Cir. 1975), *cert. denied*, 43 U.S.L.W. 3644 (U.S. June 9, 1975); *Edward B. Marks Music Corp. v. Colorado Magnetics, Inc.*, 497 F. 2d 285 (10th Cir. 1974), *cert. denied*, 419 U.S. 1120 (1975); *Dutchess Music Corp. v. Stern*, 458 F. 2d 1305 (9th Cir.), *cert. denied*, 409 U.S. 847 (1972).

cases. In the second case, decided on January 20, 1975, the Supreme Court had asked the views of the Solicitor General, who recommended against granting review on the grounds that the decision below was correct and that there was no conflict.

Thus, after some years of appellate litigation demanding the attention of four courts of appeals, with a division of opinion among the judges and varying holdings by district courts, the issue remains unsettled. While the importance of the question has been reduced by a 1971 amendment to the Copyright Act (affecting compositions first recorded after February 15, 1972) and a 1973 Supreme Court decision permitting states to protect recordings under unfair competition laws,⁸³ continuing litigation can nevertheless be expected, if only because of the renewed popularity of many older songs.⁸⁴ In light of the other cases pressing for the Supreme Court's attention, the Court cannot be faulted for denying certiorari; the question remains whether a nationally binding decision would be desirable if additional appellate capacity were available.

16. *Corporate venue under the Judicial Code.* Does the last clause of the corporate venue statute, 28 U.S.C. § 1391(c), which clearly applies to corporate defendants, also expand the venue options available to corporate plaintiffs? The provision in question was enacted as part of the general revision of the Judicial Code in 1948. The issue was first litigated in 1949;⁸⁵ it has divided the text writers and the district courts; and it has been passed on by four circuits (all holding adversely to the plaintiff corporations), most recently by the Third Circuit in a full-dress opinion in 1974.⁸⁶ In 1967 the Supreme Court characterized the issue as "a difficult one, with far-reaching effects," and declined to decide the question.⁸⁷

17. *Allocation of interest income when corporation makes interest-free loan to subsidiary.* Under section 482 of the Internal Revenue Code, 26 U.S.C. § 482, the Commissioner is authorized to allocate income between a parent corporation and a subsidiary if he determines that apportionment "is necessary in order to prevent evasion of taxes or

⁸³ *Goldstein v. California*, 412 U.S. 546 (1973).

⁸⁴ See Petras, *Tape Piracy: The Hidden Costs*, Stereo Review, Jan. 1975, at 48: "Many tape pirates get around the federal copyright law, which prohibits the duplication only of recordings made after February 15, 1972, by copying program material recorded before that time. . . . Ordinarily, such program material—five, ten, or fifteen years old—would be considered 'old' and unsalable. But not today, in a country on a nostalgia binge that makes even a half decade long enough ago for its artifacts, including popular music, to be collectible. 'Oldies but Goodies' and 'Golden Goodies' are big business today, running into tens of millions of dollars, and (tape pirates) are seizing a large share."

⁸⁵ *Freiday v. Cowdin*, 83 F. Supp. 516 (S.D.N.Y. 1949).

⁸⁶ *American Cyanamid Co. v. Hammond Lead Products, Inc.*, 495 F. 2d 1183 (3d Cir. 1974).

⁸⁷ *Abbott Laboratories, Inc. v. Gardner*, 387 U.S. 136, 156-57 n. 20 (1967).

clearly to reflect the income of" the corporations. When a parent corporation makes an interest-free loan to a subsidiary, the Commissioner has sought to allocate to the parent income from interest on the loan. The issue is whether he may do so without showing that the borrowed funds actually produced income for the borrowing corporation—that is, without "tracing" the income. In a series of cases the Tax Court has held that if the parent corporation proves that a particular loan has not resulted in the production of gross income to the subsidiary, the Commissioner cannot allocate income to the parent.⁸⁸ Since 1972 the issue has been litigated in three circuits; in each case the court of appeals has reversed the Tax Court and rejected the need for "tracing."⁸⁹ In the Commission's survey of tax practitioners, one respondent referred to this line of cases as one which "appears to have the makings of a long-run melodrama," and cited it as an example of a situation in which conflict between the Tax Court and the circuits interjects confusion and uncertainty into the tax law.

18. *Jurisdiction of bankruptcy court to require telephone company to provide continued service to debtor.* Under the Bankruptcy Act, the district court sitting in bankruptcy has summary jurisdiction over property that is in the possession of the debtor or his trustee. The issue is whether the right to use a telephone number constitutes "possession" of that number. If it does, the bankruptcy court, in a summary proceeding, may enter an injunction compelling the telephone company to provide continued service to the debtor. In 1961, the Second Circuit held that the right to use a telephone number does not constitute possession of that number, so that the bankruptcy court did not have summary jurisdiction of the dispute between the debtor and the telephone company.⁹⁰ This decision was followed by the Ninth Circuit in 1971.⁹¹ In 1975, the Fifth Circuit, noting that the two earlier decisions "are extremely brief discussions of the issue," concluded that "they should not be followed," and upheld the summary jurisdiction of the bankruptcy court.⁹² A recurring issue thus remains unsettled and subject to further litigation in the lower courts, 15 years after the first appellate decision.

⁸⁸ *Huber Homes, Inc.*, 55 T.C. 598 (1971); *PPG Indus., Inc.*, 55 T.C. 928 (1970); *Smith-Bridgman & Co.*, 16 T.C. 287 (1951).

⁸⁹ *Kerry Investment Co. v. Commissioner*, 500 F. 2d 108 (9th Cir. 1974); *Kahler Corp. v. Commissioner*, 486 F. 2d 1 (8th Cir. 1973); *B. Forman Co. v. Commissioner*, 453 F. 2d 1144 (2nd Cir.), cert. denied, 407 U.S. 934 (1972). See also *Fitzgerald Motor Co. v. Commissioner*, 508 F. 2d 1096 (5th Cir. 1975), in which the Fifth Circuit joined in rejecting the Tax Court's tracing theory, but affirmed the Tax Court on other grounds.

⁹⁰ *Slenderella Systems of Berkeley, Inc. v. Pacific Tel. and Tel. Co.*, 286 F. 2d 488 (2d Cir. 1961).

⁹¹ In re *Best Re-manufacturing Co.*, 453 F. 2d 848 (9th Cir. 1971), cert. denied, 406 U.S. 919 (1972).

⁹² In re *Fontainebleau Hotel Corp.*, 508 F. 2d 1056 (5th Cir. 1975).

19. *Non-obviousness as jury question in patent validity case.* The validity of a patent depends on several components, including novelty, utility, and non-obviousness (invention). The first two are customarily held to present issues of fact. However, the circuits are divided on whether the element of non-obviousness is a factual question that may be submitted to a jury, or an issue of law to be decided by the judge alone. The question turns in large part on the proper interpretation of the relevant Supreme Court decisions. At least three circuits have held that non-obviousness is an issue of law,⁹³ while the Tenth Circuit has adhered to its view that non-obviousness is a factual question.⁹⁴ The issue is litigated frequently, as a review of the decisions in a recent Fifth Circuit opinion makes clear.⁹⁵ In the most recent Tenth Circuit case, in which the court acknowledged the conflict, the Supreme Court denied certiorari.⁹⁶ Justice Douglas, in an opinion dissenting from the denial, took note of the differing views among the circuits.

20. *Jurisdiction over plaintiff's claim against third-party defendant.* The issue is whether an independent basis of jurisdiction is necessary to support a plaintiff's assertion of a claim against a third-party defendant who has been impleaded under Fed. R. Civ. P. 14(a), or whether such a claim is within the ancillary jurisdiction of the court. The issue has been litigated in at least three circuits and in numerous district courts since 1950.⁹⁷ While every court of appeals to have passed on the issue has held that an independent basis of jurisdiction is required, the question remains the subject of widespread litigation and, as one judge stated in 1971, "there is still much disagreement on this point"⁹⁸ among the district courts. Moreover, because of the strong policy considerations in favor of avoiding "multiplicity of suits and piecemeal litigation,"⁹⁹ the commentators have called for re-examination of the issue by the courts.¹⁰⁰ Continued litigation can therefore be expected.

⁹³ *Swofford v. B & W, Inc.*, 395 F. 2d 362 (5th Cir.), cert. denied, 393 U.S. 935 (1968); *Hensley Equipment Co. v. Esco Corp.*, 375 F. 2d 432 (9th Cir. 1967); *Monroe Auto Equip. Co. v. Heckethorn Mfg. & Sup. Co.*, 332 F. 2d 406 (6th Cir.), cert. denied, 379 U.S. 888 (1964).

⁹⁴ *Moore v. Schultz*, 491 F. 2d 294 (10th Cir.), cert. denied, 419 U.S. 930 (1974); *Eimco Corp. v. Peterson Filters and Eng. Co.*, 406 F. 2d 431 (10th Cir. 1968), cert. denied, 395 U.S. 963 (1969).

⁹⁵ *Swofford v. B & W, Inc.*, 395 F. 2d 362 (5th Cir.), cert. denied, 393 U.S. 935 (1968).

⁹⁶ *Schultz v. Moore*, 419 U.S. 930 (1974).

⁹⁷ See cases cited in 3 J. Moore, *Federal Practice* ¶ 14.27 [1], n. 1 (2d ed. 1974).

⁹⁸ *Kenrose Mfg. Co. v. Fred Whitaker Co.*, 53 F.R.D. 491, 495 (W.D. Va. 1971), aff'd, 512 F. 2d 890 (4th Cir. 1972).

⁹⁹ *Buresch v. American LaFrance*, 290 F. Supp. 265, 267 (W.D. Pa. 1968).

¹⁰⁰ 3 J. Moore, *Federal Practice* ¶ 14.27 [1] (2d ed. 1974); 6 Wright & Miller, *Federal Practice and Procedure: Civil* § 1444 (1971) at 230-32.

II. CONFLICTS AND THE SUPREME COURT: A STUDY OF PETITIONS FOR CERTIORARI

The most acute examples of situations in which there is an absence of an authoritative national ruling are those in which there is a conflict between courts of appeals (or between a court of appeals and a state court or between state courts) on an issue of federal law. The resolution of such conflicts is widely regarded as a primary function of our one national court, and indeed it was not so long ago that the leading treatise on the jurisdiction of the Supreme Court could declare unequivocally that where there is a direct conflict between two courts of appeals on an issue of federal law, "the Supreme Court grants certiorari as of course, and irrespective of the importance of the question of law involved."¹ If a substantial number of conflicts are not being resolved by the Supreme Court today, this fact would provide a strong argument for the creation of a new tribunal with the judicial capacity and authority to fill the vacuum.

In June, 1974, the Commission launched a major project to determine the extent to which the Supreme Court is denying review despite the existence of a conflict. Professor Floyd Feeney, Executive Director of the Center on Administration of Criminal Justice at the University of California, Davis, agreed to undertake the project for us.

The results of the study may be summarized briefly. Considering only cases denied review, Professor Feeney found the number of genuine direct conflicts to be about five percent of the total sample studied. Taking the ratio of issues to not-argued cases in the cases reviewed, and applying it to the number of not-argued cases in the 1971 and 1972 terms, between 65 and 70 direct conflicts per term could be projected (see Table 25). Because some cases have more than one conflict issue, the number of cases would be slightly smaller: 63 in 1971, 66 in 1972 (see Table 26). If the ratio is applied to the 1973 term, Professor Feeney states, the number of direct conflicts would be 77. To put this figure in perspective, we note that it is about one-half of the total number of cases given plenary consideration by the Supreme Court each term.

The figures remain impressive even when duplicate issues, conflicts resolved at the time review is denied, and serious procedural problems are taken into account. The total number of projected conflicts is then 45 per year, based on the 1971 caseload, or 48 per year, based on the 1972 caseload (see Table 27). If we apply the same ratios to the number of direct conflicts projected for the 1973 term, the total is 55 or 56—the equivalent of about one-third of the number of cases given plenary consideration each term.

¹ R. Robertson & F. Kirkham, *Jurisdiction of the Supreme Court of the United States* 629 (R. Wolfson & P. Kurland ed. 1951).

Some witnesses at Commission hearings have suggested that the data on conflicts are heavily weighted by constitutional issues which the Supreme Court Justices felt were not yet ripe for definitive adjudication. In fact, fewer than half of the actual direct conflicts studied by Professor Feeney involved constitutional issues (see Table 15). What is more significant, when Professor Feeney studied the persistence of conflicts, he found that conflicts on constitutional issues were much more likely to be resolved than conflicts involving statutory or other issues (see Tables 18 and 19).

Moreover, the proportion of conflicts that were duplicated in the sample, or were resolved at the time of denial of certiorari, or arose in cases with serious procedural problems, was much higher among the constitutional cases than among other cases (see Table 23). Specifically, although statutory and other non-constitutional issues constituted little more than half of the total number of direct conflicts found (54%) they constituted almost exactly two-thirds of the total number when duplications, issues resolved at the outset, and serious procedural problems are taken into account. Thus, if we take the latter ratio, two-thirds, derived from the actual figures revealed by the sample (see Table 23), and apply it to the projections, we find that the number of direct non-constitutional conflicts not duplicated, not resolved at the outset, and without serious procedural problems would be 30 in the 1971 term, 32 in the 1972 term, and 36 in the 1973 term.

In the time available, Professor Feeney was able to review some but not all of the strong partial conflicts verified by his student associates. He estimates that there would be about 50 strong partial conflicts per term in the cases denied review, in addition to the direct conflicts. (The figures are 47 for the 1971 term and 50 for the 1972 term).

The significance of these strong partial conflicts as indicators of uncertainty in the national law should not be minimized, as some of the examples cited by Professor Feeney will demonstrate. If one takes the strong partial conflicts—either 47 or 50—and reduces them to take account of duplications, immediate resolution, and serious procedural problems, and if one assumes the same proportion of non-constitutional issues as in the direct conflicts, the total number of non-constitutional strong partial conflicts remaining in cases denied review would be about 22 to 24 per term. Adding these to the direct conflicts in the same category (*i.e.*, non-constitutional, not duplicated, not resolved at the outset and without serious procedural problems), the total would be between 50 and 60 per term. Professor Feeney also found a substantial number of conflicts which he characterized as “weak partial conflicts”; none of these has been included in these projections.

Professor Feeney's report is set forth in major part in the following pages. A historical introduction and some detail have been omitted; omissions are indicated by asterisks. Textual summaries and other interpolations are enclosed in brackets.

The report follows.

CONFLICTS INVOLVING FEDERAL LAW: A REVIEW OF CASES PRESENTED TO THE SUPREME COURT

By Floyd Feeney, June 4, 1975

This study is an attempt to analyze the extent of conflict in the lower courts and the nature of that conflict by an examination of the [paid petitions for certiorari and jurisdictional statements] presented to the Supreme Court during the 1971 and 1972 terms of court. These two terms of court were chosen as the most recent for which data were generally available at the time the study began in the summer of 1974. They were believed to be typical of the current workload and problems both of the Supreme Court and the federal appellate courts. In addition the 1971 term was one that was analyzed to some extent by the Freund Study Group. In all over 7,000 cases were disposed of by the Supreme Court in these two terms, as indicated in Table 1.³⁴

TABLE 1.—*Dispositions by the Supreme Court*

	1971 term	1972 term
Argued.....	160	174
Not argued, regular docket.....	1, 513	1, 619
Not argued, in forma pauperis.....	1, 961	1, 937
Total.....	3, 634	3, 730

The 3,900 in forma pauperis cases disposed of summarily in these two terms were not studied. Over 85 percent of these involve direct review of criminal proceedings of habeas corpus petitions, and they

³⁴ The figures in Table 1 are taken from a set of special statistics which includes the 1971 and 1972 terms of court. They were made available through the courtesy of Mr. Mark Cannon, Administrative Assistant to the Chief Justice. These figures were used in the study because they provide greater detail as to cases denied review than the regular Supreme Court statistical series. Because some categories in these statistics differs from those used in the regular Supreme Court series, the total number of cases indicated also differs slightly. Cases consolidated for oral argument are counted as one case in the argued case totals.

usually supply less than five percent of the cases taken by the Court.³⁵ Generally written by non-lawyers, the petitions are as a group less substantial and less well-presented than the cases on the regular docket. As a consequence they are both less likely to contain a conflict and less likely to highlight any conflict in the lower courts that may exist.³⁶ They are also less accessible for review by non-court personnel.³⁷

Another issue which the study faced was how to treat the appeal cases disposed of without argument. Formally these dispositions are on the merits, generally in terms of an affirmance or a dismissal.³⁸ Moreover, because these cases are part of the Court's obligatory jurisdiction they are not governed by Rule 19 and in theory the existence of a conflict has little to do with the granting of plenary review. In actuality, however, jurisdictional statements in cases on appeal have for some time been treated in essentially the same manner as certiorari petitions. The Court's rules require that such statements include "the reasons why the questions presented are so substantial as to require plenary consideration,"^{38A} and as long ago as 1930 Frankfurter and Landis suggested that the criterion of substantiality "operates to subject the obligatory jurisdiction of the Court to discretionary considerations not unlike those governing certiorari."^{38B} More recently, Mr. Justice Brennan stated:³⁹

The Court's practice, when considering a jurisdictional statement whereby a litigant attempts to invoke the Court's jurisdiction on appeal, is quite similar to its well known one on applications for writs of certiorari.

Thus, because conflicts can occur in appeal as well as certiorari cases and because of the similarity in the Supreme Court's own treat-

ment of these cases, these two categories have for the most part been analyzed in similar terms. Generally, as indicated in Table 2, appeals make up less than 15 percent of all non-argued cases.⁴⁰

TABLE 2.—Regular Docket Dispositions

	1971 term	1972 term
Argued.....	160	174
Certiorari denied.....	1,352	1,361
Summary appeals.....	142	245
Total.....	1,654	1,780

At the outset the intention was to study all cases for the two terms. Time and resources did not permit this to be accomplished, however, and ultimately the number of cases analyzed was about two-thirds of the total number of regular docket cases and half or more of each category except argued cases, as indicated in Table 3.

TABLE 3.—Cases Studied

	1971 term	1972 term
Argued.....	48	84
Certiorari denied.....	877	982
Summary appeals.....	108	155
Total studied.....	1,033	1,221
Total regular docket cases.....	1,654	1,780

While the cases were not selected according to strict rules of statistical sampling, the methods utilized contained no intentional biases and are believed to contain no actual bias.⁴¹ Because the central

⁴⁰ The "certiorari denied" category includes other summary certiorari dispositions including "judgment vacated" and "judgment affirmed." There are 59 of these in the 1971 term and 93 in the 1972 term. Table 2 omits the small number of regular docket extraordinary cases such as mandamus or prohibition (19 in 1971 and 11 in 1972). "Summary appeals" covers all non-argued appeals including those affirmed, reversed, dismissed for want of a substantial federal question, dismissed, dismissed and denied, denied, and vacated and remanded. The statistics for other terms are not available in the same format at this writing. The figures on appeals for these two terms appear to be more or less typical.

⁴¹ The study was initially intended to cover all cases from the 1971 and 1972 terms. Cases reviewed were consequently selected on the basis of availability of documents rather than randomly. When it became apparent that time would not permit analysis of all cases, a check of the selection patterns used was made to see if there were any apparent biases. None were found. Limited analysis of the characteristics of the cases actually selected with the few known characteristics of all cases also suggests that the sample is representative.

³⁵ See, e.g., The Federal Judicial Center, Report of the Study Group on the Caseload of the Supreme Court A3, A8-9 (1972).

³⁶ Many of these petitions are handwritten and very short. Often they are unclear or confusing as well. See description in Lewis, Gideon's Trumpet (1965); Prettyman, Death and the Supreme Court (1966).

³⁷ Regular docket petitions for certiorari and jurisdictional statements are available for review at a number of depository libraries and in part through the Microcard Company. In forma pauperis cases are available only at the Supreme Court.

³⁸ In the 1972 term, of 245 appeals filed and not argued, 101 were affirmed, 101 were dismissed, 39 vacated, and 4 reversed.

^{38A} Sup. Ct. R. 15 (e), (f).

^{38B} Frankfurter and Landis, *The Business of the Supreme Court at October Term 1929*, 44 Harv. L. Rev. 1, 14 (1930).

³⁹ *Ohio ex. rel. Eaton v. Price*, 360 U.S. 246 (1959). See also Frank, *The United States Supreme Court: 1950-51*, 19 U. Chi. L. Rev. 165, 231 (1952); Stern and Gressman, *Supreme Court Practice* 230-38 (4th ed. 1969). Despite statements like that of Mr. Justice Brennan, however, some confusion as to the effect of summary disposition appears to continue.

focus of the study is the extent of conflicts in cases not granted review by the Supreme Court, the discussion which follows will concern not-argued cases except where indicated otherwise.

Conflicts Claimed

Each case included within the study was read and classified by a law student or a recent law graduate. Cases in which a conflict was asserted were classified as "conflict claimed" without regard to the merit of the assertion. In other words, if the petitioner or the appellant claimed a conflict, the case was classified initially as a "conflict claimed" no matter how specious the claim.

[Intra-circuit conflicts were not classified as "conflicts" for the purposes of the study. All other conflicts on issues of federal law were included. For this purpose it made no difference whether either the judgment brought up for review or the judgment with which it was allegedly in conflict was handed down by a state court, a federal court of appeals, or a federal district court. Conflicts on issues of state law were of course excluded.]

One important problem in making this classification was how to deal with cases in which the petitioner's argument was not clear. As many earlier writers have noted, this is not an infrequent situation.⁴² Particularly difficult is the case in which there is no mention of conflict but in which the principal authority or argument cited by the petitioner are cases from the courts of another circuit or state. Because the logic of the argument in these cases—to the extent that there is any—is that of conflict, these cases were also classified as a "conflict" case.

Using these classifications, conflicts were claimed or present in over one-third of all cases in which review was denied, as shown in Table 4. About five percent of all conflicts claimed or present were cases in which petitioner's line of argument was not clear and the claim of conflict was inferred.

TABLE 4.—*Conflicts Claimed or Present (non-argued cases, regular docket)*
[In percent]

	1971 term	1972 term
Conflict explicitly claimed.....	31	28
Conflict present in petition.....	3	5
Total claimed or present.....	34	33
Total petitions reviewed.....	(935)	(1,122)

* * *

⁴² 108 U. Pa. L. Rev. 1160, 1179 (1960).

In one-fifth of the cases with a conflict claimed or present, two or more conflicts were asserted. * * * The total number of conflicts claimed is thus larger than the number of cases in which a conflict is claimed. Specifically, a total of 966 conflicts were claimed in 727 cases on the paid docket.

The Nature of Conflicts Claimed or Present

Not all conflicts claimed are in fact conflicts. As it is generally believed that a conflict among the lower courts increases the likelihood of review by the Supreme Court, there is a natural tendency on the part of attorneys to assert any point that can be claimed as a conflict.⁴⁶

In order to determine the validity of the conflicts claimed, each case in which a conflict was asserted was classified into one of four categories:

(1) Direct conflict—A case in which the decision below deals with the same explicit point as some other case and reaches a contradictory result.

(2) Strong partial conflict—A case in which the decision below is in the same general area of the law as some other case and where the implications of the doctrine followed in one case would compel an opposite result in the other. These cases are not considered as conflicting directly because the points involved are not exactly the same.

(3) Weak partial conflict—A case in which there is some degree of legitimacy to the claim of conflict but where the conflict is more attenuated than in the strong partial category.

(4) No genuine conflict—A case in which a conflict is claimed but in which examination indicates no genuine inconsistency in outcome or doctrine.

How solid are these classifications? The judgment as to whether a conflict exists or not is often quite a difficult one. The literature abounds with adjectives for describing conflicts: "true conflicts," "genuine conflicts," "head-on collisions," "sideswipes" and the like. The easiest case is that in which there are clearly stated rules of law that conflict as to the exact same subject matter, and the conflict is acknowledged by one or more of the courts involved. Most conflicts are not so clean, however. Many involve rule applications to divergent fact situations. For these cases the issue is necessarily one involving judgment, and opinions often differ as to the outcome. One of the early articles in this area disputed all seven of the "conflicts" identified by Stern, one of the acknowledged masters of Supreme Court practice,

⁴⁶ See Frankfurter and Landis, *The Business of the Supreme Court*, 212 n. 115 (1927), for an example illustrating the quickness of counsel to take advantage of the rules in other circumstances.

and writing about cases in which either the court below or the respondent had acknowledged a conflict.⁴⁸

Each of the cases initially classified as a direct conflict has been reviewed by the author and generally by two students. Each of the strong partial conflicts has been reviewed by one student, most by two students, some by a law professor, and over one-third by the author.⁴⁹ Other cases, including those in which no conflict was claimed, were monitored on a sample basis by the author. This process does not eliminate the likelihood that another evaluator would not classify some of the cases differently. That would almost surely occur. The process does provide some assurance of uniformity of judgment, however, and indicates at least some degree of care in the classification.

[For the purposes of the study, an acknowledgment of conflict by the lower court or by the respondent was taken as persuasive but not conclusive evidence of the existence of a conflict. In a few instances no direct conflict was found despite such an acknowledgment.]

Following are some examples of issues classified as direct conflicts:

- the standard for determining the validity of design patents. The Ninth Circuit and the Court of Customs and Patent Appeals have defined "obviousness" in terms of the "ordinary intelligent man" while the Third Circuit is using the standard of a "worker of ordinary skill in the art."⁵⁰
- constitutionality of hair length regulations. There are many decisions on this issue; by one count, 26 upholding and 18 denying constitutionality.⁵¹
- validity of seizure via search warrant of personal papers not subject to subpoena because of privilege against self-incrimination.

⁴⁸ Compare Stern, *Denial of Certiorari Despite a Conflict*, 66 Harv. L. Rev. 465 (1953), with Roehner and Roehner, *Certiorari—What is a Conflict Between Circuits?* 20 U. Chi. L. Rev. 656 (1953).]

⁴⁹ Special appreciation is expressed to Professor James Hogan, University of California, Davis, School of Law, who assisted greatly in this undertaking. The judgments involved in evaluating the strong partial conflicts are necessarily even more subjective than those involving direct conflicts. By definition these cases have distinguishable features, and the question is: are the distinguishing factors stronger than the similarities? Judgments by the author and Professor Hogan agreed in about 90 percent of the cases reviewed by both.

⁵⁰ Compare *Hadco Products, Inc., v. Walter Kidde & Co.*, 462 F. 2d 1265 (3d Cir.), cert. denied, 409 U.S. 1023 (1972) with *In re Laverne*, 356 F. 2d 1003 (CCPA 1966) and *Schwinn Bicycle Co. v. Goodyear Tire & Rubber Co.*, 444 F. 2d 295 (9th Cir. 1970).

⁵¹ Compare *Karr v. Schmidt*, 460 F. 2d 609 (5th Cir.) (en banc), cert. denied, 409 U.S. 989 (1972) with *Richards v. Thurston*, 424 F. 2d 1281 (1st Cir. 1970). Justice Douglas recognized the conflict in dissenting from the denial of certiorari in *Freeman v. Flake*, 448 F. 2d 258 (10th Cir. 1971), cert. denied, 405 U.S. 1032 (1972).

The second Circuit has refused to suppress in this situation while the Seventh has suppressed.⁵²

—whether the refusal of non-striking employees to cross the picket lines of a common employer is protected activity under Section 7 of the NLRA. The Fourth Circuit has said that it is protected and the Seventh that it is not.⁵³

—whether a defendant in a FELA case is entitled to a jury charge that any award is not subject to diminution by taxes. The Third Circuit has held that such an instruction is mandatory while the Fifth has said it is not.⁵⁴

—the method to be used in filing a motion for a new trial under Rule 60(b) in cases in which an appeal has been taken. The First Circuit requires the motion to be made initially in the court of appeals; the Fifth, in the district court.⁵⁵

These are some examples of issues classified as strong partial conflicts:

—whether the applicable statute of limitations in private actions for 10(b)(5) securities violations is that of the state blue sky or the state fraud statute. The Eighth Circuit has used the blue sky statute, while the Tenth has used the fraud statute. The conflict is not classified as a direct conflict because the different views on the statute of limitations issue could be attributable to different approaches to the scienter requirement.⁵⁶

—constitutionality of ordinance imposing joint and several liability upon lessors as well as lessees of automobiles for parking fines. The New York courts held this ordinance valid, while other state courts have struck down more general statutes holding car owners liable for parking tickets where there was no opportunity for the owner to show that he was not responsible.⁵⁷

⁵² Compare *Scharfman v. United States*, 448 F. 2d 1352 (2d Cir. 1971), cert. denied, 405 U.S. 919 (1972) with *Hill v. Philpott*, 445 F. 2d 144 (7th Cir.), cert. denied, 404 U.S. 991 (1971).

⁵³ Compare *NLRB v. Union Carbide Corp.*, 440 F. 2d 54 (4th Cir.), cert. denied, 404 U.S. 826 (1971) with *NLRB v. Illinois Bell Tel. Co.*, 189 F. 2d 124 (7th Cir.), cert. denied, 342 U.S. 885 (1951).

⁵⁴ Compare *Western Railway of Alabama v. Blue*, 469 F. 2d 487 (5th Cir. 1972), cert. denied, 410 U.S. 956 (1973) with *So. Pac. Co. v. Guthrie*, 180 F. 2d 295 (9th Cir. 1951).

⁵⁵ Compare *Dumestre v. Travelers Ins. Co.* (5th Cir. 1972) (unreported), cert. denied, 410 U.S. 955 (1973) with *Wilson Research Corp. v. Piolite Plastics Corp.*, 336 F. 2d 303 (1st Cir. 1964). See also *Ferrell v. Trailmobile*, 223 F. 2d 697 (5th Cir. 1955).

⁵⁶ Compare *Mitchell v. Texas Gulf Sulphur Co.*, 446 F. 2d 90 (10th Cir.), cert. denied, 404 U.S. 1004 (1971) with *Vanderboom v. Sexton*, 422 F. 2d 1233 (8th Cir.), cert. denied, 400 U.S. 852 (1970).

⁵⁷ Compare *Kinney Car Corp. v. City of New York*, 295 N.Y.S. 2d 288 (N.Y.C. 1968), affirmed without opinion, 28 N.Y. 2d 741 (Court of Appeals) (1971), cert. denied, 404 U.S. 803 (1971) with *Seattle v. Stone*, 67 W. 2d 886, 410 P. 2d 583 (1966).

—the effect of a divorce decree on the right to U.S. government life insurance proceeds where the named beneficiary has not been changed. The Ninth Circuit awarded the proceeds to the ex-wife. The Fifth Circuit went the opposite way in an earlier case based on a property settlement rather than a divorce decree and containing some other procedural and policy differences.⁵⁸

[These are some examples of issues classified as weak partial conflicts:]

—the time for determining when a party is “transacting business” for venue purposes under the Clayton Act. The Fifth Circuit determines this at the time of filing; the Ninth at the time the cause of action accrued. There is, however, some doubt in this case as to whether the facts are within the conflict.⁵⁹

—effect of a stipulation by counsel in a criminal case. The Fifth Circuit allowed a stipulation to be breached over defendant’s objection. The Third and Eighth Circuit had earlier refused to do so in somewhat different factual situations.⁶⁰

Of the 966 conflicts claimed in 727 regular docket cases in which review was denied, 98 are estimated to be direct conflicts, as shown in Table 7. This figure includes 90 conflicts determined by the author to be present in cases reviewed by him and an estimated eight additional conflicts in cases not reviewed.⁶¹

TABLE 7.—Direct conflicts

	Number of issues
Direct conflicts in reviewed cases.....	90
Estimated in cases not reviewed.....	8
Total direct conflicts.....	98

The number of strong partial conflicts is estimated to be around 70. * * * [This figure includes 34 strong partial conflicts in cases reviewed by the author and an estimated 36 conflicts in cases not reviewed.]

The total extent of conflict in the cases studied is thus as indicated in Table 9. * * *

⁵⁸ Compare *Taylor v. United States*, 459 F. 2d 1007 (9th Cir.) (per curiam) cert. denied, 409 U.S. 967 (1972) with *O'Brien v. Elder*, 250 F. 2d 275 (5th Cir. 1957).

⁵⁹ Compare *Datamedia Computer Service, Inc. v. AVM Corp.*, 441 F. 2d 604 (5th Cir.), cert. denied, 404 U.S. 854 (1971) with *Eastland Construction Co. v. Keasbey and Mattison Corp.*, 358 F. 2d 777 (9th Cir. 1966).

⁶⁰ Compare *Cook v. United States*, 461 F. 2d 906 (5th Cir.), cert. denied, 409 U.S. 949 (1972) with *Burstein v. United States*, 232 F. 2d 19 (8th Cir. 1956).

⁶¹ All cases initially classified by students as direct conflicts were reviewed by the author, as were a substantial number of cases initially classified as strong partials. Some of the latter turned out on review to be direct conflicts. The estimates of additional conflict cases relate to this category.

TABLE 9.—Degree of conflict

	Number of issues	Percent
Direct conflicts.....	98	10
Strong partial conflicts.....	70	7
Weak partial conflicts.....	90*	9
No genuine conflict.....	708	73
Total.....	966	100

* Based on 14 in reviewed cases and an estimate of 76 for cases not reviewed.

The 98 direct conflict issues identified in Table 9 come from an estimated 93 cases, as indicated in Table 10. This is based on 86 actual cases for the 90 direct conflict issues found plus an estimated seven more from the unreviewed cases.

TABLE 10.—Degree of conflict

	Number of cases	Percent
Direct conflicts.....	93	13
Strong partial conflicts.....	65	9
Weak partial conflicts.....	80	11
No genuine conflict.....	487	67
Total.....	725	100

NOTE.—Cases in this table with more than one conflict are classified by the highest level of conflict. The figures for strong and weak partial conflicts are also based on estimates.

* * *

Analysis of the Direct Conflicts

[As Table 9 indicates, the study found 168 direct and strong partial conflicts in the sample, not including 80 weak partial conflicts which will not be considered further here. These data, of course, require analysis to determine how many are directly relevant to the Commission’s concerns. The discussion in this section will be confined to the 90 direct conflicts reviewed by the author.

[We begin by showing the diversity of issues found in the sample. It is noteworthy that of the 90 conflicts, only three were classified as tax issues and three as patent issues. The full range of issues is indicated in Table 10A.]

TABLE 10A.*—Direct conflicts—Subject matter (issues reviewed only)

	1971 term	1972 term	Total
Tax.....	1	2	3
Patent.....	2	1	3
Civil procedure.....	3	1	4
Private actions under Federal statutes.....	2	3	5
Federal jurisdiction.....	4	3	7
Personal rights.....	5	3	8
Labor.....	5	5	10
Criminal**.....	26	22	48
Other.....	—	2	2
Total.....	48	42	90

* This table and table 10B are taken from Professor Feeney's appendix.
** Includes both constitutional and nonconstitutional issues.

[As might have been anticipated, the majority of the direct conflicts were between federal courts of appeals—more than two-thirds, as shown by Table 10B:]

TABLE 10B.—Direct conflicts—With whom (reviewed cases only)

	1971 Term	1972 Term	Total
Circuit versus circuit.....	35	27	62
Circuit versus district court.....	2	3	5
Circuit versus State.....	5	7	12
State versus State.....	4	3	7
Other.....	2	2	4
Total.....	48	42	90

* * *

[One problem in assessing the significance of the 90 direct conflicts is the fact that issues may overlap with each other—that is, the same issue may have come up more than once in the sample.] Over 130 petitions for review on death penalty issues were reported to have been involved in the outcome of the *Furman* case, for example.⁶² To assess this problem each conflict was examined to determine: (1) whether it overlapped with any other direct conflict case, and (2) whether it was denied review contemporaneously with a Supreme Court decision which resolved the conflict.

⁶² See The Federal Judicial Center, Report of the Study Group on the Caseload of the Supreme Court A3 (1972).

About 13 percent of the total number of conflicts, as indicated in Table 13, result from issues that overlap with another conflict issue. Counting each issue as one issue irrespective of the number of times it appears in the sample, the total number of conflict issues is 78.

TABLE 13.—Direct conflicts—Extent of duplication

Number of direct conflicts.....	90
Number of overlapping issues.....	9
Number of conflicts that duplicate.....	12
Number of unduplicated issues.....	78

Fifteen issues, 12 of them unduplicated, were resolved by the Supreme Court within a few days of the date that review was denied by the Supreme Court.⁶³ While in one sense these are conflict cases denied review, it seems clear that for the most part the denial of review is simply a judgment that, given the outcome of the conflict asserted in the Supreme Court, there is no reason to review the case. If these cases are subtracted from the number of direct conflicts, the total is 66 conflicts, as shown in Table 14.

TABLE 14.—Direct conflicts—Extent resolved at outset

	Total conflicts	Unduplicated conflicts
Direct conflicts.....	90	78
Resolved at outset.....	15	12
Unresolved direct conflicts.....	75	66

Over 45 percent of the direct conflict cases concern constitutional issues. About one-third deal with statutory questions and the remaining 30 percent with rules of procedure, evidence, and the like, as indicated in Table 15.

TABLE 15.—Type of issue involved

	Number	Percent
Constitutional.....	41	45
Statutory.....	29	32
Other (Rules, evidence, etc.).....	20	22
Total direct conflicts.....	90	100

⁶³ One conflicting case involved a district court decision which was reversed by the Ninth Circuit four days prior to the denial of certiorari.

The proportion of total conflicts that are either duplicated or resolved at the outset is much higher among the constitutional cases, as shown in Table 16.

TABLE 16.—Direct conflicts—Extent duplicated and resolved

	Issues	Unduplicated issues	Unduplicated and unresolved at outset
Constitutional.....	41	32	25
Statutory.....	29	27	23
Other (rules, evidence, etc.).....	20	19	18
Total.....	90	78	66

How long do conflicts last? Each case that was classified as a direct conflict was followed up to determine whether the conflict was ever resolved and if so, how. Most of the direct conflicts were not resolved, as shown in Table 17.

TABLE 17.—Degree of resolution (number of issues)

	Resolved	Partially resolved	Not resolved
Direct conflicts.....	26	3	61
Strong partial conflicts.....	4	1	17

A much higher percentage of the direct conflicts involving constitutional issues are resolved than are those involving statutory or other issues, as shown in Table 18.

TABLE 18.—Direct conflicts resolved

	Constitutional	Statutory	Other (rules, evidence, etc.)
Resolved.....	17	6	2
Unresolved.....	22	22	18
Partial.....	2	1	—

Considering only the unduplicated issues, this picture is about the same, as shown in Table 19.

TABLE 19.—Unduplicated direct conflicts resolved

	Constitutional	Statutory	Other (rules, evidence, etc.)
Resolved.....	16	6	2
Unresolved.....	15	19	18
Partial.....	1	1	—

[Of the 29 conflicts that were resolved as of the cut-off date, 24 were resolved by decision of the Supreme Court and 5 by decisions of lower courts.]

TABLE 20.—How direct conflicts resolved (number of issues)

	Direct conflicts
Supreme Court.....	24
Legislature.....	—
Lower courts.....	5

Most issues, other than those decided contemporaneously with the denial of review by the Supreme Court, have continued for at least two years, and many for more than three years, as indicated in Table 21.

TABLE 21.—Length of direct conflicts

	Direct conflicts
Same day or prior.....	13
1 day to 1 year.....	7
1 to 2 years.....	12
2 to 3 years.....	35
Over 3 years.....	23

NOTE.—The length of continuation is measured from the date of denial of review in the principal case to resolution or April 1, 1975, whichever comes first.

Two additional problems involved in the analysis were: (1) how to treat cases having alternate bases of decision, one of which was a conflict and the other of which was not, and (2) how to treat cases in which there was a conflict but also some procedural flaw which might either prevent or inhibit an appellate court in reaching the issue involved in the conflict. Arguably neither of these categories should be

called a conflict. [Both however, were treated as such on the ground that the primary aim of the study was to determine the extent of disuniformity rather than to analyze the Supreme Court's decisions on whether to grant review.]⁶⁴

Some procedural problem existed in about 20 percent of the cases involving direct conflicts, as indicated in Table 22. Over three-fourths of these problems arose in cases involving conflicts on constitutional issues.

TABLE 22.—*Procedural Problems*

	Total issues	Constitutional	Statutory	Other (rules, evidence, etc.)
Untimely filing.....	6	2	2	2
No final judgment.....	3	3	*	—
Failure to raise below.....	5	4	—	1
Adequate non-Federal ground.....	3	3	—	—
Other.....	1	1	—	—
Total.....	18	13	2	3

*One statutory case had two problems; it is classified as untimely filing but it also lacked a final judgment.

These problems are not of equal importance. Those involving untimely filing and lack of a final judgment involve housekeeping rules which are often not observed. Those involving failure to raise the issue below and the existence of an adequate non-federal ground for decision are more serious and generally preclude review. If the eight cases involving the more serious problems are also subtracted from the total conflicts, the resulting number of conflicts that are unduplicated, unresolved at the outset and without serious procedural problems is 61, as indicated in Table 23.

Some Projections

Viewed in terms of all regular docket cases in which review is denied * * *, the number of genuine direct conflicts is about five percent of the total, as shown in Table 24.

Taking the ratio of issues to not-argued cases in the cases reviewed, and applying it to the number of not-argued cases in the 1971 and 1972

⁶⁴ The definition of conflict given by Professor Carrington [Federal Appellate Caseloads and Judgeships: Planning Judicial Workloads for a New National Forum (a report to the Commission on Revision of the Federal Court Appellate System)] would be more restrictive.

terms, and utilizing the lower of the two figures, at least 65 direct conflicts per year could be projected, as indicated in Table 25.⁶⁵

TABLE 23.—*Direct conflicts—Serious procedural problems*

	Constitutional	Statutory	Other (rules, evidence, etc.)	Total
Direct conflicts.....	41	29	20	90
With serious procedural problems..	8	—	1	9
Unduplicated and unresolved at outset.....	25	23	18	66
Minus serious procedural problems..	4	—	1	5
Total unduplicated, unresolved at outset and without serious procedural problems.....	21	23	17	61

TABLE 24.—*Degree of conflict (not argued cases only)*

	Number of issues	Percent of total cases reviewed
Direct conflicts.....	98	4.6
Strong partial conflicts.....	70	3.3
Total cases reviewed.....	2, 122	100.0

TABLE 25.—*Projected conflicts—Number of issues*

	Projection Based on 1971 Term	Projection Based on 1972 Term
Direct conflicts.....	66	70
Strong partial conflicts.....	47	50
Number of cases in term.....	(1, 435)	(1, 513)

NOTE.—Certiorari vacated and remanded cases are omitted from the base for this projection. See note 40.

⁶⁵ The projections in Table 25 were developed by dividing the total number of conflicts found in the study by the total number of cases reviewed and then multiplying the result by the number of cases in a particular term of Court.

Using similar methods of projection there would be about 60 to 65 cases per year with a direct conflict, as indicated in Table 26. [If both direct and strong partial conflicts are included, the total would be more than 100.]

TABLE 26.—Projected conflicts—Number of cases

	Based on 1971 term	Based on 1972 term
Direct conflicts.....	63	66
Strong partial conflicts.....	44	46

If duplicate issues, cases resolved at the time review is denied and procedural problems are all taken into account, the total number of projected conflicts based on 1971 and 1972 term caseloads is 45 or so per year, as shown in Table 27.

TABLE 27.—Projected direct conflicts: Number of issues not duplicated, not resolved at outset and without serious procedural problems

	Based on 1971 term	Based on 1972 term
Direct conflicts.....	66	70
Unduplicated direct conflicts.....	58	62
Unduplicated and unresolved conflicts.....	48	51
Unduplicated, unresolved and without serious procedural problems.....	45	48

NOTE.—Projections include estimates for cases not reviewed.

In drawing conclusions from these figures the assumptions and definitions upon which they are based should be kept in mind. The underlying decision as to the existence of a conflict is necessarily subjective. Some cases involve procedural problems or some alternate basis for decision other than the conflict issue. In addition some conflict issues are settled within a year or two under the present system.

There are also alternative methods which might have been used in making projections. The time and information available did not allow all of these to be tested. A number were tested, however, with results generally similar to the projections above. Thus, if certiorari cases in which the judgment is vacated and remanded are included in the base upon which the projections are made, the total number of direct conflicts is 69 for the 1971 term and 74 for the 1972 term. If separate calculations are made for the certiorari denied and summary appeal

cases (and the certiorari cases vacated and remanded are excluded), the totals are 67 and 67, respectively.

If the continuing increase in filings is taken into account, the total number of direct conflicts using the three methods for the 1973 term would be 77, 79, and 77, respectively.⁶⁶

As all three methods used for making projections produce generally similar results and since these methods involve the assumptions most likely to be true, the conclusion that there are 65 or so direct conflicts a year in the cases denied review seems warranted. [If strong partial conflicts are added, the total is over 100.]

Summaries of selected conflict cases. As noted above, a wide range of issues is found in the cases in which certiorari was denied despite a conflict. The following summaries, adapted from those prepared by Professor Feeney, will give an idea of the kinds of conflicts found in the sample.

1. *Fields v. Schwyler*, 411 U.S. 987 (1972). The issue was the validity of a design patent for a ballpoint pen. The Commissioner of Patents denied the patent because it involved modifications "obvious . . . to a person of ordinary skill working in this field." The Court of Appeals for the District of Columbia Circuit affirmed the denial, rejecting petitioner's claim that the test should have been whether the modifications would have been obvious to an ordinary person rather than to an ordinary person working in the field. In so holding, the D.C. Circuit disagreed with contrary decisions by the Ninth Circuit and the Court of Customs and Patent Appeals; the Second, Third, and Fourth Circuits are in accord with the D.C. Circuit. The Commissioner of Patents acknowledged the conflict and agreed that certiorari should be granted. The conflict is particularly acute because the D.C. Circuit and the CCPA (on opposite sides of the conflict) have concurrent jurisdiction to review validity determinations by the Patent Office. Mr. Justice Stewart and Mr. Justice White noted that they would have granted certiorari.

2. *Kocher v. United States*, 411 U.S. 931 (1973). This is a tax case in which the issue is the government's right under IRC § 7403 to sell property in which the taxpayer is only part owner (paying the other owners their share of the proceeds). The Second Circuit, following decisions of the Seventh, Fourth, and Ninth Circuits, held that the government may do so. There is a clear conflict, conceded by the government and the courts, with a 1962 decision of the Fifth Circuit.

3. *Milstein v. GAF Corp.*, 406 U.S. 910 (1972). Section 13(d) of the Securities Exchange Act requires any person who acquires more than

⁶⁶ The number of cases acted on in the 1973 term was 3961. This was an increase from 3816 in the 1972 term and 3737 for the 1971 term. The number of summary decisions (certiorari denied, appeals dismissed, etc.) was 1719 as compared with 1617 and 1510. U.S. Supreme Court, Office of the Clerk, October Term 1973, Statistical Sheet No. 27 (Final).

ten percent (now five percent) of a class of registered equity security to file a certain statement with the SEC. A group is considered a "person for the purposes of the section." The issue is whether § 13(d) is triggered by forming a "group" with the requisite amount of stock or whether the group must, in addition, agree to acquire new amounts of stock. The Second Circuit, explicitly refusing to follow a Seventh Circuit decision, held that the additional element is not required. Mr. Justice Stewart noted that he would have granted certiorari.

4. *American Airlines v. Locaynia*, 409 U.S. 982 (1972). This case concerned a veteran's entitlement to vacation pay under section 9 of the Universal Training and Service Act. If vacation pay is a property right which accrues as the result of attaining a certain degree of seniority, then a returning veteran will be entitled to full vacation pay even though he worked very little during the preceding year. If vacation pay results from having worked a certain period of time, then a returning veteran's right to pay will be governed by that section of the act which provides "other benefits" to veterans on the same basis as they are granted to employees on non-military leave, and the veteran who was in the service most of the year will not be entitled to any vacation pay. The Ninth Circuit held that vacation pay comes from seniority; the Tenth Circuit and, less clearly, the Fifth have gone the other way. There have been quite a few additional cases, and most openly acknowledge the disarray in the circuits.

On February 18, 1975, the Supreme Court held that the statute does not entitle a veteran to vacation benefits when, because of his departure for military service, he has failed to satisfy a substantial work requirement upon which the vacation benefits are conditioned. The Court noted that it had granted certiorari "because of an apparent conflict" between the Third Circuit decision under review and two other decisions, one of them the *Locaynia* case. *Foster v. Dravo Corporation*, 95 S. Ct. 879, 882 (1975).

5. *Cirillo v. United States*, 410 U.S. 989 (1973). Petitioner was convicted of conspiracy to import heroin and possession of heroin. At the trial the district court admitted hearsay evidence as to the conspiracy from alleged co-conspirators, having first established that there was independent evidence of the conspiracy. Petitioner claimed that this was an improper procedure and that the court should have left the admissibility issue to the jury under an instruction not to consider the hearsay evidence unless it first found the existence of a conspiracy from independent evidence. The Second Circuit affirmed the district court. The conflict here is with *Schmeller v. United States*, a 1944 Sixth Circuit case which held that failure to give the instruction on admissibility was reversible error. The Fifth Circuit also once had the *Schmeller* rule but has now adopted the Second Circuit's view, as have the Third Circuit and the Ninth Circuit. In a 1970 case, the Sixth Circuit questioned the "logic and appropriateness" of the

Schmeller rule and appeared to limit the case to its facts; the court has had no occasion to reconsider the issue in full. The issue has been presented to the Supreme Court in varying forms on at least three prior occasions; one of the other petitions was denied in the same term as Cirillo's.

6. *Castell v. United States*, 406 U.S. 918 (1972). The issue in this case is whether a federal indictment for possession of stolen goods transported in interstate commerce must allege the place from which the property is taken. The Fourth Circuit, in line with notice pleading concepts, held that the allegation was not required. This holding is in conflict with the Third Circuit's 1956 decision in *United States v. Manuszak*. Although the Fourth Circuit's decision in *Castell* is unreported, the court apparently followed a 1971 decision in which it explicitly rejected the rule of *Manuszak*. *Manuszak* has also been rejected by the Second Circuit and by the Ninth. The Department of Justice acknowledges the conflict but argues that it is not very important and that the later cases have tended to support the view of the Fourth Circuit. This argument is correct as to the trend of the cases, and may be sound as to importance as well, but it should be noted that *Manuszak* was followed by the Third Circuit in 1969 in a decision reversing a conviction for interstate transportation of forged securities on the ground that the indictment failed to state the element of unlawful or fraudulent intent.

III. DISSENTS FROM THE DENIAL OF CERTIORARI

On October 21, 1974, the Supreme Court denied certiorari in *Bailey v. Weinberger*, 419 U.S. 953 (1974), a case raising the issue whether "the decision of the Secretary of HEW on a request to reopen a previous denial . . . of a claim for benefits is so far committed to agency discretion by . . . the Social Security Act . . . that review of that decision is not available pursuant to the Administrative Procedure Act." The Ninth Circuit, adhering to its previous decisions, held that review was not available. Three other circuits had ruled to the contrary. Justice White, joined by Justice Douglas and Justice Stewart, wrote an opinion dissenting from the denial of certiorari. He stated:

It is a prime function of this Court's certiorari jurisdiction to resolve precisely the kind of conflict here presented Perhaps the state of our docket will not permit us to resolve all disagreements between courts of appeals, or between federal and state courts, and perhaps we must tolerate the fact that in some instances enforcement of federal law in one area of the country differs from its enforcement in another. These situations, it is hoped, will be few and far between.

This statement by three of the Justices, implying that the state of the Court's docket has made it impossible for the Court fully to perform one of its "prime function[s]"—that of resolving conflicts—reflects a certain concern over the inability of the Court to maintain a coherent, consistent body of national law. It suggested to the Commission the desirability of a detailed study of dissents from the denial of certiorari. Such a study, seeking to ascertain the number of such dissents, the reasons given, and the extent to which the dissents bear upon the need for additional appellate capacity to maintain the national law, was conducted by the Commission staff. The results are reported in this section of the Appendix.

A. The Number of Dissents

During the four most recent (complete) terms of the Supreme Court, the number of cases in which one or more Justices noted a dissent from the denial of certiorari has increased threefold. Similarly, there has been a steep rise in the total number of noted dissents, a figure which takes into account the cases with more than one dissent from the denial of review. This table gives the figures:

TABLE I *

	1969	1970	1972	1973
Cases in which certiorari denied...	NA	NA	2,921	3,282
Cases in which dissent noted.....	188	334	427	499
Total number of dissents noted....	237	469	475	625

* These figures do not include summary dispositions of cases within the Court's docket, nor do they include cases in which an appeal was improperly filed. Dissents from denials of review in such cases are also excluded.

The increase over the last 25 years has been even more dramatic. In the four terms 1949-52, there were on the average only 35 cases per term in which a dissent was noted from the denial of review. The average number of total dissents was 55.¹

Of course, it does not necessarily follow from these figures alone, striking as they are, that the national appellate capacity is inadequate

¹ Professor Fowler Harper, in the early 1950's, co-authored four articles reviewing some of the cases which the Supreme Court had declined to hear during the previous term. In the last article, Harper & Leibowitz, *What the Supreme Court Did Not Do During the 1952 Term*, 102 U. Pa. L. Rev. 427 (1954) [hereinafter cited as Harper], data from the four studies were summarized:

	1949	1950	1951	1952
Cases in which certiorari denied.....	—	881	904	973
Cases in which dissent noted.....	34	33	41	32
Total number of dissents noted.....	50	48	65	56

TABLE II.—Dissents by individual justices to the action of the court in denying review

	1969	1970	1972	1973
Burger.....	8	8	2	5
Black.....	33	53	—	—
Douglas.....	161	286	409	477
Harlan.....	9	13	—	—
Brennan.....	6	38	17	45
Stewart.....	7	20	12	22
White.....	9	20	8	16
Marshall.....	4	15	15	41
Blackmun.....	0	16	7	14
Powell.....	—	—	4	5
Rehnquist.....	—	—	1	0
Total number of dissents noted.....	237	469	475	625

today or indeed that it is less sufficient than in previous years. For instance, the increase in noted dissents may reflect changed attitudes among the Justices with respect to the propriety of such expressions. Thus, the frequency of dissent in the Court's conference may have remained constant, while only the proportion announced publicly has increased. In this regard, it should be noted that, as shown in Table II, the overwhelming preponderance of the noted dissents are attributable to Justice Douglas, whose attitude toward public notation of dissents appears to differ from that of his brethren.² However, in the most recent full term of Court there were 83 cases in which

² Justice Douglas discussed his practice in his autobiography:

When I came on the Court Hugo Black talked to me about his idea of having every vote on every case made public. In cases taken and argued, the vote of each Justice was eventually known. But in cases where appeals were dismissed out of hand or certiorari denied, no votes were recorded publicly. I thought his idea an excellent one and backed it when he proposed to the conference that it be adopted. But the requisite votes were not available then or subsequently. As a result he and I started to note our dissents from denials of certiorari and dismissal of appeal in important cases. Gradually the practice spread to a few other Justices; and finally I ended up in the sixties noting my vote in all cases where dismissals or denials were contrary to my convictions.

W. Douglas, *Go East Young Man* 452 (1974).

The significance of this description, however, must be considered in light of the data summarized in Table II. Justice Black's record, for example, deserves analysis. As Table II indicates, he dissented in far fewer cases than Justice Douglas. Even in Justice Black's last term on the Court, he dissented less than one-fifth as frequently as did his junior colleague. No other Justice, then or subsequently, has come even close to that proportion. More important, perhaps, is the fact that Justice Douglas's own record, subsequent to the period referred to in his autobiography, shows a sharp increase in dissents from denial of certiorari. The number of dissents by him alone increased almost threefold from 1969 to 1973.

dissents were recorded, excluding those cases in which Justice Douglas dissented alone. Further, the contrast between the pattern of noted dissents in the early 1950's and the pattern today strongly suggests that whatever attitudinal change has taken place is not limited to a single individual.³ Moreover, even if the change results from the fact that the Justices now see a purpose to be achieved in announcing dissents which in former times they would have suppressed, this in itself may be significant in assessing the extent to which additional national appellate capacity is needed.

It may also be argued that the increase in noted dissents simply reflects the increase in denials of certiorari, which in turn reflects the sharply increased number of petitions that come before the Court each term. Even if the proportion of noted dissents to denials has remained roughly constant, however, the increased number would still remain significant. The issue is whether the Supreme Court can meet the need for decisions of nationally binding effect. To the extent that dissents reflect cases which one or more Justices believe are appropriate for national decision, even though their brethren disagree (either because of the "state of [the] docket" or for other reasons), an

³ During the four terms studied by Harper, *supra* note 1, only four Justices dissented during each of the terms (Mr. Justice Black, Mr. Justice Douglas, Mr. Justice Reed, and Mr. Justice Burton); one Justice dissented at least once during three of the four terms (Mr. Justice Jackson); two Justices dissented only once (Mr. Chief Justice Vinson and Mr. Justice Clark); and two Justices never dissented (Mr. Justice Minton and Mr. Justice Frankfurter). *Id.* at 462. In contrast, as shown in Table II, all of the Justices dissented at least once during the four terms studied by the Commission, and only one of the eleven Justices who sat during the 5-year period dissented only once. Moreover, the percentage of cases with dissent by more than one Justice has also increased. In the period during which Harper wrote, only one Justice dissented in 71 of the 140 cases in which a dissent was noted. *Id.* During the most recent completed term of the Court, in only twelve of the 83 cases in which Justice Douglas was not the only dissenter was there a noted dissent by only one Justice:

	1969	1970	1972	1973
One Justice dissenting (not including Justice Douglas)-----	16	24	14	12
Two Justices dissenting-----	29	65	18	29
Three Justices dissenting-----	9	35	12	29
Four Justices dissenting-----	0	0	2	13

Harper's data were as follows:

	1949	1950	1951	1952
One Justice dissenting-----	19	20	21	11
Two Justices dissenting-----	14	11	16	18
Three Justices dissenting-----	1	2	4	3

increase in the number of dissents suggests a greater need, irrespective of the relation to the total volume of the Court's business. However, to determine whether the marked increase shown in the preceding pages does indicate to a significant degree an increased number of unresolved issues of national law, and to judge whether some of these issues might appropriately be considered by a tribunal other than the Supreme Court, one must examine the reasons offered by the dissenters in favor of Supreme Court review. We turn now to that inquiry.

B. The Reasons Given in Dissent

Putting aside the cases in which one or more Justices simply noted a dissent without further explanation,⁴ we find that the number of opinions written in dissent from the denial of review has also increased sharply in recent years.

TABLE III

	1969	1970	1972	1973
Cases in which opinion written-----	6	21	31	54
Number of opinions *-----	6	18	30	52

* In some cases more than one opinion was written, and some opinions covered more than one case.

The Commission's study focused on the opinions written in the two most recent complete terms of the Court. These opinions fall into six broad categories according to the reasons urged in support of review. Cases in two of the categories neither support nor refute the hypothesis that there are issues of federal law which should be decided by a national court, but which are now given final disposition by the eleven federal judicial circuits and the 51 state courts. In 26 opinions (2 in the 1972 term, 24 in the 1973 term), the dissents restate a position which has been rejected by the Supreme Court in an earlier decision. Such dissents may play an important role in the development of the

⁴ In most of these cases, Justice Douglas dissented alone, as indicated by these figures:

	1969	1970	1972	1973
All cases in which dissent was noted--	188	334	427	499
All cases in which dissent was noted, without opinion-----	182	313	396	445
Cases in which Justice Douglas dissented alone, without opinion-----	134	207	369	408

Supreme Court's jurisprudence,⁵ but they do not demonstrate a lack of national appellate capacity; when the Supreme Court has spoken authoritatively and recently on an issue, that issue would clearly not be appropriate for reconsideration by the National Court of Appeals. In a second group of cases (3 in the 1972 term, 6 in the 1973 term), the thrust of the dissent is that the decision below is wrong. If it is the reasoning of the court below with which the dissenting Justice disagrees, such cases may be appropriate for national decision, so that all of the lower courts may be informed of the rule to be followed; but if the dissenting Justice votes to grant certiorari simply to reverse an incorrect result on particular facts, then maintenance of the national law would not be appreciably aided by issuance of an opinion with national precedent value.⁶

The dissenting opinions which fell into these two categories accounted for about 40 percent of those written during the two terms; the remaining 60 percent, however—about 50 cases—may be read to support the need for a greater national appellate capacity. These dissents state that a national decision is needed for one or more of the following reasons: (1) the existence of conflicts among the lower courts on issues of national law, (2) the existence of conflicts with Supreme Court decisions, (3) the existence of important issues for decision, and (4) the existence of statutory interpretation questions appropriate for definitive resolution. To be sure, none of the dissents discussed below, taken alone, necessarily points up an instance in which the lack of adequate national appellate capacity hindered the maintenance of a stable and harmonious national law. As will be emphasized throughout this report, the denial of review in any given case may be predicated on one or more of a myriad of reasons, none of which touch on appellate capacity. Nevertheless, the cumulative effect of a series of cases in which one or more Justices dissent from the denial of review, for reasons implicating the institutional role of a national court, strongly supports the hypothesis, suggested initially by the striking increase in the number of dissents from the denial of certiorari in recent years, that the maintenance of national law could

⁵ See Brennan, *The National Court of Appeals: Another Dissent*, 40 U. Chi. L. Rev. 473, 480 (1973): "[D]issents from denial of review . . . often herald the appearance on the horizon of a possible reexamination of what may seem . . . to be an established and unimpeachable principle."

⁶ Cf., *Dunn v. Immigration & Naturalization Service*, 419 U.S. 919, 924 (1974) (Stewart, J., dissenting from the denial of certiorari):

Because the factual setting of this case is unusual, the legal questions raised are unlikely often to recur. While this is normally a sound reason to deny review, the judgment before us is grossly unjust. The Service has noted that petitioner has a "penchant for botching up his life." Perhaps so, but the Government's botching up this case has served to complete the wreckage.

I would grant certiorari and summarily reverse the judgment.

be significantly furthered if the federal appellate system had another tribunal with power to hand down decisions of nationally binding effect.

1. CONFLICTS ON ISSUES OF FEDERAL LAW

In seven cases during the 1973 term, conflicts between circuits, or between state and federal courts, on issues of federal law were cited in explanation of dissents from the denial of certiorari. (There were no such cases in the 1972 term.) Three of the seven cases involved criminal procedure. In *Wright v. North Carolina*, 415 U.S. 936 (1974), Justice Douglas, dissenting alone, noted a conflict among the circuit courts as to the sufficiency of *Miranda* warnings which include the statement that "We have no way of giving you a lawyer, but one will be appointed for you if you wish, if and when you get to court." In the Seventh, Ninth, and Tenth Circuits such a warning had been considered inadequate; the Second, Fourth, Fifth, and Eighth Circuits had found it sufficient. The conflict dated at least to 1969. Justice Douglas stated:

Because of the present conflict, the extent of one's federal constitutional rights varies according to the State or Circuit in which the question is presented. I would grant certiorari in order to resolve the issue and provide uniformity. [*Id.* at 938.]

In two other cases Justice White noted conflicts on rules of criminal procedure. His opinion in *North Carolina v. Wrenn*, 417 U.S. 973 (1974) (joined by the Chief Justice), pointed out that there was a division both among the circuits and among the states as to "whether a search warrant and its supporting affidavit, adequate on their face, may later be impeached." The Fourth Circuit, in the case at bar, had ruled that the warrant and affidavit could be impeached in light of the affiant's trial testimony; the Second, Fifth, and Seventh Circuits agreed. The District of Columbia, First, and Ninth Circuits had concluded otherwise. Justice White also noted that it was "[o]f equal or perhaps greater importance in the context of this grant of federal habeas relief to a state prisoner" that the decision of the court of appeals was in conflict with the rule followed in a majority of state courts. He listed fifteen states which had adopted a rule contrary to the one followed in the Fourth Circuit; only four state courts had agreed with the Fourth Circuit decision. Moreover, North Carolina, the state which had imprisoned the respondent in the case at bar, apparently followed the rule established in the majority of states. Justice White concluded:

The time is ripe for a decision on this question, for the courts are in conflict and the question is important for the proper administration of criminal justice. [*Id.* at 976.]

Justice White and Justice Douglas would have granted certiorari in *Fitzpatrick v. New York*, 414 U.S. 1050 (1973), in which the state court adopted the rule of "inevitable discovery" which had been rejected by the Second Circuit. Under this doctrine, evidence that would otherwise be excluded as "the fruit of the poisonous tree" may be admitted if the prosecution shows that the evidence would have been discovered through proper police investigation in the absence of the official misconduct. Justice White noted the problems resulting for law enforcement officials in New York from the adoption of different rules by the state and federal courts there.

Four opinions dissenting from the denial of certiorari noted conflicts in other areas of the law. In *Sennott v. Rodman & Renshaw*, 414 U.S. 926 (1973), Justice Douglas, writing for himself and Justice Blackmun, stated that there was an apparent conflict between the Seventh Circuit in the case at bar and opinions in the Eighth Circuit and the District Court of Minnesota on an issue of securities law: the liability of a company for the unauthorized acts of a former partner when the company had previously benefited from such unauthorized acts. The Fourth Circuit, assertedly in conflict with the courts listed above, did not find such liability.

In *Morningside Renewal Council Inc. v. Atomic Energy Comm'n*, 417 U.S. 951 (1974), Justice Douglas found that the Second and Fifth Circuits were applying different standards in reviewing an agency's determination of whether an environmental impact statement is required under the National Environmental Policy Act. The Second Circuit (whose decision was before the Court in the case at bar) asked only whether the agency's determination was arbitrary or capricious; the Fifth Circuit applied the more stringent standard of reasonableness. On the very day the Justice drew attention to the conflict, the Eighth Circuit sitting en banc confronted the same issue and joined the Fifth in applying the reasonableness test. *Minnesota Public Interest Research Group v. Butz*, 498 F. 2d 1314, 1320 (8th Cir. 1974). The Tenth Circuit had earlier explicitly rejected the Second Circuit decision. *Wyoming Outdoor Coordinating Council v. Butz*, 484 F. 2d 1244, 1249 (10th Cir. 1973).

In *Hyatt v. Atchison, T. & S.F. Ry.*, 414 U.S. 925 (1973), Justice Douglas, joined by Justice Brennan, stated that this California Court of Appeals decision was in conflict with lower federal court decisions interpreting the Federal Employers' Liability Act. The federal courts had found liability even though the employee was injured on a third party's premises when his employment had not required him to be there; the California court in a similar situation had denied recovery.

Justices Douglas and Marshall dissented from the denial of certiorari in *New Rider v. Board of Education*, 414 U.S. 1097 (1973), where the validity of school regulations governing student hair length was in

dispute. Justice Douglas cited a deep division among the circuits on the issue, and described it as one of "considerable constitutional importance."

These seven dissents indicate that at least six of the present Justices have concluded on one or more occasions that the Court was permitting a conflict to continue notwithstanding its ripeness for resolution.

2. CASES IN CONFLICT WITH PRIOR SUPREME COURT DECISIONS

In a second category of cases, one or more Justices dissented from the denial of certiorari on the ground that the decision below conflicted with a previous opinion of the Court. There were three such opinions during the 1973 term and six during the preceding term.

Writing for himself and Justice Brennan, Justice Douglas dissented from the denial of certiorari in *Pueschel v. Connecticut*, 414 U.S. 934 (1973). In *Bell v. Burson*, 402 U.S. 535 (1971), the Court had declared unconstitutional a Georgia statute under which an uninsured motorist who was involved in an accident and who was unable to post security would have his license suspended without any prior consideration of fault. The petitioner's license had been suspended under such a statute; thereafter, he was arrested for driving without a license. Both the suspension and the arrest preceded the Court's decision in *Bell*. At the petitioner's trial, he raised *Bell* as a defense. The dissenting Justices believed that the refusal of the Connecticut court to apply *Bell* was in conflict with Supreme Court decisions which vacated and remanded in light of *Bell* three cases which had upheld license suspensions prior to *Bell*.

In *Meinhold v. Taylor*, 414 U.S. 943 (1973), Justice Marshall concurred in the opinion of Justice Douglas stating that the Nevada court's decision upholding the dismissal of a teacher who had told his own children his views on the states' compulsory education laws—views never mentioned in the classroom—was in conflict with the Court's opinion in *Pickering v. Board of Education*, 391 U.S. 563 (1968), which allows a teacher to publish such views without risking dismissal.

The Ninth Circuit decision in *Montgomery v. United States*, 476 F. 2d 623 (9th Cir. 1973), was also asserted to be in conflict with decisions of the Supreme Court, 414 U.S. 935 (1973). Indians had been fined for cutting timber on government land under a federal statute which provided that the provisions of the statute should not "interfere with . . . any right or privilege under any existing law of the United States to cut or remove timber from any public lands." Justice Douglas felt that prior decisions of the Court had recognized the rights of Indians to occupy and use these lands. Moreover, he noted that the lower court's decision seemed to conflict with a rule of

construction, enunciated in *Choate v. Trapp*, 224 U.S. 665, 675 (1912), which favors the rights of the Indians at the expense of the rights of the United States.

Justice Douglas also believed that *Francis v. United States*, 409 U.S. 940 (1972), could not be distinguished from the Court's opinions in *Sicurella v. United States*, 348 U.S. 385 (1955), and *Clay v. United States*, 403 U.S. 698 (1970). In each of these cases the Court had set aside convictions for failure to report for induction because the Selective Service Board's earlier rejection of the defendants' applications for conscientious objector status rested on several grounds, at least one of which was invalid. In *Francis* the petitioner's application for C.O. status had been rejected for five reasons, at least two of which Justice Douglas considered improper. Thus, the case was seen as warranting review.

Nebraska State Board of Education v. School District of Hartington, 409 U.S. 921 (1972), involved alleged violations of the Establishment Clause which, said Justice Douglas, "on the papers before us, seem to me to be of the kind that we struck down in *Lemon v. Kurtzman*, 403 U.S. 602 (1971)." Under the plan in question, the state financed the local board of education's rental of space from a Catholic high school; the space was to be used for classes in remedial reading and math for students of both the public and parochial schools. To Justice Douglas, the state court's approval of the plan implied a "necessity for surveillance." 409 U.S. at 924. Justice Douglas wrote for himself and Justice Marshall that the denial of certiorari in this case was inconsistent with the Court's prior affirmance in *Sanders v. Johnson*, 403 U.S. 955 (1971), which invalidated a program under which the state "purchased" services from the parochial schools to be supplied to the children.⁷

In *Weaver v. Hutson*, 409 U.S. 957 (1972), the court of appeals had refused, in a Chapter X reorganization, to enforce a clause in a lease which terminated the lease upon the bankruptcy of one of the parties. Justice White dissented from the denial of certiorari "because the decision of the Court of Appeals appears to depart from the views of the [Supreme] Court expressed" in *Finn v. Meighan*, 325 U.S. 300 (1945), holding that section 70(b) of the Bankruptcy Act, which states that such clauses are enforceable, is applicable in a Chapter X reorganization. The court of appeals had relied on a later Supreme Court decision, *Smith v. Hoboken R.R., Warehouse, & S.S. Connecting Co.*, 328 U.S. 123 (1946), which Justice White found had carefully distinguished *Finn*.

Felts v. Seaboard Coast Line R.R., 409 U.S. 926 (1972), and *Adkins v. Kelly's Creek R.R.*, *id.*, were both FELA cases in which the district

⁷ Mr. Justice Brennan, explaining his vote to deny certiorari, stated that the situation in *Sanders* was "poles apart" from the present case. 409 U.S. at 926.

court judges had set aside the verdicts of the jury. Justice Douglas noted that the issues raised in the two cases were, according to previous Supreme Court decisions, appropriate jury questions: whether a Pullman employee has become, in performance of his work, an employee of the railroad; and whether a carrier sued under FELA has obtained a valid release from an injured employee or should be estopped to plead limitations. Both Justice Douglas and Justice Brennan dissented from the denial of certiorari in another FELA case on the ground that under the Court's decisions the district court had erred in taking the case from the jury. *Hartel v. Long Island R.R.*, 414 U.S. 980 (1973).

Finally, in *Nugent v. United States*, 409 U.S. 1065 (1972), Justice White, joined by Justice Douglas and Justice Brennan, considered the lower court decision to be "arguably at odds with decisions of the Court." With the landlord's consent, police had searched a basement area used by tenants as well as the landlord. The three Justices felt that the ensuing search of a trunk stored in the basement was impermissible under the guidelines of *Chimel v. California*, 395 U.S. 752 (1969), and *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). Justice White also wrote, for the three dissenters, that "whether the search of the trunk and seizure of its contents squared with the Fourth Amendment is a substantial question warranting review here," thereby placing this case in the forthcoming category as well.

Some of the cases in this category may be appropriate for the new court; some may not. All are relevant to the need, however, for to the extent that the new court can relieve the Supreme Court of other cases which it now hears, that Court will have greater latitude to accept cases which require elucidation of the Court's precedents by the Court itself.

3. SUBSTANTIAL QUESTION CASES

The third and largest category of dissents is composed of those in which the dissenting opinion states that the petition raises a substantial question of national law which the Supreme Court should decide.

Five of the eight such cases during the 1973 term involved criminal procedure and prisoners' rights. In *Corpus v. Estelle*, 414 U.S. 932 (1973), Justices Douglas and Marshall would have taken the "opportunity to delimit [the] permissible bounds" of the plea bargain.

Justice Douglas would have granted certiorari in *Moran v. Neff*, 415 U.S. 940 (1974), to consider "the question of whether a police officer with ample time to secure a warrant may deliberately circumvent this constitutional requirement on the basis of his judgment

that the police would be more effective without judicial oversight of his decision to search.”

Justices Douglas, Brennan and Marshall felt that the Court should have granted certiorari in *Alo v. United States*, 414 U.S. 919 (1973), to decide the question whether a defendant is denied his right to speedy trial when the delay is due to unworthy government motives, even though he has not been prejudiced by that delay.

In *Ex parte Kent*, 414 U.S. 1077 (1973), Justices Douglas, Brennan and Marshall would have reviewed the petitioner's double jeopardy claim. The Douglas opinion explained that the petitioner had been found not guilty because of insanity and had been committed; that the Missouri Supreme Court had granted his habeas corpus petition, finding “that petitioner was . . . improperly confined under the statute, since he never should have been acquitted”; and that he was scheduled to be tried again on December 3, 1973. The dissenters were of the opinion that petitioner had raised this double jeopardy claim at the appropriate time and that the Court should decide whether he could constitutionally be tried again.

Burt v. New Jersey, 414 U.S. 938 (1973), raised the issue whether it was permissible for the prosecutor, during his summation, to comment on the defendant's silence at the time of his arrest; the purpose of the comment was to impeach the defendant's testimony that the killing for which he was being tried occurred accidentally. The court below had found that the silence constituted a prior inconsistent statement and could, therefore, be used for impeachment purposes under *Harris v. New York*, 401 U.S. 222 (1971). However, Justice Douglas wrote for himself and Justices Brennan and Marshall that the use of silence as a prior inconsistent statement did not necessarily fall within the rationale of *Harris*. Although the dissenting opinion did not advert to it, there was already a conflict among the circuits on the question of whether the *Harris* rationale supported the right of the prosecution to show a defendant's prior act of remaining silent, and in 1974 the District of Columbia Circuit joined the Tenth Circuit in opposition to the Third Circuit rule involved in the *Burt* case. In late 1974 the Supreme Court granted certiorari in the District of Columbia case. See *United States v. Anderson*, 498 F. 2d 1038, 1041-42 (D.C. Cir.), cert. granted sub nom. *United States v. Hale*, 419 U.S. 1045 (1974).

Harris was also the basis for the lower court decision in *Bryant v. North Carolina*, 409 U.S. 995 (1972), which had come before the Court in the 1972 term. Justices Douglas and Brennan wished to grant the petition of a defendant who, after taking the stand in his own defense, was impeached by his prior statements to the police. These statements were taken without any *Miranda* warnings and were

admitted into evidence without any determination of voluntariness. Justice Douglas wrote that the instant case

goes a step beyond *Harris* in allowing the introduction of illegally obtained statements for the impeachment of the defendant when the statement was merely a remembered verbal conversation rather than a typed signed statement; when the statement was presented as direct testimony rather than for the purpose of impeachment by cross-examination; when, although there was an issue of voluntariness, the statement was permitted without a prior determination as to its voluntariness; and when the jury instruction that the statement should not be considered as substantive evidence did not contain the admonition that the statement could not be considered as evidence of guilt. [*Id.* at 997.]

Justice Douglas concluded: “If *Harris* is to be extended, we should do so only after argument and mature deliberation.”

Like *Bryant*, most of the cases in the “substantial question” category during the 1972 term involved questions of criminal procedure and prisoners' rights. Three of the cases raised the issue of the electronic surveillance of a lawyer. In *Russo v. Byrne*, 409 U.S. 1013 (1972), the lawyer was defending a man in a criminal prosecution; in the other two cases, *Tierney v. United States*, 410 U.S. 914 (1973), and *Meisel v. United States*, 412 U.S. 954 (1973), the client had been subpoenaed to appear before a grand jury. In all three cases the clients were foreign nationals who risked foreign prosecution. Justice Douglas wrote the dissenting opinion in all of the cases; Justice Brennan also dissented in *Russo*, although he did not join the Douglas opinion. In each of the three cases, Justice Douglas urged that the Court grant certiorari so that it could set forth the procedures to be followed by the district court when a lawyer asserts that he has been subjected to electronic surveillance.

In *Sellars v. Beto*, 409 U.S. 968 (1972), the Court denied certiorari over the dissents of Justices Douglas, Brennan and Marshall, who voted to hear the challenge to the Texas Department of Corrections' administration of solitary confinement on the grounds that “it raises substantial questions of law in the area of the Eighth and Fourteenth Amendments.” Justice Douglas noted that lower courts had dealt with the issues raised in the case and, without guidance from the Supreme Court, had reached divergent results. One of the questions raised was “[t]he extent to which the prohibition against cruel and unusual punishment will apply in prison.”

Related issues were raised in *McLamore v. South Carolina*, 409 U.S. 934 (1972), in which Justice Douglas would have granted certiorari “because of the importance of the question raised”:

Does the chain gang fit into our current concept of penology? If not, does it violate the Eighth Amendment? This is an important question never decided by the Court.

The second question is of equal importance. . . . The courts must determine whether the classification [between prisoners who work on the chain gang and those who are sent to the penitentiary] is reasonable in light of its purpose. For this Court to refuse to make the decision in this case allows a procedure to exist which arguably has many aspects of involuntary servitude for some, while others of the same class are treated in a more enlightened way. [*Id.* at 936-37 (footnote omitted).]

Neely v. Pennsylvania, 411 U.S. 954 (1973), presented a "question which this Court has not previously answered—under what circumstances a defendant, *prior to sentencing*, may withdraw a guilty plea." Justice Douglas, writing for himself and Justices Stewart and Marshall, would have granted review and held that "where the defendant presents a reason for vacating his plea and the government has not relied on the plea to its disadvantage, the plea may be vacated and the right to trial regained, at least where the motion to vacate is made prior to sentence and judgment."

The petitioners in *Smith v. United States*, 409 U.S. 1066 (1972), accused of sexually assaulting a fellow inmate at a Federal Youth Center, claimed that a five-month delay in arraignment violated Rule 5(a) of the Federal Rules of Criminal Procedure, which requires prompt arraignment before a United States Commissioner. The Tenth Circuit had held the rule inapplicable to someone already in custody. Justices Brennan and Douglas would have granted the petition to review what they suggested was a "myopic" interpretation "without regard to the policies underlying Rule 5 as a whole."

Hadley v. Alabama, 409 U.S. 937 (1972), presented the issue "whether by case law, a State can give more time for filing of a transcript for a person without funds than for a person of wealth." Justice Douglas wrote that while there is no constitutional right to appeal, a state cannot grant appellate review in such a way as to discriminate between the rich and the poor. Since the Alabama law appeared to be out of line with that principle, he would have granted the petition for certiorari.

Justice Douglas felt that *Mason v. United States*, 414 U.S. 941 (1973), presented the Court with the opportunity to delineate "the exact parameters of the border-search exception." He felt that longstanding precedents "permitting a minor customs official to make a warrantless search of baggage" would not necessarily permit the same official "to determine instances in which intrusive and degrading vaginal and rectal searches will be conducted." Because of the "stark contrast" between the traditional search and the body-cavity search, Justice Douglas urged that it was necessary for the Court to determine the standards applicable to the latter.

Justice Douglas also dissented from the denial of certiorari in *Achtenberg v. United States*, 409 U.S. 932 (1972). Achtenberg had been convicted of attempting to destroy "war material" and "war premises" in "times of national emergency as declared by the President." 18 U.S.C. § 2153(a). The prosecution cited as the required declaration of emergency President Truman's 1950 declaration in response to the Korean war. Justice Douglas felt that "[t]he viability of criminal responsibility predicated upon evaluations of current political temperament or outdated presidential proclamations is an important issue worthy of our consideration on the merits."

Four Justices—Douglas, Brennan, Stewart and Marshall—dissented from the denial of certiorari in *Gay v. United States*, 411 U.S. 974 (1973). To explain why certiorari was denied notwithstanding four dissents, Justice Douglas noted that while the four Justices "would grant certiorari and vacate the judgment, we do not insist on oral argument." *Id.* at 977 n. 4. In the court below one of the three judges who denied the petitioner's coram nobis petition had been an Assistant U.S. Attorney before his appointment to the District of Columbia Court of Appeals, and in that capacity had signed the brief in opposition to the petitioner's previous appeal. The four dissenting Justices acknowledged that the judge "doubtless was unaware of the fact that this case had been one of the many hundreds he had processed while in the United States Attorney's office," but the opinion pointed to Canon 3C(1)(b) of the recently adopted Code of Judicial Conduct (later enacted in substance by the Judicial Disqualification Act of 1974, Pub. L. 93-512, 455(b)(2)-(3)):

"A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where . . . he served as lawyer in the matter in controversy . . ." [*Id.* at 975.]

The opinion noted that one of the other two judges on the panel had not participated in the decision, so that "in one view there was only a single qualified judge sitting on the appeal. That fact makes singularly appropriate the suggestion of the Solicitor General that it may be just, under the circumstances, to vacate the judgment of the [lower court] and remand for further proceedings." Emphasizing the Court's "ultimate responsibility" for "insuring that the federal judiciary adheres scrupulously to . . . principles of impartial adjudication," *id.* at 977, the dissenters stated:

Although this issue may not rise to the level of a constitutional question and there is no federal statute involved, we should take this action under our supervisory authority over the administration of justice in the federal courts. [*Id.* at 975.]

In *Bland v. United States*, 412 U.S. 909 (1973), the sixteen year old petitioner argued that the statutory scheme under which he was prosecuted as an adult denied him procedural due process. Justices Douglas, Brennan and Marshall dissented from the denial of certiorari because the case presented two "large and substantial" questions:

A juvenile or "child" is placed in a more protected position than an adult, not by the Constitution, but by an Act of Congress. In that category he is theoretically subject to rehabilitative treatment. Can he, on the whim or caprice of a prosecutor, be put in the class of the run-of-the-mill criminal defendants, . . . without any chance to be heard, without an opportunity to rebut the evidence against him, without a chance of showing that he is being given an invidiously different treatment from others in his group? *Kent* and *Gault* suggest that those are very substantial constitutional questions. [*Id.* at 911.]

* * *

The Administrative Procedure Act . . . gives the courts power to review "agency action" and to hold it unlawful, if found to be "contrary to constitutional right, power, privilege, or immunity." . . . This arguably is broad enough to reach the exercise of a prosecutor's discretion in a way that violates the standards of due process laid down in *Kent* and *Gault*. [*Id.* at 912.]

In addition to these criminal procedure cases, there were a number of dissents in the two terms addressed to issues in other areas of the law. In *Meyers v. Pennsylvania*, 416 U.S. 946 (1974), Justice Douglas dissented from the denial of certiorari because he "believe[d] that the right of private action under the federal highway program is an important question, and that the Eleventh Amendment issue was wrongly decided below." Petitioners argued that the state was liable for damages arising out of its alleged failure to conform to applicable federal highway standards, but the courts below found that no private right of action was created by federal law and that the state was immune from suit in federal court by virtue of the Eleventh Amendment. Justices Brennan and Marshall dissented without opinion.

Justice Douglas felt that *Local 1791, UMW v. McGuire Shaft & Tunnel Corp.*, 412 U.S. 958 (1973), also "present[ed] substantial questions that deserve consideration by this Court." The Temporary Emergency Court of Appeals had held that the Economic Stabilization Act of 1970 overrides the anti-injunction provisions of the Norris-La Guardia Act and that the district court could, therefore, enjoin a work stoppage in violation of the regulations of the Pay Board. While Justice Douglas recognized that the Court had previously recognized exceptions to the Norris-La Guardia Act when there was a conflict

with other labor legislation, he felt that the Economic Stabilization Act did not fall within that narrow category. Thus, in his view, the Court's decisions did not support an exception in the present case. The issue arose again later in the year. *League of Voluntary Hospitals and Homes v. Local 1199, Drug and Hospital Union*, 490 F. 2d 1398, 1401 (Emer. Ct. App. 1973).

Justice Douglas also would have heard argument in *Presidents Council, Dist. 25 v. Community School Bd. No. 25*, 409 U.S. 998 (1972), "[b]ecause the issues raised . . . are crucial to our national life." The courts below had refused to enjoin a school board from enforcing a resolution which prevented children from borrowing certain books dealing with sexual and drug-related activities from the school library unless their parents approved. Justice Stewart also would have granted certiorari, although he did not join the Douglas opinion.

Justices Brennan and Douglas felt that the facts of *Confederation Life Ins. Co. v. De Lara*, 409 U.S. 953 (1972), "warrant[ed] plenary review by this Court of the question whether the obligation of the parties is governed by Cuban law." Florida residents had brought suit in Florida against a Canadian life insurance company on a policy issued on the life of a Cuban resident. Justice Brennan wrote for the two dissenters:

There is a substantial question whether the only asserted basis of the decision of the Florida Supreme Court—application of Florida law—was erroneous under the Due Process Clause of the Fourteenth Amendment. And since the Government of Canada has represented to us that the decision of the Florida court has significant international ramifications, considerations of comity provide an additional and forceful reason for granting the petition for certiorari and setting the case for oral argument. [*Id.* at 956.]

In *Sarnoff v. Shultz*, 409 U.S. 929 (1972), a taxpayer sought to enjoin disbursements to Viet Nam under certain sections of the Foreign Assistance Act of 1961, thereby raising the issue of the constitutionality of the use of funds to pursue a Presidential war. The court below held that the complaint tendered a "political question" beyond judicial competence. Justice Douglas wrote an opinion, joined by Justice Brennan, dissenting from the denial of certiorari:

Whether after full argument and deliberation we would hold that this case falls in the category of *Flast v. Cohen* is unknown. But certainly the issue is important and substantial. The provisions in Article I, § 8, cl. 11, which give Congress, not the President, the power to "declare War" is a specific grant of power that impliedly bars its exercise by the Executive Branch. And the power is so pervasive in its reach that it may affect the lives, the property, and the well-being of the entire Nation. Arguably the principles in *Flast v. Cohen* control this case. [*Id.* at 931-32.]

Justice Douglas believed that the Court should have decided the case of *Chongris v. Corrigan*, 409 U.S. 919 (1972), involving a challenge to the validity of certain zoning schemes which imposed height restrictions on use of land below flight paths. He wrote:

Whether there has been a diminution in value of petitioners' property is not clear from the present record. Whether the zoning regulations themselves constitute a taking is necessarily involved, as is the question of the appropriate remedy for an aggrieved property owner. [*Id.* at 921.]

Also in the "substantial question" category is *Albers v. Commissioner*, 414 U.S. 982 (1973), in which Justice Powell wrote a dissent, joined by Justices Douglas and Blackmun, stating that the three Justices would have granted certiorari in order to reconsider the earlier decision of the Court in *United States v. Davis*, 397 U.S. 301 (1970). Under *Davis*, a stock redemption by a closely held corporation, without a change in the relative economic interests or rights of stockholders, is to be treated as ordinary income. The dissenters described this rule as a "trap for unwary investors in small business," and facially contrary to the relevant code provisions. They added:

It has been suggested that since *Davis* was decided March 23, 1970, Congress has had more than three years to repudiate or ameliorate the *Davis per se* rule. With all respect, this suggestion seems unrealistic. Congress has had under consideration during this period a general revision of the Code as well as a broad re-examination of many of the fundamental assumptions underlying the present Code. It is unlikely that piecemeal adjustments would have been made during this period of study and re-examination. Furthermore, the *Davis* rule falls most heavily on small family corporations unlikely to have specialized tax counsel capable of warning that *Davis* has converted § 302(b)(1) into "a treacherous route to be employed only as a last resort." B. Bittker & J. Eustice, [Federal Income Taxation of Corporations and Shareholders] at 9-9. It is these very corporations that are least likely to make their voices heard in Congress, since they have limited "lobbying" capabilities. [414 U.S. at 988 n.8.]

Thus, in some 25 cases denied review during the two terms, at least one Justice found substantial questions that should have been given plenary consideration by the Supreme Court, and wrote an opinion so stating. To be sure, it is familiar learning that the Court's decision not to hear a case may rest on something other than the importance of the issues presented—for instance, the record below, the scope of the opinion, or the development of the law in the area. Justices other than the dissenters may have recognized the importance of the questions presented, but may nevertheless have voted against review on the ground that the case was an inappropriate vehicle for settling the issues raised, or because the issues did not appear ripe for a Supreme Court decision, or for any number of other reasons. Nevertheless, the dissents do point to issues which one or more Justices thought were

ripe for decision in the cases before them. If, as Justice White intimated in *Bailey v. Weinberger*, the pressures of the Supreme Court's docket have forced the Justices to deny certiorari despite a conflict, it is certainly plausible that these same pressures have influenced the denial of certiorari on issues which are important but which have not yet given rise to a conflict.

4. CASES REQUIRING STATUTORY INTERPRETATION

The fourth category includes those cases which, in the opinion of the dissenting Justices, raised issues of statutory interpretation best decided by the Supreme Court or incorrectly decided below. There were several such cases during each of the two terms. *Erckman v. United States*, 416 U.S. 909 (1974), a prosecution for willful filing of false tax returns, involved issues under the Jencks Act. The lower court, although recognizing that the defendant was entitled under the statute to examine the report of an Internal Revenue Service agent who was a witness for the prosecution, held that the trial court's refusal to order production of the report was harmless error. Justice Marshall wrote an opinion, in which Justice Brennan concurred, stating that the report should have at least been given to the defendant's attorney so that he might argue that the error was not harmless. Justice Marshall asserted that the Jencks Act "on its face" gives the defendant the right to examine any relevant statements of government witnesses, regardless of the trial judge's view as to their usefulness in cross-examination. "[D]isclosure of the report," the dissent stated, "is essential to permit the defense to make an informed presentation of the uses to which he might have put the report. And without consideration of such a presentation by counsel, the Court of Appeals could not make a truly informed decision on the harmless error question."

In *Flaherty v. Arkansas*, 415 U.S. 995 (1974), the trial court had admitted into evidence tapes of incoming calls in which the police officer had pretended to be the defendant. The police had a warrant to search the defendant's home, but the warrant did not authorize the interception or recording of telephone calls. In upholding the conviction, the Arkansas Supreme Court relied upon a section of the Omnibus Crime Control Act of 1968 which permits "a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception." Justices Douglas, Brennan and Marshall dissented from the denial of certiorari because they believed that this interpretation "carrie[d] the seeds of destroying a substantial part of the congressional plan in Title III [of the Act] and its constitutional underpinnings." The Douglas opinion noted that this case involved more than misplaced trust (as in earlier Supreme Court cases); rather, there was an actual deception as to identities.

The petitioner in *Lee v. United States*, 414 U.S. 1045 (1973), had been convicted on two counts of distributing heroin and had entered a guilty plea with respect to a third count. The trial judge sentenced him to concurrent fifteen-year terms, with drug addiction treatment recommended. Because the defendant was a dealer, the judge refused to sentence him under the Narcotic Addict Rehabilitation Act, which provides for civil commitment followed by after-care in the community. Justice Douglas, joined by Justice Marshall, noted that the petitioner was a middleman for a federal agent and had received only \$15 on the three sales, and that Congress recognized that addicts frequently sell narcotics in order to support their own habits. The dissenters felt that Congress had intended a more enlightened approach than that exercised by the trial judge.

Thomas v. United States, 409 U.S. 992 (1972), involved the validity of nighttime search warrants in the District of Columbia. A series of recent Congressional enactments seemed to embody inconsistent requirements. At the time of Thomas's petition, the Court of Appeals for the District of Columbia Circuit had before it an appeal from a ruling by Judge Gesell that was inconsistent with the decision of the District of Columbia Court of Appeals in Thomas's case. Justices Douglas, Brennan and Marshall would have either held Thomas's petition until the circuit court rendered its decision or granted certiorari and heard oral argument. Justice Douglas wrote:

We should resolve this controversy. As Judge Gesell stated: "The search warrant statutes of possible application to narcotics searches in this jurisdiction are a bramblebush of uncertainties and contradictions. It is difficult if not impossible to determine the present congressional intent. This uncertainty should be clarified immediately, so that future search warrants will not be invalidated because of misunderstandings as to the applicable law." [*Id.* at 995 (citation omitted).]

Subsequent to the Court's denial of Thomas's petition, Judge Gesell's decision was reversed by the circuit court. Certiorari was granted in that case, and in April 1974, the Supreme Court resolved the issues left in abeyance by the denial of certiorari in *Thomas* in 1972. *Gooding v. United States*, 416 U.S. 430 (1974).

Justice Marshall wrote an opinion, in which Justices Douglas and Brennan joined, dissenting from the denial of certiorari in *Irish Northern Aid Comm. v. Attorney General of the United States*, 409 U.S. 1080 (1972). Petitioner had registered under the Foreign Agents Registration Act of 1938. The district court ordered him to comply with the Act by filing a statement of contributors and contributions; the Second Circuit affirmed. The dissenting Justices believed that the disclosure required by the Attorney General went beyond that required by the Act, and that if indeed such disclosure were authorized, the Act might violate the First Amendment protection of membership

in an organization. Justice Marshall wrote that "[t]he constitutional argument is a difficult one. I would not assume that Congress had carefully considered it when enacting a statute which does not, in terms, pose the constitutional question."

In *Dye v. New Jersey*, 409 U.S. 1090 (1972), Justice Douglas felt that the Court should consider the proper application of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, which was almost identical to the New Jersey statute being challenged in this case. He noted that although the warrant, authorizing the tap of a telephone in a restaurant, was sufficiently specific, the seizure had been more general. He wrote:

If the authorization of the wiretap in the instant case, which is the equivalent to a general warrant, is allowed by either of these statutes, then it is difficult to declare them constitutional. I would grant certiorari. [*Id.* at 1093.]

In sum, this category of cases may be viewed as indicating a lack of national appellate capacity in that there are issues of federal statutory construction which the dissenting Justices feel should be decided by the Supreme Court, but which are left unresolved by the denial of review.

C. Conclusion

To what extent can the sharp increase in dissents from the denial of certiorari, many of them accompanied by opinions of substantial length, be regarded as evidence of a lack of adequate national appellate capacity? Given the wide variety of considerations which may be relevant to the certiorari decision, it will ordinarily be impossible to say in any particular case that review was denied because of the pressures of the Court's other work. At the same time, the growing number of dissents, and the development of a pattern strikingly at variance with the pattern of earlier years, when the demands on the Court's attention were substantially smaller, reduce the probability that denial in all or most of these cases was due solely to an idiosyncratic record or other factors unrelated to appellate capacity.

Even if we look only at the dissents accompanied by opinions and, further, put to one side the opinions indicating only an attenuated relationship to appellate capacity, the array is an impressive one. In each of the cases described in this study, at least one Justice, and sometimes as many as four, found issues that had significance beyond the particular controversy; concluded that those issues were ripe for resolution in the case before them; and felt strongly enough to write an opinion calling the issues to the attention of the bar. In some of the cases—those involving conflicts among lower courts—the issues had already given rise to a multiplicity of appellate decisions at the time of the denial. In the other cases, the issues were regarded by the dissenters as recurring ones; and indeed, with regard to some of the

issues, further appellate litigation took place subsequent to the Court's action. At the least, the cumulative effect of these dissents is to point up a series of instances in which the denial of certiorari, for whatever reasons, denied the country a decision which had a strong potential for adding significantly to the body of nationally binding precedents that make up the country's decisional law.

This study has dealt only with those cases in which one or more Justices felt impelled not only to record his dissent from the denial of certiorari, but also to write an opinion explaining his reasons for believing that review should have been granted. There are literally hundreds of other cases in the two most recent terms alone in which one or more Justices noted a dissent but did not write an opinion. Some of these cases may be potentially of great significance in the development of the national law. For instance, in the current term Justices Douglas, Stewart and White dissented from the denial of certiorari in *Place v. Weinberger*, 419 U.S. 1040 (1974), a case raising the issue of the retroactivity of section 717(c) of the Equal Employment Opportunity Act, which creates a private right of action for federal employees seeking to redress job discrimination. At the time certiorari was denied, two circuits had held that the section does apply retroactively to claims pending at the time of its enactment, while a third circuit, in the case before the Court, had ruled to the contrary. District courts, too, had reached opposite conclusions, and, subsequent to the denial, a fourth circuit was called upon to decide the issue. The dissents were without opinion; the case thus provides an example of those outside the scope of this study in which a Justice noted a dissent, thus inviting attention to the fact that the issue was not being decided, but did not feel impelled to file an opinion.

Even the noted dissents do not fully measure the volume of cases which, in the judgment of a knowledgeable participant in the process, were appropriate for national decision. Some Justices are reluctant to note a dissent under any circumstances; others may be reluctant to note a dissent unless they are prepared to write or to join an opinion. In this regard, it is significant that, as Justice Brennan has informed us,⁸ approximately 30 percent of all cases docketed annually—more than 1,100 in the 1972 term—are thought by at least one Justice to be worthy of discussion at conference. We learn also that of the cases granted review in the 1972 term, "approximately 60 percent received the votes of only four or five of the Justices. In only 9 percent of the granted cases were the Justices unanimous in the view that plenary consideration was warranted."⁹ It would be surprising if unanimity was the usual pattern when the Court denied review in those cases deemed worthy of discussion at conference, even if the dissents are

⁸ Brennan, *supra* note 5, at 479.

⁹ *Id.* 481-82.

not always recorded publicly. All of these decisions, of course, are made against the background of an awareness of the Court's limited capacity for plenary adjudication. Thus, it seems likely that there are a substantial number of cases in which the denial of review is motivated in whole or in part by a judgment, perhaps not fully articulated, that given the limited number of cases which the Court can decide, the importance to the nation of resolving a particular case simply does not rise to a level high enough to justify plenary consideration.

In our view, this study provides evidence that the Supreme Court alone should not be expected to do all that ought to be done in maintaining uniformity in the national law and providing guidance for litigants and lower courts in its interpretation and application.

IV. RELITIGATION AS A GOVERNMENT POLICY

Litigation to which the United States Government is a party¹ sharply points up the consequences of a system under which the number of nationally binding decisions is severely limited. Questions relating to the administration of Government programs or the interpretation of Government regulations may be litigated again and again—within the agency, in the district courts, and in the courts of appeals—because the questions have not been resolved by a tribunal whose decision is binding on all who may be affected. The result is to burden not only the courts and the litigants, but also those who deal with the Government and cannot be certain of the rule that will be applied to their transactions. The lack of an authoritative answer also encourages forum shopping and permits differential treatment of persons who are similarly situated.

These consequences can be attributed in part to the litigation policies of the United States Government. Professor Paul Carrington, who conducted an empirical study of appeals by the United States in civil cases, concluded that the Federal Government "is quite 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."² Evidence before the Commission supports this assertion, at least with regard to the Internal Revenue Service and the National Labor Relations Board.

¹ We include in this category litigation by Federal Government agencies and by Federal Government officials when acting in their official capacity. It should be noted, however, that responsibility for an agency's appellate litigation may be divided between the agency and the Solicitor General, and differences of opinion may arise both with respect to general policies and with respect to the conduct of a particular case. See further discussion *infra*.

² Carrington, *United States Appeals in Civil Cases: A Field & Statistical Study*, 11 Houston L. Rev. 1101, 1104 (1974).

In the survey of tax practitioners conducted by the Commission's consultant, Professor Gersham Goldstein, several of the respondents asserted that the litigation practices of the Internal Revenue Service contribute significantly to uncertainty and confusion in the area of tax law. These responses reflect the belief that, in the words of Professor Goldstein, the Service "unnecessarily seeks to litigate issues in undecided circuits despite several adverse decisions" in the courts of appeals. One attorney commented that the Service "takes shameless advantage of the lack of 'national law' precedent to support deficiencies in questionable areas." A second attorney reported:

It is not uncommon for me to disregard a potential tax plan notwithstanding that it has been accepted or approved in one or more circuits because of the government's continued resistance to the results in the appellate decisions and the knowledge that they will litigate again in my circuit.

The attorney added:

So long as the Internal Revenue Service does not feel bound in my circuit with the results of cases in one or more other circuits, a small taxpayer in an office audit or pursuant to the Unallowable Deductions Program will be told by the Internal Revenue Service that he owed X dollars for some particular item of income. Those dollars of course are very small and not significant enough to be contested. This taxpayer normally pays the tax although the government full well knows that it has lost the case in another circuit and in all probability may lose it in every circuit in which it is tried.

A third attorney commented:

[I]t seems to me that many of the time lag problems that result from our present system result from the deliberate actions of the Service and the Treasury in their litigating posture and in their refusal either to accede to the opinions of one or more Circuit Courts or in their refusal to go to the Congress in order to obtain legislative relief.

Confirmation of these perceptions comes from the Service itself. In 1966 the chief counsel of the IRS stated explicitly that "in the interests of uniformity" the service engages in "planned litigation, occasionally referred to—uncharitably—as 'circuit shopping.'" He emphasized that "the extent to which we engage in the search for a conflict should not be exaggerated. The number of issues which arise in this context is very small."³ In recent years the relitigation policy of the IRS has been institutionalized through the National List of Prime Issues and in a series of Revenue Rulings. The Prime Issues List is a compilation of issues which the Service believes have not been tested adequately in litigation and which the Service will therefore ordinarily insist on litigating and will not concede or compromise.⁴

³ Uretz, *Settlement of Tax Controversies*, 44 *Taxes* 794, 799 (1966).

⁴ See CCH 1975 Standard Federal Tax Reporter ¶195, taken from Internal Revenue Manual (MT 1277-8, Nov. 19, 1974).

The most recent list includes brief summaries of 20 issues; many of these contain references to the "Government position" in cases decided adversely to the Government in the courts of appeals. Similarly, the Service has issued a number of Revenue Rulings and Technical Information Releases stating explicitly that the Service would not follow court of appeals decisions in particular cases.⁵

Of particular interest is a Technical Information Release issued in 1965 announcing that a Ninth Circuit decision on net operating loss carryover "will not be followed as a precedent in the disposition of similar cases." The Release stated that "certiorari was not requested in the Ninth Circuit case due to the absence of direct conflict between circuits."⁶ It may be that the Solicitor General concluded that, in light of the other issues pressing for the Supreme Court's attention, he could not in good conscience urge the Court to grant review in a case of this kind unless a conflict did exist. The result, however, is that a recurring issue of corporate tax law remained unsettled. In 1971 the Eighth Circuit expressed agreement with the Ninth Circuit decision, though sustaining the Government's position on the facts of the case.⁷

A more extreme example concerns the rules to be applied in determining whether a combination of two or more commonly owned operating corporations may qualify as an "F" reorganization under section 368(a)(1)(F) of the Internal Revenue Code. The issue may arise in connection with the determination of loss carrybacks and other questions. A 1966 decision by the Fifth Circuit held that a particular transaction did constitute an "F" reorganization.⁸ In 1968,

⁵ See, in addition to the examples described below, Rev. Rul. 69-162, 1969-1 Cum. Bull. 158 (1969).

⁶ IRS Technical Information Release No. 773, Oct. 13, 1965, CCH 1965 Stand. Fed. Tax Rep. ¶6751.

⁷ *Exel Corp. v. United States*, 451 F. 2d 80, 84 (8th Cir. 1971).

⁸ *Davant v. Commissioner*, 366 F. 2d 874 (5th Cir. 1966), cert. denied, 386 U.S. 1022 (1967). The Service's position in this case deserves attention. In the proceedings in the Tax Court, the Service argued that the transaction in question constituted a reorganization within the meaning of both subparagraph "D" and subparagraph "F" of section 368(a)(1). The Tax Court, agreeing with the Service that the transaction constituted a "D" reorganization, did not rule on the "F" issue. 43 T.C. 540 (1965). On appeal to the Fifth Circuit, the Service abandoned the position that the transaction constituted an "F" reorganization and relied solely on subparagraph "D." The court, however, held that the transaction constituted both a "D" and an "F" reorganization. The result under the particular facts was to sustain the Government position that the contested portion of the taxpayer's income was ordinary income rather than capital gain. The taxpayer sought review in the United States Supreme Court. In opposing the petition, the Service again relied on the characterization of the transaction as a "D" reorganization. Thereafter, in proceedings in other courts, the Service adhered to its position, contrary to initial argument in the Tax Court, that transactions of the kind involved did not constitute an "F" reorganization. The irony of these developments was noted by the Court of Claims. *Movielab, Inc. v. United States*, 494 F. 2d 693, 696 (Ct. Cl. 1974).

two cases arising out of facts similar to those of the Fifth Circuit case came before the Ninth Circuit. The Service urged the Ninth Circuit not to follow the portion of the Fifth Circuit decision which defined the tests for an "F" reorganization, but the Ninth Circuit rejected the Service's position and instead adopted the rule established by the Fifth Circuit.⁹ In the following year the Service announced in a Revenue Ruling that it would "not follow as precedent in the disposition of similar cases the decisions of the . . . Ninth Circuit in [the two 1968 cases], nor that portion of" the Fifth Circuit decision dealing with the tests for an "F" reorganization.¹⁰ Two years later the issue came before the Fifth Circuit again. The Service urged that court not to follow its 1966 decision, but the court, pointing out that panel decisions were binding until overruled by the court en banc, declined to follow that course.¹¹

In 1974, the Service carried its argument to the Court of Claims. Noting that "[t]he Government has been consistently unsuccessful in urging its position that the definition of an 'F' reorganization cannot accommodate the amalgamation of two or more separate operating corporations," the court analyzed the Fifth and Ninth Circuit decisions and adopted their rationale. "The Government," stated the court, "has totally misconstrued the intent of Congress."¹² A few months later the Sixth Circuit joined in rejecting the Government position.¹³ The Government did not apply for certiorari in either case. The issue was included on the List of Prime Issues as of November 1974, so that further relitigation can be expected on this recurring question that has now been before the courts for almost a decade.

Another example involves the question "whether, where a net operation loss has been carried back and used in computing taxable income as a step in determining a taxpayer's tax for an earlier year under the alternative method of taxing capital gains, the excess of the net operating loss deduction over ordinary income for the earlier year may be carried forward to a succeeding year."¹⁴ According to the Government (in its oral argument to the Fourth Circuit in 1974), this question has arisen in some 99 cases involving approximately \$20,000,000 in taxes.¹⁵ In 1969, the Tax Court held, in accordance with the

⁹ *Estate of Stauffer v. Commissioner*, 403 F. 2d 611 (9th Cir. 1968); *Associated Machine v. Commissioner*, 403 F. 2d 622 (9th Cir. 1968).

¹⁰ Rev. Rul. 69-185, 1969-1 Cum. Bull. 108, 109.

¹¹ *Home Construction Corp. of America v. United States*, 439 F. 2d 1165, 1169 (5th Cir. 1971).

¹² *Movielab, Inc. v. United States*, 494 F. 2d 693, 696, 698 (Ct. Cl. 1974).

¹³ *Performance Systems, Inc. v. United States*, 501 F. 2d 1338 (6th Cir. 1974).

¹⁴ *Mutual Assurance Society of Virginia Corp. v. Commissioner*, 505 F. 2d 128, 129 (4th Cir. 1974).

¹⁵ *Id.* at 138 n. 21.

taxpayer's argument, that the excess could be carried forward.¹⁶ The First Circuit, characterizing the question as "unimportant" and "seldom occurring," affirmed.¹⁷ The question then arose in a Washington state case decided by the district court in early 1972.¹⁸ In early 1974, the Ninth Circuit, noting that the issue "has been consistently decided against the Government," held for the taxpayer.¹⁹ In the same year, the Service carried its arguments to the Eighth Circuit. Conceding that the unanimous weight of judicial opinion was against its position, the Service contended that those cases were, as the court put it, "merely ill-considered reaffirmations of an allegedly aberrant secondary holding in the original Tax Court decision on this issue."²⁰ The court, noting that "[n]one of the decisions is binding precedent in this court, and [that] several of the opinions are quite brief in their discussion of the issue," nevertheless rejected the Government position, thus becoming the third circuit to do so. The opinion stated: "[W]e cannot dismiss lightly the cumulative weight of our fellow judges' decisions or the divisiveness and administrative confusion that a contrary conclusion at this point might foster."²¹

Less than three months later, the issue came before the Fourth Circuit. Acknowledging that the Tax Court and three circuits had rejected the Government position, the Fourth Circuit concluded that "from our analysis of the applicable statutes and their legislative history, we are constrained to disagree."²² Within three months the Sixth Circuit had joined the Fourth in adopting the Government position.²³ A conflict having finally been created, the Supreme Court then granted the Government's petition for certiorari in the Eighth Circuit case.²⁴ Thus, it will have taken more than six years to resolve this recurring issue that has already affected 99 taxpayers and tax liabilities of \$20,000,000.

Of course, it is possible for the Service to "acquiesce" in a decision by a regional court of appeals, thus giving that decision nationwide effect and putting an end to uncertainty and relitigation. The chief counsel of the Service, in the article quoted earlier, stated that "our general rule of thumb, to which of necessity exceptions must be made, is that we will accept a holding made by two courts of appeals where there are

¹⁶ *Chartier Real Estate Co.*, 52 T.C. 346 (1969), *aff'd per curiam*, 428 F. 2d 474 (1st Cir. 1970).

¹⁷ *Chartier Real Estate Co. v. Commissioner*, 428 F. 2d 474 (1st Cir. 1970).

¹⁸ *Olympic Foundry Co. v. United States*, 72-1 USTC ¶9299 (W.D. Wash. 1972), *aff'd*, 493 F. 2d 1247 (9th Cir. 1974).

¹⁹ *Olympic Foundry Co. v. United States*, 493 F. 2d 1247 (9th Cir. 1974).

²⁰ *Foster Lumber Co. v. United States*, 500 F. 2d 1230, 1232 (8th Cir. 1974), *cert. granted*, 95 S. Ct. 1443 (1975).

²¹ *Id.* at 1232-33.

²² *Mutual Assurance Society of Virginia Corp. v. Commissioner*, 505 F. 2d 128, 129 (4th Cir. 1974).

²³ *Axelrod v. Commissioner*, 507 F. 2d 884 (6th Cir. 1974).

²⁴ *United States v. Foster Lumber Co.*, 95 S. Ct. 1443 (1975).

no contra appellate decisions.”²⁵ Others have suggested that when the Service has lost in two circuits, this creates “an inertia of defeat” that will ordinarily put an end to litigation at that point. However, as the cases cited above illustrate, and as the general counsel conceded, exceptions do exist; and as the Commission’s survey indicates, these exceptions have caused considerable concern among attorneys.

A second agency whose practices have aroused concern is the National Labor Relations Board. Professor Clyde W. Summers, the Commission’s labor law consultant, has pointed out that “the Board does not consider itself bound by any prior decisions of any Court of Appeal.” For instance, Professor Summers notes that the Board’s “right of control” test in applying the secondary boycott provisions of the Labor Act “was rejected in five successive Courts of Appeal . . . from 1968 onward, but the Board continued to use that test in deciding unfair labor practice cases, including cases arising in those circuits.”²⁶ The Government did not seek Supreme Court review of any of the adverse decisions, though in one case a petition was filed by the employer.

The Government’s response to the employer’s petition in that case sheds light on the circumstances which may lead to prolonged uncertainty with respect to questions of national law. The Board filed a memorandum, signed by the Solicitor General, noting that the Board had sought to file a petition for certiorari in an earlier case raising the same issue, but that the Solicitor General had refused leave to petition, “principally because, in his judgment, there was little likelihood that the Court would uphold the Board’s position, and also because the decision was interlocutory since the court of appeals had remanded [the case] to the Board” In light of the Solicitor General’s position in the earlier case, the Board did not request him to file a petition in the later one. However, the Board insisted that the later case was ripe for review. The Government memorandum concluded, “The Board believes that the decision below is erroneous, that it raises an important issue, and, accordingly, that this Court should grant the petition for a writ of certiorari. The Solicitor General believes that the petition should be denied.”²⁷ Certiorari was denied, with two Justices dissenting. Two years later, the issue came before the Fourth Circuit.²⁸ That Court upheld the Board’s position, but the respondent did not petition for certiorari. An issue that has been litigated in six circuits over a period of seven years thus remains unresolved.

Another striking example involves the Board’s application of its

²⁵ Uretz, *supra* note 3, at 799.

²⁶ C. Summers, Report on Labor Law Cases in the Federal Appellate System 13-14 (1974).

²⁷ Memorandum for the NLRB at 3, *J. L. Simmons Co., Inc. v. Local 742, United Brotherhood of Carpenters & Joiners*, 404 U.S. 986 (1971).

²⁸ *George Koch & Sons v. NLRB*, 490 F. 2d 323 (4th Cir. 1973).

“Midwest Piping” doctrine. The Board holds that an employer commits an unfair labor practice by recognizing one of two unions competing for exclusive representation at a time when the other union has filed a representation petition that has sufficient merit to trigger formal proceedings. This rule has been rejected by at least five circuits in a series of decisions from 1961 on.²⁹ In a 1973 case, the Board acknowledged that its decision conflicted with the holdings of at least four circuits, but stated that “we respectively [*sic*] disagree and adhere to our view until such time as the U.S. Supreme Court has passed on the matter.”³⁰ However, the Board has not sought certiorari in any of the cases in which its position has been rejected, and the Government has consistently opposed petitions filed by other parties.³¹

As Professor Summers notes, the Labor Board may continue to relitigate an issue even in a circuit which has rejected its position. The result, he continues, is that, “[e]mployers and unions may be found guilty of violations by the Board, ordered to cease and desist or take affirmative action, even though the order is clearly not enforceable in the Court of Appeals. The Board’s proceedings serve little purpose except to provoke appeals.”³² In support of its practice, the Board

²⁹ *NLRB v. Inter-Island Resort, Ltd.*, 507 F. 2d 411 (9th Cir. 1974), petition for cert. filed, 43 U.S.L.W. 3594 (U.S. Apr. 24, 1975) (No. 1340); *Suburban Transit Corp. v. NLRB*, 499 F. 2d 78 (3d Cir.), cert. denied, 419 U.S. 1089 (1974); *NLRB v. Peter Paul, Inc.*, 467 F. 2d 700 (9th Cir. 1972); *NLRB v. Midtown Service Co.*, 425 F. 2d 665 (2nd Cir. 1970); *NLRB v. North Electric Co.*, 296 F. 2d 137 (6th Cir. 1961); *NLRB v. Swift & Co.*, 294 F. 2d 285 (3d Cir. 1961); *St. Louis Independent Packing Co. v. NLRB*, 291 F. 2d 700 (7th Cir. 1961).

³⁰ *Kona Surf Hotel*, 201 NLRB 139, 142 n. 12 (1973). On appeal, the Ninth Circuit denied enforcement, citing the various court of appeals decisions that had rejected the Board’s position. These included an earlier Ninth Circuit decision not referred to by the Board in its opinion. *NLRB v. Inter-Island Resorts, Ltd.*, 507 F. 2d 411 (9th Cir. 1974). The losing union has petitioned for certiorari, 43 U.S.L.W. 3594 (U.S. Apr. 24, 1975) (No. 1340). The Board, in opposition to the petition, argued that the case did not merit further review and that the union had no standing to seek certiorari because it had failed to intervene in the court of appeals proceeding. Memorandum for the NLRB at 2, *Hotel Employees, Local 5 v. Inter-Island Resorts, Ltd.*, petition for cert. filed, 43 U.S.L.W. 3594 (U.S. Apr. 24, 1975) (No. 1340). The certiorari petition was pending at the time of this writing.

³¹ See note 30, *supra*, and note 34, *infra*.

³² C. Summers, *supra* note 26, at 15. In 1966, at least, the Internal Revenue Service appeared to be following a similar policy. The then chief counsel asserted that “settlement offers may be rejected, even though they represent a reasonable assessment of the litigating hazards involved in the specific case . . . [when] the same issue is currently being litigated in other cases, going to another circuit, and review by more than one circuit holds the possibility of finally settling the question.” Uretz, *supra* note 3, at 799. This statement, however, was made before the decision in *Jack E. Golsen*, 54 T.C. 742, 756-58 (1970), *aff’d*, 445 F. 2d 985 (10th Cir. 1971), holding that the Tax Court will follow appellate court decisions for the circuit in which a taxpayer resides when filing his Tax Court petition. This decision represented a change in policy for the Tax Court.

argues that by the time the proceedings and appeal are completed, the Board's position may be vindicated by the Supreme Court. However, this argument loses much of its force when the Government does not ask the Supreme Court to review the adverse decisions.

In response to a questionnaire circulated by the Administrative Conference, the general counsel of the Board stated that "if a circuit has ruled against the Board and another case presenting the same issue arises in that circuit, the Board will seek to distinguish the adverse case on its facts. In the rare instances where that has not been possible, the Board has acquiesced in the adverse decision." However, this policy must be evaluated in the light of two recent cases. In one, the Board held that a New Jersey employer had committed an unfair labor practice notwithstanding a 1961 Third Circuit decision rejecting the doctrine relied upon by the Board.³³ The Board acknowledged that its finding conflicted with the 1961 case, in which no petition for certiorari had been filed. The Third Circuit adhered to its position, and again the Board did not seek certiorari. Moreover, when the losing union filed a petition, the Board opposed it, arguing that the case did "not provide a good factual setting" for Supreme Court review.³⁴ Certiorari was denied.

A second instance involves the provision of the National Labor Relations Act which excludes "agricultural laborers" from coverage. The Board has sought to enforce bargaining orders for units composed of employees who work in various operations of feed mills run by poultry raising corporations. The Fifth Circuit held in 1969 that such employees were excluded from the Act's coverage.³⁵ In 1972, the Ninth Circuit denied enforcement of a Board order entered on what the court termed "substantially identical facts."³⁶ The court stated, "If Congress is troubled by the reasoning in *Strain*, it is free to translate its intent into clearer legislation. The NLRB has not demonstrated that we need create a conflict between the Circuits on this point." The Board persisted in its view, however, and in the *Abbott Farms* case it conducted a representation election and issued a bargaining order with respect to employees of a feed mill in Alabama notwith-

³³ *Suburban Transit Corp. v. NLRB*, 499 F. 2d 78, 82 (3d Cir.), cert. denied, 419 U.S. 1089 (1974). The case involved the Board's application of its Midwest Piping doctrine. As noted earlier, other circuits have also rejected the Board's rule. See text accompanying notes 29-31, *supra*.

³⁴ Memorandum for the NLRB at 2, *Highway Freight Drivers Local No. 701 v. Suburban Transit Corp.*, 419 U.S. 1089 (1974).

³⁵ *NLRB v. Strain Poultry Farms, Inc.*, 405 F. 2d 1025 (5th Cir. 1969).

³⁶ *NLRB v. Victor Ryckebosch, Inc.*, 471 F. 2d 20 (9th Cir. 1972).

standing the Fifth Circuit's 1969 decision. The Fifth Circuit again denied enforcement, saying that the fact situation and the Board's contention were "well nigh identical" to those of the 1969 case, and that the distinction urged by the Board "faintly distinguishes [the earlier decision] on its facts but not its principles."³⁷ The Government has not sought certiorari in any of these cases. It should be noted that in order to contest the Board's determination of employee coverage, the employer must go through an election, decline to follow the bargaining order if the union wins, and then petition for review (or await the Board's petition for enforcement). This is the situation even in the Fifth Circuit, although the Board's position has been unequivocally rejected, and it can be predicted that enforcement of the bargaining order will be denied.

Little information is available on the relitigation practices of other agencies, but the responses to the Administrative Conference questionnaire do shed some light on the extent to which agencies conform their conduct to unfavorable court of appeals decisions. The question was asked, "Does your agency have a policy of acquiescence in the event of one or more adverse court of appeals decisions?" Seven agencies and departments said simply that they had no policy of acquiescence. This was also the response of the Securities and Exchange Commission; the general counsel then added that "on at least one occasion some years ago the Commission issued a statement that it did not acquiesce in a court of appeals decision where the Solicitor General did not agree that we might seek Supreme Court review." The Judge Advocate General of the Air Force replied that "[a]s a general rule, the Air Force has no specific policy of acquiescence when more than one circuit has rendered an unfavorable decision, except, perhaps, in those cases arising in the circuit in which the decision is rendered. Some conflicts, such as those involving military justice matters, are not considered resolved except by the Supreme Court . . . [W]hen circumstances dictate a change in policy as a result of an adverse decision, even at the District Court level, it generally results more from a projected probability of failure of success on appeal than from a policy of acquiescence."

Six agencies indicated that the decision is made on a case-by-case basis. These responses were as follows:

The [Veterans Administration] generally acquiesces in the event of one, or more, adverse appellate decisions, but its policy is best

³⁷ *Abbott Farms v. NLRB*, 487 F. 2d 904 (5th Cir. 1973). In a case decided by the Fifth Circuit a few months later, the Board conceded that *Abbott Farms* governed, but adhered to its position. *McElrath Poultry Co. v. NLRB*, 494 F. 2d 518 (5th Cir. 1974).

described by saying that we would not acquiesce if the issue involved was of sufficient importance to pursue the matter further, or, if we felt the decision was wrong.

[Comptroller of the Currency:] There is no policy of acquiescence in the event of one or more adverse court of appeals decisions. The decision whether or not to acquiesce in an adverse court of appeals decision or to appeal to the Supreme Court is made on a case-by-case basis.

[Customs Service:] Whether or not Customs "acquiesces" to an adverse decision depends upon the particular factors of the decision and how Customs feels it will affect our enforcement programs.

[Federal Power Commission:] This agency does not have a policy of acquiescence in the event of conflicting Court of Appeals decisions; our strategy is determined on a case-by-case basis.

The Department of the Army does not automatically acquiesce in adverse court of appeals decisions. Each decision is made *ad hoc*. The factors weighed include the impact of the decision if applied across the board; the administrative burden of doing so; and an evaluation of the Army's chances for success should the issue arise again in another jurisdiction.

[Bureau of Alcohol, Tobacco and Firearms:] Acquiescence depends on the importance of the issue and the possibility of its being resolved in the Bureau's favor by the Supreme Court.

It should be noted, however, that the Bureau also stated that it "will attempt to obtain a conflict in the circuits in order to have an important principle of law decided adversely to it [in one circuit] resolved by the Supreme Court."

In several of the instances where government agencies have continued to relitigate an issue in the face of one or more adverse court of appeals decisions, the Government did not seek certiorari in any of the cases which it lost. Often the agency responsible for enforcing the rule rejected by a court of appeals will urge that a petition for certiorari be filed, but the Solicitor General, who has the ultimate authority, will refuse to allow the agency to seek review. "A statistical study found that the Solicitor General authorized less than twenty percent of the certiorari petitions requested by executive departments; less than sixty percent of those requested by the appellate sections of the Justice Department; and less than sixty-five percent of those requested by the regulatory agencies."³⁸ In their responses to the Administrative Conference questionnaire, both the Civil Aeronautics Board and the Securities and Exchange Commission referred to in-

³⁸ Note, *Government Litigation in the Supreme Court: The Roles of the Solicitor General*, 78 Yale L. J. 1442, 1454 (1969), citing Brigman, *The Office of the Solicitor General* (Ph.D. Dissertation, University of North Carolina, 1966). Brigman's figures corresponded to the estimates suggested in interviews with attorneys in the Solicitor General's office and in the offices of the agencies. See also Carrington, *supra* note 2 at 1101.

stances in which the agencies had urged Supreme Court review, but could not persuade the Solicitor General. The most detailed account of differences of opinion with respect to the filing of certiorari petitions comes from the National Labor Relations Board and involves the Board's "right of control" test in secondary boycott cases, discussed earlier.

As the NLRB episode illustrates, the Solicitor General's refusal to allow a petition for certiorari to be filed may be based upon considerations of strategy. However, there is also evidence that the Solicitor General sometimes declines to seek review in the United States Supreme Court because he believes that the burden of the Court's workload would not justify asking the Court to hear the case. Erwin Griswold stated in the Irvine Lecture that "there are a fair number of cases which [the Solicitor General] thinks are really worthy of final appellate review, but where he does not file because he knows that the pressures on the Court now are such that they probably will not be able to take the cases" ³⁹ Moreover, it has been suggested that the effect of the Solicitor General's concern for the Court's workload is probably not limited to decisions made in his own office; government agencies, aware of the Solicitor General's attitude, may well refrain from asking leave to seek Supreme Court review in all but the most important cases. "Members of the Office of the Solicitor General and the agencies' general counsels . . . agree . . . that thirty years of experience have taught the agencies to internalize the Solicitor General's standards for authorizing certiorari." ⁴⁰

These data suggest that to a significant extent relitigation by the Federal Government results from a lack of adequate national appellate capacity. As has been shown, the Government may decline to seek Supreme Court review of adverse decisions, even where the issues involved are recurring ones, because no conflict has yet arisen, or because the procedural posture is less than ideal. Litigation decisions of that kind are influenced by the knowledge that there are stringent limits to the number of cases which the Supreme Court can hear. Cases which do not present the most urgent claims upon the Court's resources are justifiably put to one side in order that others, more pressing, can be heard and decided. To the extent that such concerns are responsible for the Government's failure to seek review of adverse decisions on recurring issues, the problem would be mitigated or even eliminated by the creation of a new court that would double the national appellate capacity.

³⁹ Griswold, *Rationing Justice—The Supreme Court's Caseload and What the Court Does Not Do*, 60 Corn. L. Rev. 335, 344 (1975) (originally delivered as an Irvine Lecture in 1974).

⁴⁰ Note, *supra* note 38, at 1457.

V. THE PERCEPTIONS OF THE "CONSUMERS"

The Commission considered it very important to know whether, and to what extent, the attorneys who practice in the federal appellate courts and look to that system for authoritative rulings on issues of national law—the "consumers"—have encountered in their practice unresolved conflicts, unsettled issues, or undue delays in the resolution of questions of federal law. To obtain broad-based answers to this inquiry, the Commission asked its consultants to survey the experiences and perceptions of attorneys with extensive practices in four important areas of the law. In cooperation with the Administrative Conference of the United States, we also sought the views of the general counsels of the federal administrative agencies. The empirical data received indicates that such problems are encountered in the practice of the private attorneys and general counsels, albeit in widely varying degrees in the areas of law and agencies sampled.

In the area of tax law, "virtually everyone [of the respondents] indicated that he had some perception of the lack of national law precedent." The Commission's patent law consultants reported that their study confirmed that "the lack of uniformity in decisions on patent-related issues has been a widespread and continuing fact of life" and "continues to be a problem." On the basis of the survey and their own experience, these consultants concluded that there is a clear need for a new court which "could not only deal with the actual conflicts which develop between circuits and within circuits but more importantly . . . could provide a monitoring function to eliminate or at least minimize the attitudinal aberrations with which we are too often now confronted."

Among antitrust practitioners the consensus was "that uncertainty and inter-circuit conflict do not significantly affect antitrust cases as distinguished from other categories of legal controversies," although "the responses catalogued a wide range of issues on which there was inter-circuit conflict and uncertainty." Labor lawyers "considered the uncertainty caused by the multi-court appellate system to be no serious practical problem." The administrative agency responses were varied enough to defy brief characterization.

Many respondents who acknowledged the existence of problems found the causes to lie elsewhere in the system than in the appellate structure: in varying attitudes among district judges within the same circuit, in inconsistent approaches by different panels of a single court of appeals, in changes in the composition and orientation of the Supreme Court, or even in the uncertainties inherent in the various

subject matters. And it came as no surprise that many who pointed to problems in the appellate structure nevertheless asserted that change in the system was unnecessary or undesirable. The opposition of many members of the bar to any simplification of the intricacies of common law pleading is familiar history. Lawyers, like other people, become accustomed to working within an existing system, and soon adjust to whatever infirmities it may have. Moreover, practitioners may be adept at turning the infirmities of the system—whether they be niceties of pleading or unresolved issues of federal law—to the advantage of their clients in planning and litigation. Furthermore, many of the respondents who urged that the present system be retained were defending it against changes not suggested or recommended by the Commission. This was especially true in respect to the opposition recorded to various models for "specialized" courts—models which the Commission also rejects. We note, too, that many of the practitioners emphasized that delay in the final resolution of issues is not necessarily bad and that a case by case adjudication in different circuits may contribute to an appropriate resolution of the issue.

The Commission gave these views serious and deliberate consideration, although the focus of the Commission's inquiry was on whether and to what extent practitioners and agency counsels have actually encountered conflicts, unsettled issues, and delay in the resolution of questions of federal law. To the results of that particular inquiry we now turn.

Tax Law

The Commission's consultant, Professor Gersham Goldstein of the University of Cincinnati College of Law, reported that "virtually everyone [of the respondents] indicated that he had some perception of the lack of national law precedent in tax law." He added: "While a number of the attorneys pointed to specific situations where they have been critically affected by a circuit conflict, generally, the responses indicate a satisfaction with the present system which comes from years of adaptation to the unusual situations which are sometimes created."

Many of the attorneys who perceived problems identified them as resulting from factors other than the existence of a multi-court appellate system. Among those deficiencies attributed by the respondents entirely or in large part to the structure of the present appellate system, however, perhaps the most important are the "time lag and unnecessary litigation in the system." As to these problems Professor Gold-

stein reported "widespread agreement."¹ For instance, a Washington, D.C. attorney, while asserting that "[d]espite the difficulties, the present system is not inadequate," nevertheless stated:

There are difficulties with the present appellate system handling the resolution of conflicts which arise as a result of unresolved issues in the Internal Revenue Code. Issues take long periods to be resolved and relitigation of similar issues creates an unnecessary burden.

Other attorneys were more emphatic in describing how the present system fosters delay and relitigation. Several adverted to two particular defects associated with a multi-court appellate system: relitigation by the Internal Revenue Service and conflicts between the Tax Court and one or more circuits. Professor Goldstein quotes some of the responses on this point.

The usual time lag is inordinate from the point the issue first surfaces until it is finally resolved. The IRS carefully selects prime cases in order to achieve the ultimate appellate result that it desires. For this reason many pending cases are settled in favor of the taxpayer, even though the IRS has a good measure of confidence that it could win in litigation. Despite this, it prefers to select for appellate review those cases that are most likely to bring not only favorable results to the IRS, but also a broad court decision that will lay down the direction that it has in mind. The present system is not as efficient as it should be. It does often involve excessive and unnecessary relitigation of the

¹ The Committee on Tax Policy of the New York State Bar Association, Tax Section, in their *Report on Complexity and the Income Tax*, 27 Tax L. Rev. 325, 354-55 (1972), made the point as follows:

With 11 courts of appeals deciding appeals from the Tax Court, it is obvious that diverse results may be reached by the various courts. Until there is a square conflict, it is rare that the Supreme Court will grant certiorari and decide the question. In the meantime, there is the incongruous situation that the Tax Court will decide cases involving identical issues in different ways merely because they are appealable to courts of appeals which have reached divergent results or have not passed on the issue. The rule has been carried to the logical extreme of reaching different decisions in cases involving the same issue and the same taxpayer for different years, merely because the taxpayer had changed his residence and the decisions were appealable to different courts of appeals, one of which had reversed the Tax Court on the point in another case and the other of which had not passed on the point. As a general proposition it may take nine to ten years for a final decision to be reached on a particular tax question. In the meantime, both the taxpayer and the administrator have been faced with the frustrating situation of being completely uncertain as to the correct rule. The fact that even three or four courts of appeals have decided the question the same way does not guarantee that a much later case will be decided by another circuit the same way. If a conflict develops, there is always uncertainty as to how the Supreme Court eventually will decide the matter.

same issues or nearly the same issues. Delay and extra expenses frequently occur. [another Washington, D.C. practitioner]

* * *

I believe that the time lag between the time the government first lays down the gauntlet in the Revenue Ruling and the time that the issue is finally decided adversely to the government in at least three circuits is significant. I recall when the issue of the professional corporations was first raised, the government continued to litigate for four or five years until the issue was finally resolved. The only effect of their announced position was to deter an average person from proceeding to establish a professional corporation because of "troubles with the IRS" while the more adventuresome received all the benefits that accrued during the period of time. [a Miami practitioner]

* * *

[A] decision by the Service that it will not follow a circuit court decision is tantamount to a guarantee that the same issue will be presented to one or more other circuits. Non-institutional litigants in other substantive law areas are obviously less motivated to litigate in the face of an adverse circuit court decision. If the Tax Court is in agreement with the Service, so that future appeals are likely to be from pro-government decisions, the chances of a conflict ultimately developing are increased and further doubt is cast upon the original pro-taxpayer decision. The foregoing is not intended to imply any criticism of the Service's litigating policy: rather, I think the problem is inherent in the court structure. [a Los Angeles practitioner]

* * *

[I]t seems to me that many of the time lag problems that result from our present system result from the deliberate actions of the Service and the Treasury in their litigating posture and in their refusal either to accede to the opinions of one or more Circuit Courts or in their refusal to go to the Congress in order to obtain legislative relief. [a New Orleans practitioner]

In the area of planning and advice, Professor Goldstein distinguishes between the consequences attributable to the multi-court appellate system, considered in isolation, and those which result from the interaction of the system with the practices of the Internal Revenue Service and the Tax Court. "[F]ew people," he writes, "indicated any great difficulty due to the inability to anticipate results of courts in undecided circuits and to estimate what the trend of the law is." However, "the planning area is complicated by factors outside the court system which coalesce with the court structure to provide for planning problems." Specifically, the roles of the IRS and the Tax Court were cited. For instance, one lawyer, after describing the lack of national precedents as "by no means unbearable" and stating that "tax lawyers are creative and sufficiently intelligent to form judgments providing their clients with a wise and reasonably safe course of action to follow," acknowledged nonetheless that "[w]e feel obligated in our

planning practice to advise clients of the difference of approach and varying conclusions among the courts of appeals." Other attorneys were less equivocal in their descriptions of the planning problems created by the lack of nationally binding precedents:

I believe that the lack of a national precedent is probably most serious in the planning area. It is not uncommon for me to disregard a potential tax plan notwithstanding that it has been accepted or approved in one or more circuits because of the government's continued resistance to the results in the appellate decisions and the knowledge that they will litigate again in my circuit. [a Miami, Fla. practitioner]

* * *

Conflicts in the Circuits also create planning problems. We frequently advise a client that if he proceeds in a particular manner, according to the precedents in one circuit he will get a particular result. We then are obligated to point out that, on the other hand, in another circuit a different result might obtain. Finally, in our circuit there may be no authority. [a New York practitioner]

* * *

My feeling is that circuit-Tax Court conflicts interject at least as much confusion into the tax law as circuit conflicts, and hence the delay and uncertainty in the resolution of circuit-Tax Court conflicts is unacceptable.

A contemporary example of the kind of uncertainty this problem creates is provided by the recent spate of litigation involving the incorporation of cash method proprietorships. In many situations the liabilities assumed by the new corporation (primarily accounts payable) exceed the basis of the assets transferred to the corporation when such assets include zero-basis accounts receivable. The Second Circuit has spared taxpayers the rigors of Section 357(c) in this situation, *Bongiovanni v. Commissioner*, 470 F. 2d 921 (2nd Cir. 1972), but both the Tax Court and the Service seem determined to apply this Section literally.

Most tax lawyers would probably agree that *Bongiovanni* is a questionable interpretation of the statute. As such, it is hazardous to rely on it. However, even if the decision seemed to represent the better view, I submit that few competent tax practitioners would advise their clients to rely on it, primarily because of the contrary position taken by both the Tax Court and the Service. The result is that a routine, garden-variety business transaction, the incorporation of a cash basis business, is plagued by significant tax uncertainties. [a Los Angeles practitioner]

The lack of an adequate volume of nationally binding precedents may be seen even in situations where there is neither conflict among circuits nor uncertainty about the governing rule. The reason is that a paucity of national decisions applying a rule in a wide variety of factual situations make its more difficult to achieve predictability

and consistency in the application of the rule to still other factual settings. The problem was described by a Florida practitioner:

We feel that the Internal Revenue Service takes shameful advantage of the lack of "national law" precedent to support deficiencies in questionable areas. There are so many variations of factual patterns involving the same principles of law that none of us can feel certain that even a Supreme Court decision will be followed. For example, the *Clay Brown* case. We recently litigated a *Clay Brown* factual pattern before the Tax Court. It was a much stronger case on the facts than the *Clay Brown* case; however, the government insisted on litigating it.

A number of the respondents expressed the view that the absence of nationally binding precedents under the existing system results in elements of unfairness. Professor Goldstein writes:

One element of unfairness lies in the fact that most taxpayers are confined to one court of appeals for resolution of all their tax issues. Since the Supreme Court infrequently grants certiorari in tax cases without clear conflicts in the circuits, the decision of the court of appeals is final.

Specific examples were cited by practitioners, one of whom emphasized the unfairness to "the small taxpayer who cannot afford legal counsel":

So long as the Internal Revenue Service does not feel bound in my circuit with the results of cases in one or more other circuits, a small taxpayer in an office audit or pursuant to the Unallowable Deductions Program will be told by the Internal Revenue Service that he owed X dollars for some particular deduction or some particular item of income. Those dollars of course are very small and not significant enough to be contested. This taxpayer normally pays the tax although the government full well knows that it has lost the case in another circuit and in all probability may lose it in every circuit in which it is tried. I specifically have in mind a situation where the parent of a dependent child who accompanied the child to a foreign state for purposes of having a medical operation and who lived at a hotel near the hospital during the period of the operation and postoperative period, was not permitted to deduct the expenses incurred as medical expenses in spite of a decision to the contrary in a circuit other than the Fifth Circuit. I feel constrained to say that it is my view that in these situations the Internal Revenue Service specifically drags out the period of time before the issue is finally resolved in order to collect the maximum amount of taxes. [a Miami, Fla. respondent]

* * *

It is certainly, it seems to me, self-evident that the lack of national law in tax creates a great deal of unfairness among taxpayers. Thus, for example, in the 5th Circuit, we have the *Rushing* case which we can use to a clear advantage but it is not available in other Circuits. We also have cases more helpful

to us in the field of debt-equity. On the other hand, there are various decisions in the 5th Circuit which are more negative than those of other Circuits and thus our activities are restricted, in comparison with other taxpayers. The actual fact of practice is we regard the 5th Circuit as the ultimate court for most problems which I think is unrealistic from a national law standpoint. [an Orlando, Fla. practitioner]

What Professor Goldstein describes as "a glaring example of unfairness" is the treatment of shareholders in a single corporation who file their tax returns in different circuits. "A corporate transaction should be treated similarly for all taxpayers," Professor Goldstein writes but in reality, the tax consequences of corporate distributions may "face conflicting and inconsistent results, without any factual distinctions whatsoever." One respondent noted:

[A]t one time the Revenue Service was litigating the issue of whether a corporate spin-off of one business, followed by an amalgamation of the remaining business with another corporation, could constitute a tax-free reorganization. The Circuits were split and we had the issue raised by a corporation located in South Carolina. The IRS obviously would not issue a favorable advance ruling on the proposed transaction; and the clients asked whether we would be prepared to give a legal opinion on the tax-free nature of the transaction. With favorable opinions in the Fourth Circuit, we had no difficulty in opining that the transaction would be held in favor of the taxpayer in that Circuit. Neither the acquired corporation would be subject to tax nor would its shareholders. However, if any of its shareholders resided outside of the jurisdiction of the Fourth Circuit, the IRS could seek to get a contrary ruling from the controlling Circuit and subject him to liability.

"A related problem," Professor Goldstein writes, "arises when competing firms in a single industry receive different tax treatment because they are situated in different circuits. A Washington, D.C. attorney found this to be unfair":

Because our practice involves representation of a number of clients in the same industry, we frequently feel it is unfair where similarly situated clients receive different treatment because the court of appeals in their Circuit is not inclined to follow the decision or line of reasoning of another Circuit. This is particularly bothersome on "industry" types of issues because the same set of facts and circumstances generally surround the legal issue when it applies to a whole industry resulting in unfairness, unnecessary and costly litigation, and a certain amount of disrespect of the courts.

Professor Goldstein suggested one consideration which may illuminate the responses to the survey. "[S]everal of the practitioners," he

notes, "emphasized that the lack of a national tax law creates valuable opportunities in both planning and litigation." One stated:

Tax planning is still possible and may even be enhanced (even if made more challenging) by the ability to choose among Circuits. Thus, problems and difficulties are created by the present system, but these problems are not overly burdensome. [a Washington, D.C. practitioner]

Another commented:

I suppose most tax practitioners view the lack of a national tax law as somewhat of an opportunity. Certainly, we engage in forum shopping. [a Portland, Ore. lawyer]

A third said:

Despite the above, I am not inclined to consider the lack of "national law" as a major problem in my practice. A conflict sometimes even presents opportunities, e.g., easier stipulation of facts, choosing the more favorable line of authority for planning purposes where the risks are acceptable, etc. [a Seattle, Washington practitioner]

Another practitioner elaborated upon this point:

Although I can recall no tax case which I have handled in the Court of Appeals, in which there was a conflict with a decision involving the same issue in another circuit, I have, nevertheless, had a number of tax proceedings before the IRS, both at the Appellate Division level and in dealings with the National Office, in which I was dealing with conflicting decisions among the circuits. Naturally, as counsel for the taxpayer, I sought to take full advantage of the decisions favorable to my client. [a New York practitioner]

Yet another attorney found another benefit in the absence of authoritative decisions:

Very frankly, it is precisely that lack of an answer to so many questions that makes the practice of tax law exciting. Those relatively rarer instances in which there is a diversity of answers is a part of that excitement. [a Cleveland, Ohio practitioner]

Patent Law

The Commission's patent law consultants, Professor James B. Gambrell of New York University Law School and Donald R. Dunner, Esq., of Washington, D.C., circulated a questionnaire to approximately 1,400 attorneys who had participated in patent cases. About 240 usable responses were received. Analysis of the responses showed that "by far the major problem is the circuit conflicts due to differences in the application of the law." Some 48 percent of the respondents

indicated "that this was a cause of considerable impact on disputes involving patent-related issues." Differences in interpretation of law were identified as a problem by 28 percent. Analysis of the data suggested that "most of the problem lies in the intra- and inter-circuit conflicts which arise by virtue of the differences in applying the law to the facts in particular cases before the court." Moreover, "directly attributable" to differences in the interpretation and application of the law are "forum disputes and the extensive forum shopping that goes on." Summarizing some of the particulars of the survey, Professor Gambrell and Mr. Dunner found it "reasonably clear" that

the individual lawyers responding to the questionnaire were quite concerned about the circuit conflicts due to differences in the application of law to facts in patent-related proceedings and the consequences that this and other problems generated in the area of forum disputes, expense and, to a slightly lesser degree, their ability to advise clients, delays in adjudication and quality of adjudication. It is also clear that this concern is fairly uniform as between corporate and privately employed lawyers, although the concerns were not uniformly held by respondents in all circuits.

In a letter to the Commission, Professor Gambrell and Mr. Dunner, drawing upon their own experience as well as the responses to the survey, elaborated on the seriousness of the problems and the urgency of the need for change.

Our collective experience over the 20 years or so each of us has been active in the field led us to believe that the lack of uniformity in decisions on patent-related issues has been a widespread and continuing fact of life. This study merely confirms our judgment that it has been and continues to be a problem. The inevitable consequence of this fact is that patent owners and alleged infringers spend inordinate amounts of time, effort and money jockeying for a post position in the right court for the right issues. Nowhere is the quest more vigorously pursued than for the right forum to rule on validity. Patentees now scramble to get into the 5th, 6th and 7th circuits since the courts there are not inhospitable to patents whereas infringers scramble to get anywhere but in these circuits. Such forum shopping not only increases litigation costs inordinately and decreases one's ability to advise clients, it demeans the entire judicial process and the patent system as well.

* * *

It is our view that the principal cause of circuit-to-circuit deviations in the patent field stems from a lack of guidance and monitoring by a single court whose judgments are nationally binding. True, the Supreme Court technically fills this role but in practice it has not and, indeed, it cannot. The few decisions it renders in critical patent law areas, e.g., obviousness, have done little to provide the circuit courts with meaningful guidance.

The Supreme Court is just too busy to perform anything even resembling a monitoring function on patent-related issues. . . .

Since it is clear that the Supreme Court will not be able to fill this void, we believe the next best solution resides in the creation of a national court such as recently has been suggested by former Solicitor General Erwin Griswold. If such a court were to be given statutory authority to review a meaningful number of patent cases each year, it could not only deal with the actual conflicts which develop between circuits and within circuits but more importantly it could provide a monitoring function to eliminate or at least minimize the attitudinal aberrations with which we are too often now confronted.

Professor Gambrell and Mr. Dunner emphasized that if the new court is to perform the monitoring function adequately, the court "must be prepared to handle a significant number of patent-related cases in the various areas of uncertainty, such as obviousness and the like."

Antitrust Law

The survey of antitrust practitioners conducted by Professor Louis B. Schwartz of the University of Pennsylvania Law School "focused on the existence and extent of a substantial problem of legal uncertainty or inter-circuit conflict in the antitrust field, rather than on the merits of a particular solution to such problems where they exist." Professor Schwartz found a "consensus that uncertainty and inter-circuit conflict do not significantly affect antitrust cases as distinguished from other categories of legal controversies." Nevertheless, "the responses catalogued a wide range of issues on which there was inter-circuit conflict and uncertainty." Among them were:

the line of demarcation between interstate and local commerce; necessity of proving a relevant market in cases of attempt to monopolize; measure of damages in Robinson-Patman price discrimination cases; availability in a price discrimination case of the defense of "meeting" competition, where defendant discriminated "aggressively," i.e. to take a customer away from a competitor rather than to hold an existing customer; the handling of class actions; "standing" to bring treble damage actions; and criteria for measuring the award of attorneys' fees.

Professor Schwartz found that, given these uncertainties, "[i]t was the more remarkable" that the practitioners as a group revealed themselves unreceptive to "proposals for a new court." He also reported, however, that the "[o]pposition to restructuring the appellate system did not stem from any belief that the antitrust law is not characterized by uncertainties and conflicts among the circuits." And it was clear that the contemplated restructuring which was opposed was not necessarily the same as that proposed by the Commission.

Labor Law

The survey of labor law practitioners was conducted by Professor Clyde W. Summers of Yale Law School. He reports:

THE PROBLEM OF UNCERTAINTY

The labor lawyers who responded to the inquiries, and who were interviewed, both union and management, with few exceptions considered the uncertainty caused by the multi-court appellate system to be no serious practical problem. Many expressed the view that concern with conflicts between the circuits was misplaced because conflicts were infrequent and were usually quickly resolved. All recognized that the appellate system created uncertainties, but most also declared that the problems were infrequent. Some lawyers stated that clients were at times disturbed by the lack of answers, afraid of the risks, angered by unexpected outcomes, and bothered by the costs of appeal. The majority, however, indicated that the clients were not particularly bothered by uncertainty, because they had come to accept it as inevitable in labor law.

. . . [T]he dominant and recurrent theme was that the uncertainties in the law caused by the multi-court appellate system were inconsequential compared with uncertainties from other sources.

There is much greater uncertainty at the district court level, both as to the legal rules which will be applied and the way the facts will be evaluated. There is also great uncertainty as to how the Board will decide a case, for its legal rules are not always clear and are constantly changing. In addition, the Board's decisions may not be internally consistent. A number of lawyers expressed the belief that the outcome of a case often depended on which Board members sat on the panel with the application of the law changing as the members of the panel changed.

Furthermore, there is a source of uncertainty in the Courts of Appeal which has no relation to the multi-court character of the system. Appellate review of both district court and Board decisions often involves evaluation of the facts, so that even though the legal rule is certain, the outcome is not. Here, as with the Board, many lawyers feel that the outcome often depends on the panel of judges drawn to hear the case.

THE PROBLEM OF LACK OF UNIFORMITY

* * *

National unions and employers doing business in more than one circuit are, of course, confronted from time to time with conflicting decisions in the Courts of Appeal. But they apparently have relatively little difficulty in adjusting their affairs to accommodate the legal rule applicable to the particular location. . . . The one potential danger, and labor lawyers seem to count it inconsequential in practical terms, is that because of appellate forum shopping, the Board's decision will be reviewed in another circuit which has a different rule.

The lawyers' responses make clear that from their viewpoint conflicts between the circuits are infrequent and the problems are insubstantial and transitory. In the lawyers' view, when conflicts do arise they are resolved with reasonable promptness by the Supreme Court, and labor lawyers experienced in Supreme Court litigation confirm the view that if a conflict exists, the Court will generally grant certiorari. Only a small minority of lawyers responding to the inquiries and interviews considered the problem of lack of uniformity because of conflicts in the circuits substantial.

Even though there is no conflict between the circuits as to the legal rule to be applied, there may be lack of uniformity because of different attitudes or predispositions of various circuits toward labor law cases. Some circuits acquire from time to time the reputation of favoring unions, of being skeptical of the Board's expertise, or of upholding findings and remedies of racial discrimination. . . . Lack of uniformity from this source creates more prevalent and serious problems than conflicting decisions as to legal rules. . . . [I]t cannot be corrected by Supreme Court review. Labor lawyers are in disagreement as to how much difference there is between the circuits in this regard, though there seems to be a consensus that the differences are not as great as ten or twenty years ago. This is believed to be due, at least in part, to the increase in the number of judges and the appointment of new judges.

Even though lack of uniformity causes fewer practical problems than lack of certainty, it generates much sharper criticism of the legal process. Lawyers and clients alike are willing to accept the fact that the law is uncertain and that outcomes cannot be predicted because the legal rule is unsettled or the facts undetermined. But they have difficulty accepting the fact that the outcome depends on where the case is heard or who hears it. They are not troubled by state law differing from state to state, but they are troubled by federal law differing from circuit to circuit. Though the practical problems created may be the same, differences in state law are viewed as unfortunate, while differences in federal law are viewed as unseemly or unfair. The greatest sense of unfairness arises, however, when the differences are due to the identity of the judges deciding the case, for this is seen as violating the Rule of Law. But it is this latter source of differences in outcome which is most common and pervasive, and it is not related to the multi-court character of the federal appellate system.

ENCOURAGEMENT AND DISCOURAGEMENT OF APPEALS

When one Court of Appeals rules on an issue, this may provoke appeals in other circuits for the purpose of obtaining a conflict and review by the Supreme Court. Lawyers for national unions and employers associations alike engage in this practice, often keeping watch for or even searching out cases in the district courts or in the Board which will be good vehicles for such appeals. In some instances, several cases in different circuits will be appealed concurrently with the expectation of creating a conflict between the circuits and petitioning for certiorari.

Whether this practice, which involves a very small number of cases, actually increases the work load of the Courts of Appeal is not at all clear. If the issue is important enough and the result is uncertain enough to provoke such action, then it will not be settled without decisions by other Courts of Appeal in any event. The number of appeals may be as great, though spread over a longer time. Indeed, deliberate testing in different circuits may reduce the number of appeals because the interest group which has lost in the first case will normally appeal in those circuits believed most likely to rule in its favor. The conflict between the circuits is thereby likely to appear earlier and the issue will get resolved more quickly.

A decision in one circuit, however, may also discourage appeals in other circuits. . . . [M]any labor lawyers give considerable weight to decisions in other circuits and feel an unfavorable decision in another circuit is a serious handicap to success on appeal.

Proliferation of appeals is a problem only to the extent that decisions in more than one circuit are necessary to settle a legal issue. In theory, decisions in all eleven circuits would be required, but in labor law this is not the case. Many issues are in fact settled by a single appellate decision, and very few require more than three decisions. The number of additional appeals required to settle issues in a multi-court system, as compared with a single court system, is difficult to estimate but in labor law they probably account for less than two percent of the labor case load of the Courts of Appeal.

Lawyers and law teachers responding to the inquiries emphasized that the value of having two or more courts consider a legal issue was far greater than any of the costs involved. In their view, the difficult issues which lead to multiple appeals are often complex, their implications are often far-reaching, and they are often permeated with difficult policy choices. Different judges bring different backgrounds, different perspectives, and different value structures. Consideration of these issues by different courts ensures that a wide range of ideas and policies are fully forwarded, analyzed and evaluated before they are finally accepted or discarded. . . .

In summary, both the lawyers and the academics viewed the ability to appeal the same legal issue to different Courts of Appeal as a strength of the federal appellate system, not a weakness. The burden of multiple consideration was far outweighed by the benefit of complete consideration.

The one area of labor law where lawyers believe there are identifiable differences between the circuits is in the interpretation and application of Title VII of the Civil Rights Act. Lawyers for plaintiffs and employers share the belief that the Fifth Circuit is more willing to find discrimination and provide more substantial remedies than most other circuits. The Second Circuit, it is said, is a favorable forum for racial minorities but not for women. The attitudes of the court of appeals is generally reflected at the district court level, at least in part, but the choice of the trial judge still is of major importance.

The ability to choose a forum, particularly an appellate forum, is limited in the Title VII cases. The venue provisions permit suit

to be brought where the plaintiff was employed, where the discrimination took place, or at the employer's principal place of business. In cases involving single employees or small employers, there may be no choice of forum. Only in class actions against multi-plant employers for general discriminatory practices is there ability to choose the circuit in which to bring the action. The advice may then be influenced as much by circuits' willingness to entertain class actions as by its handling of Title VII cases.

The Administrative Agencies

Working under the aegis of the Administrative Conference of the United States, our consultants, Professor David P. Currie of the University of Chicago Law School and Professor Frank I. Goodman of the University of Pennsylvania Law School, sought to learn the experiences both of the independent regulatory agencies and of departments within the Executive Branch. The general counsels of these agencies were asked to respond to a questionnaire which included, among others, inquiries about the agencies' experiences with inter-circuit conflicts and forum shopping.

We turn first to inter-circuit conflicts. The question was put as follows:

4. In the last five years, have there been conflicts of decision among the circuits in litigation to which your agency was a party? Can you estimate the number of cases or the number of principles of law involved? Where inter-circuit conflict arose, how frequently and how promptly were they resolved by the U.S. Supreme Court? Does your agency have a policy of acquiescence in the event of one or more adverse court of appeals decisions? Please describe that policy. In what ways has the existence or potentiality of inter-circuit conflict affected, for better or worse, the quality or efficiency of the agency's operation?

The responses to this question were varied. Seven agencies reported that there had been no instances of inter-circuit conflict in the past five years. One of these was the Interstate Commerce Commission, which noted that it has only a small amount of litigation in the courts of appeals, since most of its litigation was in the district courts with direct appeal to the United States Supreme Court. (The direct-appeal provision has now been eliminated by Congress.) The other six agencies were the Atomic Energy Commission, the Consumer Product Safety Commission, the Department of the Treasury, the Defense Supply Agency, the Federal Railroad Administration, and the Federal Home Loan Bank Board. The Home Loan Bank Board pointed out that it has uniformly prevailed in litigation. The General Counsel of the Atomic Energy Commission commented that "the Commission has been a party to only one significant regulatory review case with an adverse court of appeals decision in recent years," and added, "[t]hus

far, at least, the 'potentiality of inter-circuit conflict' has not had any effect on 'the quality or efficiency of the agency's operation.'"

Three agencies each reported one conflict. The Acting Chief Counsel of the National Highway Traffic Safety Administration wrote:

Cases challenging the promulgation of Federal motor vehicle safety standards have been decided in the 6th, 7th and District of Columbia Circuits. The 7th Circuit and the D.C. Circuit have held that the correct test for judicial review is the arbitrary and capricious test. The 6th Circuit, however, has held that the substantial evidence test is the correct standard of review. The issue is now before the 9th Circuit. NHTSA feels the 6th Circuit is incorrect but has not sought *certiorari* in the Supreme Court because the decision was favorable to NHTSA's substantive mission. The Supreme Court has not addressed the issue.

The following report came from the Veterans Administration:

In the last five years, the only conflict, at the courts of appeals level, in which this agency was involved, concerned the interpretation of 38 U.S.C. 211(a). . . . The District of Columbia Circuit, as opposed to all others, held that a "termination" of a benefit or award was not a "claim" within the meaning of that word, which was the word used in the statute at that time. It was held, therefore, that a termination action was subject to judicial review. The conflict was resolved however, by the Congress, not the Supreme Court. . . . Based upon the one inter-circuit conflict . . . it is our judgment that the efficiency of the agency's operation was adversely affected. Congress agreed and amended the law to resolve the matter.

A third agency, the United States Customs Service, noted that the one conflict "was promptly settled by the Supreme Court."

Five agencies indicated that a few conflicts had arisen, but added that these had had little or no effect on the quality or efficiency of the agency's operations. Responses of that tenor came from the National Labor Relations Board, the Federal Aviation Administration, the Department of the Army, the General Services Administration, and the Securities and Exchange Commission. The NLRB reported:

Since July 1, 1972, there have been about 9 cases involving the National Labor Relations Board which presented a conflict of decisions among the circuits. In 6 cases petitions for certiorari were filed (5 by the Board and 1 by the intervenor), and the Supreme Court granted 5 of the petitions and denied 1 (a Board petition). In the remaining 3 cases, the Board decided not to seek certiorari, but rather to await better vehicles for presenting the issue involved to the Supreme Court.

* * *

The existence of inter-circuit conflicts has not adversely affected the quality or sufficiency of the Board's operations. Whenever such conflicts have existed, the Board has generally promptly petitioned for, and obtained, Supreme Court resolution of the conflict.

The Federal Aviation Administration did not specify the number of conflicts, but noted that they had arisen in tort decisions involving the question of Air Traffic Control responsibility. None went to the Supreme Court for resolution. The Department of the Army, though reporting that "[t]he effect of the potential for circuit conflicts has been minimal on the efficiency of" the agency's operations, also indicated that some of the conflicts may have had a significant impact on its adversaries and on the courts:

Conflicts of circuits on approximately nine points of law have developed in the last five years. Four have been resolved and five are still open questions. Several have involved potential for great numbers of cases and substantial monetary amounts. See *Cass v. United States*, U.S., 42 U.S.L.W. 4799. Approximately 25-30 cases were involved in these eight conflicts. The conflicts, were "important" in terms of determining entitlement to a cause of action or right to relief, have been promptly resolved. Where the conflict is "unimportant", i.e., whether a particular Act is jurisdictional, when other bases for jurisdiction can be found to exist, the resolution is not so swift.

The Securities and Exchange Commission also pointed to possible effects not directly involving the agency's own litigation:

During the last five years there have been relatively few conflicts among the circuits in litigation in which the Commission was a party or in which it participated, *amicus curiae*. We are now urging the Solicitor General to file a brief, *amicus curiae*, in support of a petition for a writ of certiorari in one of our enforcement cases where there is a conflict among the circuits. Also in two cases instituted by private litigants, where there are conflicts among the circuits, we are proposing to support petitions for writs of certiorari.

* * *

Generally, the conflicts between the circuits have not affected the quality of the Commission's operations. In those circuits, however, which impose a higher standard for proof of fraud than others (i.e., a reckless disregard for the truth, as opposed to negligence), there may be a lesser degree of investor protection than in other circuits.

Two other agencies indicated that as many as ten conflicts had developed during the preceding five years, but the responses did not indicate whether these conflicts had had any appreciable effect on the operations of the agency. These were the Federal Highway Administration, which reported approximately ten conflict cases during the period in question, and the Civil Aeronautics Board. The CAB response is of particular interest:

In the past five years, four courts of appeals have split on essentially the same legal issues, two of the courts agreeing with the Board's theory, and two rejecting it. Contrast *Ozark Air Lines v. C.A.B.*, 441 F. 2d 893 (C.A. 8, 1971), and *Texas International Airlines v. C.A.B.*, 458 F. 2d 782 (C.A.D.C., 1971), with

Allegheny Airlines v. C.A.B., 465 F. 2d 778 (C.A. 4, 1972), and *Hughes Air Corp. v. C.A.B.*, 482 F. 2d 143 (C.A. 9, 1973). While the Board requested the Solicitor General to seek certiorari in the latter two cases, he decided against doing so. His decision rested on the view that the \$8 million cost to the government resulting from the two adverse decisions did not warrant Supreme Court consideration and that the inter-circuit conflict would be unlikely to create future difficulties because the cases were more or less *sui generis*. The most notable instance of conflict came more than five years ago in *American Airlines v. C.A.B.*, 365 F. 2d 939 (C.A.D.C., 1966) and *Pan American World Airways v. C.A.B.*, 380 F. 2d 770 (C.A. 2, 1967). The issue in both cases was identical and of fundamental importance. When the Second Circuit's decision in the second case went against the Board, certiorari was sought and granted. The Supreme Court split evenly, however, and the conflict thus remained unresolved (391 U.S. 461 (1969)). It was then quickly resolved by Congress which amended the statute so as, in effect, to overrule the Second Circuit.

A larger number of conflicts was reported by three agencies. The Small Business Administration estimated that approximately 25 cases over the five-year period involved conflicts of decision among the circuits. The agency added: "The Supreme Court has resolved such instances of conflict, although resolution has been slow." The Federal Power Commission reported that during the preceding five years "we have been involved in ten to fifteen situations in which we believed that an adverse Court of Appeals decision conflicted with the holdings of other circuits or the Supreme Court in prior cases. In a majority of these cases, the conflict was resolved by the Supreme Court." Neither the SBA nor the FPC adverted to possible adverse effects of these conflicts. The Comptroller of the Currency, noting that inter-circuit conflicts "are not typical of litigation in which our agency is involved," estimated that the number of such cases during the past five years is "probably no greater than 15." The existence or potentiality of conflict was found to have no effect on the quality or efficiency of the agency's operation.

Four agencies expressed varying degrees of concern about the effect of inter-circuit conflicts. These were the Department of the Air Force, the Department of the Navy, the Environmental Protection Agency, and the Bureau of Alcohol, Tobacco and Firearms. Although the Air Force did not specify the number of conflicts, the department referred to "the present conflict of decisions involving the applicability of the *O'Callahan* issue to off-base drug-related offenses"; and to a conflict, recently resolved by the United States Supreme Court, involving Articles 133 and 134 of the Uniform Code of Military Justice. The Judge Advocate General then added:

Inssofar as the effect of inter-circuit conflict on the efficiency of the agency, it can be stated that a significant adverse impact on the administration of military justice is evident in those

circuits in which pre-court-martial intervention by a Federal Court is permitted. We have also encountered difficulties in the administration of the conscientious objector program as a result of inter-circuit conflict. In other areas of military administration, inter-circuit conflict has little, if any, impact.

For the Navy, the Judge Advocate General reported:

In the past 5 years, there have been no conflicts by the courts of appeal where the Department of the Navy was a party in contract litigation. However, in all other areas of litigation many (involving approximately 10-15 issues annually) have occurred. Of these, only one or two a year are resolved by the Supreme Court. * * * The existence of inter-circuit conflict has affected the Department of the Navy's operation, *e.g.*, in certain circuits it has been decreed that Reserves have a right to wear wigs during active-duty training, whereas other circuits have said they have no such right; also, the right to military lawyer counsel at a summary court-martial has been at variance within the several circuits. These conflicting holdings have caused variances in Navy operations from circuit to circuit.

The Bureau of Alcohol, Tobacco and Firearms emphasized that "[a] conflict among the circuits prevents the uniform and consistent administration of the laws which the Bureau is charged with enforcing." The Bureau reported:

We have had approximately 5 principles of law in conflict among the circuits which were ultimately resolved by the Supreme Court within the last five years. These were *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970); *United States v. U.S. Coin and Currency*, 401 U.S. 715 (1971); *Bass v. United States*, 404 U.S. 336 (1971); *United States v. Biswell*, 406 U.S. 311 (1972); and *Huddleston v. United States*,—U.S.—, decided March 26, 1974. Although all of these cases arose in a criminal or forfeiture context they also relate to administrative action which can be taken against a licensee or permittee. These conflicts took between two to four years to be resolved.

A conflict in the circuits prevents the uniform and consistent administration of the laws which the Bureau is charged with enforcing. For example, the Ninth Circuit in *United States v. Hoctor*, 487 F. 2d 270 (9th Cir. 1973), held that a defendant who had pleaded guilty to a felony and subsequently had his conviction expunged pursuant to Washington law was not a person under disabilities under 18 U.S.C. § 842(i) (transporting or receiving explosives in interstate or foreign commerce, after having been convicted of a felony). It is the Bureau's position that the Federal statutes in their relief and pardon provisions contain the exclusive method by which Congress intended Federal firearms and explosives disabilities to be removed. Thus, we do not issue licenses or permits to persons who have been convicted of felonies under the firearms and explosives statutes (such persons not entitled to licenses or permits under these laws) who have had their convictions expunged. The issue is in litigation in District Courts of two other circuits and we hope to have the issue ultimately decided by the Supreme Court.

Finally, attorneys for the Environmental Protection Agency, interviewed by Professors Currie and Goodman, expressed concern about the uncertainty engendered by conflicting court of appeals decisions on the basic procedures the agency must follow in passing upon state implementation plans.

We turn next to forum shopping and the responses to the following question:

5. To what extent, if any, has forum shopping been practiced, either by the agency or by adverse parties, in litigation involving the agency? Can you indicate in general the reasons for this practice—e.g., the existence of actual inter-circuit conflicts, the desire to create a conflict in order to obtain ultimate Supreme Court resolution, the belief that judges in one circuit are generally more sympathetic (or unsympathetic) to the agency than the judges in other circuits, etc.? Please describe the impact, if any, of forum shopping upon the quality or efficiency of the agency's operation.

Again, the agencies' responses were varied. Seven of the agencies stated that there was no forum shopping of which they were aware. These agencies were the Coast Guard, the Consumer Product Safety Commission, the Customs Service, the Federal Highway Administration, the Federal Railroad Administration, the Department of the Treasury, and the Veterans Administration. Two of the respondents within this category attempted to explain the absence of forum shopping. The Chief Counsel of the Federal Railroad Administration stated:

All but one of the statutes which this office is normally charged with enforcing limit jurisdiction to the court in the locality where the violations shall have been committed. That one exception is the Accident Reports Act, 45 U.S.C. 38-43, as amended. The sole court with jurisdiction is the District Court of the District of Columbia. (45 U.S.C. 38 and 39). Thus, forum shopping is all but impossible.

Similarly, the Assistant General Council of the Customs Office commented:

To our knowledge, no forum-shopping has ever been practiced by the Customs Service or by adverse parties in litigation involving Customs. This is due to the fact that Customs cases must be brought in the district where they arise.

Several of the agencies noted that their adversaries tended to file appeals in the Court of Appeals for the District of Columbia Circuit. However, there was a difference of opinion among the respondents as to whether this fact indicated that the appellants were engaging in forum shopping. The Atomic Energy Commission merely reported data about where appeals from its decisions had been filed in recent years:

There is a limited body of experience upon which to base a response to the question about forum shopping. Venue in direct review cases is in either the petitioner's circuit or the D.C. Circuit, at the petitioner's option. 28 U.S.C. § 2343. During the last three fiscal years, nineteen direct review cases involving the AEC were filed in the District of Columbia Circuit, compared to a total of eight in all the other circuits.

The Federal Power Commission expressed an unwillingness to comment on the meaning of a similar phenomenon:

[T]he overwhelming majority of our appeals are filed in the U.S. Court of Appeals for the District of Columbia Circuit. It would be presumptuous of me, however, to conclude that this is a manifestation of "forum shopping."

The Office of the Comptroller of the Currency felt that the incidence of appeals in the D.C. Circuit did indicate forum shopping:

It is our opinion that forum-shopping, when practiced, results from either the desire of the parties to employ a "name" law firm located in Washington, D.C., or the belief that the judges in the United States District Court for the District of Columbia, and the United States Court of Appeals for this circuit, are tougher on federal agencies than are the courts in the other districts and circuits.

The Civil Aeronautics Board, after explaining that the "Board does not initiate proceedings in the courts of appeals and thus there would be no opportunity for forum shopping by the Board even if it were disposed to engage in the practice," continued by noting that "forum shopping by those challenging Board action has been minimal, a conclusion demonstrated by the fact that the majority of such cases have been in the D.C. Circuit." However, the General Counsel described "a number of cases which involved forum shopping":

In *Eastern Air Lines, et al. v. C.A.B.*, 354 F. 2d 507 (C.A.D.C., 1965), there was an attack in the D.C. Circuit on a Board determination as to the course it would follow in carrying out a remand by the First Circuit. While the course of action selected by the Board went further than the First Circuit required, it was plain that that court would have viewed it as permissible had a direct attack on it been made there. *Northeast Airlines v. C.A.B.*, 345 F. 2d 488, 490 (C.A. 1, 1965). It was thus that the petition for review was filed in the D.C. Circuit. The Board moved in the latter court to dismiss or transfer the case to the First Circuit. The court ordered transfer, noting that this "would be consonant with the general Congressional purpose [in 28 U.S.C. 2112] of avoiding forum conflicts and forum shopping" (354 F. 2d at 511).

Another case of forum shopping will be found in *Trailways of New England v. C.A.B.*, 412 F. 2d 926 (C.A. 1, 1969). The petitioner had not been a party to the Board proceeding, though its parent, Transcontinental Bus System, had been a party. The subsidiary filed first in the First Circuit while the parent filed later in the Fifth Circuit (where it had met with only partial

success in an earlier case involving similar issues). The First Circuit was obviously the preferred one and the Fifth Circuit filing by the parent was just as obviously protective. The parent's petition was later transferred to the First Circuit where it was consolidated with the subsidiary's. In its decision on the merits, the First Circuit noted, "for compilers of statistics, [that] this is a clear case of forum shopping * * *", adding that this "fact * * * we note with no pleasure * * *."

A third case of forum shopping which comes readily to mind involved quite literally a race to different courthouse doors. The winners were parties who filed petitions for review after public notice of the Board's decision but prior to release of the text of the decision itself. *Saturn Airways v. C.A.B.*, 476 F. 2d 907 (C.A.D.C., 1973).

Most of the respondents, however, did recognize that their adversaries, if not they themselves, engaged in forum shopping. Nevertheless, the perceptions of the agencies varied with respect to the effect of the forum shopping on their operations. Five agencies felt that although their adversaries engaged in forum shopping, this practice had little or no effect on the quality and efficiency of the agency's operations. These agencies were the Department of the Army, the Defense Supply Agency, the Federal Home Loan Bank Board, and the Small Business Administration. Of these five, only the SBA failed to give some explanation for the existence of the forum shopping phenomenon. The response of the Department of the Army stated:

The Department of the Army, nearly always the defendant, has very little opportunity to forum shop. Adverse parties do so to some extent. It is difficult to ascertain the extent of the shopping or the reasons therefor, but all of the reasons expressed in the question seem relevant. Another common type of forum shopping comes from litigants who file in the Court of Claims instead of the district court. This occurs because the Court of Claims is notably more liberal in granting claims for back compensation. Again, while forum shopping presents another matter of concern for attorneys handling Department of the Army litigation, the operation of the agency is basically unaffected.

The Federal Home Loan Bank Board thought that their adversaries' choice of forum depended on the sympathies of the courts as perceived by the parties:

This agency has not engaged in forum-shopping. However, since the Board and the FSLIC are generally suable either in the District of Columbia or in the judicial district where the principal office of the suing party is located (*see, e.g.* 12 U.S.C. 1464(d)(3)(B); 12 U.S.C. 1730(g)(5)), there have been numerous instances, we believe in which the choice of the above forums has been determined by adverse parties on the basis of which court would appear more sympathetic to their cause. To the extent such forum-shopping exists, it has had virtually no affect upon the quality or efficiency of the agency's operation.

The sympathies of the courts were also the reason given by the Defense Supply Agency for their adversaries' forum shopping:

Only in cases seeking injunctive relief relating to the proposed release of information furnished this Agency by contractors under the EEO Contract Compliance Program have we been aware of forum-shopping. The reason appears to be that a particular district court has been more sympathetic to arguments of competitive harm advanced by plaintiff contractors seeking injunctive relief. In these cases the Agency is basically a stake holder as between the contractors and the member of the public seeking the information furnished to the Agency by the contractors. Thus, the forum-shopping has had little impact on the quality or efficiency of this Agency's operations.

The response of the National Labor Relations Board is distinguishable from the responses quoted immediately above because the Associate General Counsel noted certain effects of forum shopping by the Board's adversaries although he concluded that forum shopping did not have "any real impact upon the quality or efficiency of the agency's operations":

Adverse parties sometimes bring a petition to review in a circuit apparently selected for one of the reasons suggested in your question—that is, to take advantage of a favorable authority, to create a circuit conflict in an effort to obtain Supreme Court resolution, or to take advantage of what the party perceives to be the judge's attitudes. In addition, unions engaging in conduct found unlawful by the Board often seek review in the District of Columbia Circuit, because a favorable decision based on statutory construction will, in effect, have national application, since any Board decision raising that issue can be reviewed in that circuit. Forum-shopping causes some delay and additional pleading where two parties file petitions to review different portions of the Board's order in different circuits, but the impact is not significant, for we have found that adequate means for handling this situation are provided by 28 U.S.C. 2112(a), which requires consolidation in the circuit where the first petition was filed, but allows discretionary transfer. In such instances we take no position on the discretionary determination as to which circuit should hear the consolidated cases on the merits.

In sum, we do not regard occasional efforts at forum shopping by others as having any real impact upon the quality or efficiency of the agency's operations.

The Associate General Counsel also noted that "the Board's practice has been to seek enforcement only in the circuit in which the unfair labor practice occurred" and, therefore, the Board litigates "in all the circuits without any regard to possible advantage to be gained by selecting a circuit even where that is possible."

The General Counsel for the Interstate Commerce Commission was less certain of the extent of forum shopping:

Forum shopping is done by plaintiffs seeking review of Commission decisions, but its extent and impact are difficult to assess.

The usual manner in which such forum shopping occurs is when there are several potential plaintiffs, the one having its residence or principal office in what is felt to be the most favorable jurisdiction initiates the action and the others subsequently intervene. When this is done it is usually in the belief that the judges in the chosen district will be more sympathetic to the plaintiff's case.

Four agencies responded to the questionnaire by explaining that although they did not engage in forum shopping, their adversaries did, with deleterious effects to the agency's operations. Both the General Services Administration and the National Highway Safety Administration stated that forum shopping presented a problem because of the limited resources of those two agencies. The Assistant General Counsel of GSA explained:

Forum shopping has been practiced to a great extent by parties opposing GSA. Parties may either come to the District of Columbia or stay at home if they think their local district court is better for them. Many lawyers feel that the District of Columbia District Court and the Court of Appeals for the D.C. Circuit are more liberal and more anti-government. Forum shopping has hurt agency operations by creating complex litigation which another forum would have dismissed. As a result, a great deal of time of operating personnel is consumed.

The Acting Chief Counsel of NHTSA noted a specific example of forum shopping and the problems created thereby:

NHTSA usually sues in the District of Columbia because it has no litigation staff in regional offices.

Upon occasion opponents appear to engage in forum-shopping. General Motors filed 2 separate pre-enforcement actions, one in Delaware and one in Detroit, apparently shopping for a sympathetic forum. This type of activity produces additional burdens on our limited resources.

Both the Department of the Navy and the Department of the Air Force also noted that forum shopping had affected the operations of those services. The Judge Advocate General of the Navy wrote:

Because of the restrictive venue provisions of the Public Vessels Act, forum-shopping has not been a significant factor in admiralty litigation. Neither has it been a factor in contract litigation. However, in the general-litigation area, as well as tort litigation, forum-shopping is frequently encountered. Undoubtedly, the reason for this is an effort by plaintiff to select the law most favorable to his case. For the reasons noted in the last sentence of paragraph 4, ["these conflicting holdings have caused variances in Navy operations from circuit to circuit"], forum-shopping has had a significant impact on the Department of the Navy's operation. It is not unreasonable to surmise that the sophisticated plaintiffs encountered today are ever mindful of the law in the various circuits and have deliberately "picked and chosen" the circuits which have given rise to the conflicts heretofore mentioned.

The Judge Advocate General of the Air Force also described the effects of forum shopping:

Some forum-shopping exists in cases brought by individuals seeking to obtain conscientious objector status. This generally results from a belief that the judges in a particular circuit or district are more sympathetic to suits against the government. Forum-shopping is also prevalent in procurement cases, and because of the geographic separation of military personnel and documentation, defense of these cases, particularly when injunctive relief is sought on short notice, is difficult. This situation causes considerable disruption in the conduct of military procurement programs and excessive expenditures of large sums of money in the logistics of the preparation of the defense of these cases. There is little, if any forum-shopping in cases involving torts or in tax, utility, or environmental law.

Several agencies admitted that they, as well as their adversaries, engaged in forum shopping. The response of the Department of the Treasury implied that there is some forum shopping by the agency:

[A]ny comments with regard to forum shopping would be mere speculation. In one instance we were orally advised by the Justice Department that an appeal in the Ninth District [*sic*] should be avoided.

The Chief Counsel of the Federal Aviation Administration explained that the FAA's forum shopping is limited:

Forum-shopping takes place primarily by plaintiffs. Government forum shopping is pretty well limited to argument before the Multi-District Litigation Panel.

In Enforcement cases, adverse parties sometimes initiate proceedings in the wrong judicial forum, but such actions are generally due to ignorance of the party, or his attorney, rather than an effort to seek sympathetic judges. Generally, this has not been a problem to FAA in enforcement cases.

The General Counsel of the Securities and Exchange Commission noted that his agency considered "the general attitude of the judges" in choosing the district court in which an enforcement action will be brought:

The persons filing petitions for review of Commission orders often have the choice of doing so in one of several courts of appeals. They can file the petition in the District of Columbia Circuit or the circuit where the petitioner is a resident or has its principal place of business. Since there are very few clear conflicts among the circuits with respect to matters determined by the Commission in its adjudicatory proceedings, I assume that the petitions are often filed in the circuit where previous decisions suggest that the court might nevertheless be most favorable to the petition. In the light of the large number of judges on most courts of appeals, however, it is generally rather difficult to make this judgment, and for that reason petitioner's counsel is most likely to file the petition in the circuit where he practices. The Commission has no choice of circuits in its appeals. Often it can bring an

enforcement action in one of several district courts, however, and one of the considerations in determining that court might sometimes be the general attitudes of the judges towards such proceedings. This is normally a minor consideration in the light of the fact that it cannot be known in advance what judge will handle the case.

The Chief Counsel of the Bureau of Alcohol, Tobacco, and Firearms was most candid in his explanation of why the agency pursues litigation in different circuits:

The Court of Claims may be more sympathetic in some types of tax cases than district courts and there may be some forum shopping in the tax area. In other cases we are unaware of any forum shopping nor is there much opportunity for litigants to do so. The Bureau will attempt to obtain a conflict in the circuits in order to have an important principle of law decided adversely to it resolved by the Supreme Court.

Appendix C

STATISTICAL DATA

In Fiscal Year 1960, the number of cases commenced in the United States courts of appeals was 3,899. In 1974 the filings had risen to 16,436, representing an increase of more than 321 percent.¹ During this period, authorized judgeships increased by only slightly over 43 percent. This represents an increase of 112 filings per judgeship over this timespan.

There have been suggestions that the proper statistical base to be used in examining the workload of the courts of appeals is the number of terminations after hearing or submission rather than the number of filings. The preference for this statistic is based upon the notion that many of the appeals filed "wash out" without substantial judicial intervention and that filings therefore present a less accurate picture of the workload actually imposed on the judges. The relevant figures are presented in the accompanying table.

Selected data on filings and terminations in the Courts of Appeals

	Fiscal year						
	1960	1968	1970	1971	1972	1973	1974
Judgeships	68	97	97	97	97	97	97
Filings	3,899	9,116	11,662	12,788	14,535	15,629	16,436
Terminations (total)	3,713	8,264	10,699	12,368	13,828	15,112	15,422
By consolidation	NA	892	1,077	1,371	1,373	1,552	1,936
Without hearing or submission	1,032	2,704	3,483	3,391	3,918	3,942	5,035
After hearing or submission	2,681	4,668	6,139	7,606	8,537	9,618	8,457
Cases pending on June 30	2,220	6,615	8,812	9,232	9,939	10,456	11,470
Total hearings held	NA	4,873	5,411	5,816	5,748	6,555	5,978
Number of cases disposed of after hearing or submission without opinion	NA	594	765	1,148	1,395	2,355	2,052
Number of cases disposed of without hearing or submission for which a memorandum or per curiam opinion was filed	NA	NA	642	393	318	358	891

Source: Annual Report of the Director of the Administrative Office of the United States Courts, 1960-1974.

¹ The data presented do not include matters filed on the miscellaneous docket. From 1970-1974, these filings were 3,161; 3,183; 3,064; 2,701; and 2,528, respectively.

We note, however, that there are a number of problems associated with utilizing this statistic as a measure of judicial workload. First, it would be inaccurate to consider all cases terminated without hearing or submission as cases requiring no judicial effort. In hundreds of cases classified by the Administrative Office as terminated without hearing or submission, a memorandum or per curiam opinion was filed, as shown in the accompanying table.

Second, in 1974 the criteria employed for classifying cases as terminated before or after hearing or submission were revised.² It appears that prior to this revision, the circuits varied in their standards for classification. This makes meaningful comparisons from year to year or circuit to circuit much more difficult.³

Third, while all would agree that termination by consolidation, as such, does not require judicial effort, this does not mean that cases consolidated for hearing or submission will be the equivalent of a single case in judicial workload. For example, if fifteen parties file appeals from a ruling of the Federal Communications Commission and these appeals are consolidated for hearing, the consolidated case with multiple briefs may well require considerably more judicial time and effort than would any one of the original fifteen.

In using any of these data, it is important to keep in mind the obvious point that different types of cases require varying amounts of work. At the request of the Commission, the Federal Judicial Center has undertaken a project aimed at measuring the relative burden typically imposed upon the judges by various types of cases. Twenty-three types of cases were identified in the first stage of the project and the relative burden of each was studied in three circuits: the Sixth, Eighth, and the District of Columbia. While the type of case characterized as most onerous varied from circuit to circuit, in all circuits surveyed the judges of each court agreed that after excluding appeals at each extreme, the "most burdensome" types made demands upon the judges at least six times as great as the "least burdensome

² In order for a case to be classified as terminated after hearing or submission in the 1974 statistics, the following criteria must be met: (1) filing of the complete record, (2) filing of briefs pursuant to Fed. R. App. P. 28, (3) a reported date of either an oral hearing or submission, and (4) a reported date of termination. If any of the above is not met, the case will be classified as terminated without hearing or submission regardless of how much judicial effort went into the termination of that case.

³ Similar care should be exercised in connection with any comparative analysis of the data on opinions. Currently the Fifth Circuit classifies Rule 21 opinions as cases decided "without opinion." Through Fiscal 1974, however, they were classified in that circuit as disposed of "with opinion." Until December, 1974, the Seventh Circuit classified Rule 28 unpublished opinions, which may be several pages in length, as disposed of "without opinion." They are now classified as "with opinion."

case." This much is indicated by the preliminary results; the project is yet to be completed.

Finally, caution should be exercised in comparing figures which reflect the treatment accorded cases at different stages in their progress through the appellate court. A case may be filed in one fiscal year, heard or submitted in another, and terminated, with or without opinion, in yet a third fiscal year. Moreover, the extent to which different fiscal years are likely to be involved will vary from circuit to circuit as well as from case to case.

Appendix D

THE VIEWS OF THE JUSTICES OF THE UNITED STATES SUPREME COURT

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Views of the Chief Justice

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

MAY 29, 1975.

Hon. ROMAN L. HRUSKA,
*Chairman, Commission on Revision of the Federal Court Appellate
System, Washington, D.C.*

DEAR SENATOR HRUSKA: I acknowledge your letter of April 18 asking for comments on the Preliminary Report of the Commission on Revision of the Federal Court Appellate System which was published last month. It is a wholly constructive effort to cope with the problems of the courts of appeals. The act of Congress creating your Commission was a most significant step, enabling study of serious problems before they developed into a grave crisis. The Commission has performed its task with expedition and with careful consideration of all aspects of the problems involved. Although I have not participated in the work of the Commission, I have followed its activities closely and I feel bound to say that the careful attention and dedication of the members and the staff deserve the praise and gratitude of the country and particularly of the legal profession.

Your Report has developed new insights into the problems on the basis of data not previously assembled or so carefully and lucidly analyzed. The creation of the Commission manifests an attitude on

the part of the Congress to try to anticipate problems by enlisting the skills and experience of a body of highly qualified lawyers and judges. I hope the Commission's final Report will suggest consideration of a continuing commission that would report directly to the Congress, through the Committees on the Judiciary, from time to time so that examination of the problems of the courts could be on a comprehensive and continuous rather than a "single shot" basis.

Although the statutory mandate of your Commission did not authorize your treatment of District Court jurisdiction or of Supreme Court jurisdiction, I am not similarly constrained, and I am bound to view the system as a whole. Of course, such a system-wide view is implicit in your conclusion that as the Supreme Court's workload exceeds its capacity, it may be unable to give binding national resolution to all cases that deserve it.

As additional burdens are placed on the Federal courts, the capacity of the District Courts and of the Courts of Appeals can be expanded by increasing the manpower of those courts. In other words, when acts of Congress or new developments from any source, including opinions of the courts, give rise to more litigation, the solution lies essentially in an increase in the number of judges or the units of the judicial system—either district or circuits. I do not advocate more judges as a prime solution to problems, but more judges are inescapable if the workload continues to increase.

With respect to the burdens of the Supreme Court, however, that kind of solution is not realistically available. It has occasionally been proposed that the Supreme Court be enlarged so that the Court could sit in divisions or panels, but any such proposals would meet with almost universal opposition, even assuming their constitutionality. Such a change would appear to alter the basic concept of "one supreme Court" under Article III.

The particular revision of jurisdiction which would give some relief to the Supreme Court would be the elimination or reduction of mandatory jurisdiction insofar as that can be done by statute. The latter, as you well know, was one of the objectives of the Judiciary Act of 1925, often called the "judges' bill" or the "certiorari bill." That enactment, 50 years ago, indeed gave the Supreme Court substantial control of its jurisdiction for a period of time, but that control has been eroded by subsequent developments, including the expanded use of three-judge district courts. Of course, in 1925, no one could anticipate all the developments that would bring new forms of litigation to the district courts. All cases decided by three-judge district courts can be appealed directly to the Supreme Court as a matter of right, frequently on an inadequate record and without the benefit of review by a court of appeals.

The erosion of the benefits of the 1925 "certiorari bill" is shown by the fact that, as recently as 1942, the proportion of cases decided by the Supreme Court on the merits (including cases decided without oral argument) under its mandatory jurisdiction was 28 percent. This reached 40 percent in 1952 and 1962 and rose to 60 percent in 1972.

The Supreme Court has no desire to avoid the resolution of important cases of broad general and national concern and significance, but the capacity of nine human beings has a finite scope. That a Court continues to dispose each year of all cases ready for hearing is not the sole test; to perform its historic mission the Supreme Court has an obligation to maintain a quality that will give its decisions durability.

In the past five years we have taken numerous small steps to conserve the time of the Justices. As recently as ten years ago, for example, it was not uncommon for all of Monday's Court time and part of Tuesday's to be consumed by the ceremonies of admitting members of the bar and announcing opinions. In 1971, we created the option of bar admission by written motion, and now about 80 percent of the more than 5,000 applicants each year are so admitted. We have virtually eliminated the lengthy announcement of opinions in favor of brief statements of the end result of the Court's decision, or, at a maximum, a few minutes' digest of what the case involves. In our 1970 revision of our Rules, we formally fixed one-half hour for each side for oral argument. We have thus gained some valuable time at the expense of pleasant, traditional, but unproductive ceremony; obviously, there is a limit to what such changes can accomplish.

As to the proposal for an intermediate court, I have no doubt that if the Congress does not curtail the jurisdiction of the Supreme Court, in some way generally comparable to the 1925 Judiciary Act, then surely a solution must be found by creating such a court. As your Report points out, one element of the Court's historic function is to give binding resolution to important questions of national law. Under present conditions, filings have almost tripled in the past 20 years; even assuming that levels off, the quality of the Court's work will be eroded over a period of time.

To create an additional court within the present structure is probably a more significant step and more substantial change than was the introduction of the middle tier of courts in 1891 when the Circuit Courts of Appeals were created. The 1891 Act creating the Circuit Courts of Appeals in reality formalized and institutionalized an appellate structure that had existed since 1789 with Supreme Court Justices and federal district judges sitting on circuit and performing essentially the appellate function now performed by the eleven Courts of Appeals.

For this reason, among others, it is my view that if an intermediate appellate court such as that proposed is to be created, it might be prudent to consider treating this structure as experimental and temporary. It is difficult to predict how long such an experimental court should function before we could assess its performance and its utility. Such a period should be at least five years. To avoid creating a permanent structure, such an experimental court could perhaps be drawn initially from among the existing federal courts, as has been suggested by some. This would bring to the experimental court judges experienced in the appellate function and familiar with the practices and precedents that should guide them.

A number of devices could be worked out to accomplish this. Conceivably, one solution would be to have the judges of such a court drawn from the ranks of federal judges on a rotating basis. If study should indicate that this would impair the continuity and consistency of decision, that problem could be solved by appointing the new court from among presently sitting judges, but under a statute that would leave Congress free to abolish the court or to develop some other mechanism allowing the members of this experimental court to return to the courts from which they had been drawn. Should it be suggested that this would create significant problems of "surplus" judicial personnel, it should be remembered that the average tenure of judges in the federal courts is in the neighborhood of 19 years, and that to return seven or nine judges of the experimental court to the various circuits from which they were drawn would hardly create any significant problem; the continued growth of the country and the predictable growth of litigation are such that there is an annually measurable need for additional judges. Moreover, the availability of seven or nine unassigned judges would be an enormously valuable resource to assist courts experiencing emergency problems such as are caused by the illness or death of active judges or the sudden onset of enlarged dockets.

I am well aware that what I have already outlined to express my views is in some respects substantially beyond the problems your Commission was authorized to study, but I repeat that the problems of the Judicial Branch must be viewed not court-by-court, but on a system and nationwide basis. In the long run, we will not have accomplished very much if we solve problems at one end of the spectrum, but do not solve them at the other end on a basis consistent with our Constitution and with national tradition and experience. I would, therefore, summarize the observations I have made so far by suggesting that the objections of those who are opposed to an intermediate federal court would be met if other possible alternatives were first exhausted. These

remedies, no one of which would be a solution (and perhaps not all of which together would be a solution) would include the following:

1. The elimination of three-judge courts and the elimination of all direct appeals to the Supreme Court, leaving it to statutory provisions for expediting appeals to deal with emergency cases. If the Congress considered it necessary to guarantee that no single judge could strike down a statute by providing that no action of a district court, holding unconstitutional an act of Congress or of a state legislature, would be effective until all avenues of review had been exhausted or had been foregone; however, I doubt that such a precautionary measure would be necessary since I would have confidence that in matters of importance, a district judge would stay the effective date of his judgment or, if not, that the court of appeals would do so, and if both failed, the Supreme Court could do so. Plainly, the elimination of three-judge district courts would, to some extent, add to the burdens of the courts of appeals, but this would be offset to a significant extent by relieving circuit judges from serving on the three-judge district courts.

2. The matter of diversity jurisdiction of the federal courts is one to which I have addressed myself on a number of prior occasions, particularly in reports to the American Bar Association annual meeting. We are all familiar with the reasons for the diversity jurisdiction provisions in the Constitution. Two centuries ago, with conditions of travel and communication available at that time, it was not unreasonable to think that a federal forum should be available to a citizen of Massachusetts, for example, having litigation in a distant state. But today, when one can communicate instantaneously with every part of the country and travel from Boston to Atlanta in less time than it once took to travel by horse, coach or boat from Washington, D.C. to Alexandria, Virginia, the situation is changed. Continuance of diversity jurisdiction is a classic example of continuing a rule of law when the reasons for it have disappeared.

The elimination of diversity jurisdiction will add only minimally to the burdens of the state courts, as the 1969 American Law Institute Report pointed out. One study put the expected increase in major state courts at no more than 1½ percent, due to the vastly greater number of judges in the 50 state court systems. Moreover, the capacity of state courts is growing and improving. The National Center for State Courts, which has been in existence for only four years, and whose impact will be felt increasingly every year, will continue to improve the quality of the state courts. The emergence of outstanding leaders among the Chief Justices of some of the states, the introduction of court management personnel, coupled with the facilities for the new National Center, should help enable the state courts to meet whatever added cases go to them as a result of eliminating diversity jurisdiction of federal courts. Whatever may be the impact on state

courts, however, if we are faithful to our basic concepts of federalism we should render to the state courts the jurisdiction which fundamentally belongs to them and reserve to the federal courts only such jurisdiction as modern conditions demand. Indeed, there is likely to be so much additional jurisdiction thrust upon the federal courts over the next decade that we will do well to perform those functions without having almost 19 percent of district court cases involve issues such as automobile intersection collisions and contract disputes. I repeat, in the 20th century such cases have no more place in the federal courts than the trial of a contested overtime parking ticket!

Of course, elimination of diversity jurisdiction will give no relief to the Supreme Court and only a moderate amount of relief to the courts of appeals, but it is a change which is called for to carry out the fair distribution of the total litigation of this country between the states and the federal system. This was admirably documented in the monumental 1969 Report of the American Law Institute which proposed at least a first step in this direction; that Report has received far too little attention.

I also have particular comments regarding your recommendations on the structure and internal operating procedures of the courts of appeals. As to the proposed revision of the structure of the circuits, the data presented to the Commission merit the most careful attention of the bar, the public, and the Congress. To continue large circuits such as the Fifth and the Ninth under one administrative direction is totally unrealistic. I have already expressed my view that no circuit should be geographically larger than can be cared for by nine circuit judges.

I have reservations about placing on the Supreme Court the responsibility for selecting the Chief Judges of the several circuits. I am not unmindful of the infirmities of having the selection of Chief Judges be on a matter of strict seniority since the function of the Chief Judge of a circuit in this stage of the 20th century is a significant management or administrative responsibility.

As to the selection of Chief Judges of the district courts by the Judicial Council of the circuit, the principal problem is that in all but one circuit the Judicial Council has little opportunity to become familiar with the day-to-day administrative capabilities of individual judges. However, I have far less concern with Judicial Councils picking Chief Judges of districts than I do with having the Supreme Court select Chief Judges of circuits, for in the latter case it would be both an unwise burden to place on the Supreme Court and would involve the risks of having the Supreme Court drawn into controversial matters in its relations with the several circuits.

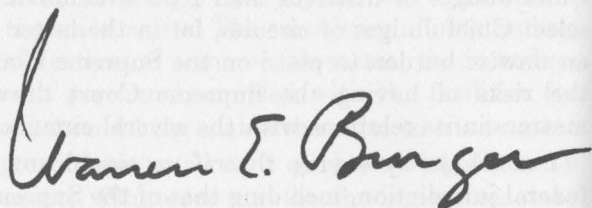
I conclude by saying that if no significant changes are made in federal jurisdiction, including that of the Supreme Court, the creation

of an intermediate appellate court in some form will be imperative. The notion that nine Justices of the Supreme Court can deal as effectively and correctly with four times as many docketed cases as were dealt with only four decades ago may seem flattering to the incumbent Justices, but Congress must become aware of the enormous change in the burdens on the Justices in that short period of time. Indeed, it can be documented that as far back as 40 years ago, 10 years after the Judiciary Act of 1925, many of the Justices were even then apprehensive about the capacity of the Supreme Court to perform the functions performed in its first 150 years. The changes brought on in the 20th century and the new social, political and economic developments have surely not diminished the importance of the questions presented to the Supreme Court and have vastly increased the volume of important questions which can have an impact of great significance on the country.

Although not in any sense relevant to my comments on your Report, it has come to my attention that some people have assumed that because the committee chaired by Professor Paul Freund to study the caseload of the Supreme Court was appointed under the aegis of the Federal Judicial Center (whose Board of Directors I chair by virtue of an act of Congress), that I or the Center endorsed the recommendations of that Report. That distinguished committee was given its task so that the Judiciary could have the benefit of objective views of a diverse group whose members were intimately familiar with the work of the Supreme Court over a period of a half century. The objective was in large part to stimulate discussion and debate within our profession, and obviously that objective has been realized. Three outstanding studies have been generated largely as a result of the study of Professor Freund and his colleagues. Up to now I have neither advocated the creation of an intermediate court nor expressed any view, but I have no hesitation in stating, now, that if other remedial measures are not adopted, the creation of such a court is inevitable. It is my hope that the Commission's study will stimulate Congressional action leading promptly to reducing the jurisdiction of the federal courts, including the Supreme Court.

The admirable work of your Commission, I repeat, deserves the applause and the appreciation of all who are concerned with the administration of justice. You may be assured that you and your colleagues on the Commission have mine.

Cordially,



Views of Mr. Justice Douglas

We have solicited the views of each of the members of the Court and have heard from all of the Justices except Mr. Justice Douglas who has been absent from his chambers because of illness. However, in a letter to the Executive Director a year ago, Justice Douglas stated that he saw no need for an additional court.

[The Commission's report was formally filed on June 20, 1975 and included the above statement of the views of Mr. Justice Douglas. Thereafter, Mr. Justice Douglas wrote the following letter, elaborating on his views:

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

JUNE 23, 1975.

Mr. A. LEO LEVIN,
Executive Director, Commission on Revision of the Federal Court Appellate System, Washington, D.C.

DEAR MR. LEVIN: I have your inquiry of June 13th and I add the following to my comments on the mini-court contained in my letter of March 5, 1974.

Those who come to the Court from law practice, teaching law, or from a lower appellate court soon discover that they have never been busier in their lives. They often feel deluged by the incoming petitions for certiorari and jurisdictional statements. But those inured to the system usually conclude that although the statistics may seem alarming to the outsider or newcomer that the total work amounts to no more than four days a week. Those with that experience, therefore, are against the mini-court and look for other reasons behind the proposal for a mini-court. The Chief Justice and Mr. Justice Powell are convinced that some remedial measures are needed. I agree with former Chief Justice Warren, the late Justice Black, and Mr. Justice Brennan that the proposal is unwise and unnecessary.

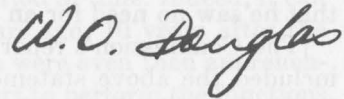
Some who promote the mini-court proposal have a different objective. They realize that what the Court does *not* do is often more important than what it does. When we deny certiorari or dismiss an appeal we, for all practical purposes, bring an end to that litigation.

With all respect, the state court judges and lower federal court judges are usually quite conservative. Hence, letting their decisions stand is to keep alive a conservative ruling supportive of the status quo. That means that the mounting pleas of individuals are not heard and that the Court will no longer take on highly controversial issues. The establishment and its coterie of news commentators will applaud

as the law will have been shaped by the philosophy of judges who share their view.

The mini-court is therefore a far more effective court-packing plan than the one FDR dreamed up. It emphasized what the Court does not do—the petitions it denies—not the principles it expounds.

Yours faithfully,



W. O. DOUGLAS meb]

Views of Mr. Justice Brennan

Mr. Justice Brennan met with representatives of the Commission in May, 1975 to discuss the Commission's preliminary report. He has authorized publication of the following brief summary of his views:

Mr. Justice Brennan stated that he remains completely unpersuaded, as he has repeatedly said, that there is any need for a new national court. He believes that such a change in the structure of the federal judiciary—a structure that has worked well for 175 years, and still does—cannot be justified, at least unless and until available alternatives for better management of court work loads—such as abolition of requirements for three-judge courts, for example—are tried and are proved to be ineffective.

Mr. Justice Brennan stated that if nevertheless such a court were created, he was unable presently to perceive any reasons indicating that its proposed reference jurisdiction would be unworkable, but expressed a number of reservations concerning the proposed transfer jurisdiction.

Views of Mr. Justice Stewart

Mr. Justice Stewart met with representatives of the Commission, in May, 1975 to discuss the Commission's preliminary report. He has authorized publication of the following brief summary of his views relevant to the proposal for a National Court of Appeals:

Mr. Justice Stewart stated that he was not convinced that there was a need for the creation of a new national court at this time. He was of the view, however, that it was highly desirable that careful thought be given now to details of how such a new court would function, should the need develop. In his opinion, the proposed reference jurisdiction would impose no undesirable burden on the Justices of the Supreme Court.

Mr. Justice Stewart stated that he thought it likely that the day would come when a new court would be needed.

Views of Mr. Justice White Supreme Court of the United States Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

JUNE 9, 1975.

HON. ROMAN L. HRUSKA,
Chairman, Commission on Revision of the Federal Court Appellate System, Washington, D.C.

DEAR SENATOR HRUSKA: The wisdom and energy with which the Commission has pursued its assigned tasks have been impressive; and as one interested in the outcome of your pursuits, I am deeply appreciative of all of your efforts.

The remaining purpose of this letter is to comment briefly on certain aspects of the Commission's proposal with respect to the creation of a National Court of Appeals.

I favor the formation of an additional appellate court whenever the knowledgeable members of the community are convinced that there are enough cases for such a court to entertain which should be decided after plenary consideration but which the Supreme Court now either declines to review or resolves summarily. For myself, I am convinced that there is a substantial number of such cases and that there are enough of them to warrant the creation of another appellate court, at least on a trial basis. It should also be borne in mind that the existence of a new court might well lead this Court to refuse plenary consideration and to refer to the new court a good number of cases that would ordinarily be heard here at the present time.

It is my view that all of the docket of the proposed new court should be made up from cases that have first been presented to the Supreme Court in the usual manner. This would offer this Court the opportunity first to select those cases meriting early attention here. I would be satisfied if all of the cases in which review is declined here were then immediately presented to the new court and that court were authorized to select its docket from that large pool of cases. I would prefer that the Supreme Court not be *required* to select the new court's docket, primarily because it would be considerably more burdensome to choose from the 4,000 cases filed here annually not only the 100-150 cases we now select for our own review, but another 100-200 cases for the new court. I note, however, that you now propose that the new court have authority to complete its docket from cases denied plenary consideration here but that this Court be given the power to require the new court to decide specified cases as well as the power to withhold

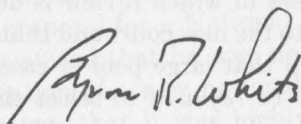
particular cases from its consideration. This would be a manageable arrangement as I see it and I would not object to it.

I should emphasize what is apparent from the above—that in my view the Courts of Appeals should not be authorized to transfer cases to the new court. If cases are to be reviewed in a higher court before judgment in the Courts of Appeals, those cases should first come to this Court under the existing statutes authorizing certification or certiorari before judgment. It would not appear in any event that the new court could give substantial relief to all of the presently overburdened Courts of Appeals, and I am afraid that transfer would bog down the new court in the hard, fact-bound and time-consuming cases that require so much judicial time and effort. As I see it, the new court would have a substantial task in sorting through almost all of the cases that have first come to this Court and deciding those that warrant consideration on the merits. If the informed judgment is that this would not be the case, I would not favor creating additional appellate capacity of the kind presently under discussion.

I should also emphasize that the proposed new court would not only permit the decision of a good many cases that are not now being decided at all by this Court, but would also (1) permit plenary consideration in selected cases which are within our compulsory appellate jurisdiction but which are presently being summarily disposed of here; (2) permit this Court to decline full consideration of and refer to the new court a substantial number of cases the issues in which are not unusually important or complex but which are now reviewed here because of existing conflicts among the circuits or among the federal and state courts; (3) enable this Court, if it was so minded, to reduce the total number of cases in which it now hears oral arguments and writes full opinions, perhaps to the yearly average of approximately 100 that obtained for 15 years prior to the 1970 Term; and (4) present the opportunity for this Court to review some cases that it would not now otherwise hear because of docket pressures.

In conclusion, because I have stated these views publicly in other contexts, I do not request that you keep this letter confidential.

Sincerely,



Views of Mr. Justice Marshall

Mr. Justice Marshall, in remarks delivered on the occasion of accepting the Learned Hand Medal on May 1, 1975, set forth his views on various proposals for establishing a new national court. The following extracts are reprinted with his permission:

After looking over various of these proposals, I have come to the conclusion that while some changes are sorely needed, the more drastic proposals offer overly strong medicine. In my view, substantial restructuring of the federal judicial system is not necessary, and in the end I think such restructuring might well do the federal courts considerable harm. I realize that when the enthusiasm for reform catches on, it often appears short-sighted and timid to recommend limited and modest forms of relief. On the other hand a few well-placed changes in jurisdictional statutes would serve us all a lot better than wholesale revision of the federal court system.

* * *

For example, one single change in our appellate jurisdiction would work wonders—eliminating it altogether. I can see but one reason for retaining a significant group of cases that come to the Supreme Court by right rather than by the ordinary route of certiorari—and that is to give the law reviews and clerks interesting problems of jurisdiction to muse over.

* * *

Last November, Dean Griswold made a proposal that, it seems to me, incorporates some of the better parts of the Hruska plan without its weaker points. He, too, recommends the creation of a National Court of Appeals, but his court would only take cases on reference from the Supreme Court. This, according to Dean Griswold, would permit the court to supplement its current production with more nationwide decisions, particularly in certain nonconstitutional areas such as tax, patent, antitrust, and administrative law. This might be a good move, and the plan certainly deserved serious consideration, but I am still not convinced that the problem of intercircuit conflicts in these areas would not be better solved by putting some of them—such as certain administrative appeals—to a single court of appeals for review. This is currently done in appeals from certain types of FCC decisions, which can be taken only to the Court of the Appeals for the D.C. Circuit. Extending that practice might well solve the problem as effectively as creating a new court, and should be investigated before we are committed to a more wrenching course.

Views of Mr. Justice Blackmun

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF

JUSTICE HARRY A. BLACKMUN

May 30, 1975

Hon. ROMAN L. HRUSKA,
Chairman, Commission on Revision of the Federal Court Appellate System, Washington, D.C.

DEAR SENATOR HRUSKA: This is in response to your letter of April 18, and to Professor Levin's subsequent letter of May 9, requesting comment on the Preliminary Report of the Commission.

You, of course, have received word from other members of this Court including the Chief Justice. What I say here sets forth only my personal views:

1. There is no question in my mind that a problem exists. One need only look at the statistics of the last twenty years to be convinced of this. I regard the problem as akin to that which existed a half century ago and led to the enactment of the Judiciary Act of 1925.

2. It is all very well to say that the Court functions "because we do our own work." The question is how long we can continue so to function and to do our own work adequately. The heavier the burden, the less is the possibility of adequate performance and the greater is the probability of less-than-well considered adjudication. Personally, I have never worked harder and more concentratedly than since I came to Washington just five years ago. I thought I had labored to the limits of my ability in private practice, in my work for a decade as a member of the Section of Administration of the Mayo organizations, and as a judge of the Court of Appeals. Here, however, the pressure is greater and more constant, and it relents little even during the summer months. One, therefore, to a large degree, relies on experience and an innate and hopefully already developed proper judicial reaction. One had better be right! Good health is an absolute requisite. The normal extracurricular enjoyments of life become secondary, if it can be said that they exist at all. What I am saying, I suppose, is that there is a breaking point somewhere at which one's capacity will be exceeded or at which one's work becomes second-rate. The Nation, in my opinion, deserves better than this.

3. What the Freund Committee accomplished, and is to be thanked for, was to mark and to emphasize the existence of the problem and to bring it to public attention. If the presence of the problem were noted and accepted, its measure could be taken and something could be done about it.

4. I have watched with interest the presentation of suggested resolutions. These necessarily have differed in detail. As your Commission has worked devotedly on the problem, and as others have contributed their best efforts, great progress obviously has been made. I am not in a position to state with absolute assurance at this time that one known plan is better than another and that the final solution is in sight.

5. I do feel, however, that the elimination of direct appeals, as of right, is a proper step and—although I say this with some reluctance—that narrowing (and perhaps even the elimination) of the diversity jurisdiction is another proper step.

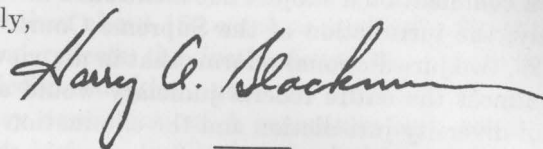
6. I am inclined to think that experiment along the line of a National Court of Appeals, much as the concept has been refined in Professor Levin's letter of May 9, is taking us down the correct road. I would prefer, however, to see that whatever is done remain on an experi-

mental basis for a time, much, I believe, as was outlined by the Chief Justice in his recent letter to you. We learn by doing. I would dislike to see a rigid structure imposed at this time, only to have it develop within a short while that the plan falls short of its expectations.

7. Some of us here worry about the cases that we "barely" do not take, namely, those that almost assuredly would have been taken twenty years ago. The country has grown and surely it has become much more complex. Perhaps the plan presently proposed will alleviate this worry about the cases that we almost take.

I add my personal appreciation for the hard work and devotion that the members of the Commission have undertaken and demonstrated. I am sure this is a task worth doing despite the apparent elusiveness of the precisely correct answer.

Sincerely,



Views of Mr. Justice Powell
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF

JUSTICE LEWIS F. POWELL, JR.
Hon. ROMAN HRUSKA,

JUNE 10, 1975.

Chairman, Commission on Revision of the Federal Court Appellate System, Washington, D.C.

DEAR SENATOR HRUSKA: Thank you for the opportunity of meeting with you, Judge Robb and Professor Levin to discuss the then tentative proposals of your Commission. As I outlined at that time my general reactions to the proposals, you already have the substance of my thinking. In a recent conversation with Professor Levin, he suggested that it might be helpful if I recorded my views more formally. Accordingly, I write this brief letter of confirmation.

You may recall that I referred to conversations that Justice White and I have had about the principal recommendations tentatively made by the Commission. I have a copy of Justice White's letter to you of June 9, and it is fair to say that I am substantially in accord with the views expressed therein.

I agree particularly with Justice White as to the relationship between the Supreme Court and a new National Court of Appeals. I am not entirely convinced, however, that Courts of Appeal should have no authority under any circumstances to transfer cases to the new court. There may be circumstances in which a transfer would serve a useful purpose. I would think such a transfer, if authorized at

all, should be limited and subject to the authority of the National Court of Appeals to control its own docket.

We are all somewhat reluctant to make a major change in the structure of the federal court system. Yet, the burgeoning caseload of the federal courts is not likely to diminish, and this Court can hardly serve the national appellate needs of our country as adequately today as it could when petitions filed here were about 1,000 per year as contrasted with the present 4,000 plus. The Commission's proposals, as the Report indicates, are not designed to lessen the number of these petitions or the workload of the Court. But, as Justice White indicates, the availability of a National Court of Appeals could present constructive options to this Court that are not presently available.

I do have a comment on a subject not mentioned in Justice White's letter, namely, the jurisdiction of the Supreme Court. As you know from our talks, two jurisdictional reforms that in my view are urgently needed—as almost the entire federal judiciary would agree—are the elimination of diversity jurisdiction and the elimination or substantial curtailment of three-judge court jurisdiction with the consequent direct appeals to this Court. The latter, in particular, disserves the entire system.

I have enjoyed the privilege of discussing these problems with you, other members of your Commission, and with your most able Professor Levin. The Commission already has rendered a distinct public service, for which I am most grateful.

Sincerely,

Lewis F. Powell

Views of Mr. Justice Rehnquist
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

JUNE 10, 1975.

A. LEO LEVIN, Esq.,
Executive Director, Commission on Revision of the Federal Court Appellate System, Court of Claims Building, Washington, D.C.

DEAR PROFESSOR LEVIN: Since I know that the Commission on Revision of the Federal Court Appellate System is about to close its record, I thought that I would take the opportunity to put in writing some of the thoughts I have expressed to you, Senator Hruska, Judge Lumbard, and Judge Robb when we discussed the Commission's proposal for an intermediate appellate court.

I think the Commission has made out a convincing case for the creation by Congress of a national court of appeals along the general

lines described in your report. I agree with the Commission's view that the desirability of a national court of appeals turns not on the workload of the Supreme Court but rather on the sufficiency of judicial capacity within the federal system to review issues of federal constitutional and statutory law. While the adoption of the Commission's proposal might enable the Supreme Court to make some changes in the way it exercises its discretionary jurisdiction, the principal objective of the proposal is not "relief" for the Supreme Court but "relief" for litigants who are left at sea by conflicting decisions on questions of federal law.

Conflicting views on questions of federal law remain unresolved because of the Supreme Court's unwillingness, which is reflected in the exercise of its discretionary jurisdiction each year, to undertake to decide more than about 150 cases on the merits during each Term. This reluctance reflects the institutional view that thorough and deliberative decision-making, and not quantity of output, is the Court's primary consideration. A generation ago, when I was a law clerk to Justice Jackson, this order of priorities imposed no hardship to litigants. The Supreme Court's capacity to decide important issues of federal constitutional and statutory law was adequate for the needs of the country.

I think the Commission's report documents the case that the capacity of this Court is no longer adequate for that purpose. While the number of unresolved conflicts between courts of appeals which were not resolved by this Court is not numerically large, it is significant and, I think everyone would agree that it is bound to increase. Congressional action that would constrict this Court's appellate jurisdiction and thereby increase our ability to resolve direct conflicts through exercise of our discretionary jurisdiction would affect only the immediacy of the need for a national court of appeals, and not the ultimate need for expanded capacity.

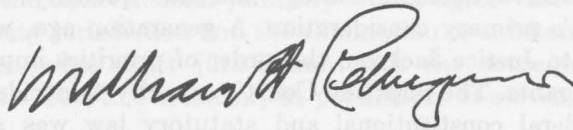
Congress has acted quite deliberately in enacting other changes in the structure of the federal judiciary, and the possibility exists that the need for a national court of appeals may not be realized until five or ten years from now. This does not mean that those interested in the federal judicial system should ignore a growing problem until it reaches a more critical crisis stage.

I have not given the Commission's report sufficiently thorough study to warrant commenting on each characteristic of the proposal. My present view is one of general agreement with the composition of the national court of appeals although I have strong doubts about the wisdom of the transfer jurisdiction proposal.

To the extent that the national court of appeals is intended to increase the capacity for resolution on a national scale of conflicting circuit precedents, the Supreme Court is in a unique position to assess

the importance and directness of any asserted conflicts. The reference jurisdiction of the national court of appeals would permit the national court to perform the function for which it is proposed because the Supreme Court could direct to the national court those cases presenting conflicts which the Supreme Court feels should be resolved but do not warrant plenary consideration in the Supreme Court. The transfer jurisdiction proposal would decentralize that responsibility by placing the initiating burden on the courts of appeals and final authority with the national court. These tribunals cannot be expected to have the same perspective and overview of federal court adjudication as does this Court which reviews 4,000 petitions and jurisdictional statements annually. Unless experimentation with the national court of appeals demonstrates that a system of reference jurisdiction results in underutilization of the national court, which I doubt would happen, I would prefer to see the jurisdiction of that court confined to reference jurisdiction.

Sincerely,



THE WHITE HOUSE
WASHINGTON
September 4, 1975

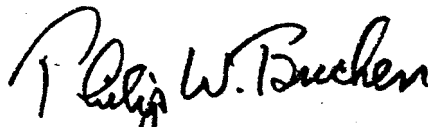
*Comm on
Rev. of
Appellate
System*

Dear Judge Filice:

Thank you very much for your letter to the President expressing your concern about the recommendation made to create a National Court of Appeals. The Commission on Revision of the Federal Court Appellate System in its report deals with the problem you pose and makes some rather convincing arguments that there would be advantages that more than offset the possibility of an increased length of time before final decision is reached. Also, the Commission proposed safeguards which would make it rare that any case would have to be heard by three appellate courts.

If you would like to have a copy of the full report, we would be happy to send one to you.

Sincerely,



Philip W. Buchen
Counsel to the President

The Honorable Charles F. Filice
District Judge
District Court of the State of Michigan
Lansing, Michigan 48933



District Court of the State of Michigan

District Fifty Four - A

City of Lansing

A. L. KIRSCHENBAUER
CLERK OF THE COURT

JAMES F. GHASTIN
CHIEF PROBATION OFFICER

DISTRICT JUDGES
TERRANCE A. CLEM
JAMES J. WOOD
CHARLES F. FILICE
JAMES R. GIDDINGS
PATRICK F. CHERRY

August 11, 1975

*Delip
Buchen*

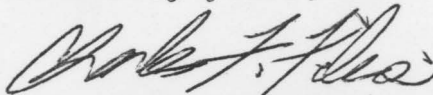
The Honorable Gerald F. Ford
President
United States of America
Washington, D.C.

Dear Mr. President:

This is in reference to the proposal contained in the Report of the Commission on Revision of the Federal Court Appellate System to Create a National Court of Appeals.

It is my personal opinion that to establish such a court would greatly extend the length of time necessary for any case to be finalized. One of the major criticisms that is presented to me by the public in reference to our judicial system is the tremendous length of time required for a party to be assured of the final decision in the case.

Sincerely yours,



Charles F. Filice
District Judge

CFF:ja

cc: U.S. Representative Edward Hutchinson



OFFICE OF THE WHITE HOUSE PRESS SECRETARY

THE WHITE HOUSE

PRESS CONFERENCE
OF

ROMAN L. HRUSKA
SENATOR FROM THE STATE OF NEBRASKA
AND

A. LEO LEVIN
EXECUTIVE DIRECTOR
COMMISSION ON REVISION OF THE
FEDERAL COURT APPELLATE SYSTEM

THE BRIEFING ROOM

12:05 P.M. EDT

MR. NESSEN: As you know, the President this morning accepted the final report of the Commission on Revision of the Federal Court Appellate System. This Commission was set up under an act of Congress of 1972 to study the Federal court appellate system.

The members were appointed in early 1973. Four of them were appointed by the President, four by the Chief Justice, four from the Senate and four from the House. Senator Hruska, whom many of you know, was elected the chairman.

They have turned in their final report to the President. We have given you, I believe, a statement by the President on the acceptance of this report.

Senator Hruska will answer your questions as to the contents of the report, and immediately after, I will have my regular briefing.

SENATOR HRUSKA: Thank you, Mr. Nessen.

Here with me is Professor Levin, who has been the Director of our Commission.

The Commission did make its report and tender copies of the report to all four sources -- to the President, to the Senate, to the House, and also to the Chief Justice, who was present at the ceremony.

We feel that it is a report that will remove the general subject of improvement of the Federal appellate court system from the general realm of rhetoric to specifics.

MORE

(OVER)



That is very much needed because this is the fourth body--the first official body, but it is the fourth body--considering this subject that has come forward with a proposal for a national court. In our case we call it the National Court of Appeal.

So, that is the proposition which has our attention in this second phase of the report.

The first phase of our report was rendered in December 1973, at which time we undertook to redraw the boundaries, or propose the redrawing of the boundaries of the fifth and ninth circuits, but this one has for its lead article the proposal of the National Court of Appeal, although there are eight or ten proposals for interior workings of the Federal Circuit Courts of Appeal.

Our work was limited to the Courts of Appeal. We did not get into, and were not allowed by the statute to get into, district court problems, nor into the Supreme Court problems, as such, only where they do make contact and affect each other directly.

I am open for questions, if you have any.

Q Senator, are you going to sponsor legislation for the National Court of Appeals?

SENATOR HRUSKA: I am, indeed. There is already in process the drafting of bills that will be drawn on the basis of this report, both for a National Circuit Court of Appeals and for the other changes that are proposed, which will require legislation.

Q Senator, the Chief Justice and some of the other Justices have suggested this ought to be tried out for a few years on an experimental basis. What is your reaction to that idea?

SENATOR HRUSKA: That was considered by the Commission. We felt that we ought to propose it on a permanent basis. After all, nothing is permanent insofar as court structure is concerned, with one exception.

The Constitution says there shall be a Supreme Court. The Congress cannot touch that court, but it can abolish, or it can alter, or it can create new courts at its pleasure.

We recognize, of course, as a Commission, that that question is a question of policy. If the Congress in its best judgment says it should be on an experimental basis, five years, seven years, ten years, that will be a decision that they can make, and, of course, that will be it.

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On the other hand, if it is put on a permanent basis, at the end of five years, the matter can be reviewed, and it can be abolished and the judges of the court can be assigned to other circuits and the effort would have been made.

Q Senator Hruska, is it your expectation that the Congress will complete action on this proposal in the present Congress, and if that is your expectation, is it a reasonable one?

SENATOR HRUSKA: We would expect that bills will be introduced, available for introduction, and introduced shortly after the August recess, this fall, and hopefully even arrange for some preliminary hearings.

Q Senator Hruska, Chief Justice Burger pleaded for a raise in salary for Justices around the country because they were having trouble getting them. How will this be funded, and to what extent?

SENATOR HRUSKA: You mean, how is it treated in here?

Q Yes.

SENATOR HRUSKA: We recommend it and say two things. First, there should be an adequate supply of judges to accommodate the ever increasing case loads, and secondly, that there should be salary adjustments not only to attract judges of quality and of good standing, but to keep those that are presently on the Circuit Court.

Q Senator, what is wrong with the system as it exists today?

SENATOR HRUSKA: The basis of the National Court of Appeals is this: You will find the best discussion of it in the testimony of Ervin Griswold, who served for nine years as Solicitor General. The Supreme Court is doing well. This is not for the purpose of relieving the burden of the Supreme Court. It is for the purpose of furnishing greater appellate capacity within the Federal judicial system.

There are many cases Dean Griswold said -- and other cases, as well -- which are deserving of attention, by the Supreme Court, but they sheer do not have time to consider them.

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Consider these figures. They are very brief and simple.

Some 20 years ago, or 30 years ago, there were about 1,000 cases docketed in the Supreme Court. Now there are between 4,500 and 5,000, notwithstanding that differential. Thirty years ago the Supreme Court was deciding and rendering written opinions in about 140 to 150 cases a year. That is still the range, so that over the last 30 or 40 years, they have decided that many cases.

Obviously, with that great increase in litigation, there are many problems to which they cannot address themselves. They sheer do not have time. That would not mean, necessarily, that the National Court of Appeals would consider real national policy questions or deep, profound Constitutional questions.

Those still can be decided by the Supreme Court and would, but it would enlarge the capacity of the court in tax cases, for example, or Social Security cases, or environmental cases that no longer require Constitutional consideration, but just a decision on one side or the other of the two contesting parties.

Q This would come between the circuit courts and Supreme Court?

SENATOR HRUSKA: That is right.

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Q Senator, I am not clear whether you believe this legislation can be passed by the present Congress, or not.

SENATOR HRUSKA: Well, I don't know. We will have to await the reaction to the report and await the time that the issues contained in this report will be addressed by the committees, and with what diligence we can pursue the matter.

Mechanically, yes, it is possible. I would say probably, and we will certainly work towards that end.

Q Senator, did the President endorse your recommendations?

SENATOR HRUSKA: He said that he was going to devote, as he indicated in his statement, devote a good deal of time to study and consideration of it, and he would cooperate with us in processing the proposals so that they can be considered for legislation.

Q How much would this court cost, Senator?

SENATOR HRUSKA: It would involve seven additional judges who would be on the same pay scale that circuit courts are now, as I understand it.

MR. LEVIN: Subject to the will of Congress.

SENATOR HRUSKA: Subject to the will of Congress, but we recommend they be considered as circuit judges. Of course, they would have to be staffed, have quarters, and so on. I don't know what the cost is but it is minimal considering the cost of the entire judicial system.

Q Senator, couldn't cases that went to this National Court of Appeals be appealed further on up to the Supreme Court? This would really not be the last step going to the National Court of Appeals. Cases could be appealed higher to the Supreme Court?

SENATOR HRUSKA: Absolutely. Any case decided by the National Court of Appeals would be subject to a writ of certiorari. They would petition for a writ of certiorari. The granting of that petition would then allow the Supreme Court to review the work of the National Circuit Court.

Q So it might not necessarily reduce the Supreme Court's workload?

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SENATOR HRUSKA: On the contrary. I think in due time, it was considered on the Commission that very few of those cases would be accepted in the Supreme Court for review because they are of high caliber. They are devoting their time to it. After all, the case does have to be decided one way or another, and sometimes soon. So it is considered it would relieve the Court in that way.

Q Are you really doing a favor to litigants by establishing another layer of appellate courts and prolonging the appellate process?

SENATOR HRUSKA: No, not at all. In fact, it would reduce the volume of litigation for this reason. Now we have many instances, and tax law is one of the chief offenders. There would be one rule on tax law in the Ninth Circuit, another one in the Second Circuit, in New York, and its neighborhood. Citizens of the United States who are entitled to a national law on taxes and pay the same kinds of taxes under the same kinds of circumstances, they are not getting that.

The appearance on the scene of a National Circuit Court of Appeals would be that they would be able to take those conflicts and decide them, and thereby eliminate the necessity for proliferation of litigation, and for the searching for a new district or a new circuit court that would hold differently in that same case.

So the national issues would be resolved sooner and in larger number, and it would really reduce litigation.

Q What are the steps, Senator, if the case is there? Does it go directly to this court, or have to go up the steps to get there?

SENATOR HRUSKA: There are two sources of cases -- for cases to be decided by the National Court. One would be by assignments from the Supreme Court, specific assignments. Case number one, two, three, would go to the National Court for decision. Then the Supreme Court could take from the docket itself, 4,500 cases, any number of cases it wanted to, and refer them to the National Court for its selection from that list.

So that is one source, to refer from the Supreme Court.

The other source of cases for this National Court would be transferred, cases transferred from circuit courts to the National Courts, and the National Court could either accept the case for decision or say, no, you decide it on the circuit basis first.

So there are those two sources for cases.

Q Senator Hruska, only one Justice on the present Court has endorsed, even luke warmly, the idea of transferring cases from the present Courts of Appeals. Five of the other Justices have said they are opposed to that. I know, however, in the final report the Commission did not abandon the transfer of jurisdiction.

Can you tell me why you did not in the face of that kind of opposition?

SENATOR HRUSKA: There is another thing in this report that says by way of a particular detail, that is set in concrete. The reason we put it in was that there are some who believe it would be a valid and a very effective way of dealing with part of the problem.

On the other hand, it is what we would call, if we were at the council table or conference table, it is a negotiable point. If there is too great an opposition to it, obviously Congress will not approve it, and they will try out first the source of litigation being only by reference from the Supreme Court, find out how it works, and then after some years find out if there would be room for reinstatements of the transfer of jurisdiction.

Q How do you feel about it, Senator, as a Member of Congress?

SENATOR HRUSKA: I think it would be well to try it. It would be subject to rules that would be developed by the Supreme Court. Guidelines here by the circuit courts could transfer those cases, and that is also the case with reference to the reference class of cases.

The idea is that the Supreme Court will be the one that will supply those reference cases, but the rules whereby they will be governed in that regard will be formulated by the Supreme Court in keeping with the rule-making power.

Q Senator, is there any way of gauging how much of a speed-up there would be under this new court for getting a final decision?

SENATOR HRUSKA: I don't like to think of it in terms of a speed-up. That has a connotation that there is delay now in the Supreme Court. There isn't, but there is an inadequate output from the Supreme Court from sheer lack of time.

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So there would be an elimination of delay in this way, however, that now when there are inter-circuit conflicts it takes a long time before those inter-circuit conflicts are settled, and sometimes they are never settled because the Supreme Court will not take cognizance of them. By eliminating those inter-circuit conflicts there will be less litigation on that point because whatever is decided by the National Court and not disturbed by the Supreme Court--that would be a relatively short space of time--that becomes national law.

Q Senator, Justice Douglas is conspicuous for proposing this kind of plan and yet you cite his dissent from denial of certiorari as an example of weakness in the system, the inadequacy of the Supreme Court's ability to pour out this national law.

How can you use Douglas for one proposition and not accept his other proposition that the Supreme Court could handle these cases?

SENATOR HRUSKA: After all, that is like comparing a zebra with a race horse, really, because in the one case he is acting on certiorari, and in another case he is dealing with the concept that is developed in the report.

He has taken the position that no change is necessary, that the way the Supreme Court is functioning now is ample, and that he doesn't see any necessity for this new concept. However, the other Justices have indicated either that they favor the concept or that they say it is workable, and they do go into the question of timing. They say maybe this is not the time to do it.

Q Then, you reject Justice Douglas's position that the court could accommodate this need for national law. His position is the Supreme Court could.

SENATOR HRUSKA: He doesn't say that the Supreme Court can take on more work and decide more cases. He doesn't do that.

Q Justice Douglas does not do that?

MR. LEVIN: Justice Douglas quite supports, with his repeated dissents--which we have discounted because he seems to be idiosyncratic, and the report so indicates--but he certainly documents the need for the Supreme Court to take additional cases. He is constantly saying we should take additional cases.

Q He says you can't.

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MR. LEVIN: At this juncture, after asserting and underscoring the needs for the Supreme Court to take additional cases, he is divided from his brethren in terms of their capacity, or the court's capacity, to accommodate it.

There is always two questions. First is, is there need. Justice Douglas is always in support of the needs. Second, can the Supreme Court do it. You can take a look at the letters. Douglas says, "I can keep working. I can work more than this. I can work faster, turn out more opinions."

His colleagues, however, are less positive that he himself can do it. But he is a very unusual man. Read carefully what his colleagues say, what time is left for them. And second, the risk of the erosion of the process because they are doing things too fast. They put it very softly.

All I said was risk. Read Justice White's letter. He is a very thoughtful person. They would like to cut back to where they were two years ago in terms of volume.

Read Justice Black's letter. On this thing, the issue of whether they have time to do the additional work which Justice Douglas agrees ought to be done, it is on that point the brethren divides from Justice Douglas, and what the Commission has done is look at all of the evidence according to each one, or the weight, according to each effort involved.

THE PRESS: Thank you, Senator.

END

(AT 12:24 P.M. EDT)

