# NATIONAL COURT OF APPEALS ACT

## HEARINGS

BEFORE THE

## SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL MACHINERY

OF THE

## COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

NINETY-FOURTH CONGRESS

SECOND SESSION

ON

## S. 2762 and S. 3423

THE NATIONAL COURT OF APPEALS ACT

**PART I**

MAY 19, 20; NOVEMBER 9, 10, 1976

Printed for the use of the Committee on the Judiciary

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# NATIONAL COURT OF APPEALS ACT

WEDNESDAY, MAY 19, 1976

U. S. SENATE,
SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL MACHINERY
OF THE COMMITTEE ON THE JUDICIARY,
*Washington, D.C.*

The subcommittee met, pursuant to notice, at 10 a.m., in room 2228, Dirksen Office Building, Hon. Quentin N. Burdick (chairman of the subcommittee) presiding.

Present: Senators Burdick (presiding), Hruska, and Scott of Virginia.

Also present: William P. Westphal, chief counsel; Kathryn M. Coulter, chief clerk.

Senator BURDICK. Today and tomorrow the subcommittee has scheduled the first 2 days of an extensive set of hearings to be held on two bills which propose to establish a national court of appeals.

The subcommittee has received a large number of requests from persons who have expressed the desire to appear and give testimony on these bills. All of these requests will be granted, but it will not be possible for the subcommittee to hear all of the witnesses during this session of Congress. Additional hearings will be scheduled as time and circumstance permit.

The two bills under consideration are S. 2762 and S. 3423. With two significant exceptions, the two bills are identical. They would create a new court—a national court of appeals—to be interposed between the court of appeals for the several circuits and the Supreme Court of the United States.

The court would consist of seven judges and it would have the power to decide cases of national importance involving the application of Federal law. Its decisions would be binding precedents to be followed by Federal courts and, on questions of Federal law, also by State courts.

Under the provisions of S. 2762, the seven members of the court would be appointed by the President, with the advice and consent of the Senate.

Under the provisions of S. 3423, the seven judges who serve for the first 4 years would consist of two judges appointed by the President and confirmed by the Senate and the five most senior circuit judges designated by the Chief Justice of the United States from a list of all circuit judges.

At succeeding 4-year intervals the President appoints, first, two additional judges and then three additional judges, with the remaining judges being designated by the Chief Justice from the list of circuit judges in order of seniority.

With respect to the jurisdiction of the new court, S. 2762 provides for two heads of jurisdiction; one, cases referred to the new court by the U.S. Supreme Court, and two, cases transferred by the courts of appeals of the several circuits. Under S. 3423, this second head of jurisdiction would be eliminated.

This is a concise explanation of the nature of and the differences between the two proposals. Copies of these bills will be included in the record.

[The bills follow:]

To explain these bills we will hear from Senator Hruska, who is not only the chief sponsor of both bills, but also served as Chairman of the Commission on Revision of the Federal Court Appellate System. It was the Commission which recommended the creation of such a court. Other witnesses will be heard on the issue of a need for this new court.

94TH CONGRESS
1ST SESSION

# S. 2762

IN THE SENATE OF THE UNITED STATES

DECEMBER 10, 1975

Mr. HRUSKA (for himself, Mr. BURDICK, Mr. FONG, and Mr. MCCLELLAN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

# A BILL

To establish a National Court of Appeals, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That this Act may be cited as the "National Court of Appeals Act of 1975".

ESTABLISHMENT OF COURT

SEC. 2. (a) Part I of title 28, United States Code, is amended by inserting immediately after chapter 1 of such title, the following new chapter:

## "Chapter 2—NATIONAL COURT OF APPEALS



### "§ 21. Establishment and composition of court

"There shall be a National Court of Appeals which shall be composed of a chief judge and six associates judges who shall be appointed by the President, by and with the advice and consent of the Senate.

### "§ 22. Chief judge; precedence of associate judges

"(a) If the chief judge is temporarily unable to perform his duties as such, they shall be performed by the associate judge who is next in precedence.

"(b) The associate judges shall have precedence according to the seniority of their commissions. Judges whose commissions bear the same date shall have precedence according to seniority in age.

### "§ 23. Tenure and salary

"(a) The judges of the National Court of Appeals shall hold office during good behavior.

"(b) The judges of the National Court of Appeals shall receive a salary of $52,500 a year.

"§ 24. **Principal seat and terms**

"The principal seat of the National Court of Appeals shall be in the District of Columbia. The court may sit at such times and places within the United States as the court may designate.

"§ 25. **Seal**

"The National Court of Appeals shall have a seal which shall be judicially noticed.

"§ 26. **Sessions**

"The time and place of the sessions of the National Court of Appeals shall be prescribed by the chief judge pursuant to rule of the court.

"§ 27. **Hearings and quorum**

"Cases and controversies shall be heard and determined by the court in banc. Five of the judges of the National Court of Appeals shall constitute a quorum.

"§ 28. **Disqualification of judges**

"No judge shall hear or determine an appeal from the decision of a case or issue therein heard or tried by such judge.".

(b) The analysis of part I of title 28, United States Code, is amended by inserting immediately below the item relating to chapter 1 of such part, the following new item:

"2. National Court of Appeals---------- 21".

OFFICERS AND EMPLOYEES

SEC. 3. (a) Part III of title 28, United States Code, is amended by inserting immediately after chapter 45 of such title, the following new chapter:

**"Chapter 46—NATIONAL COURT OF APPEALS**



**"§ 691. Clerk and employees**

"(a) The National Court of Appeals may appoint a clerk who shall be subject to removal by the court. The court may appoint or authorize the appointment of such other officers and employees in such number as may be approved by the Director of the Administrative Office of the United States Courts.

"(b) The officers and employees of the court shall be subject to the removal by the court or, if the court so determines, by the clerk or other officer who appointed them, with the approval of the court.

"(c) The clerk shall pay into the Treasury all fees, costs, and other moneys collected by him and make returns thereof to the Director of the Administrative Office of the United States Courts under regulations prescribed by him.

**"§ 692. Law clerks and secretaries**

"The judges of the National Court of Appeals may appoint such law clerks and secretaries as may be necessary,

"§ 693. Librarian, marshal, and bailiffs

"(a) The National Court of Appeals may appoint a librarian and necessary library assistants who shall be subject to removal by the court.

"(b) The National Court of Appeals may appoint a marshal, who shall attend the court at its sessions, be custodian of its courthouse, have supervision over its custodial employees, take charge of all property of the United States used by the court or its employees, and perform such other duties as the court may direct. The marshal shall be subject to removal by the court. The marshal, with the approval of the court, may employ necessary bailiffs. Such bailiffs shall attend the court, preserve order, and perform such other necessary duties as the court or marshal may direct. The bailiffs shall receive the same compensation as bailiffs employed for the district courts.".

(b) The analysis of part III of title 28, United States Code, is amended by inserting immediately below the item relating to chapter 45 of such title, the following new item:

"46. National Court of Appeals---------- 691".

JURISDICTION AND REVIEW

SEC. 4. (a) Part IV of title 28, United States Code, is amended by adding immediately after chapter 81 of such title, the following new chapter:

## "Chapter 82—NATIONAL COURT OF APPEALS



### "§ 1271. Reference jurisdiction

"The National Court of Appeals shall have jurisdiction of cases referred to it by the Supreme Court.

### "§ 1272. Transfer jurisdiction

"(a) The National Court of Appeals shall have jurisdiction of any case filed or instituted in a court of appeals, the Court of Claims, and the Court of Customs and Patent Appeals, upon transfer of such case to it by any such court.

"(b) The courts of appeals, the Court of Claims, and the Court of Customs and Patent Appeals may transfer to the National Court of Appeals any case that is filed or instituted in such court if the case is one in which an immediate decision by the National Court of Appeals is in the public interest, and if—

"(1) the case turns on a rule of Federal law and the courts have reached inconsistent conclusions with respect to such rule;

"(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 Ap-

peals outweigh any potential disadvantages of such a determination; or

"(3) the case turns on a rule of Federal law previously announced by the National Court of Appeals, if there is a substantial question about the proper interpretation or application of that rule in such case.

"(c) The National Court of Appeals may decline to accept any case transferred under section 1272(b) of this title. The National Court of Appeals shall promptly remand any case not accepted by it to the court that transferred such case.

**"§ 1273. Finality of decisions**

"(a) The National Court of Appeals may deny review in any case referred to it by the Supreme Court unless directed by the Supreme Court to decide the case.

"(b) There shall be no appeal or review of any order of a court of appeals, the Court of Claims, or the Court of Customs and Patent Appeals granting or denying transfer under section 1272(b) of this title.

"(c) There shall be no appeal or review of any order of the National Court of Appeals under section 1272 of this title accepting or rejecting a case transferred to it for decision.

"(d) Unless modified or overruled by the Supreme Court, the decisions of the National Court of Appeals shall be binding on all courts of the United States, and, with

respect to questions arising under the Constitution, laws, or treaties of the United States, on all other courts.".

(b) Chapter 81 of title 28, United States Code (relating to the jurisdiction of the Supreme Court), is amended by adding at the end thereof the following new section:

**"§ 1259. National Court of Appeals**

"(a) After denying certiorari or in lieu of noting probable jurisdiction of an appeal in any case before it, the Supreme Court may refer any such case to the National Court of Appeals. The Supreme Court may, and in cases subject to review by appeal shall, direct the National Court of Appeals to decide any case so referred.

"(b) Any case in the National Court of Appeals may be reviewed by the Supreme Court by writ of certiorari granted upon the petition of any party to any such case before or after rendition of judgment or decree.".

(c) (1) The analysis of part IV of title 28, United States Code, is amended by inserting immediately below the item relating to chapter 81 of such title, the following new item:

"82. National Court of Appeals---------- 1281".

(2) The analysis of chapter 81 of title 28, United States Code, is amended by adding at the end thereof the following new item:

"1259. National Court of Appeals.".

TECHNICAL AND CONFORMING AMENDMENTS

SEC. 5. (a) (1) The first paragraph of section 331 of title 28, United States Code, is amended by inserting immediately after "shall summon annually" the following: "the chief judge of the National Court of Appeals,".

(2) The third paragraph of such section 331 is amended by inserting immediately before the first sentence the following new sentence: "If the chief judge of the National Court of Appeals is unable to attend, the Chief Justice may summon any other judge from such court.".

(b) (1) Section 372 (a) of title 28, United States Code, is amended—

(A) by inserting in the third paragraph immediately following "Supreme Court," the following: "the chief judge of the National Court of Appeals,"; and

(B) by inserting immediately below the third paragraph of such subsection the following new paragraph: "A judge of the National Court of Appeals desiring to retire under this section, shall furnish to the President a certificate of disability signed by the chief judge of such Court.".

(2) Section 372 (b) of title 28, United States Code, is amended—

(A) by inserting immediately after "Chief Justice of the United States in the case of" the following: "the chief judge of the National Court of Appeals or"; and

(B) by inserting immediately after "chief judge of his court in the case of a judge of the" the following: "National Court of Appeals,".

(c) (1) The second paragraph of section 451 of title 28, United States Code, is amended by inserting immediately after "Supreme Court of the United States," the following: "the National Court of Appeals,".

(2) The fourth paragraph of section 451 of title 28, United States Code, is amended by inserting immediately after "includes judges of" the following: "the National Court of Appeals,".

(d) The second paragraph of section 456 of title 28, United States Code, is amended by inserting immediately after "justices of the Supreme Court" the following: ", the judges of the National Court of Appeals,".

(e) Section 610 of title 28, United States Code, is amended by inserting immediately after "includes" the following: "the National Court of Appeals,".

(f) (1) Section 1912 of title 28, United States Code, is amended by inserting immediately after "Supreme Court" the following: ", the National Court of Appeals,".

(2) (A) Section 1913 of title 28, United States Code, is amended to read as follows:

**"§ 1913. National Court of Appeals; courts of appeals**

"The fees and costs to be charged and collected in the

National Court of Appeals and in each court of appeals shall be prescribed from time to time by the Judicial Conference of the United States. Such fees and costs shall be reasonable and shall be uniform in all the circuits.".

(B) The item relating to section 1913 of title 28, United States Code, in the analysis of chapter 123 of such title, is amended to read as follows:

"1913. National Court of Appeals; courts of appeals.".

(g) The first paragraph of section 2072 of title 28, United States Code, is amended—

(1) by striking out "of the district courts and courts of appeals of the United States" and inserting in lieu thereof "of the district courts, courts of appeals of the United States, and the National Court of Appeals"; and

(2) by striking out "review by the courts of appeals" and inserting in lieu thereof "review, in cases of transfer to the National Court of Appeals of, and review by the court of appeals".

(h) Section 2106 of title 28, United States Code, is amended by inserting immediately after "Supreme Court" the following: ", the National Court of Appeals,".

AUTHORIZATION OF APPROPRIATIONS

SEC. 6. There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this title.

94TH CONGRESS
2D SESSION

# S. 3423

IN THE SENATE OF THE UNITED STATES

MAY 12, 1976

Mr. HRUSKA introduced the following bill; which was read twice and referred to the Committee on the Judiciary

# A BILL

To establish a National Court of Appeals, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That this Act may be cited as the "National Court of Appeals Act of 1976".

ESTABLISHMENT OF COURT

SEC. 2. (a) Part I of title 28, United States Code, is amended by inserting immediately after chapter 1 of such title the following new chapter:

## "Chapter 2—NATIONAL COURT OF APPEALS



### "§ 21. Establishment and composition of court

"(a) There shall be a National Court of Appeals which shall be composed—

"(1) during the four-year period beginning on the date of the enactment of this chapter, of a chief judge and one associate judge appointed by the President, by and with the advice and consent of the Senate, and of five circuit judges designated under subsection (b) to serve as associate judges;

"(2) during the four-year period beginning on the day after the expiration of the four-year period described in paragraph (1), of a chief judge and one associate judge appointed under paragraph (1), two associate judges appointed by the President, by and with the advice and consent of the Senate, and three circuit judges designated under subsection (b) to serve as associate judges; and

"(3) after the expiration of the four-year period described in paragraph (2), of a chief judge and one

associate judge appointed under paragraph (1), two associate judges appointed under paragraph (2), and three associate judges appointed by the President, by and with the advice and consent of the Senate.

"(b) (1) Subject to the provisions of paragraph (4), the Chief Justice shall designate—

"(A) the five most senior circuit judges who, as of the date of designation, are eligible for designation to serve as associate judges during the four-year period described in subsection (a) (1); and

"(B) the three most senior circuit judges who, as of the date of designation, are eligible for designation to serve as associate judges during the four-year period described in subsection (a) (2).

"(2) In the event of the death, resignation, or retirement of a circuit judge designated under paragraph (1), the Chief Justice shall, subject to the provisions of paragraph (4), fill the vacancy caused thereby, for the remainder of the four-year period which such circuit judge was serving, by designating the most senior circuit judge who, as of the date of designation, is eligible for designation to serve as an associate judge during such four-year period.

"(3) A circuit judge shall be eligible to be designated to serve as an associate judge under paragraph (1) during

the four-year period described in subsection (a) (1) or (a) (2), as the case may be, if—

"(A) he has informed the Chief Justice that he is willing to be designated; and

"(B) he is not eligible to retire from regular active service under section 371(b) (1) and will not be so eligible during the applicable four-year period.

"(4) Not more than one circuit judge of the same court of appeals may serve as an associate judge at the same time.

"(5) For purposes of this subsection, the seniority of circuit judges shall be based on the seniority of their commissions, and, in the case of circuit judges whose commissions bear the same date, on seniority in age.

**"§ 22. Chief judge; precedence of associate judges**

"(a) If the chief judge is temporarily unable to perform his duties as such, they shall be performed by the associate judge who is next in precedence.

"(b) The associate judges shall have precedence according to the seniority of their commissions. Associate judges whose commissions bear the same date shall have precedence according to seniority in age. Circuit judges designated to serve as associate judges shall have precedence according to the seniority of their commissions as circuit judges, and in the case of circuit judges whose commissions bear the

same date, according to seniority in age. Associate judges shall have precedence over circuit judges designated to serve as associate judges.

**"§ 23. Tenure and salary**

"(a) The judges of the National Court of Appeals shall hold office during good behavior.

"(b) Each judge of the National Court of Appeals shall receive a salary of $52,500 a year, as adjusted by section 461 of this title, until annual rates are first determined under section 225 of the Federal Salary Act of 1967 (2 U.S.C. 351–361) after the date of the enactment of this chapter, and thereafter shall receive a salary at an annual rate determined under such section, as adjusted by section 461 of this title. A circuit judge designated to serve as an associate judge shall receive the same salary as a judge of the National Court of Appeals and shall continue to receive the same salary as a judge of such court after he has ceased to serve as an associate judge.

**"§ 24. Principal seat and terms**

"The principal seat of the National Court of Appeals shall be in the District of Columbia. The court may sit at such times and places within the United States as the court may designate.

"§ 25. Seal

"The National Court of Appeals shall have a seal which shall be judicially noticed.

"§ 26. Sessions

"The time and place of the sessions of the National Court of Appeals shall be prescribed by the chief judge pursuant to rule of the court.

"§ 27. Hearings and quorum

"Cases and controversies shall be heard and determined by the court in banc. Five of the judges of the National Court of Appeals shall constitute a quorum.

"§ 28. Disqualification of judges

"No judge shall hear or determine an appeal from the decision of a case or issue therein heard or tried by such judge.".

(b) The analysis of part I of title 28, United States Code, is amended by inserting immediately below the item relating to chapter 1 of such part, the following new item:

"2. National Court of Appeals---------- 21".

OFFICERS AND EMPLOYEES

SEC. 3. (a) Part III of title 28, United States Code, is amended by inserting immediately after chapter 45 of such title. the following new chapter:

## "Chapter 46—NATIONAL COURT OF APPEALS

"Sec.
"691. Clerk and employees.
"692. Law clerks and secretaries.
"693. Librarian, marshal, and bailiffs.

### "§ 691. Clerk and employees

"(a) The National Court of Appeals may appoint a clerk who shall be subject to removal by the court. The court may appoint or authorize the appointment of such other officers and employees in such number as may be approved by the Director of the Administrative Office of the United States Courts.

"(b) The officers and employees of the court shall be subject to the removal by the court or, if the court so determines, by the clerk or other officer who appointed them, with the approval of the court.

"(c) The clerk shall pay into the Treasury all fees, costs, and other moneys collected by him and make returns thereof to the Director of the Administrative Office of the United States Courts under regulations prescribed by him.

### "§ 692. Law clerks and secretaries

"The judges of the National Court of Appeals may appoint such law clerks and secretaries as may be necessary.

### "§ 693. Librarian, marshal, and bailiffs

"(a) The National Court of Appeals may appoint a

librarian and necessary library assistants who shall be subject to removal by the court.

"(b) The National Court of Appeals may appoint a marshal, who shall attend the court at its sessions, be custodian of its courthouse, have supervision over its custodial employees, take charge of all property of the United States used by the court or its employees, and perform such other duties as the court may direct. The marshall shall be subject to removal by the court. The marshal, with the approval of the court, may employ necessary bailiffs. Such bailiffs shall attend the court, preserve order, and perform such other necessary duties as the court or marshal may direct. The bailiffs shall receive the same compensation as bailiffs employed for the district courts.".

(b) The analysis of part III of title 28, United States Code, is amended by inserting immediately below the item relating to chapter 45 of such title, the following new item:

"46. National Court of Appeals---------- 691".

JURISDICTION AND REVIEW

SEC. 4 (a) Part IV of title 28, United States Code, is amended by adding immediately after chapter 81 of such title, the following new chapter:

**"Chapter 82—NATIONAL COURT OF APPEALS**



**"§ 1271. Jurisdiction**

"The National Court of Appeals shall have jurisdiction of cases referred to it by the Supreme Court.

**"§ 1272. Finality of decisions**

"(a) The National Court of Appeals may deny review in any case referred to it by the Supreme Court unless directed by the Supreme Court to decide the case.

"(b) Unless modified or overruled by the Supreme Court, the decisions of the National Court of Appeals shall be binding on all courts of the United States, and, with respect to questions arising under the Constitution, laws, or treaties of the United States, on all other courts.".

(b) Chapter 81 of title 28, United States Code (relating to the jurisdiction of the Supreme Court), is amended by adding at the end thereof the following new section:

**"§ 1259. National Court of Appeals**

"(a) After denying certiorari or in lieu of noting probable jurisdiction of an appeal in any case before it, the Supreme Court may refer any such case to the National Court

of Appeals. The Supreme Court may, and in cases subject to review by appeal shall, direct the National Court of Appeals to decide any case so referred.

"(b) Any case in the National Court of Appeals may be reviewed by the Supreme Court by writ of certiorari granted upon the petition of any party to any such case before or after rendition of judgment or decree.".

(c) (1) The analysis of part IV of title 28, United States Code, is amended by inserting immediately below the item relating to chapter 81 of such title the following new item:

"82. National Court of Appeals---------- 1281".

(2) The analysis of chapter 81 of title 28, United States Code, is amended by adding at the end thereof the following new item:

"1259. National Court of Appeals.".

RETIREMENT OF CIRCUIT JUDGES DESIGNATED TO SERVE ON THE NATIONAL COURT OF APPEALS

SEC. 5. Section 371 of title 28, United States Code, is amended by inserting "(1)" after "(b)" and by adding at the end thereof the following new paragraphs:

"(2) Except as provided in paragraph (4), any circuit judge who has been designated to serve as an associate judge of the National Court of Appeals may retire from regular active service upon termination of the period for which he

was designated to serve or at any time thereafter and shall, during the remainder of his lifetime, continue to receive the salary of a judge of that court. The President shall appoint, by and with the advice and consent of the Senate, a successor to a circuit judge who so retires. Any such circuit judge who does not retire from regular active service under this paragraph upon termination of the period for which he was designated to serve as an associate judge of the National Court of Appeals shall resume his duties as a circuit judge of his court of appeals.

"(3) Any circuit judge who retires from regular active service under paragraph (2) may elect the status of a retired judge of the National Court of Appeals or of a retired circuit judge of his court of appeals. Such election shall be made in writing to the Chief Justice on or before the day on which he so retires.

"(4) A circuit judge who has been designated to serve as an associate judge of the National Court of Appeals during the four-year period described in section 21(a)(1) and is also designated to serve as such an associate judge during the four-year period described in section 21(a)(2) may not retire from regular active service under paragraph (2) before the termination of such second four-year period.".

APPOINTMENT OF ADDITIONAL CIRCUIT JUDGES

SEC. 6. Section 44 of title 28, United States Code, is amended by adding at the end thereof the following new subsection:

"(e) When a circuit judge is designated under section 21(b) to serve as an associate judge of the National Court of Appeals, the President shall appoint, by and with the advice and consent of the Senate, an additional circuit judge for that circuit. Notwithstanding the provisions of sections 371 and 372, upon the death, resignation, or retirement of a circuit judge appointed under authority of this subsection, no successor shall be appointed.".

TECHNICAL AND CONFORMING AMENDMENTS

SEC. 7. (a)(1) The first paragraph of section 331 of title 28, United States Code, is amended by inserting immediately after "shall summon annually" the following: "the chief judge of the National Court of Appeals.".

(2) The third paragraph of such section 331 is amended by inserting immediately before the first sentence the following new sentence: "If the chief judge of the National Court of Appeals is unable to attend, the Chief Justice may summon any other judge from such court.".

(b)(1) Section 372(a) of title 28, United States Code, is amended—

(A) by inserting in the third paragraph immedi-

ately following "Supreme Court," the following: "the chief judge of the National Court of Appeals,"; and

(B) by inserting immediately below the third paragraph of such subsection the following new paragraph:

"A judge of the National Court of Appeals desiring to retire under this section, shall furnish to the President a certificate of disability signed by the chief judge of such Court.".

(2) Section 372(b) of title 28, United States Code, is amended—

(A) by inserting immediately after "Chief Justice of the United States in the case of" the following: "the chief judge of the National Court of Appeals or"; and

(B) by inserting immediately after "chief judge of his court in the case of a judge of the" the following: "National Court of Appeals,".

(c) (1) The second paragraph of section 451 of title 28, United States Code, is amended by inserting immediately after "Supreme Court of the United States," the following: "the National Court of Appeals,".

(2) The fourth paragraph of section 451 of title 28, United States Code, is amended by inserting immediately after "includes judges of" the following: "the National Court Appeals,".

(d) The second paragraph of section 456 of title 28, United States Code, is amended by inserting immediately

after "justices of the Supreme Court" the following: ", the judges of the National Court of Appeals,".

(e) Section 610 of title 28, United States Code, is amended by inserting immediately after "includes" the following: "the National Court of Appeals,".

(f) (1) Section 1912 of title 28, United States Code, is amended by inserting immediately after "Supreme Court" the following: ", the National Court of Appeals,".

(2) (A) Section 1913 of title 28, United States Code, is amended to read as follows:

**"§ 1913. National Court of Appeals; courts of appeals**

"The fees and costs to be charged and collected in the National Court of Appeals and in each court of appeals shall be prescribed from time to time by the Judicial Conference of the United States. Such fees and costs shall be reasonable and shall be uniform in all the circuits.".

(B) The item relating to section 1913 of title 28, United States Code, in the analysis of chapter 123 of such title, is amended to read as follows:

"1913. National Court of Appeals; courts of appeals.".

(g) The first paragraph of section 2072 of title 28, United States Code, is amended by striking out "of the district courts and courts of appeals of the United States" and inserting in lieu thereof "of the district courts, courts of

appeals of the United States, and the National Court of Appeals".

(h) Section 2106 of title 28, United States Code, is amended by inserting immediately after "Supreme Court" the following: ", the National Court of Appeals,".

(i) Section 225(f)(C) of the Federal Salary Act of 1967 (31 U.S.C. 356) is amended by inserting "and the judges of the National Court of Appeals" before the semicolon.

AUTHORIZATION OF APPROPRIATIONS

SEC. 8. There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this title.

Senator BURDICK. I am pleased to recognize the representatives from the American Bar Association and I believe our first witness today will be Robert J. Kutak, representing the American Bar, and also Judge Hufstedler will also be here.

Mr. KUTAK. Thank you, Mr. Chairman. For the record, my name is Robert Kutak and I am a lawyer practicing in Omaha——

Senator BURDICK. Excuse me. We have another member of the bar will you——

Mr. KUTAK. I will introduce him—Mr. Adrian Foley.

Senator BURDICK. There we are. I understand Mr. Foley is fully qualified, having been raised in North Dakota.

Mr. KUTAK. That's right.

Senator BURDICK. Proceed.

## STATEMENT OF ROBERT J. KUTAK, ESQ., AMERICAN BAR ASSOCIATION

Mr. KUTAK. I'm here today in my role as chairman of the ABA Committee on Coordination of Judicial Improvements. As you have already noted, Mr. Chairman, with me are Judge Shirley Hufstedler, Judge of the United States Court of Appeals for the Ninth Circuit and a member of our committee, and Mr. Adrian Foley, a practicing lawyer in Newark, N.J., who is vice chairman of our committee.

At its meeting in February 1976 the House of Delegates of the American Bar adopted a resolution supporting the passage by the Congress of S. 2762, except so much of section 4 of that bill as it relates to transfer jurisdiction. In effect, such a bill is S. 3423, introduced by Senator Hruska on May 12, 1976, which is pending before your subcommittee.

Therefore, because S. 3423 embodies the position endorsed by the house of delegates, we are authorized to state that the American Bar Association supports this legislation, as well as S. 2762 coauthored by yourself.

Mr. Chairman, I would like to offer the resolution adopted by the house of delegates and the report of our committee in support of the resolution for inclusion in the record of these hearings, if we may do so.

Senator BURDICK. With no objection, it will be received.

### AMERICAN BAR ASSOCIATION RECOMMENDATION

The Special Committee on Coordination of Judicial Improvements recommends adoption of the following resolution:

"*Be it resolved*, That the American Bar Association approves and supports the adoption by the Congress of S. 2762, a bill for the establishment of a National Court of Appeals, excepting so much of section 4 as relates to transfer jurisdiction, or other legislation conforming substantially thereto.

"*Be it further resolved*, That the president of the association or his designee is authorized to present these views to the appropriate committees of the Congress.

### REPORT

#### GENESIS OF THE PROPOSED COURT

At its meeting in February 1974 the House of Delegates adopted a resolution recognizing the urgent need for a national division of the United States Court of Appeals and supporting the creation of such a court by the Congress. The

stated purposes to be served by the proposed court were to afford relief to the United States Supreme Court and the individual circuits, to afford prompt resolution of legal issues of national concern which the Supreme Court lacks time to resolve, and to eliminate conflicting decisions among the circuits.

The action by the House of Delegates was one of the major forces which shaped the approach taken by the Commission on Revision of the Federal Court Appellate system, appointed by the Congress, the President and the Chief Justice to study means of improving the appellate court system. In June 1975 the Commission filed a report in which it further shaped the principle recommended by the House of Delegates. In its report the Commission proposed the establishment of a National Court of Appeals which would fulfill the purposes set forth in the House of Delegates' resolution.

The principle first endorsed by this House two years ago has now been given specific form in legislation introduced in the Congress. S. 2762, drafted to implement the recommendation of the Commission, provides for the creation of a National Court of Appeals.

The House of Delegates is now asked to adopt a resolution endorsing S. 2762 with the exception of those portions of Section 4 of the bill relating to transfer jurisdiction.[1]

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STRUCTURE OF THE NATIONAL COURT OF APPEALS

S. 2762 would establish a new National Court of Appeals consisting of seven Article III judges. Unless modified or overruled by the Supreme Court, its decisions would be binding upon all federal courts and, with respect to questions of federal law, upon all other courts. The National Court's docket would derive from two sources:

(1) a "reference jurisdiction" under which the Supreme Court, after denying certiorari or in lieu of noting probable jurisdiction of an appeal, would refer such cases as it deemed wise;

(2) a "transfer jurisdiction" under which regional Courts of Appeals, the Court of Claims and the Court of Customs and Patent Appeals could transfer cases which would otherwise be heard by those courts.

The National Court would have discretion to refuse to hear any case transferred to it from a lower court, or any case referred to it by the Supreme Court, unless directed by the Supreme Court to decide the case. All cases in the National Court wold be subject to deview by the Supreme Court upon petition for certiorari.

This Committee does not recommend support of the transfer jurisdiction at the present time. While the proposed transfer jurisdiction may ultimately prove valuable, it needs further study before being implemented. Most of the present Justices of the Supreme Court who have addressed themselves directly to the question of the transfer jurisdiction have expressed reservations about it.[2] It is likely to prove complex in operation. On the other hand, the reference jurisdiction is simple and its effect is clear. It would allow the Supreme to retain complete control over its docket. Most of the present Justices, in their comments to the Commission, addressed the question of the reference jurisdiction, and none perceived any difficulty with its functioning.

NEED FOR DECISIONAL CAPACITY

In its report the Commission made a compelling demonstration of the need to enlarge the capacity of the federal appellate system to interpret, harmonize and unify the national law. Its report calls attention to some 55 intercircuit conflicts per term (a number equal to approximately one-third of the cases to which the Supreme Court gives a full hearing) which would probably have been reviewed, at a national level had the capacity to do so been available; and

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[1] With respect to the appointment of the judges, the Committee supports the provision of the bill, which provides for appointment by the President with the advice and consent of the Senate; but the Committee acknowledges that for the appointment of the initial court some alternatives would be equally practicable. These include appointment of some judges from the circuit courts for limited terms, limitation of the number of judges who may be appointed initially, limitation by political party, limitation of initial appointment to court of appeals judges, or making the court effective only after the first five appointments are made.

[2] The comments submitted to the Commission included a response from Justice Douglas, now retired. Justice Stevens, who took office after the Commission's report was filed, was not contacted for his views.

only a small portion of these were in the areas of tax and patents, where specialized courts are often put forward as the cure for the ills of the appellate system.

The need to resolve a conflict between circuits in any given case is inevitably subjective, but there can be no gain saying the need for greater appellate capacity in light of the fact that review on the merits of the Supreme Court has shrunk from 18 percent of the paid cases decided by the Courts of Appeals in 1953 to 6 percent in 1973.

There is no doubt then that greater capacity to resolve issues of national law is needed. Time has made clear that the Supreme Court is capable of giving full consideration to approximately 150 cases per year, year in and year out. That number has not changed substantially over the years. What has changed is the number of filings for review. That number has grown from about 1,200 in 1951 to over 3,600 in the 1974 term; and this is aside from the "hidden docket" of cases that some authorities have suggested is not being brought to the Court at all.

The need for relief extends not only to the Supreme Court, but to the Courts of Appeal as well. Between 1960 and 1973, filings in the circuits increased fourfold. The multiplicity of cases involving unresolved issues of national law is at least partly to blame for this situation. Much of this arises from government relitigation in the separate circuits of cases already decided elsewhere, due to inability to achieve a national decision. Early resolution of such cases would ease this pressure on the Courts of Appeal as well as on the Supreme Court; and it would ultimately provide relief to the District Courts as increased predictability diminishes the need for litigation of settled points.

One symptom of the need for increased federal appellate capacity is the declining proportion of nonconstitutional cases being heard by the Supreme Court. The Harvard Law Review reported in 1971 that prior to 1960 nonconstitutional holdings almost uniformly made up two-thirds to three-fourths of the Court's decisions. Now the proportions have almost been reversed. This has occurred at a time when federal legislation has proliferated and become vastly more complex. Thus while the scope of federal legislation has been broadening, the number of definite decisions interpreting the legislation has been diminishing.

A second symptom of the same need, perhaps arising from the first, is that the number of noted dissents from denial of certiorari has increased threefold during the last four Court terms. Many of these dissents were accompanied by written opinions, of which 60 percent stated that a national decision was needed because there existed a conflict between circuits or with Supreme Court opinions or because there was an important question appropriate for definitive resolution. This is clear evidence that in the opinion of some Justices, important cases are not being decided. The majority of the Supreme Court, in statements to the Commission, recognized the need for additional capacity for decisions at the national appellate level.

Thus, a docket already exists for a national appellate court, in the cases not now being reviewed. The establishment of the National Court of Appeals would fill an existing need—not so much a need of the appellate courts as a need of litigants. As Justice Rehnquist stated in a letter to the Commission, "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."

There is of course no unanimity on this proposal—as there never is. Alternatives have been proposed, ranging from specialized courts to elimination of a large part of the jurisdiction of the federal courts. This Committee has given serious consideration to these arguments. Most of them fail to address the problem—the need for harmonization of national law. Some are so major as to require years of study and debate. And all of them recognize that a need for relief of some sort is urgent.

One proposal—that for the establishment of specialized courts—is probably of little practical effect. The Commission's studies show that unresolved direct or strong partial conflicts between circuits or between states and circuits on nonconstitutional issues may run to some 60 per term; and of 90 direct conflicts studied, only three were in the specialized area of tax and three in patents. Furthermore, of the 16,000 Courts of Appeal filings in 1974, only 562 were tax cases. The bulk of the caseload is not in specialized areas. Moreover, the American Bar Association has already repudiated the creation of specialized courts.

Section 1.13(b) of the American Bar Association Standards Relating to Court Organization (adopted 1974) reads:

"(b) *Intermediate Appellate Courts.*—The organization of appellate courts below the Supreme Court should be guided by the following principles:

"'(i) *Jurisdiction.*—Every level and division of appellate court should have authority to hear all types of cases; appellate courts of specialized subject matter should not be established. * * *' "

It has been suggested that conflicts in the interpretation of national law should not be resolved, but left to "percolate" among the circuits. The benefits to be gained from "percolation" of an issue in the courts vary greatly from issue to issue. This Committee agrees with Dean Griswold that in certain types of cases "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." Establishment of the National Court would reduce needless relitigation of issues. Where percolation is needed, the Supreme Court and the National Court of Appeals would be free to allow it to continue, and the need will no doubt be as evident to the National Court as to anyone else, including critics of the plan. At present, percolation goes on whether needed or not, because there is no way to end it. Percolation should be at the pleasure of the cook and not of the pot.

The argument, sometimes made, that conflicts on statutory interpretation should be resolved by Congressional action is refuted by the record of the past: such conflicts have been in existence for years without Congressional resolution. Attorneys who have tried to get the ear of the Congress for a specific amendment of a statute know well that the competition for the attention of the Congress is as great as for that of the Supreme Court itself.

To those who would hold out for a complete solution to the problems of the appellate system there is no answer, other than to point out the difficulty and delay which have historically been inherent in achieving even minor changes in the jurisdiction and the structure of the courts. For example, the conflict over diversity jurisdiction has continued for more than a decade and shows no signs of abating. Major changes in the structure or jurisdiction of courts require years of preparation. If the present proposal is not adopted there may be no relief for years to come.

This Committee is not unfriendly to other proposals to overhaul the federal courts; but many of the proposed jurisdictional or structural changes, though desirable, are not relevant to the problems which the National Court is meant to solve.

For example, if diversity cases are channeled into the state courts, the same total judicial capacity will still be required, and the same capacity to resolve questions of federal law at the national level will also be required. Similarly, proposals to establish "federal small claims courts" for "welfare law" cases would have no effect on the present problems, for, to the extent that the issues involved are unworthy of Article III courts, they do not contribute to the present need for increased appellate capacity.

A final difficulty with any proposal to stem the flow of cases to the federal courts is that, unless we assume the cases averted present no issue requiring judicial resolution, it represents an inversion of priorities. The courts exist to adjust individual problems. The important thing is the impact of the courts on the problems, not of the problems on the courts. It would be possible to reduce caseloads to zero by adjustment of the jurisdictional statutes; but does this serve the public needs?

### BENEFITS FROM A NATIONAL COURT OF APPEALS

The benefits of such a court to the practicing lawyer, and more importantly to his clients, would be many. The most important benefit would be the reduction of unpredictability in the law. In the past, conflicting decisions on a single question of federal law have sometimes persisted for a decade or more simply because the Supreme Court lacked the decisional capacity to grant a hearing on the issue. The difficulty is greatest for the citizen in a circuit where no decision on the question yet exists—he does not know which of the conflicting decisions courts of his circuit may follow. In consequence, cases multiply in the lower courts as citizens attempt to ascertain the law of their own jurisdictions. Were that unpredictability to be removed, the lower courts would be relieved of a myriad of cases which had their genesis only in the incapacity of the Supreme Court to resolve crucial conflicts.

At the heart of the lawyer's role in society is his ability to advise his clients on the propriety of their conduct. Predictability in the law is a necessary ingredient of this ability, without which our contribution to the public welfare is diminished. The National Court would approximately double the capacity for resolution of questions of national law, and should thus go far to reduce conflicts.

Not the least important benefit is the sheer increase in national appellate capacity. Aside from reduction of uncertainty and delay, there would be a hearing in a national forum for cases which now can never be heard in such a forum at all. The number of filings in the Supreme Court shows clearly that demand for national review is far greater than capacity. Comments made in Justices' opinions dissenting from denial of certiorari indicate that many cases worthy of hearing are not heard. The increased capacity offered by the new court would in itself help to meet citizens' expectations of due consideration by the appellate courts.

CONCLUSION

In February 1974 the House of Delegates adopted a resolution supporting in principle the creation of a new national appellate court. The need for such a court has not diminished. Indeed, the Commission's report clearly demonstrates the need. This Committee believes that the National Court of Appeals proposed in S. 2762 is soundly designed to meet that need. Its simplicity and flexibility will allow it to relieve the burden on the Supreme Court without interfering with access to that Court. It will also relieve he Courts of Appeals of repetitious litigation engendered by uncertainty in the law.

The proposed legislation is founded on the past efforts of many lawyers and scholars. It was in 1968 that the American Bar Foundation report first recognized that structural change might be required to accommodate the need for additional appellate capacity. In 1972 the Study Group on the Caseload of the Supreme Court first proposed the establishment of a new court for that purpose. In 1974 the House of Delegates of the Association supported in principle the proposal ultimately embodied in S. 2762. The exhaustive studies of the Commission on Revision of the Federal Court Appellate system have only capped years of study with a sound proposal for action now. The introduction of S. 2762 in the Congress to implement the recommendation of the Commission gives the American Bar Association the opportunity and the responsibility to act in its support. That action should be taken.

Respectfully submitted,

JOSEPH N. BONGIOVANNI, Jr.
DAVID COTTRELL, Jr.
ADRIAN M. FOLEY, Jr.
SHIRLEY M. HUFSTEDLER.
A. LEO LEVIN.
FRANCIS T. P. PLIMPTON.
JOSEPH D. TYDINGS.
ROBERT J. KUTAK, *Chairman.*

FEBRUARY 1976.

Mr. KUTAK. I also prepared a written statement to which I would like to speak, but not read from, which I hope might be included in the record also.

Senator BURDICK. Your entire statement will be made a part of the record without objection.

[The above referred to statement follows:]

STATEMENT OF ROBERT J. KUTAK

Mr. Chairman and members of the subcommittee: At its meeting in February 1976 the House of Delegates of the American Bar Association approved a resolution supporting the adoption by the Congress of S. 2762, except so much of Section 4 as relates to transfer jurisdiction, or legislation conforming substantially thereto. I, as Chairman of the American Bar Association's Special Committee on Coordination of Judicial Improvements, together with members of the Committee, have been delegated by the President of the Association to testify today in support of the bills before this Subcommittee. It is my privilege and pleasure to offer the resolution adopted by the House of Delegates and the report of our

Committee in support of the resolution for inclusion in the record of these hearings.

I am sure that I need not relate to the members of this Subcommittee the history of the proposal now before it for the creation of a National Court of Appeals. You are all aware of the many years of effort upon which the proposal is founded—the efforts of some of your members, certainly of the Commission on Revision of the Federal Court Appellate System, and of other groups and individuals as well. It was in 1968 that the American Bar Foundation report first recognized that structural change might be required to accommodate the need for additional appellate capacity in the federal court system. In 1972 the Study Group on the Caseload of the Supreme Court first proposed the establishment of a new Court for that purpose. In 1974 the House of Delegates of the American Bar Association went on record as supporting the principle, which, after comprehensive and detailed study by the Commission on Revision of the Federal Court Appellate System, was ultimately embodied in S. 2762 and S. 3423.

The Commission on Revision of the Federal Court Appellate System made the case for the proposed Court—a case that convinced the American Bar Association. I am certain I do not need to repeat the Commission's arguments here.

Let me acknowledge first that the American Bar Association, in voting to support S. 2762, excepted that part of Section 4 which provides for transfer jurisdiction for the National Court of Appeals. A court without that feature is now proposed in S. 3423. The action of the Bar should not be seen as half-hearted support of the National Court of Appeals, nor even as a complete rejection of the concept of transfer jurisdiction. It was the feeling of the members of our Committee, which studied S. 2762 closely on behalf of the Bar, that the transfer jurisdiction may ultimately prove valuable, but that it needs further study in view of the reservations expressed by sitting Justices of the Supreme Court and in view of the uncertainty of its effect. But with that exception the Bar has gone on record as supporting not only the concept of relief for the appellate courts but also the specific proposal to establish a National Court of Appeals as set forth in S. 2762, and perhaps more fully the Court as now set forth in S. 3423.

Because the affirmative case for the establishment of a National Court of Appeals has been so well made by others, perhaps it would be useful if I were to discuss with you some of the objections which have been raised to the proposal—for there have been objections, of course, as there will be to any proposal to change the structure of the federal court system. It is right that objections should be raised. Change in this area is too important to all of us to slip by unexamined. But I do not think the objections touch the heart of the proposal. Even those who raise the objections concede the need for some relief to the appellate courts. They would rather bring relief in other ways, but they know that it must come somehow.

Objections to the proposed Court cover several areas: but by and large they have centered on five themes: that a new layer of appellate review would be added; that the Supreme Court would be made less accessible; that "percolation" of difficult issues in the lower courts is advisable before a national resolution is reached; that specialized courts in such areas as tax and patents would be a better response; or—and this argument is perhaps the most pernicious, because on its face it is the most appealing—that the only satisfactory solution is a complete and permanent solution and that the only complete solution lies in a reduction of the jurisdiction of federal courts.

The first two arguments are easily disposed of. One of the great strengths of the proposed Court is that it would neither add a layer of appellate review nor bar access to the Supreme Court. In the form supported by the American Bar Association, the national court's caseload would be made up entirely of cases referred to it by the Supreme Court. It is expected that few of these would subsequently be heard by the Supreme Court, although that review would always be available. At the same time, the Supreme Court would retain the same control of its own docket as it presently has. As for the third argument, the benefit to be gained from "percolation" of an issue in the courts varies greatly from issue to issue. At present, as the Commission's report has shown so well, lack of appellate capacity makes it necessary that many issues "percolate" not by choice but by chance. Too often it appears that unresolved issues are not percolating but stagnating. Establishment of the proposed court would double the capacity to resolve issues at a national level. At least some unwanted percolation could be ended. Where percolation is needed, the Supreme Court would be free to allow it to continue, as it can now.

The proposal to establish specialized courts probably would have little practical effect on the caseload of the appellate courts. Of the 16,000 Courts of Appeals filings in 1974, for example, only 562 were tax cases. The bulk of the caseload simply does not lie in these specialized areas.

To those who would hold out for a complete solution to the problems of the appellate system there are two answers. The first is to point out the difficulty and delay which have historically been inherent in achieving even minor changes in the appellate jurisdictions and the structure of the appellate courts. Some have seen the National Court of Appeals as a "temporary expedient that create[s] new problems." At least one author proposes as a complete solution the elimination of diversity jurisdiction and the creation of "an entirely new set of tribunals that would take over completely litigation in a variety of areas where an Article III Court is realistically not required." The author suggests as candidates for such consideration cases "rising under the Social Security laws, the National Environmental Policy Act, many prisoners' suits, the Clean Air Act, the Water Pollution Control Act, the Consumer Products Safety Act, the Truth in Lending Act, the Federal Employers' Liability Act, and the Food Stamp Act."

It is evident enough that such a radical restructuring of the federal courts is easier to describe than to do. The elimination of the diversity jurisdiction, for instance, has been discussed for fifteen years or more and is no nearer accomplishment. As a matter of political reality, it will not come about soon. As for small claims courts to hear federal questions of the kind described, the political divisiveness of such an apparent downgrading of the importance of these issues would seem to guarantee that passage of legislation could come only after preparation even longer and more exhaustive than that which has preceded the present proposal for a National Court. In the meantime, the appellate dockets continue to swell. And there should be no mistaking the fact that such "small claims courts" would downgrade the importance of the issues. The author of the proposal states that they contain "few difficult legal questions worthy of Article III courts, but are the result of "a welfare state produc[ing] masses of complex legal trivia through the proliferation of detailed statutes and regulations. It is said that "often the assessment of such materials can be done by someone far less qualified than a judge. Whether or not this be true, it seems certain that there will be many members of the Congress and many litigants who are their constituents who will doubt that the issues are so trivial or so easily decided.

And there are judges also who doubt that their talents and the time of their courts are wasted on the "trivia" of factual cases. As Judge Kaufman of the Second Circuit has said, "If delay and cost were not insuperable obstacles, I insist that there is no fairer or more sensitive method [than a trial to determine] whether an alleged lumbo-sacral sprain is in fact only a feigned whiplash, or whether the manufacturer or the retailer was responsible for a child's defective bicycle brakes." If more and more cases are being brought to the courts, perhaps this should be seen not as a weakness of the system but, as Judge Kaufman points out, as a strength, and what we should seek is not ways to reduce the consideration given to each case but ways to reduce the delay and cost. To do otherwise is an inversion of priorities. The important thing is the impact of the courts on the cases, not of the cases on the courts. It would be possible to reduce the caseload to zero by adjustment of the jurisdictional statutes; but would this serve the public need?

But, more importantly, whatever the effect on lower courts might be, proposals to "avert the flood by stemming the flow" in this manner will not significantly affect the national appellate caseload. The elimination of the deversity jurisdiction will not help. If there is a federal question, it will still reach the Supreme Court on appeal from the State court which has heard the case instead of a federal court; and if there is no federal question, the case would not reach the Supreme Court now.

It will not help to relabel the federal courts of primary jurisdiction, to call them administrative courts. To the extent that there is any real issue of federal law involved, it must be assumed that an appeal will still be provided even from an "administrative" court; and if no such issue is involved, no burden is being imposed on the national appellate capacity even under the present structure. Trivial cases simply do not reach the Supreme Court.

Another suggestion for reducing the federal court caseload is to reverse the movement toward ever more federal regulation. This would of course reduce federal question litigation in proportion to the reduction in regulation. It is difficult, however, to believe that the suggestion would provide appellate relief

other than over a very long span of years, and no doubt it was meant only in that way. But relief for the appellate courts is needed now. The very existence of proposals to limit the federal jurisdiction is a concession that relief is needed.

The court whose establishment is being considered by this Subcommittee, though it will not solve all of the problems of the federal courts, will at least provide much-needed relief to the Supreme Court. It should also reduce the caseload of the Courts of Appeals by resolving conflicts among the circuits and thus making the law more predictable and the prospect of relitigation less attractive. It does not require a major restructuring of the federal courts or a major change in their jurisdiction, as other proposals would do. For that reason alone it is feasible now where more grandiose proposals may not be. The American Bar Association supports the establishment of this Court now, to meet the problems of today.

Mr. KUTAK. The Commission on Revision of the Federal Court Appellate System made a clear and cogent case for the establishment of a national court of appeals, a case that convinced the American Bar Association, and, I am confident, would convince any doubting Thomas who took the time to read and reflect upon the data and the analyses the Commission so painstakingly assembled and provided.

That case for a need for the court will be concisely presented by the chairman of the Commission and its executive director. I should not, nor could I very well, elaborate upon that case. The action of the house of delegates in withholding support of the provision of S. 2762, which provides for transfer jurisdiction, should not be construed by you or your colleagues as a half-hearted support of the new court or even rejection of the concept of transfer jurisdiction.

After careful consideration, our committee concluded that this provision for transfer jurisdiction needed more study. But with that one reesrvation, the American Bar Association has gone on record in support not only of the concept of relief for our Federal appellate courts but also for the specific proposals to establish the national court of appeals as embodied and set forth in S. 2762 and, even more precisely, in S. 3423.

In our study of the proposal to establish a national court of appeals we encountered certain concerns over—indeed, objections to—changing the structure of the Federal court system. We examined them very carefully. We don't think these concerns or these objections are substantiated.

Significantly—and this point is often overlooked—those who raise the objections concede the need for some relief to our appellate courts. They would provide it, however, in other ways.

It might be helpful, however, to focus briefly on the principal objections and briefly, as well, respond to them. First, the objection we hear most of all about this proposal is that a new layer of appellate review would be added, with all of the attendant costs and delays.

The response to that concern is clear. As proposed by the S. 3423 pending before your subcommittee, the new court's caseload would be made up entirely of cases referred to it by the Supreme Court. The ABA has also endorsed that concept. Of course, the right of review remains, but it will undoubtedly be very sparingly used.

The second objection we hear to the proposal is that the Supreme Court may be made less accessible by this new court system. But as just mentioned, the Supreme Court would retain control over its own docket, just as it presently does.

The third objection we hear is that percolation of difficult issues in the lower courts is advisable before any national resolution is reached and the proposal would cut off that needed procedure. But as we think the Commission report makes very clear, lack of appellate capacity makes it necessary that many issues percolate, not by choice, but really by chance.

At least with the establishment of the new court, some unwarranted percolation could be ended. In other words, when percolation is needed, the Supreme Court would be free to allow it to continue, just as it does now.

The fourth concern or objection we hear so much about, Mr. Chairman, is that specialized courts in such areas as tax or patents would be a better solution than the one offered by the bills. The answer to that is also found in the record which the Commission has assembled. New courts of the kind mentioned would have very little practical effect on the caseload of our appellate courts. The bulk of the caseload does not lie in these specialized areas.

Fifth, and finally, the main objection we hear—and it's the most beguiling and really the most distracting and perhaps the most troublesome one of all—is that the only satisfactory solution is a systemic revision of our Federal jurisdiction, to the end of creating a drastic reduction in our Federal court business.

Those who are heard to raise this objection to the proposal are, indeed, powerful and persuasive individuals. They speak with clear and considerable authority. But let me say that many, if not all, of their counterproposals are quite compelling and need consideration and no one can really quarrel with their approach, but how realistic is it to talk about taking such an approach? Are we to really completely blind ourselves to the difficulty and the delay involved in achieving even minor changes in the appellate jurisdiction and structure of our appellate courts?

The Chief Justice of the United States talked yesterday before the American Law Institute about the urgent need to pass a bill, which you are very familiar with, eliminating the requirements for three-judge district courts. Even as passed by the Senate, certain exceptions had to be carved out and it appears that even more may have to be carved out before the House would act on the proposal, a proposal as simple as this one is.

This points up how delicate the considerations are that need to be weighed and recognized before any revision of our Federal jurisdiction and structure can be made. And, therefore, a radical restructuring of the Federal courts, as proposed by those who say, "This is the only alternative," is simply wishful thinking, more suitable perhaps for ivy towers than legislative chambers.

Moreover, were it practically and politically possible to make systemic changes and if you in the Congress choose, for example, to eliminate all diversity jurisdiction and jurisdiction to hear many other kinds of cases as well, this still would not significantly affect the national appellate court overload.

If there is a Federal question, it will still reach the Supreme Court on appeal from State courts, which have heard the case, instead of a Federal court, which may hear it now. And if, of course, there is no

Federal question involved, the case would not reach the Supreme Court, as it does not reach that court now. Talk about reducing the Federal court caseload by reversing the movement toward more Federal regulation is even more unrealistic.

Even if some laws are repealed and some regulations are abolished that would cut down such a caseload, others are added. It may be sad, but true. And relief for our Federal appellate courts is needed now. The solution, we submit, provided by S. 2762 and by S. 3423 does not solve all of the problems of our Federal courts, but it's not designed to.

It is designed to provide relief for our Federal appellate court system without a major restructuring of the system and without a major change to the courts' jurisdiction. The American Bar Association is now on record as saying to you that the proposal contained in these bills is a feasible approach. It meets the problems of today. The American Bar Association, therefore, recommends the passage of this legislation now. And with your leave, Mr. Chairman, I would like to yield the floor to my colleague, Judge Hufstedler, to make her remarks.

STATEMENT OF SHIRLEY M. HUFSTEDLER, CIRCUIT JUDGE, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

I appreciate the invitation to appear before the Subcommittee to express my views on S. 2762. In appearing before you, I speak as a member of the American Bar Association's Special Committee on Coordination of Judicial Improvements, and not as a representative of other members of the federal bench.

The creation of a National Court of Appeals with reference jurisdiction is a vital and necessary addition to the federal judicial structure. The primary purpose of the new court is and should be to meet the needs of the general public and litigants in the federal courts for greater stability and predictability of national law. An important byproduct of the new court, however, will be some relief to all of the beleaguered courts in the federal system.

The United States Supreme Court is the sole judicial institution empowered to pronounce law binding the whole federal judiciary. Therefore, it is the only agency that presently can eradicate intercircuit conflict; harmonize churning issues of national law, not only between circuits, but also within and between federal administrative agencies; and effectively supervise lower federal courts. The Supreme Court simply does not have the decisional capacity adequately to perform these essential tasks. The Court can give plenary consideration to not more than 200 cases per year, and usually the figure is closer to 150 cases per year.

The decision of these 150 cases is not enough to keep the federal jurisprudential house in order. Thousands of the cases pending in the Courts of Appeals do not involve questions of unsettled federal law, although they may concern thorny problems in applying the law to the particular facts. However, hundreds of those cases do present serious questions of national law which are unsettled within and between circuits. These cases are potentially certworthy; indeed, they are the very kinds of cases that the Supreme Court would have heard a decade or two ago, before their numbers multiplied beyond the Court's capacity to take them. Cases in this category are highly diverse because, quite apart from the impact of the Federal Constitution, federal statutes reach into every cranny of our national life. Thus, these cases deal not alone with federal taxation, patents, copyrights, bankruptcy, admiralty, immigration and naturalization, and antitrust laws, long recognized as requiring definitive rulings with nationwide effect, but also with such subjects as environmental law, equal opportunity legislation, energy allocations, truth in lending, social security, welfare, securities laws, elections law, freedom of information laws, privacy acts, and administrative law in all its myriad hues. The need for reasonably prompt, nationally binding decisions construing new statutory law is acute. The lack of such decisions breeds excessive litigation before federal administrative tribunals and before all of the lower federal courts. In the effort to obtain national precedents, litigants bring action after action throughout the country, not only to obtain judgments in particular cases, but also to generate intercircuit conflict hoping thereby to open

a path to the Supreme Court. The major litigator in the federal courts is the Government. It can sue and be sued across the land, with the result that it has both the means and often the motive to relitigate national law issues in multiple circuits. Moreover, many of the cases in these new fields of statutory law are extremely complex, the environmental cases are an outstanding example. Without definitive decisions, both public and private rational planning is thwarted.

The number of cases that the Supreme Court can hear cannot be significantly expanded, but the volume of litigation rises precipitously. In each succeeding year during the last 15 years, the number of cases has set new records at all levels of the federal judiciary.[1] At the close of fiscal year 1975, over 16,600 new appeals were filed in the Courts of Appeals, to which must be added over 12,100 cases in the backlogs of those courts.[2] The rate of increase of appeals declined in fiscal 1975, but climbed steeply again during the current fiscal year.[3] The Supreme Court cannot review more than about one percent of these cases at the present time, after estimating deductions for those cases in which review cannot or will not be sought. Courts of Appeals can neither be right nor harmonious 99 percent of the time.

We have no basis for believing that the federal litigation inflationary spiral will decrease significantly. To be sure, some of the bills before Congress and others that have been proposed, such as bills to reduce diversity jurisdiction, would provide some relief to the lower federal courts, but these measures will not alleviate the pressures that the National Court of Appeals is designed to ease. Among the reasons why this is so are the following: First, Congress has shown no inclination to reverse its long-time pattern of adding more jurisdiction to the federal courts than it subtracts; second, many of the proposed jurisdictional cuts, for example, the reduction of diversity jurisdiction, do not involve national law questions to which the National Court of Appeals is addressed. Furthermore, some of the proposed curtailments of jurisdiction, such as those in the civil rights area, affect sensitive and volatile issues that augur extremely difficult rites of passage. Even if this pessimism is unwarranted, however, and federal district jurisdictional cuts as large as 20 percent could be achieved and could be directly translated into corresponding deductions from the dockets of the Courts of Appeals, we would still be left with more than 13,000 new appeals each year (using 1975 figures). The effect would be to return the dockets of the Courts of Appeals to their 1971 levels.[4] The reduction would permit only a slight increase in the percentage of reviewed decisions from the Courts of Appeals and no increase in their absolute numbers.

Although the impact of increased decisional capacity, embodied in the National Court, upon the lower federal courts cannot be precisely quantified, I believe that considerable savings of time will be realized. One can make a very rough estimate. If we assume that the National Court will decide about 150 cases per year, I think that those decisions will dispose of not less than 300 cases pending in the Courts of Appeals. My modest hypothesis is that for each case decided by the new court, there will be at least two cases pending in different circuits which turn on the key issue decided by the National Court. The effective disposition of 300 hard cases will provide meaningful relief to the circuits. In addition, for every case pending in the Courts of Appeals, many more cases raising the same issue will be pending in the federal district courts. One nationally binding precedent has a substantial multiplier effect on all of the lower federal courts. Moreover, many cases that would otherwise have been filed simply will not be filed when the law has been settled.

Finally, the National Court can save some of the Supreme Court's time. The most obvious saving is relieving the Court from having to take any cases to harmonize national law in respect of issues that would not otherwise be of sufficient gravity to merit the Court's attention. Deciding not to decide cases of this kind, as well as deciding them, now consumes a good deal of the Justices' time.

A perusal of the Supreme Court's docket this term and last reveals numerous noted dissents from denials of certiorari grounded on the need to eliminate intercircuit conflict. These savings are not seriously eroded by the potential return to

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[1] 1975 Annual Report of the Director, Administrative Office of the United States Courts, XI–10.

[2] *Ibid.*

[3] The Administrative Office's current projection for fiscal 1976 is a 12.3 percent increase over 1975.

[4] *See* footnote 1, *supra.*

the Court of referred cases. Plenary consideration of such cases will surely be rare, and in those few instances in which the Court will take the case, the issue will be important enough to warrant the Court's time.

The criticism that reasonably prompt decisions by the National Court of Appeals will prevent useful "percolation" is unwarranted. The Supreme Court as the source of reference can always decline both to decide and to refer a case that it believes is unripe for decision. The National Court can do the same thing unless the Supreme Court otherwise directs. Moreover, the claim that aging improves decisions is greatly exaggerated.

As your Subcommittee is aware, the American Bar Association does not support transfer jurisdiction. Although transfer jurisdiction has merit, it entails many difficult problems that are presently unresolved and decisions about its ultimate efficacy are premature.

## STATEMENT OF HON. SHIRLEY M. HUFSTEDLER, JUDGE, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

Mrs. HUFSTEDLER. Thank you. I appreciate, Mr. Chairman, the opportunity to appear before the subcommittee as a member of our subcommittee. I do not appear here in my capacity as a Federal judge representing the views of other Federal judges. I speak only as a member of the American Bar Association subcommittee.

The creation of a national court of appeals with reference jurisdiction is a vital and, indeed, a necessary addition to the Federal judicial structure. The primary purpose of the court is—and it should be—to give better justice to the American public and particularly litigants in the Federal court, because courts exist to serve the public. The public benefit is the reason for undertaking any restructuring of the system.

I will not dwell very long on that at the moment because my colleague, Mr. Foley, will discuss that point in more detail. Although the benefit to the public is the primary purpose, in my view, these bills, by creating the national court, will also provide some relief to the beleaguered Federal court system.

As your subcommittee is well aware, at the present time the U.S. Supreme Court is the sole judicial institution which is empowered to pronounce law that will bind the whole Federal judiciary, and to the extent that Federal questions are involved, the State judiciary as well.

Therefore, it is the only agency that can presently eradicate intercircuit conflict, harmonize churning issues of national law, not only between circuits, but also within and between Federal agencies, and also can effectively supervise lower Federal courts.

The plain truth is that the Supreme Court does not have the capacity to perform these tasks adequately. The Court cannot give plenary consideration to more than 200 cases a year and, in fact, the number is much closer to 150 per year and even with respect to 150 cases a year, there are members both on the bench and off who believe that number is excessive.

The decision of 150 cases a year is simply not enough to keep the Federal jurisprudential house in order. Thousands of the cases pending in courts of appeal do not involve pressing national issues upon which some kind of national binding precedent is a vital matter. However, hundreds of them do and those hundreds of cases are the kind which produce questions long deemed certworthy.

They are the very kinds of cases that the Supreme Court of the United States would have taken a decade or two ago before the whole

burgeoning quantity of litigation made it impossible for the Court to do so.

Cases of this kind are very diverse, indeed. Quite apart from the impact of the Federal Constitution, Federal statutes reach into every cranny of our national life. Thus, the cases which have been deemed rather specialized as to which there have been comments about building separate courts, do not represent a tremendously significant part of the overall caseload.

The cases in the former category are Federal taxation, patents, copyrights, bankruptcy, antitrust. All of those have long been recognized to require nationally binding precedent. But in addition to that we have enormous quantities of highly complex litigation which deal with such fields as environmental law, equal opportunity legislation, energy allocation, truth in lending, social security, Federal securities laws, election laws, freedom of information laws, privacy acts, and a whole catalog of cases which will more readily come to the subcommittee's mind than even my own.

And the need for nationally binding precedents in these areas is acute. The lack of such decision excessively breeds litigation at all levels of the Federal courts. In an effort to obtain national precedents, litigants bring action after action throughout the United States, not only to obtain judgments in particular cases, but also to generate intercircuit conflict with the hope of opening the path to the Supreme Court of the United States.

Of all of the litigants, the U.S. Government is the largest and the most persistent. It also is both plaintiff and defendant; it also can sue and be sued in the Federal courts all over the Nation.

As a result, the United States is, itself, the biggest litigation generator and it has both the power, and often the motive, to litigate repeatedly throughout the United States. And that relitigation persists until there is a national binding precedent. In short, now until the case is decided by the U.S. Supreme Court.

The number of cases the Supreme Court can hear cannot be significantly expanded, but the volume of litigation has risen steeply every year. At the close of fiscal year 1975, over 16,000 new appeals were filed in the U.S. courts of appeals and they had to be added to a backlog of more than 12,000 cases.

The rate of increase of appeals declined slightly last year but has risen very steeply this year. The projected figures are that the rate of increase of appeals of this year over last is on the order of 12½ percent.

At the present time, the Supreme Court cannot review more than about 1 percent of the cases that are subject to certiorari or to appeal to the Supreme Court of the United States and I think it is evident that the courts of appeal simply cannot be harmonious 99 percent of the time.

I don't think we have any basis to believe that the Federal litigation spiral will significantly level off. These pressures are going to rise. Even if every jurisdictional cut were made which has been suggested—and we recognize how hard it is to make any jurisdictional cut—there's still no relief of the problem as to which the national court is addressed.

For example, if we assume there could be a 20-percent cut in Federal jurisdiction and that that cut could be directly translated into the U.S. court of appeals caseload, it would mean—I am using figures from last year—that cut would manage to reduce the overall U.S. court of appeals caseload to the level of 1971. And in 1971 the figure of 13,000 appeals means that the U.S. Supreme Court could conceivably take slightly more than 1 percent, but the absolute number is not going to change; and maybe they could take three more of these cases than they do today.

As a result, it would not be possible, even with a 20-percent cut in jurisdiction, significantly to increase the amount of national decisional capacity or to review an appropriate number of cases from the lower Federal courts.

Now, why does it make any difference, so far as the workings of the courts are concerned, that there shall be an additional approximately 150 opinions a year? Well, it makes this kind of difference. If you have a nationally binding decision, the end product will be to dispose of pending cases which turn upon that issue. And, to take a hypothetical figure, if we assume that the national court of appeals will decide 150 cases, I think at a very minimum we're talking about disposing of 300 cases then pending in and between the circuits.

Now, that is a significant saving of time because for each one of those cases you have tied up three judges and many of them are very difficult cases. So you are saving, in effect, 900 judges' time. Obviously, we don't have 900 Federal appellate court judges, but by using 7 national court judges, you are saving 900 judge-hours, if you will. I'm using that figure hypothetically.

Now, that is not a trivial saving. In addition to that, there is a multiplier effect because of those 300 decisions we're saving in the U.S. courts of appeals. We have many, many more—twice, three times; one cannot exactly estimate—of the same issues pending in the Federal district courts.

Moreover, we have a large number of cases that will not be filed at all if the question is earlier decided by the national court of appeals. So I think there is a significant saving to the lower Federal courts. Also, it seems to me, there is a significant saving to the U.S. Supreme Court. A perusal of the Supreme Court's docket this term and last reveals numerous noted dissents from denials of certiorari grounded on the need to eliminate intercircuit conflict.

It takes time to decide not to decide. And I think the addition of a referral power will save time deciding not to decide. Moreover, it obviously will save the Court from having to take at all those cases to harmonize national law with respect to issues that, but for conflict, would not have sufficient significance to warrant the Supreme Court's attention.

For all of these reasons, I believe that S. 3423 should, indeed, be passed and I speak, therefore, in support of both bills, as endorsed by the association. Thank you, Mr. Chairman.

Mr. KUTAK. Mr. Chairman, the final witness of our committee is Mr. Foley.

## STATEMENT OF ADRIAN M. FOLEY, ESQ., AMERICAN BAR ASSOCIATION

Mr. FOLEY. Thank you, Mr. Chairman. I should also like to echo the sentiments of Judge Hufstedler and Bob Kutak and, of course, to acknowledge the thanks we feel for this opportunity.

I think the committee's report, as supplemented by the two witnesses heretofore heard amply make our case. But, in part, I should like to address myself to the impact of the passage of your current bills for the creation of the court upon a very important segment of society; namely, the part of society that becomes engaged in litigation.

So I speak, therefore, this morning not only as a member of the committee, but mostly as a practitioner in the third circuit, as a trial lawyer. How, then, you ask, does this really affect the course of trials at the lowest level? Primarily the effect of the creation of this court upon the lower level, and therefore, upon the trial of cases, will be to reduce the uncertainty that presently exists as to the state of the law in many, many fields, both civil and criminal.

With that reduction of uncertainty will come about also a great reduction in the proliferation of cases, cases which have their generation and genesis solely by reason of uncertainty. Judge Hufstedler and the Commission have documented the problem of the pressure of the caseload. That caseload has its effect today upon the very nature of a trial. Oral argument is being greatly curtailed in all of the circuits. It is being curtailed in the motion practice in the district courts and if it continues I might have to come back here as a trial lawyer and seek the Senate's protection because we might become an extinct and endangered species. The whole nature of a trial is being affected by the inability of the bench and bar to handle the work that they have.

With the reduction of uncertainty, and also with the reduction of those conflicts that exist between the circuits, will come about at least the first part of the relief that I think the trial courts need. Now, Mr. Kutak did make the point in discussing the other avenues of relief, which have been championed by other people. I'd like to just emphasize that. We don't claim that this court will be a panacea and neither do we take issue with or contest all of those advocates. There have been many reforms that—for instance, Judge Friendly—advocates in his book on Federal jurisdiction.

They might all be helpful in the elimination of this gigantic problem. However, we do suggest that this is a strong beginning and a real beginning. I think that, in addition to the very real effect that it will have upon a number of cases, it goes to the very philosophy that is at the heart of every lawyer's practice. Our role in society depends upon our ability to guide people. The stability which our society calls for can only be given and granted if we are able to predict that this sort of conduct is permissible, that that sort of conduct should be interdicted and should not be permitted.

Reduced of the ability to make such predictions, reduced of the ability to guide our fellow citizens along a stable course, our whole role in society is greatly diminished, if not completely done away with,

so that we have both a philosophical and a very practical basis for suggesting the relief which this new court affords.

Lastly, I should like to invite—I'm sure that this committee has already examined the great report of the Commission in detail—but to invite its attention to the studies that were done in the field of denials of certiorari. I think every lawyer in the country will gain a great deal of confidence with the knowledge that certiorari, which heretofore is granted in those rare, rare cases, will now, by reason of the creation of this court, afford the opportunity for a careful consideration of petitions and some hope that cases of virtue will receive grants of certiorari.

Thank you.

Senator BURDICK. Well, thank you—all of you—for your contributions this morning. May I try to simplify the problem with a suggestion? I understand that jurisdiction will come from two ways: cases appealed to the Supreme Court on certiorari. The Supreme Court can make one of three decisions: it can deny certiorari, take the case, or refer it to the new court; is that correct?

Mrs. HUFSTEDLER. That's correct under S. 3423.

Senator BURDICK. Are there any guidelines as to which way they might go or is that all discretionary?

Mrs. HUFSTEDLER. It's discretionary.

Mr. FOLEY. Discretionary.

Senator BURDICK. And the other avenue or route to this new court would be directly from the circuit courts?

Mrs. HUFSTEDLER. Well, our committee does not endorse the transfer jurisdiction. Therefore, that portion of S. 2762 which had transfer jurisdiction we do not approve at this time—the association does not approve of.

Senator BURDICK. But that other avenue would be strictly from the circuit courts?

Mrs. HUFSTEDLER. Well, the only avenue is, under the bill as we are endorsing it, S. 3423, is reference by the Supreme Court of the United States.

Senator BURDICK. Would there be any landmarks or rules for those cases that would be transferred?

Mrs. HUFSTEDLER. I think it's the rules that the Supreme Court itself uses already in deciding whether to decide. The bill adds a choice to what it now does; that is, if it is not going to take the case, it can also decide to send any case or block of cases down to the new court. In short, the Supreme Court of the United States already has the discretion to decide or not to decide. I would not endorse the idea of attempting to tell the Supreme Court how it ought to exercise its discretion in connection with the business of whether it's going to decide to take a case.

It has to be left with the Supreme Court of the United States.

Mr. FOLEY. Might I suggest, Senator, perhaps at the root of your question is whether, for instance, there has been any suggestion that some sort of cases—tax cases, patent cases or the like—should be the subject matter of reference as opposed to others that should not be? And the reason I only suggest that—we've heard that debate on the floor of the house of delegates many times.

As Judge Hufstedler said, we could not—and the Commission, I know, feels that it could not attempt to, in any way, restrict or delineate the fields in which the Supreme Court's discretion should be exercised. But the fear has been raised by some people—and we think that we must just meet that fear with the confidence that we have in the court—that bulks of cases of a single nature might be referred to this court.

Mr. KUTAK. And going one step further, Mr. Chairman, I know, in anticipation of what the bar would say, that it would oppose any elimination or limitation on the exercise of discretion by the Supreme Court, not only in what cases it would take or what cases it would not take, but what cases it would refer and what cases it would not refer if the new Court were established.

Senator BURDICK. Have you explored the possibility of increasing the size of the Supreme Court itself in your discussions?

Mrs. HUFSTEDLER. Well, that subject has come up before and, after all, the U.S. Supreme Court, at one brief span of its history, was 10 Justices. Actually, increasing the size of the Court has already been tried with respect to many State systems. It has been treated overall as a maturation process. First it expands the Court; then the Court is broken into divisions; and then very soon that does not work and you have to restructure the system vertically.

Indeed, as long as the Supreme Court sits en banc, as it always does, adding people to the Court adds more work and produces perhaps less than the other way around, because whatever additional help you get on particular cases is eroded immediately by the greater time it takes to get a full agreement or even deciding how you are going to disagree. So I think that it is too practical to consider expansion of the personnel of the Supreme Court of the United States.

Mr. KUTAK. As you know, Mr. Chairman, there——

Senator BURDICK. Just a minute.. I've got a response for the judge. This is precisely the argument we make in our circuit courts—there is a limit in size, precisely.

Mrs. HUFSTEDLER. Well, I think it is not of the same order, Senator Burdick. It is one thing to expand the second level and quite a different set of considerations with respect to the apex of the pyramid.

Senator BURDICK. I must respectfully disagree. Your first proposition is well stated.

Mr. KUTAK. Mr. Chairman, I would only add a footnote, even mindful of your disagreement, and that is to call the chairman's attention to a proposal that was made, I guess, about 30 years ago to that same effect—but for other reasons. And the political—not to say practical—problems that were created would probably signify that even if it were a good idea, sir, it probably would never fly, or as they say down in Texas, "That dog just plain won't hunt."

Senator BURDICK. Mr. Westphal, do you have any questions?

Mr. WESTPHAL. Just a couple. I might lead off with the observation that, having less hair than Mr. Kutak, that last effort was 40 years ago. As you know, there was recently a meeting held about a month and half ago at St. Paul entitled "A National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice." The advance billing on that meeting was to the effect that the conference

would be initiating some consideration of the changes in structure, personnel, and laws that we would need in order to be able to handle the judicial needs of this country in the year 2000.

The speakers told us that by the year 2000 we could anticipate a population of 262 million people in this country instead of the 215 million that we have today. There were discussions about the possibilities of handling some of our adjudicatory needs in a forum other than the courts and possibly by a procedure other than the adversary process.

If that is not done and if the view advocated by Judge Friendly and others that Federal jurisdiction must be reduced does not prevail, looking ahead to the year 2000 without structural changes, without diverting some of the cases that are now in the Federal courts to other courts or to other forums, one can visualize that the present Federal court system might well need 1,000 district court judges by the year 2000. And if you have 1,000 trial courts, you're going to need—instead of the 97 circuit judges that we have now—you'd very likely need 200 or 300 or 400 circuit court judges. Sitting atop of this whole pyramid with the greatly broadened base would be a supreme court of nine, unless some proposals for increasing that number should make sense. And I think the question I'm leading up to is this: In the deliberations of your committee, did you consider the role that this proposed court, national court of appeals, could play in that kind of an expanded Federal court system or were your thoughts limited solely to the level that we have now, where we have 400 to 445 district court judges and, hopefully, 120 circuit judges?

In other words, as you look into the future, how do you see the effect of this proposed national court of appeals, were it to be created now? Does anyone care to respond to that?

Mr. KUTAK. Do you want to try and I'll follow?

Mrs. HUFSTEDLER. Well, yes, indeed. We discussed the future impact of continued growth on the whole structure, including a national court of appeals. But the first effort to make structural change to meet existing and projected needs is to get a court built. I might put it by way of hypothetical.

When a young couple gets married, they may have in mind a dream house and a group of dream children. But they don't build a structure initially to accommodate a family of 14 when, in prospect, there's only a family of 4; one tries to get the structure first built, recognizing that as conditions change, the court—if the need is there—can be expanded. It is lots easier to expand an existing institution, either jurisdictionally or by way of personnel or both, than it is to attempt to build it new.

It takes many, many years to build any new structure into the Federal system. This proposal by the Commission, as implemented in both of these bills, is a sound effort to build a modest structure, which is very deeply needed.

Mr. KUTAK. To pick up at that point, Mr. Westphal, I think you touched on a very important principle that needs emphasis. There is a feeling sometimes when we talk about making a change in the Federal appellate court system that we're doing violence to the Constitution and, indeed, to the concept of our forefathers.

And impliedly in your remarks is, in fact, what has happened in our country. Our Federal appellate court system has changed as the country has grown and expanded. The system that we have today is different from the system of 1925 when, the judge's act was passed and the one before that in 1890, when the Federal circuit court system was established.

We would not anticipate, nor would we be, I think, rash enough to say, "This is the solution forever and ever." It is the solution, we think, feasible and practicable to respond to the conditions of today and to the needs of the hour. It adds to a system that has grown and evolved and that the growth and evolution does not do violence to the Constitution. It, in fact, facilitates and improves our appellate court system.

So I think the important point you stress—and the point we recognize—is that the system has changed and we must not be concerned about developing a proper structure to respond to the conditions that growth brings.

Mr. FOLEY. Well, Mr. Westphal, may I just add that as a discussion leader out in Minneapolis, I heard the same discussions and was greatly impressed as to the need for decriminalization in a great many fields, for arbitration and other nonadversary disposition of cases.

In our committee we assumed that the future would bring about some remedies, that perhaps 24,000 diversity cases would be eliminated, that other reforms at the lower level will come about. But we also examined into the history of jurisdiction and the history has been that whenever you create a void or a vacuum by removal of such of these, it is very quickly filled, as we know, by new causes of action, new theories of action coming about through State legislatures, the Congress, and the like.

So that we did look to the future; we did look to the possibility of an even greater proliferation of judges and courts, but we always assumed that the need would remain at least what it is today.

Senator BURDICK. I want to interject at this moment. You mentioned the Congress and what we're trying to do here—eliminate some of these diversity cases. You know where the problem is, don't you? Right out there in the State bar association—your States. The Congress is trying. But we haven't gotten one endorsement from the State bar associations on the diversity question.

Mr. FOLEY. Mr. Chairman, I'm very conscious of the——

Senator BURDICK. So it's got to start out there in the country.

Mr. FOLEY. I'm very conscious of the responsibility that we all share for that situation, at least I and my brothers here.

Senator BURDICK. I would hope that some bar association in some State would give us some recommendations along these lines. I'm not trying to chastise anybody, but that's a fact of life—they haven't given us any recommendations.

Mr. WESTPHAL. I have no further questions.

Senator BURDICK. Senator Hruska? You missed the best part of it here, but you can pick up from here.

Senator HRUSKA. Thank you, Mr. Chairman. On the point you just made, Mr. Chairman, that is correct. The Congress had been willing and the chairman of this subcommittee has been more than willing.

A bill like that has been processed a time or two, but it falls flat and gets no momentum because of the fear that it's going to swamp the State courts.

Well, it won't swamp anything, because you take the caseload generated from diversity jurisdiction and spread it over 50 States and each one has a small share. But no one State is quite willing—even the State from which I come and which I represent—no State has been willing to come in and say, "Overall and on a national basis, we need this and we should have it."

I hope we can make some progress with that. I join you in your hope, Mr. Chairman. Unfortunately, I have no questions to ask of the present witnesses, not having been favored with the opportunity to hear their testimony.

I was gratified at the American Bar Association's endorsement of the bill that was introduced, with the exception which they noted—and properly so. The second bill which was introduced and on which I shall comment later obviates that difficulty and I think other difficulties that arise.

But I want to thank the committee and its chairman and its members for having taken the interest that they have in these bills. So having thanked them and commended them for their efforts, I will turn any further questions over to Senator Scott or to the chairman.

Senator BURDICK. We recognize you next.

Senator HRUSKA. Very well.

Senator HRUSKA. Mr. Chairman, I was slated as the first witness but, as you know, higher priorities asserted themselves and I say it in a very august company, but that was the fact and I'm sure you're acquainted with it.

Might I ask Professor Levin to come forward and sit at the witness table and imagine that I'm sitting there. This microphone works well and I shall testify from here. And when the really tough questions come up, I shall refer them to him, because he is the authority, not only by reason of scholarly knowledge, but also by reason of having worked so intimately with the Commission and in the drafting of the bills, both bills, and in other ways.

I have a prepared statement, Mr. Chairman. I should like to submit it for the record and then make a very few minutes of presentation and comment on the bills and on the situation as we now have it in the consideration of a national court of appeals.

Senator BURDICK. Your full statement will be received and made a part of the record.

Senator HRUSKA. Thank you.

STATEMENT OF SENATOR ROMAN L. HRUSKA

I am pleased to appear here today at the opening of the hearings on S. 2762 and S. 3423. Each of these bills would establish a new tribunal in the federal judiciary system, the National Court of Appeals. The second bill is identical to the first, with two exceptions to which I will refer in the course of my testimony. The bill first mentioned was drafted by the Office of Legislative Counsel to implement the recommendations of the Commission on Revision of the Federal Court Appellate System on this subject.

I am pleased to offer for the record the final report of the Commission, entitled "Structure and Internal Procedures: Recommendations for Change."

The report speaks for itself, but it may be useful to review briefly the history of the Commission and the procedures which it followed in arriving at its recommendations.

The Commission was created by the Congress. It came into being with a broad mandate as a result of Joint Resolution 122, introduced in 1971 by the distinguished chairman of this subcommittee, the junior Senator from North Dakota. I was privileged to serve as a cosponsor of that Resolution, and thereafter I had the honor of chairing the Commission and of serving on it with the senior Senators from Arkansas and Hawaii and the distinguished chairman of this subcommittee.

Mr. Chairman, I think it is appropriate to enter of record here the names of each of the members of the Commission. I have already referred to the four Senators who served. From the House, there were Congressmen Jack Brooks, Walter Flowers, Edward Hutchinson, and Charles E. Wiggins.

Appointed by the President were Honorable Emanuel Celler, Dean Roger C. Cramton, Francis R. Kirkham, Esq., and Judge Alfred T. Sulmonetti.

Appointed by the Chief Justice were Judge J. Edward Lumbard, Judge Roger Robb, Bernard G. Segal, Esq. and Professor Herbert Wechsler.

Over a period of three years, the Commission held hearings in twelve cities, from the Pacific Northwest to the deep South, including the east coast, the west coast and the midwest. The transcripts of those hearings have been published in three volumes which together include over 2,500 pages. It is true that the early hearings were devoted primarily to the question of circuit realignment, but from the very first day of the first hearing the Commission was advised of the need to be concerned with the lack of clarity and harmony in federal law, viewed from a national perspective.

Extensive studies were undertaken for the Commission by distinguished scholars. A number surveyed the experience of practitioners in four important areas of the law: tax, patent, labor and antitrust. A major study was devoted to the examination of literally thousands of petitions for certiorari in the United States Supreme Court. Another study conducted by the Commission staff, analyzed dissents from the denial of certiorari.

Finally, the Commission focused on data concerning relitigation as government policy, the refusal to acquiesce in an adverse ruling or series of rulings in the effort to create inter-circuit conflict and ultimately to obtain Supreme Court review. All of these are described in the text of the Commission's report and detailed in more than 100 pages of appendices thereto.

A preliminary report was published and widely distributed in April, 1975 in the effort to gain the benefit of comments and criticism from bench and bar and from other interested citizens. Finally, the final report of the Commission referred to above was filed in timely fashion with the President, the Chief Justice and the Congress in June of last year.

The Commission concluded that "a National Court of Appeals is needed today, and, if the demands of society continue to grow," such a court "will be indispensable in the years ahead." The new court is 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 discriminaton in employment. It wll 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.

In short, the new court is intended to provide an added measure of clarity in the national law to make it possible for the courts and the bar to serve society more effectively.

There have been so many proposals for creation of a new federal court, proposals which differ radically in purpose and design, that it may be important to spell out with some precision what the Commission has recommended and what these bills provide. Putting to one side a variation limited to the start-up period of the court's existence, the bills being considered today both provide for a court of seven judges, appointed by the President with the advice and consent of the Senate, all of whom would serve for life. The court would not screen cases for the Supreme Court; it would not deny access to the Supreme Court.

It would accept cases referred to it by the Supreme Court and its judgments would constitute binding precedents on all federal courts and, with respect to federal questions, on all state courts as well. Moreover, its judgments would be subject to review by the Supreme Court on writ of certiorari.

It would, I think, serve a useful purpose to describe briefly the nature of the problem to which these bills are addressed. Under our system of government nine men, sitting always en banc, are charged with maintaining harmony and clarity in the national law. There are already over 140,000 cases which enter the federal judicial system every year, not to mention the decisions on federal cases which, with unabated flow, are handed down by the fifty state supreme courts. The United States Supreme Court can accept only about 150 to 175 cases per year for plenary consideration. When the filings in that Court were at the level of 1,000 per year this proved adequate. When the fittings in the Supreme Court approach or exceed 4,000 every year, what happens? The number accepted for plenary considerations remains the same or increases very slightly. Fewer and fewer cases, relatively speaking, can be considered by the Supreme Court. Moreover, as Mr. Justice Blackman wrote to the Commission, a number of the Justices "worry about the cases that [they] 'barely' do not take, namely, those that almost assuredly would have been taken twenty years ago."

Perhaps of greater concern has been the inability of the Court to devote adequate attention to non-constitutional issues. Prior to 1960 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.

During this period new statutes have multiplied. They deal with clean air and with other problems of protecting the environment, they concern occupational safety and consumer protection. Nor have older statutes lost their propensity for spawning litigation. No one has suggested, for example, that the tax laws have become simpler or that the field of labor litigation promises to atrophy and disappear.

The net result of this proliferation of legal problems beyond the capacity of the Supreme Court to resolve is a clear lack of capacity in the federal judicial system for the declaration of the national law.

It should be emphasized that the primary concern is not with the burdens which the Justices of the Supreme Court may feel, nor is the purpose of the proposed legislation to provide relief for that Court. The focus of concern is the state of the federal law and the need to provide relief, as Mr. Justice Rehnquist wrote to the Commission, "for litigants who are left at sea by conflicting decisions" on federal questions.

In an address delivered earlier this year, Mr. Justice White focused on the same point. He said: "The Commission, it seems to me, has correctly identified the real issue as the state of the federal law, rather than whether or not the Supreme Court is overworked." This may be the reason that Justice White, with characteristic generosity, has characterized the final report of the Commission as "a most significant event of the last year insofar as the future work of the Supreme Court is concerned."

Nor should this statement of the problem occasion surprise. My colleague, the distinguished chairman of this subcommittee, in a valuable article entitled "Federal Courts of Appeals: Radical Surgery or Conservative Care," which was published in 1972, called attention to the fact that "there will be need to furnish assistance to the Supreme Court in its function of . . . harmonizing the federal law decided by the Courts of Appeals" and specifically referred to the possibility of the creation of a "national circuit." In so writing, Senator Burdick took occasion to refer to and to quote from an earlier study, completed under the auspices of the American Bar Foundation.

As Senator Burdick's writing demonstrates, the Commission was not the first to point to the lack of adequate appellate capacity and to suggest a new court of appeals as the vehicle to achieve it. In fact, it is the fourth organization or group to come to this conclusion within the past few years. There was the Study Group on the Caseload of the Supreme Court, appointed under the aegis of the Federal Judicial Center, which reported in 1972; the Advisory Council for Appellate Justice in 1974; and thereafter, there was the American Bar Association acting at the 1974 midwinter meeting. Their work was foreshadowed by the 1968 American Bar Foundation report on "Accommodating the Workload of the U.S.

Courts of Appeals." Moreover, the American Bar Association, at its midwinter meeting held earlier this year, reaffirmed its view of the need for a new court and, with an exception to be referred to latter, specifically endorsed S. 2762.

Finally, it should be noted that the Board of the American Judicature Society, in a Resolution adopted in August, 1975 concurred "in the need for" and expressed its support of "the concept of a National Court of Appeals."

To appreciate the significance of these conclusions it is important to consider the consequences of the failure of the federal judicial system to provide adequate capacity for the declaration of the national law. The studies of the Commission showed four, each of which should be characterized as of major significance. First, there is the unresolved inter-circuit conflict, where the rights and liabilities of citizens are dependent on the accident of geography—an accident which assumes legal significance because the Supreme Court is unable or unwilling to resolve the conflict. If the Social Security Act means one thing in terms of eligibility for benefits in Mississippi, shall it mean the opposite solely because the aggrieved litigants lives in Ohio?

Second, as the system presently operates, there may be a delay of several years before a conflict develops and is resolved. The result is uncertainty and confusion for the litigant and his attorney and, almost inevitably, forum shopping for which the judicial system itself pays a heavy price.

Third, since the Supreme Court is at present the only judicial body with the power to resolve inter-circuit conflicts, the Court must frequently take a case merely because two circuits have differed. These cases, which are otherwise not worthy of the Court's limited resources, place a burden on the justices which could and should be removed.

Finally, even when a conflict never develops, we presently must live with uncertainty as parties continue to relitigate issues in circuit after circuit until each circuit has spoken or until the government acquiesces in the adverse decision of several courts of appeals.

Perhaps special mention should be made of the relitigation policy of the Government. It is clear that citizens are repeatedly burdened by relitigation of issues on which the Government has already suffered an adverse decision, sometimes in as many as five separate circuits. Certainly, this is an undesirable state of affairs. It has been suggested that the familiar doctrines of res judicata and collateral estoppel be extended to preclude such relitigation. Yet, it is difficult to recommend such a restriction of the options presently enjoyed by the Government where the major difficulty is the lack of adequate capacity for resolution of the legal issue on a national basis. If a Government agency is in fact convinced that a particular case has been wrongly decided, that the accident of the selection of the particular panel or panels of circuit judges has been an important factor in the decision and that review by the Supreme Court is possible only after an intercircuit has in fact developed, would it be proper and in the public interest to apply the strictures of res judicata to the very first or even the second judgment in one of the courts of appeals? In the view of the Commission, the problem is more properly attacked by dealing with the source of the difficulty, i.e. increasing the capacity of the federal system for definitive adjudication on a national basis.

It may be well to put to rest the recurring suggestion that, if only the Supreme Court could do a little more, the problem would go away. In assessing such suggestions, it is helpful to consider the opinions of the Justices themselves. The Commission, I should add, had the advantage of an authorized statement of views by each of the Justices, all of which are published as an appendix to its report. In dramatic contrast to the suggestion that the Court might undertake more, Justice White urges consideration of a very substantial reduction in the number of cases accepted for plenary consideration, a return to the pattern which prevailed not so long ago. Justice Powell concurs and Justice Blackmun's description of the pressures, even during the summer months, lends support.

Justice Blackmun makes the point in striking fashion. He wrote the Commission:

> 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.

So many cases within the Court's appellate jurisdiction are already treated summarily and, inevitably, prove to be of limited precedential effort that to

look to the Court to do more than it is already doing is to create the risk of serious harm to the very processes of Supreme Court adjudiciation.

Among the most striking comments are those of the Chief Justice. He, too, refers to the increased demands being made on the Court and lists a number of remedial measures, from the abolition of diversity jurisdiction to elimination of all direct appeals, adding that without the adoption of such remedial measures—and perhaps even with them—the creation of such an intermediate court is "inevitable." Of greater significance, however, is the risk which the Chief Justice perceives in allowing the present situation to continue, the risk that the increasing demands being placed upon the Supreme Court will affect the quality of its work:

> [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.

I have already described in broadest terms the jurisdiction of the new court. There remains for consideration a fuller description of this aspect of the bills before us and of an important difference between them.

Under the recommendation of the Commission on Revision of the Federal Court Appellate System, embodied in S. 2762, cases could reach the National Court in one of two ways: either by reference from the United States Supreme Court—referred to as reference jurisdiction—or by transfer from one of the regional Courts of Appeals, the Court of Claims or the Court of Customs and Patent Appeals—referred to as transfer jurisdiction. The bill introduced today, S. 3423, retains reference jurisdiction; it does not provide for transfer jurisdiction.

The Commission perceived many advantages to transfer jurisdiction. It could provide for a more efficient, less time-consuming method of resolution of intercircuit conflicts in appropriate cases. Thus, where two circuits had already taken opposing views of the meaning of a federal statute, and the issue was ripe for resolution on a national basis, no judgment by yet another Court of Appeals could provide the needed definitive determination, applicable in all federal courts. It appeared to the Commission that prompt transfer of the cause to the National Court of Appeals would better serve the interests of the public and litigants alike.

Whatever the merits of transfer jurisdiction, its most ardent proponents must concede that few, if any, of the Commission's proposals with respect to the National Court aroused so intense and so widespread dissent as that directed to transfer. Justices of the Supreme Court, with one exception, either ignored the provision or opposed it. Witnesses at a series of hearings termed the proposal either impracticable or undesirable or both. Finally, the American Bar Association, acting through its House of Delegates on the recommendation of its Special Committee on Coordination of Judicial Improvements, while warmly endorsing the proposal for establishing a National Court of Appeals, withheld approval of the provisions of S. 2762 concerning transfer jurisdiction, at least at this time.

I do not propose to debate the merits of transfer jurisdiction. If and when the National Court of Appeals is established and has proved its value as an important element of the federal judicial system, it will be time enough for the Congress to assess the wisdom of providing for the transfer of cases from the regional courts of appeals and from the Court of Claims and the Court of Customs and Patent Appeals to the National Court. Until that time, it seems clear, the new tribunal can perform a valuable, indeed an indispensable service to the federal system and to the citizens for whom the smooth-functioning of that system is so important, with its entire docket composed of cases referred to it by the United States Supreme Court.

The detailed provisions governing reference jurisdiction need not be rehearsed here; they are fully described in the Commission's report. Suffice it to note that under the provisions of both bills as under the proposals put forth by the Commission on Revision of the Federal Court Appellate System, the Supreme Court would have the power to refer any case within its appellate jurisdiction to the National Court of Appeals. The Supreme Court could, if it chose, designate any case as one requiring disposition on the merits by the National Court. The Supreme Court could also refer cases to the National Court without requiring the National Court to decide them on the merits. Under this provision, described as open-ended reference, the Supreme Court, once it had determined to deny

certiorari refer hundreds or even thousands of cases to the National Court; the National Court would then select those cases which it would decide on the merits and decline review in others, thus terminating the litigation.

I would not at this time eleborate on the advantages inherent in the provisions for reference jurisdiction, but it may not be inappropriate to note that not a single voice from among the active Justices of the United States Supreme Court has doubted that reference jurisdiction is feasible or asserted that it would impose added burdens on the Court. On the contrary, it stands endorsed as a feasible, practicable mechanism, one which would make it possible for the National Court of Appeals to achieve those benefits for which it was designed.

Permit me to elaborate on the views of the Justices. Five of the eight presently sitting are favorable to the basic concept of a new national court. Even the dissenters lend a measure of support. Justice Stewart, for example, "thought it likely that the day would come when a new court would be needed" and therefore considered careful planning of how the new court would function "highly desirable." Justice Marshall, also one of the dissenters, nevertheless noted that creating a court limited to reference jurisdiction "might be a good move" and was "certainly" deserving of "serious consideration." Justice Brennan, the third of the dissenters, stated that he could perceive no reason why reference jurisdiction would not work and Justice Stewart noted that this head of jurisdiction "would impose no undesirable burden on the Justices."

I should like to turn now to the difficult subject of the process by which the judges of the new tribunal are to be selected. In introducing S. 2762, I took occasion to observe that "selection of judges for a new court such as this, is a political question, and one on which the Congress should be allowed to work its will." That bill as drafted stated clearly that the members of the National Court shall "be appointed by the President, by and with the advice and consent of the Senate." In so providing, it followed the recommendation of the Commission on Revision of the Federal Court Appellate System. In introducing that bill, however, I was at pains to call attention both to the reasoning which underlay that provision and to the factors which required special concern with respect to the provision in question. Permit me to quote from my earlier remarks:

> This is the conventional, simple, well-established method. Normally, one would not expect departure from this formula. But it is clear that this is not a normal situation. To empower a President to appoint at virtually one sitting, the entire membership of so important a tribunal could be considered a grant of too much power to one man.
>
> It is unlikely that Congress would favor such a grant. The Commission as well as the sponsors of the bills are well aware of this.
>
> Fortunately, there are a number of available and acceptable alternatives from which Congres may choose, and by which the court members may be selected for the initial composition of the court.

The present bill, S. 3423 selects one of these alternatives, one which after careful study commends itself as most suitable for the problem at hand. It provides for Presidential appointment of only two judges at the time the court is first created, one of whom would be the Chief Judge. There would be two further Presidential appointments four years thereafter and, finally, the bill provides for Presidential appointment of the last three of the seven judges four years after that.

So that the National Court might operate with a full complement of seven judges from the time of its inception, this bill provides for the remaining judgeships to be filled by designation from among the most senior active judges of the Courts of Appeals, subject to restrictions which I shall describe in due course.

In short, Presidential appointments are phased in over a period which must perforce extend over at least three Presidential terms of office. Following this "inaugural period," the normal process of Presidential appointment, by and with the advice and consent of the Senate, obtains for the judges of the National Court of Appeals, as it does with respect to every Article III judge.

Designation for service on the National Court of Appeals would be by seniority, but only judges who are not already eligible for senior status and who would not become eligible for senior status during the course of the four-year term of their service on the National Court would be included on the roster of those who might be designated. Moreover, to assure some geographical diversity, no more than one judge from each circuit could be designated for service on the National Court. Finally, only judges who agreed to serve would be designated.

If a judge serving by designation as an associate judge of the National Court of Appeals should leave office, whether by death or by resignation, he would be

replaced by the designation of the next senior judge on the roster of those eligible for service on the National Court.

I think it should be emphasized that these provisions serve not only to avoid undue Presidential influence on the National Court at its inception, but they also serve important affirmative ends. They assure that the new court will have the benefit of the experience and the insights of a substantial number of court of appeals judges precisely at a time in the history of the new tribunal when such experience should prove most valuable. At least five of the initial court will bring to the National Court through understanding of the functioning of the courts of appeals and of the needs and the nature of the federal judical system itself. They may be expected to contribute much to the smooth functioning of the National Court during its formative period.

It would, of course, be wrong to deprive any of the regional courts of appeals of the service of any active judge for any extended period without making provision for his replacement. Accordingly, this bill provides for the creation of a vacancy on the court from which any judge is assigned to the National Court under the provisions described above.

At the conclusion of his service on the National Court of Appeals, a judge who accepts designation to that court is afforded a number of options. Having moved to Washington with his family, he may prefer to remain in Washington. In that event, he is allowed to accept retired status and will be available for service by designation on any federal court as is now true of retired Justices of the United States Supreme Court. He may choose to return to the circuit from which he was assigned, in which event he may accept senior status on the court of appeals of that circuit. Finally, he may prefer to return to the court from which he came and remain an active judge of that court. In that event, the number of judgeships on such court would automatically be increased by one for so long as he remains an active judge. Thus, the designation for service on the National Court of Appeals of any member of a court of appeals would occasion no dislocation or serious readjustment. On the contrary, whether he returned as a senior judge or as an active judge, his return would add to the judicial resources of that court, resources which experience demonstrates are warmly welcomed in virtually every circuit.

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 can provide atuhoritative determinations of recurring issues before a conflict has ever arisen. The cost of litigation, measured in time or money, would be reduced overall as national issues are 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.

In conclusion, I should like to emphasize the ultimate aim which motivated the Commission in its deliberations. Ours was the effort to assure the continued vitality of the federal judicial system by making it possible for it to function smoothly and efficiently in the interest of the citizenry at large. Whatever our differences, whatever differences will develop in the Congress, I know that we all share the goal of preserving and enhancing the role of the federal judiciary in our system of government and the quality of justice in our society.

## STATEMENT OF HON. ROMAN L. HRUSKA, U.S. SENATOR FROM THE STATE OF NEBRASKA

Senator HRUSKA. My oral statement will be brief because there will be more fruitful and authoritative testimony to follow me by witnesses

who are scheduled. I want to say this at the outset, Mr. Chairman. I think the general attitude and the general approach of the Commission for the Revision of the Federal Appellate Court System, on the whole, has been good, not only in formulating its report on its second phase, but also by way of the evolutionary development which has occurred.

We needed, for a long time, a specific measure, a definite bill, upon which attention could be centered and focused. That bill was introduced sometime ago and it was built upon the Commission report. It exercised restraint in some areas: for example, in deferring to Congress on the fashion in which the judges would be selected initially for the national court of appeals, and also extending options in other regards, options, for example, in the field of reference of cases.

The Commission bill was the first bill that was introduced. It was sponsored, for the purpose of getting it before the Congress, by the four Senate members of the Commission on Revision. That bill and that report were based not only upon our own ruminations, as it were, but they also built upon the experience of other formal bodies that have considered this subject.

Now, the second bill sharpens the focus even more. It is the bill which I introduced only recently. It sharpens the focus even more and, of course, only has two points of variance from the first bill. Those points are, first, the method of selection of the judges to serve initially on that court and, second, elimination of the transfer jurisdiction. So, with that change there would only be one source of cases that can be considered by the new court of appeals and that will be by assignment and by reference by the Supreme Court to the national court of appeals.

Now, this has great advantage. One of the greatest objections to the bill which evidenced itself was the matter of this transfer jurisdiction. The elimination of transfer jurisdiction, of course, leaves the Supreme Court in total and complete charge of its own docket. This bill retains, without any question or equivocation of any kind whatsoever, the basic idea, that it is a Supreme Court, as prescribed by our Constitution.

Now, just a word or two about what the bill is and what it isn't. Neither of these bills is a bill for the relief of the Supreme Court's load. That is constant; it has been constant for a long time; it will remain constant. That level of consideration of important cases which it, in its own judgment, will consider will be the level at which it will work.

There is general feeling that the Court now is overworked, that it probably should level off a little bit in the interest of making a more selective choice, in the interest of giving it more time so that the high quality of its work will continue and prevail.

Not only is this bill not a bill for the relief of the Supreme Court, this national court of appeals, as proposed, will not add to the burdens of the Supreme Court and that is the judgment of members of the Supreme Court. Eventually its load will be lightened because of the increase of appellate capacity, by reason of the operation of the national court of appeals.

The subject has already been dealt with by the American Bar Association Committee as to whether or not this adds another tier of courts,

generating further delay and greater expense. It does not. We can say that flatly and without equivocation.

It is not another tier. It is a body to which there will be assigned by the Supreme Court those cases the Supreme Court thinks it should deal with. And the appeals from circuit courts will still be made as they are now. The elimination of the transfer jurisdiction, I believe, will facilitate considerations of this bill and with good reason. I shall not go into these reasons because they are outlined in my prepared statements and by other witnesses.

We come, therefore, to the selection of judges. In the introductory statements of the first bill, this Senator pointed out that the bill provided for a court consisting of seven judges to be nominated by the President and confirmed by the Senate and then appointed following such confirmation.

It was said in my opening statement on introducing the bill that obviously the Commission was right: The matter of composition of the court in its initial stages was a political question in the true sense of the word. That political question we did not, as Commission members, seek to usurp. That was reserved for the Congress and that's where it should be.

Obviously, again, the power of one President to appoint all seven members "in one fell swoop" was too great a power to vest in any President. And Congress would not tolerate it. Therefore, we had to develop some mechanism whereby there would be an evolutionary process by which we could escalate from the initial membership on that court to the ultimate stage where the President would exercise the same powers of appointment over the national court of appeals that he now does over the Supreme Court and over the other courts of this Federal court system. And briefly stated, the President would appoint two of the original members of the court.

There would be an assignment from certain circuit court judges, to the court, of five judges for stated terms. Four years after the court became perfected and organized in that fashion, 4 years later an additional two judges would be appointed by the President. Four years later, three additional judges would be appointed by the President, in each instance to be confirmed by the Senate.

By that spacing, it figures out that there will be three Presidential terms before the entire court will be appointed by the President, and therefore, it would not normally and cannot conceivably occur—unless there is a freak somewhere along the line as to timing when the process starts—that one President would appoint all of these judges.

Now, then, the figures of 4 years and 4 years and the later appointment of two and three judges, respectively—those are negotiable. Those are not necessarily fixed in cement. It would be up to the Congress to decide whether, perhaps, that's too short a period. And, if so, I think that would be a recognition of the principle with which we started out: namely, that no one President should appoint all or too great a portion of this court.

A problem arose initially as to the eligibility of the circuit court judges that would be drawn on for assignment to the national court of appeals. Who would be considered eligible?

Second, what disposition would be made of the judges after they had served? Thus, there are two questions: Who would be appointed

for those terms? What would happen to them after their terms expired and their assignments would be taken over by Presidential appointees?

I address myself first to the matter of eligibility. It was felt, first of all, that no more than one of such appointments should come from any circuit court. The second would have to do with the proximity of the retirement age that would be reached by the judge who would be so assigned. And it is written in the bill that no judge who is eligible for retirement within the term for which he is appointed would be eligible. And thereby, there would be a mechanism created that would make eligibility not solely on the basis of seniority, not solely at the top part of the seniority, but on a level which is somewhat removed from retirement.

Now, then, the second point is: What to do with these judges after they have served on the national court of appeals? What disposition would be made of this judge power that would be released at different times when the President, under the law, would appoint two more, or three more, judges?

Those judges would have options, those that would be retired from such service. They would have the option to return to their original assignment and the law would provide that, to the extent that their return for active assignment on the circuit, the number of circuit judges would be automatically increased by one to accommodate that additional judge.

Another option would be that they could return to service as a senior judge, but available for assignment, as any other circuit judge would be upon reaching the age of retirement. Or, the third option would be that they could remain in Washington, members of the Washington judiciary to be assigned, as other retired Supreme Court Justices or retired circuit court judges would be.

A further option that should be mentioned is this: That no assignment would be made even from the eligible ranks, and those that would be in the order of seniority, except by voluntary acceptance of the assignment.

Now, there, again, we have, as I say, a sharpening of the focus so that we start to consider specific, definite measures instead of saying, "Well, this could be or that could be," And during committee consideration and prior to its report, these things would be considered more specifically and maybe changes made.

And then, when the bill is reported to the Senate, eventually the same process would be repeated in the other House. Perhaps the Senate would like to exercise some of its prerogatives and work into the bill other amendments which would meet their pleasure and their will.

So, Mr. Chairman, it is from that standpoint that I appear here and would subject myself to such questions as my colleagues would have—or counsel—of the subcommittee and with that statement, I rest my case, except for adding that with respect to those questions that do come up, I would be so happy if Professor Levin would be afforded the privilege of adding to the questions or furnishing the entire answer.

Senator Burdick. Well, we'll decide at a future date how much cross-examination to give you. Professor Levin?

Mr. Levin. Thank you, sir. I'm honored to be here, but I have nothing to add, unless there be any questions.

Senator BURDICK. Senator Scott, is there any question you'd like to ask about this legislation?

Senator SCOTT of Virginia. Mr. Chairman, I feel that Senator Hruska has studied this question for a long period of time and he is quite knowledgeable about the matter. I think he has indicated his knowledge by speaking as he has and explaining the bill to us without reference to his statement that was incorporated in the record.

Frankly, I have some reservations about the bill myself and yet I recognize that I haven't looked into the matter as much as our distinguished colleague from Nebraska. It just seems to me that anyone seeking judicial relief is entitled to due process; they are entitled to one trial, but I hate to see another level of Federal courts established, because we have three levels now—the district court, the circuit court, and the Supreme Court. Also, I understand that the magistrates are handling a number of the minor cases in the district courts and if you included those, we have four levels, and this would add still another level, even though it may refer to only this specific line of cases.

I feel that we have appeals that really delay the final determination. I would like decisions to be made more expeditiously. I just wonder if we couldn't get the courts to quit deciding political questions. Habeas corpus, I understand, takes a whole lot of their time and possibly some change could be made in this by the Supreme Court and maybe even Congress could make some change in the diversity of citizenship jurisdiction so there would not be the burden on the courts that there is today.

If we try to solve problems by just adding to the levels, maybe we would need to have still another level in 10 or 20 or 30 years. I feel that we do need to expedite the decisions, but I just wonder if another court is the answer. These are thoughts that occur to me without a thorough search and without the thorough consideration that my distinguished colleague has made, Mr. Chairman.

He may want to respond to this and I would hope he would, if he feels so inclined.

Senator BURDICK. Or Mr. Levin.

Mr. LEVIN. I would be pleased to, subject to the Senator's pleasure.

Senator HRUSKA. [Nodding head.]

Mr. LEVIN. Senator, we were very mindful of the problems that you have raised. I think you have raised two very, very serious matters and I'd like to suggest the response that I think the Commission would give.

First, today a great deal of the difficulty is relitigation by the Government. A Government attorney boasted to us—and from his perspective it was understandable—that they had lost on a single issue in five circuits, but felt that they couldn't get to the Supreme Court unless they had a conflict. They kept relitigating until on the sixth try—six times in the court of appeals taking different citizens to court—until they were able to get a conflict so they could go up to the Supreme Court.

In our view, as Judge Hufstedler pointed out earlier, the new court would add to efficiency; it would ease the burden on the citizenry by providing some mechanism available for national resolution of issues of this type earlier, more efficiently, more cheaply.

Now, the second point you made was a matter of grave concern to us. Do we simply add courts, in tiers of review? As the new court is organized now, except in the very rarest of cases, there would be no added tier. What it would amount to would be that a case which was brought to the Supreme Court in the normal way might be decided by the Supreme Court or it might, in the Supreme Court's discretion, be decided by the national court of appeals. It's right at that same level of review, you don't add an extra level of appeals. The only time you could add one would be in the exceedingly unlikely and unusual case where the Supreme Court, having once decided it did not want to hear the case, later decided, after the national court of appeals acted, that it ought to hear that case.

We are convinced, from discussion with the Justices, each of whom has had his opinion expressed in the report, that this would be rare, indeed. In short, mindful of your concerns, our notion is that we think litigation can be reduced, relitigation by the Government ought to be sharply reduced, and no tier of review would be added except in the very rarest instance.

Senator Scott of Virginia. Mr. Levin, I'm interested in your statement that there were six decisions in order to obtain a conflict among the circuits. Is this what you're saying that——

Mr. Levin. In that one particular case, yes, sir.

Senator Scott of Virginia (continuing). The Justice Department kept going in that particular case?

Mr. Levin. Yes.

Senator Scott of Virginia. Well, I think that really is a reflection on the judgment—and I don't say this critically of you, but I say it critically of the Solicitor General because any decisions going to the Supreme Court, as I understand it, by the Government, has to have the personal approval of the Solicitor General of the United States. And if he would do that, then I think he ought to be called to task for taking any such action as this.

I believe that's the general procedure, that the Solicitor General of the United States must approve appeals of the Federal Government within the federal system. Is that your understanding?

Mr. Levin. Senator, yes. Mr. Chairman, if I may be permitted to add a word. The real difficulty there didn't come with the final effort to go to the Supreme Court. The real difficulty came within the Department in relitigating these many times. The Commission took into consideration the possibility of recommending a policy of res judicata or of a statute prohibiting this relitigation.

Senator Scott of Virginia. Well, now, does not the Solicitor General, though, also have to approve appeals to the circuit courts?

Mr. Levin. I don't think in——

Senator Scott of Virginia. Well, I can tell you he does, having spent 21 years with the Department of Justice and he does have to do that.

Mr. Levin. Yes. On the substantive issue, this particular area, the Department was convinced they were right and the general Department policy, as it was studied, was that the Government will feel bound, as a general rule, only if there are three unanimous decisions against it. And the amount of relitigation by the Government is just tremendous.

And we decided not to recommend against relitigation unless we gave them the capacity in the judicial system to be able to get definitive resolution of issues, without having the result on an accident of the particular panel in the particular circuit.

Senator SCOTT of Virginia. Thank you, Mr. Chairman.

Senator BURDICK. Do you have a question you'd like to ask?

Senator HRUSKA. What percentage of the cases considered by the Supreme Court are cases in which the Government is a party?

Mr. LEVIN. I don't have that figure at the moment. Dean Griswold, who will be here, may have it, but my understanding is that it has been increasing substantially.

Senator HRUSKA. Dean Griswold is in the room. Could you answer that question, Dean?

Mr. GRISWOLD. Those cases heard on the merits?

Senator HRUSKA. Heard on the merits, yes, sir.

Mr. GRISWOLD. About 65 percent.

Senator HRUSKA. Sixty-five percent.

Mr. GRISWOLD. The Government or an agency is a party.

Senator HRUSKA. That describes the degree of the problem—65 percent. I would just venture this suggestion and this idea: If we would think of this new court as being another tier of courts and, therefore, delay proceedings and make them more expensive, that would be erroneous because there are no questions of jurisdiction raised by the new court getting jurisdiction of a case. There's nothing to litigate. And that's one of the most fruitful sources of dilatory tactics—to litigate jurisdiction.

In the second place, the proceedings are delayed in more cases by the lack of additional appellate capacity by the present system where the Supreme Court, because they have reached a ceiling, a limit of their activity, they have to deny consideration.

And what happened? That problem remains unresolved. Too often you'll have unresolved a question which is decided one way in one circuit and another way in another circuit and thereby we find proliferation of litigation rather than simplification of it.

And the question is not resolved. The question is not resolved. Now, that feature of it, Senator Scott, was discussed at length and considered at length by the Commission and we do not believe that there is any delay in decision or a fourth tier of court.

And in mighty few instances, it is conjectured—and I think properly—would there be a tendency by the Supreme Court to disturb the ruling of the national court of appeals. That remains for the Supreme Court to decide ultimately. But as a practical matter, it was not considered that that would be the case.

Senator SCOTT of Virginia. Well, Mr. Chairman, if the Senator would yield briefly, let me reiterate that this is something I haven't checked into very thoroughly. And I know the thoroughness with which the distinguished Senator has reviewed this matter. I was just sharing my own thoughts with regard to it and they don't have the foundation that the views of the Senator from Nebraska have.

Senator HRUSKA. Well, I want to say the Senator from Virginia has a longtime background in this field, in this procedural field. And any thoughts that he has, even if they might seem—which this one doesn't—outlandish. I wish he would tell us about them so we can discuss them

and explain our reaction to those same points, most of which have been made and raised before the Commission.

That's one purpose of these hearings. And I'm grateful to him for having raised this one. I have no further comments or questions.

Mr. WESTPHAL. Mr. Chairman, I have just a couple of technical points I'd like to clear up here. First, a point of inquiry to Senator Hruska: I thought you misspoke when you described how the seven judges on this court would be appointed under the new bill, S. 3423. I thought you used the period of time of 2 years after the intial appointment that the President would make some additional appointments. My understanding was that it was a 4-year period?

Senator HRUSKA. You are correct.

Mr. WESTPHAL. All right. Now, then, if I could addresses a couple questions to Professor Levin, I take it you are familiar with the provisions in the new bill, S. 3423, for the composition of the court.

Mr. LEVIN. [Nodding head.]

Mr. WESTPHAL. So at the time the court is created, it would be authorized to consist of seven judges. And the President, as authorized by the bill, would initially make two appointments: one, the chief judge of the court, and the other, an appointment of one of the associate judges of the court; is that correct?

Mr. LEVIN. That's correct.

Mr. WESTPHAL. The additional five judges to complete the complement of the court would then be designated by the Chief Justice of the United States by selecting the five most senior judges who meet the qualifications to be placed on a list of the circuit judges in order of their seniority and those five judges, then, would serve for a period of 4 years; is that correct?

Mr. LEVIN. That's correct.

Mr. WESTPHAL. Then at the end of that initial 4-year period, would all five of those judges have completed their term on their court? They would then be through on that court?

Mr. LEVIN. They would be through on that court. There's a theoretical possibility, Mr. Westphal, that one of them might still conceivably be eligible for reappointment on the next round. I refer to it only as a theoretical possibility because it seems most unlikely, in view of the requirement in the bill that to be on the list, the eligibility list, you not only have to be an active judge, one who is not eligible for senior status at that time, but also one who would not become eligible for senior status within the 4-year period he would serve on the court.

So, practically speaking, it seems almost certain that each of the five who had served the first 4 years would then not remain on the court.

Mr. WESTPHAL. Well, as I understand it, all circuit judges who are in active service and who have not reached the eligibility for retirement or senior status within a four-year period, would be placed on this list. Is there any requirement for a minimum number of years of service on the circuit court in order to get on the list in the first place?

Mr. LEVIN. No.

Mr. WESTPHAL. So that theoretically, taking today's situation with 97 circuit judges, some who are within 4 years of retirement would not be eligible to be placed on the list at all. But Judge Hill from Georgia,

who was just confirmed today to replace Judge Bell on the fifth circuit—once he becomes a circuit judge, he would be on the list. He would be the bottom man on the list.

Mr. LEVIN. They very bottom man. That's correct.

Mr. WESTPHAL. So, the Chief Judge, under this bill, is not given a power of selection. He is merely given the power to issue a perfunctory order saying, "I hereby designate these top five to serve for that first 4-year period." And then at the end of that 4-year period, those five would have completed their 4-year term. The President would appoint two additional judges and at that time, with four Presidential appointments serving on the court, the Chief Justice would designate another three.

And theoretically, if the sixth, seventh, and eighth judge on the original list were not prohibited by virtue of their coming within a 4-year period of their eligibility for senior status, it would then be the duty of the Chief Justice to designate No. 6, No. 7, and No. 8 on the list to serve for another 4-year period on the national court of appeals.

Is that what you understand the bill to provide?

Mr. LEVIN. That is correct.

Mr. WESTPHAL. Then at the end of that second 4-year period, those three designated circuit judges would have completed their term on the bench and the President would then appoint three? You might say "Yes" because not even voice-writers can get a nod of the head in the record.

Mr. LEVIN. Yes. Yes, indeed. I'm sorry.

Mr. WESTPHAL. So that under the bill the Chief Justice's power is not one of selection. It is merely one of designation.

Mr. LEVIN. That is correct.

Mr. WESTPHAL. By virtue of the provisions in the bill by which you determine the eligibility to get on the list and by reference to seniority dates at the time the bill is passed, it would be possible for one to determine who would be the first five judges on that list and then 4 years later who the sixth, seventh, and eighth would be; would it not?

Mr. LEVIN. I think, subject of course to such things as resignation, death, and also I ought to add one other—the answer to your question is "Yes." However, I think we also ought to be aware that eligibility for retirement includes service on the court of appeals and on the district court.

Seniority is measured only by service on the court of appeals. I think I ought to just mention that. There's that difference. I think you are right that subject to the extent to which people go on or off the court—or go off the court for reasons other than simply eligibility for retirement, I think your statement would be correct. In addition, one should note what I will term variation in the circuits—in other words, it could turn out that what would affect the seniority list, limited to one judge per circuit, would not only be someone who died in one circuit but what happened elsewhere.

Mr. WESTPHAL. But in any event, under that method of filling the complement of the court at 4-year intervals, you would have a situation where, at the end of the first 4-year period, on a seven-man court you would have five new judges coming in to perform duties on that court. And the experience gained by the original five who served for the first 4-year term, in effect, would be lost.

So that there would be quite a large rotation of five out of the seven members. What consideration was given to the effect that this might have upon the stability or predictability of the law determined by that court?

Mr. LEVIN. Mr. Westphal, you have, as usual, put your finger on the most sensitive issue here, which invites possible reconsideration. Our thought was, in discussing this, a situation as follows: you would have two judge remaining on the court with the experience; you would have at least three others with extensive court of appeals experience, so they don't come totally fresh. They've been within the system to a point where they have achieved a seniority level, in addition to the two more who would be appointed by the President, conceivably also with certain kinds of experience.

The alternative would be to allow some of those serving by designation to serve until the retirement, or to serve for a longer period, or to be reappointed without reference to the system we've described. The question, I think, was having a little bit of a balance of whether you were concerned with too much age, with having a proper experience level. We wanted to make sure that the court in its early phases had judges just below the very most senior, active judges.

But I think it is very, very tough—and this wasn't a Commission decision—to answer the question whether some of that original appointed five shouldn't remain beyond the first 4-year period. And I would find it difficult, you know, to argue strongly against that.

Mr. WESTPHAL. Well, of course, if some of the original five designees were to serve beyond that period, then there would have to be some kind of a selection made by someone authorized by the Congress to make that selection, in order to determine which three of the five would continue to serve.

Mr. LEVIN. I think, Mr. Westphal, that the most desirable approach—if any of them were to remain on—would be to build in objective standards.

Mr. WESTPHAL. I'm not trying to determine which is the best alternative. I'm trying to identify what alternative there is to the procedure that's specified in the bill.

Mr. LEVIN. Yes.

Mr. WESTPHAL. So that my question is that if you don't have the type of procedure specified in the bill and, as an alternative, wanted to entertain the idea of having three of the five original designees continue to serve for a second 4-year term, you would then have to provide in the bill for some kind of a selection process by someone, or by lot perhaps, in order to see who the three would be to continue on. Do you follow me?

Mr. LEVIN. Yes; or by objective standard, the most junior of the original five serves on, not for 4, but for 6 or 8 years. That's an objective standard that you could build in. Those are the three alternatives.

And the selection process, theoretically, could be by the Chief Justice, a procedure which was obviously avoided. It has been suggested the panel on multidistrict litigation, such as appointed the railroad court be used to make the selection. But, again, you get into personalities selecting personalities, and the like.

Mr. Westphal. Well, I would understand that one of the objects of providing in S. 3423 for this three-step process of Presidential appointment of the seven members of the court was to overcome the practical political problem that often arises in constituting a new court of having some method of being sure that the political philosophy of the appointees are, in some way, divided between the different parties.

Now, I also understand that by the provisions made for the designation of circuit judges to fill up the gap in the meantime, there's no political considerations in that because it's based strictly on seniority. There's no selection accorded to the Chief Justice.

Then, my question is: You either have to have your two-step designation or you have to have a system for winnowing down the original five down to three and then, at the end of the second 4-year term, those three disappear.

Mr. Levin. That's correct.

Mr. Westphal. If you had a winnowing down process at the end of the second 4-year period, you then would be able to retain the experience gained by at least three of those five during the first 4-year period and you would have possibly enhanced this element of stability or predictability insofar as the operation of that court is concerned. Isn't that true?

Mr. Levin. Yes. That is correct. Or, not keeping all three, but keeping one or two of the three, with one other by designation. These are among the alternatives.

Mr. Westphal. Have you given this thought to this suggestion that the three most junior of the five would be retained: if you do that, then this brings in an 8-year period affecting the eligibility, so only those circuit judges who were more than 8 years away from retirement age would qualify in the first place?

Mr. Levin. Well, on balance, having considered a variety of these things, I think the best solution we could come up with was the double designation. In part—and I must be candid about this—in part this is true because the original designation is an accident of position on the list. You have not selected the very best judge on the basis of whatever qualities you want to judge on.

And, therefore, while you are giving up some of the experience level, it just seemed to us in making this difficult decision that it might be a little better to have the designation just for a 4-year period and then proceed with three more.

I think the court will have enough experience. I mean, all of the judges will have had experience of some type which qualifies them for service—most of them with judicial experience in an appellate Federal court.

I certainly am pleased to find these considerations which you raise made of record. But we thought that the very best choice was the one that's put forth in S. 3423. But it's difficult, as you've pointed out.

Mr. Westphal. I have no further questions.

Mr. Levin. Thank you very much, Mr. Chairman.

Senator Burdick. Thank you.

Our next witness is Hon. Erwin N. Griswold, long-time Solicitor General and the distinguished Dean of the Harvard Law School.

Mr. Griswold. I have prepared a statement which I would like to offer as part of the record.

Senator BURDICK. It will be received without objection.
[The above referred to statement follows:]

STATEMENT OF ERWIN N. GRISWOLD

At the outset, I want to express my appreciation to this subcommittee for the privilege of appearing in support of S. 2762, the bill to establish a National Court of Appeals.

My interest in the docket of the Supreme Court, and in the problems which arise because of the limited scope of review available there, began some forty-five years ago, when I was a young lawyer in the office of the Solicitor General of the United States. Even then, only about one petition for certiorari in ten was granted, and I found myself sometimes distressed at what seemed to me to be injustices resulting from inadequate availability of judicial review, and at lost motion and delay in the process of waiting for a conflict to develop which would trigger Supreme Court review.

More than thirty years ago, I wrote an article on "The Need for a Court of Tax Appeals"—57 Harvard Law Review 1153 (1944). That article was ahead of its time, and it encountered a good deal of opposition from the profession, based largely on the contention that it was undesirable to have a specialized court confined to cases in the federal tax field. Over the years, I have come to feel that there is merit in that objection. It now seems to me that a National Court of Appeals would meet many of the needs in the tax field, and in many other fields as well, and would do it without the problems which would be presented by a court of narrowly limited specialized jurisdiction.

Over the past four years, starting with the Report of the Freund Committee in 1972, the problems in this area have been thoroughly and thoughtfully examined, and I need not repeat the considerations which have been so well set forth in the reports of the Commission on Revision of the Federal Court Appellate System. Instead, I want to focus on two aspects of the matter which seem to me to make the establishment of a National Court of Appeals desirable in the public interest, an idea whose time has come.

1. There is a considerable amount of talk about the resolution of conflicts. It is said that it takes a considerable amount of time to bring about the resolution of conflicts, and that the Supreme Court does not always take the first opportunity to eliminate conflicts between the circuits, or between the federal courts and the state courts.

That is true, I believe, and it is well documented in the report of the Commission on Revision.

However, I have another point in mind which I think is of equal importance. That is, that there are many cases which are not of vast intrinsic importance, but where the issue arises frequently in the administration of the law, and where it is desirable to have a prompt interpretation, effective on a nationwide basis, without the necessity of the long drawn out process of waiting for a conflict.

An excellent example of this is found in the case of *United States* v. *Cartwright*, 411 U.S. 546 (1973). That case involved the question of the valuation of mutual fund shares which were held in the estate of a decedent at the time of his death. Should such shares be valued at the sales price, which includes a substantial element for loading, or sales charge, or should such shares be valued at the redemption price? This can be argued both ways, and in the long run it does not make much difference, as a lower valuation at death will mean a higher capital gain (or lower capital loss) when the shares are eventually sold by the beneficiary.

Despite the basic unimportance of this question, it is very important that it should be clearly resolved. It must arise tens of thousands of times every year. Executors all over the country need to know what value to include in estate tax returns, and revenue agents who audit these returns need to know what figure they should use in determining the estate tax. While this matter was pending, there must have been many tens of thousands of conferences in field offices of the Internal Revenue Service, and there must have been an equally large number of cases where the question was compromised out as a part of an overall settlement since no one knew the right answer.

This question was pending for nearly ten years before it was finally decided by the Supreme Court. In 1963, the Treasury issued a regulation fixing the higher value. Estate Tax Regulations, Section 20.2031–8(b), published as T.D. 6680 in

28 Fed. Reg. 10872 (1963). Some six years later, the regulation was sustained by the Sixth Circuit Court of Appeals, *Ruehlmann* v. *Commissioner*, 418 F.2d 1302 (1969), and the Supreme Court denied certiorari. 398 U.S. 950 (1970). A corresponding regulation under the gift tax was upheld in *Powell* v. *United States*, 414 F.2d 45 (7th Cir. 1969). Not until 1972 did a conflict develop, when the Second Circuit decided in *United States* v. *Cartwright*, 457 F.2d 567, that the regulation was invalid. The Supreme Court's decision did not come until 1973, nearly ten years after the regulation was issued—during which time the problem had been faced and dealt with by lawyers and government officials in more than one hundred thousand cases.

With the Supreme Court as hard pressed as it is, we have to wait for conflicts before questions can be decided, and that takes years and years. It seems obvious to me that the proper operation of the government, in the interest of all citizens as well as government officers, requires that there be some means of obtaining a prompt definitive answer to frequently recurring questions of this sort even though they may not be of great importance in the individual case. The National Court of Appeals will be a help in this process.

2. Another aspect of our lack of adequate appellate capacity lies in the fact that Supreme Court review has for all practical purposes now become almost completely discretionary. Even cases which come within the Court's constitutional original jurisdiction are now treated on a discretionary basis. The Court's rules require that a motion for leave to file a complaint must be presented to the Court, and this has come to be little more than a petition for certiorari, which is frequently denied. See *United States* v. *Nevada*, 412 U.S. 534 (1973); *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972); *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971).

Although the Congress has provided a considerable number of cases which can be taken to the Supreme Court as of right, that is by appeal, the Court in fact and in practice treats the jurisdictional statement in these cases as little more than a petition for certiorari. I have recently tried to deal with this problem in a lecture entitled "Equal Justice under Law" which I gave at Washington and Lee University on May 8, 1976. I there called attention to the recent observation of Mr. Justice Clark in an opinion in the Fourth Circuit where he said that while he was on the Court "appeals from state court decisions received treatment similar to that accorded petitions for certiorari and were given about the same precedential weight." Clark, J., concurring in *Hogge* v. *Johnson*, 526 F. 2d 833, 836 (4th Cir. 1975). He went on to say that he could not believe that the Court, when making *per curiam* affirmances in appeal cases, "gave such serious consideration to the merits of the case" as to justify substantial precedential value. This seems a rather striking observation. Is it wise that the Supreme Court, though hard-pressed as we know it is, should be deciding cases without giving them, in the words of a former Justice of the Court, "such serious consideration to the merits" as to warrant full precedential value?

There is another aspect to the almost completely discretionary nature of the Supreme Court's jurisdiction as it is presently exercised. It was one thing to introduce discretion in 1891, and to extend it in 1925, when the function of discretion was to eliminate from consideration a relatively small number of cases at the bottom, which everyone would agree did not merit further review. It is quite another matter when discretionary jurisdiction from necessity operates to pick out a few cases at the top from a considerably larger number of cases for which a strong case of reviewability can be made.

Although the analogy may be a rather distant one, I am reminded of an aspect of my experience as a law school dean. Until about 1936, the Harvard Law School admitted all persons who applied who had been graduated from an approved college. At the close of the first year, a substantial number of these failed. Many persons felt that this was harsh and wasteful. Accordingly, at the close of the War, I joined with some other deans in developing a sort of examination which was called the Law School Admissions Test. This was designed to screen out at the bottom the ten percent to twenty percent of the applicants who were not qualified to undertake legal studies. Over the years, though, the number of applicants—like the number of cases on the Supreme Court's docket—sharply increased. By the 1960s, the Law School Admissions Test was being used not to screen out unqualified applicants at the bottom, but rather for the purpose of picking out ten or fifteen percent of the applicants at the top out of a very large number of persons who are clearly qualified for law studies. It was never clear to me that the test was designed or fitted to make this distinction among well-qualified applicants.

Without pushing the analogy too far, we have a somewhat similar situation with respect to the Supreme Court's docket. There are well over four thousand cases which come to the Supreme Court every year. We may readily agree that there are at least two thousand of these cases, and perhaps as many as three thousand, which do not merit Supreme Court review by any appropriate standard. But that leaves one thousand cases of varying degrees of qualification for appellate review. Yet, the Supreme Court hears only about one hundred and fifty of these cases on the merits each year—and everyone agrees that that is as many cases as the Court can be expected to handle on the merits. It is not possible to say, I think, that there are not at least one hundred and fifty more cases which are well worthy of appellate review. Many of these cases, like the *Cartwright* case, do not present difficult questions, and do not merit the time nor attention of the Supreme Court. Yet, they do present questions which ought to be decided on a prompt basis, with nationwide authority.

The National Court of Appeals can make an important contribution to the country, and to the Supreme Court, by doubling the nation's appellate capacity. It will not in any way interfere with the ultimate authority of the Supreme Court. The cases for review will continue to be selected by the Supreme Court. The Supreme Court will allocate an appropriate proportion of the reviewable cases to the National Court of Appeals. And the Supreme Court will retain ultimate review over the decisions of the National Court of Appeals, though it would be my expectation that that would very rarely be exercised.

There is another aspect to the problem. With only one hundred and fifty cases being heard on the merits by the Supreme Court each year, the Supreme Court rules, but it rules with a very long leash. It is a striking fact, I think, that less than one percent of the cases now decided by the United States Courts of Appeals are in fact reviewed by the Supreme Court. This means that a Court of Appeals judge knows that there is a very small chance that a decision he is writing will actually be reviewed by the Supreme Court. It is hard to demonstrate this, but I think that this leads to a good deal of "freewheeling" by the courts of appeals, and by the state supreme courts. This means that decisions all the way along the line are not of much precedential value, and this results in a considerable increase in appellate litigation. Any losing litigant wants to appeal, because it is very hard to foretell the reaction of the appellate court. I would not want the courts of appeals to be held on a very tight leash. We need their wisdom and judgment, too. But it is not sound, I think, to have a system in which we have eleven or more tribunals in this country which are virtually final and independent, knowing in advance that less than one percent of their decisions will be reviewed on the merits by the Supreme Court.

There is too much lottery in the present system, where final appellate review is so rarely available. Too often, I fear, certiorari is denied to a case well worthy of review simply because of the pressure on the Supreme Court. And too often, it is impossible to articulate the bases on which the Court does grant or withhold review. When a system of justice becomes as completely discretionary as ours is, with final appellate review so rarely available, there is a large element of chance in the operation of the system. We have been forced into this because of the sheer volume of the cases. But it is not a healthy or a desirable situation.

The National Court of Appeals will not resolve this problem entirely, but it will help significantly. By doubling the appellate capacity of the country, it will enable us to get many important questions decided more promptly, without the necessity of consuming time while waiting for a conflict to develop. And it will enable the Supreme Court to grant review in twice as many cases as it does now, allocating half of these to the National Court for decision. This will reduce the element of lottery. And it will also increase the number of precedents with nationwide validity, and this should greatly assist the courts of appeals in their task of participating in the development of a truly national legal system. As precedents become established, and are applied by the courts of appeals, the volume of appellate litigation should appreciably diminish.

Indeed, it is hard to imagine a system which is more conducive to uncertainty and to the fostering and development of appellate litigation than is our present system of eleven courts of appeals, virtually autonomous, and only very rarely subject to review. The National Court of Appeals is not a complete solution, but it will help substantially. It has been worked out with great care, after thorough and scholarly investigation. I hope that S. 2762 will be enacted by the Congress.

## STATEMENT OF ERWIN N. GRISWOLD, LAWYER, WASHINGTON, D.C.

Mr. GRISWOLD. The statement was prepared late last week, at which time I did not know of S. 3423 and in the statement I say that I support S. 2762. I would like to say now, since I have read S. 3423, that I strongly support the elimination of transfer jurisdiction.

I put in my statement that I supported S. 2762 because I thought that the bill and I'll take a bill to establish a national court of appeals without fussing too much about the details. But I have never liked the transfer jurisdiction and I certainly support the change made in S. 3423, which would eliminate the transfer jurisdiction.

With respect to the appointment of the judges, I think I should make it clear that I would prefer—simply speaking as a lawyer who has had experience in the executive branch of the Government—that I would prefer the immediate appointment by the President after nomination and confirmation by the Senate, because I value very highly continuity and the development of an institutional sense in this court.

I think one of our major problems in the Federal system today is this business of having courts of appeals with 15 judges, of which 3 sit at any particular time. What's more, often only one of them or perhaps two of them will sit and some district judge from some other part of the country will be part of the panel. This makes it very haphazard, eliminates any institutional approach in the administration of justice, makes it very difficult for counsel—not only private counsel, but counsel for the Government—to predict how the case will come out and is, among other things, a factor which makes it almost inevitable that these multiple appeals by the Government shall be taken because there is no certainty and no institutional solidity in the decision of a particular panel of a court of appeals.

Indeed, it is so bad, it seems to me, that in a good many courts of appeals the result of the case is pure lottery, depending upon the panel which happens to come through the door when the court comes in.

You can know at that time that you won your case; you can look and know at that time that you have lost your case. And I don't think that is a good way to run a judicial system, particularly when the chances of review by the Supreme Court are as slim as they are.

I was rather startled to learn from Judge Hufstedler 2 or 3 years ago that less than 1 percent of the cases decided by the courts of appeals are actually reviewed by the Supreme Court. And that means that this varying collection of different judges are almost always final in the making of their decisions and that leads to a great uncertainty and, I'm sure, to the multiplication of litigation in the lower courts.

There has been a good deal of talk in connection with this proposal about conflicts. And I think that conflicts are important and that, as the report of the Commission shows, the Supreme Court does not always grant certiorari, even when there is a conflict, and I think that is unfortunate.

But I'm more interested in anticipating conflicts. I'm more interested in having a situation where we can pick out the kinds of questions which are inevitably going to recur and making it feasible for

the Solicitor General or for private counsel to take up the first case that comes along presenting such a question, to point out in the petition for review that this is the kind of question that is inevitably recurring, that it will contribute to the administration of justice to get it decided on a basis which has nationwide validity and to have that decision come promptly.

And in my statement I have referred particularly to a case which I happened to argue in the Supreme Court of the United States for the Government: *United States* against *Cartwright*, 411 U.S. 546. That case involved a perfectly homely question. What is the value which should be assigned to shares in a mutual fund which are owned by a person when he dies? Should they be valued at the asking price, the cost price, which includes a loading charge—let's say 100? Or should they be valued at the redemption price, that is, the amount which the executor can get if he turns them in, which excludes the loading charge? You can treat it as a wholesale-retail matter, if you want to.

Now, I can't think of any question which is of less importance to civil rights or to the constitutional structure of the country or to the kinds of questions which the Supreme Court ought to be deciding. Nevertheless, this is the question which comes up in tens of thousands of instances every year. It comes up particularly in small estates because, generally speaking, people with large wealth don't buy shares in mutual funds.

It took 10 years for a conflict to develop before that question was decided by the Supreme Court, although it had been decided by courts of appeals in favor of the Government in a number of cases beforehand. And in two of those cases, the Supreme Court denied certiorari. And the Government opposed certiorari because it thought the decision below was correct.

Finally, after 9 years, the court of appeals for the second circuit decided the question the other way. The Supreme Court granted certiorari and decided that the lower value was the one which should be used. I have not made a count, of course, but my guess would be that there must have been over 100,000 instances where that question arose in conferences between executors and revenue agents in connection with the adjustment of the estate and where neither side—neither the executor nor the Government—knew what they should do. And since ordinarily the amount involved wasn't very much, it was probably settled out as part of the overall adjustment of the estate.

There were also 8 or 10 reported cases and there must have been hundreds of cases filed in the lower courts awaiting that decision, all of which could have been avoided if there were a means by which this kind of a question could be anticipated and decided without having to wait for a conflict.

The other point which I would like to emphasize is the fact which I think is not fully understood, which is that as a practical matter, virtually all of the cases heard by the Supreme Court are heard there on a discretionary basis— that is, the Court decides whether, on the overall factors involved and taking into account the great pressure which the Court is clearly under—whether this a a case, not only which they ought to review, but—I think it has become more and more a factor—

is it a case which they can review, in view of the time pressure on them.

Even the Supreme Court's original jurisdiction—the suits brought by a State or by the United States—has now become discretionary. You are required to file a motion for leave to file a bill and the Court—I've cited in my statement three cases within the last 4 years where the Court has declined leave to file a bill in cases which come clearly within the original jurisdiction.

In addition to that, the Court has an extensive assigned jurisdiction that is assigned to it by Congress to hear cases on appeal. But for many years, the Court has required the filing of jurisdictional statements in those cases. One of the elements in a jurisdictional statement is whether the question is a substantial question. And the determination as to whether a question is a substantial question becomes not very different from the determination which is made on a petition for certiorari.

And there has been a discussion in some of the recent cases as to the effect to be given to a dismissal of a case taken to the court on appeal. There is a recent decision in the Fourth Circuit Court of Appeals by Mr. Justice Clark, who was assigned to sit on that court, in which he says that appeals from State court decisions, during his tenure on the court, received treatment similar to that accorded to petitions for certiorari and were given about the same precedential weight.

And that he went on to say that he could not believe that when the Supreme Court made per curiam affirmances in appeal cases the court gave such serious consideration to the merits of the case as to justify substantial precedential value. That seems to be a glimpse from the inside that to me is rather startling. I'm not criticizing the court because I'm fully aware of the pressure to which they are subjected. But to have a system under which the court makes decisions which, in the words of a former member of the court, "are not given such serious consideration" that they merit "substantial precedential value," seems to me to be a rather serious matter.

Now, this leads up to the essence of my support of these bills, which is that as all of these factors show, we have a very great shortage of appellate capacity, of final appellate capacity in this country.

Twenty years ago the Supreme Court was deciding about 150 cases a year on the merits. This year the Supreme Court will decide about 150 cases on the merits. Twenty years ago the number of cases before the Supreme Court was perhaps a third of what it is now. And we have a system, the certiorari system, which was designed to eliminate at the bottom a relatively small proportion of cases which were not worthy of Supreme Court review.

We are, in fact, using it today for the purpose of selecting out at the top a relatively small number of cases out of a much larger group, which by any rational standard, it seems to me, would merit final appellate consideration if the court was not subject to such great pressure.

Now, it is subject to great pressure. I recognize that. We have to make a lot of compromises. But I think we've made too much compromise. I think we have eliminated from final appellate review too great a proportion of the cases. And it is for that reason primarily that I support these bills which would establish a national court of appeals,

because the effect would not be to double the country's appellate capacity.

Many of the cases that ought to be given final, national appellate review are not of the world shaking or nation shaking importance and consequence that the Supreme Court ought to be considering, but there are a great many other cases of lesser importance which, in a well organized and well run judicial system, would receive appellate review on a national basis for the purpose not just of deciding that case, but for the purpose of establishing the law so that lawyers in private practice would know how to advise their clients, so that Government lawyers at all levels—not merely the Solicitor General, but the people in the revenue agents' offices—would know what the rule is and how they ought to administer this provision.

So often in practice, I find, that you have to say to a client:

> Well, nobody knows how this would come out. There are cases in the second and fourth circuits that go your way, but then the seventh and ninth circuits are different and there isn't any decision in this circuit. And it will be fairly expensive to litigate and I can't tell you what will happen, but the only way you can protect yourself will be to take that chance.

Now, there's another aspect of the problem with which I have become increasingly impressed year by year. With only 150 cases being heard on the merits by the Supreme Court each year, the Supreme Court rules, but it rules with a very long leash. It is a very striking fact, as I have indicated, that less than 1 percent of the cases now decided by the U.S. courts of appeals are reviewed by the Supreme Court.

And this means that a court of appeals judge knows that there is a very small chance that a decision he is writing will actually be reviewed by the Supreme Court. It is hard to demonstrate this, but I think that this leads to a good deal of freewheeling by the courts of appeals and by the State supreme courts. This means that decisions all of the way along the line are not of much precedential value. And this results in a considerable increase in appellate litigation.

Any losing litigant wants to appeal because it's very hard to foretell the reaction of the appellate court, particularly when you haven't any idea of what the panel on the appellate court will be. I would not want the courts of appeals to be held on a very tight leash. We need their wisdom and judgment too. But's it's not sound, I think, to have a system in which we have 11 or more tribunals in this country which are virtually final and independent, knowing in advance that less than 1 percent of their decisions will be reviewed on the merits by the Supreme Court. There is too much of lottery in the present system, where final appellate review is so rarely available.

Too often, I fear, certiorari is denied to a case well worthy of review simply because of the pressure on the Supreme Court. And too often it is impossible to articulate the bases on which the court does grant or withhold review. When a system of justice becomes as completely discretionary as ours is, with final appellate review so rarely available, there is a large element of chance in the operation of the system.

We have been forced into this because of the sheer volume of the cases, but it is not a healthy or a desirable situation. The national court of appeals won't solve all of the problems by any means, but it will help. It will enable the Supreme Court to grant review in twice

as many cases as it now does, allocating half of these to the national court of appeals. This will increase the number of precedents with nationwide validity and this should greatly assist the courts of appeals in their task of participating in the development of a truly national legal system.

As precedents become established and are applied by the court of appeals, the volume of appellate litigation should appreciably diminish. Indeed, it's hard to imagine a system which is more conducive to uncertainty and to the fostering and development of appellate litigation than is our present system of 11 courts of appeals, virtually autonomous, and only very rarely subject to review.

The national court of appeals is not a complete solution, but it will help substantially. It has been worked out with great care after thorough and scholarly investigation and I hope that S. 2762 or S. 3423 with appropriate refinements will be enacted by the Congress.

Senator HRUSKA. Thank you, Dean Griswold. We were favored by testimony from you before the Commission and we were grateful for it. We're grateful for your present comments.

The point you make in the latter part of your statement about a truly national legal system, with 11 circuits coming out as virtually independent in the bulk of their cases, the overwhelming part of them, there isn't any prospect of developing or achieving a truly national legal system; is there?

Mr. GRISWOLD. Senator, I think there is a prospect if we can increase the final appellate capacity of the country. That's why I regard these bills as so very important—because I think that in this area it's a kind of geometric matter. If you can double the number of final appellate decisions, I think it will increase certainty about four times.

Senator HRUSKA. And in the case to which, of course, you referred, the tax case, the Cartwright case being the final chapter, over a period of 10 years, you say that may have involved maybe 100,000 cases in which that issue was——

Mr. GRISWOLD. Oh, 100,000 in revenue agents' offices. I don't mean in the courts.

Senator HRUSKA. That's right.

Mr. GRISWOLD. Oh, I think it must have been at least 100,000 estates which involved that question. During all of that period, the Treasury's regulation was outstanding, which said it should be the higher value, and yet the matter was being contested widely and nobody knew what the final answer would be.

Actually, the final answer was adverse to the Treasury's regulation.

Senator HRUSKA. Well, now, in a case of that kind—I heard it referred to one time as a class of cases where a decision one way or the other would not make too much difference. And there's ground for saying that because the circuits did divide on it.

So it didn't make too much difference which way it was decided, but it did make a lot of difference that it be decided one way or the other.

Mr. GRISWOLD. That's exactly what the Cartwright situation was. Actually, Senator, in the Cartwright problem—I don't want to get too technical here—but if you took the higher value, then it would reduce a potential capital gain when the beneficiary eventually sold his shares or increase a capital loss; whereas if you took the lower value and paid

less of estate tax, then it would increase the capital gain when the beneficiary eventually sold it and he would pay a higher capital gains tax.

So it really didn't make much difference except that nobody knew how to handle these matters.

Senator HRUSKA. Now, we came across this statistic that in earlier years the percentage of nonconstitutional cases undertaken by the Supreme Court for decision was relatively larger than the constitutional cases. Now, that is reversed; is it not?

Mr. GRISWOLD. Oh, yes. The proportion of constitutional cases is now very high.

Senator HRUSKA. And what is your comment as to the impact of this national court of appeals insofar as that higher quantity of constitutional cases is concerned?

Mr. GRISWOLD. I think that the proportion of constitutional cases heard by the Supreme Court would be at least as high—and very likely higher than it is now. But this would make it possible for the court to grant certiorari in a considerable number of nonconstitutional cases and to assign those cases to the national court of appeals.

In other words, this is an area—the whole area of private litigation—which can often be of very great importance, not only to the parties but to people engaged in trying to make the legal system work. The whole area of private litigation has been virtually denied review for the past 10 or 15 years because of the necessity to review constitutional cases and the—I don't want to use the wrong word—but the appeal of constitutional cases has been so great, the legitimate feeling of the court that it is necessary and desirable that they should decide constitutional cases, has been so great that they have virtually no time available to decide nonconstitutional cases.

Senator HRUSKA. And, of course, without belaboring that Cartwright case too much, that type of case does not necessarily have to have the talents and the wisdom and the application of the Supreme Court; does it?

Mr. GRISWOLD. I don't think it involved any—without disrespect to Justice White, who wrote the opinion—I don't think it involved any high level legal consideration at all.

Senator HRUSKA. And is it your feeling that there are many comparable situations in which those same general elements are involved?

Mr. GRISWOLD. It is my feeling that there are many comparable situations. That, of course, was a Government case, but there are many situations arising under all of these statutes which have come along recently: The Freedom of Information Act, the Privacy Act, Occupational Health and Safety Act, and so forth, involving questions of statutory construction—where, if the court goes wrong, the Congress can correct it—which seemed to me to be technical, legal questions involving high competence, but not the sort of broad consideration which is involved in constitutional decisions by the Supreme Court.

Senator HRUSKA. One final question and that has to do with the question and the matter of time, a period of percolation, of cases before they are finally submitted for final and ultimate disposition. Now, we have heard a lot about that during the course of our hearings in the Commission, but in particular it related to the transfer jurisdiction rather than the Supreme Court jurisdiction.

If the transfer jurisdiction is eliminated, much of that discussion can be discarded, can it not, inasmuch as it will be for the Supreme Court to say, either by granting the writ and undertaking jurisdiction itself or assigning it to the national court of appeals and they will be the ones who will decide whether or not that time of percolation is sufficient or whether it had reached an area of stagnation rather than percolation. Is that true?

Mr. GRISWOLD. Well, insofar as there is validity in the percolation argument—and I think there's a little, but not nearly as much as has been made of it—these bills will not change the situation a particle because it will remain completely in the control of the Supreme Court as to whether the question should be taken up at all or whether it should be allowed to percolate.

Senator HRUSKA. That's all of the questions I have right now. Senator Scott, what have you for the dean?

Senator SCOTT of Virginia. Mr. Chairman, let me first say I'm real pleased to see Dean Griswold here and all of us are well aware of his devoting his adult life to the law in a variety of capacities. I have great respect for any views that he expresses to the committee.

Dean, it is your feeling that a party to a lawsuit should have the right to be heard before courts at all levels, to take his case all of the way from the trial court to the highest appellate court? Does due process mean that a person is entitled to one trial or does it mean that he's entitled to go—we often hear the common expression, "I'm going to take that all of the way to the Supreme Court"—should he have the right under our system of jurisprudence to take a matter all of the way to the Supreme Court or would substantial justice be done by affording him a fair trial at the trial level?

Could you comment briefly on that? I know we're not talking precisely here, but could you comment briefly on that?

Mr. GRISWOLD. It's perfectly obvious that in a country of 215 million people you cannot have a situation in which every litigant is entitled to the decision of the Supreme Court, of one Supreme Court consisting—let's say for the moment—of not more than nine members, because I think that there is a delusion sometimes in the air here that you can increase the size of the Supreme Court and then have it sit in panels. But you have destroyed the Supreme Court once you have it sit in panels.

And if you were going then to have an en banc of all of the judges sitting, you've added really another tier. And I don't favor that at all. I think very highly of the Supreme Court and I don't think that nine is a magic number. I do think it is a number that experience has shown works out very well.

It's perfectly apparent that nine judges in a country of 215 million people with 100,000 new cases filed every year in the Federal courts, not to mention cases that come up through the State courts, cannot possibly review every case that the litigant wants to have it review.

I don't think it follows from that that there shouldn't ever be review or that it should be so rare that it does not reach cases like the *Cartwright* case where it would be in the public interest and the national interest and in the interest of having a workable administrative legal system, and that it simply isn't possible to have such cases reviewed.

I also think that it is highly undesirable in this great country of ours to have the law of the United States be one thing in New Hampshire and another thing in Idaho and still another thing in Louisiana, which is the situation that you run into repeatedly when final national appellate review is not available.

Now, we cannot have final national appellate review of every legal question that comes up because that isn't possible in a country of 215 million. I think that under these billls we can have it in twice as many cases as we now have it and that that will help a great deal.

Senator SCOTT of Virginia. Well, now, would you feel that if this new court is established that, being a longtime student of the law as you have been, that we'll ever have an exact science of the law——

Mr. GRISWOLD. Oh, of course——

Senator SCOTT of Virginia [continuing]. That we'll ever have it so the Supreme Court and this national court of appeals over the years, that they'll always agree with everything?

Mr. GRISWOLD. Of course not, Senator. But my best guess is that nobody is ever going to reconsider the *Cartwright* case. I think that question has been decided for all times.

Senator SCOTT of Virginia. Well, I heard something on the radio yesterday to the effect that the Department of Justice was considering joining in with the city of Boston in a busing case and we might think that that had been determined, but apparently there are matters that are constantly subject to review and perhaps the distinguishing of cases is not an exact science.

Mr. GRISWOLD. Oh, of course——

Senator SCOTT of Virginia. I mean, personalities change and people change, the decisions change. And I think you would agree, do you not?

Mr. GRISWOLD. I'm not seeking any ultimate finality or any exact science. I'd just like to have something that's a little more stable and certain than what we now have, which I think, if we can only look at it—let's just assume for the moment that we are qualified English lawyers and you come and look at this system and I think you'd be astounded. I think you'd say, "Well, how in the world could they have let themselves drift into that? How unworkable it is."

We've grown up with it; we've become used to it; and we accept it because we recognize all of the pressures that are involved. I'd like to improve it a little. I can't make it perfect and I can't make a scientifically precise legal system, but to me it is quite obvious that we can help it a great deal by doubling the national appellate capacity of the country without impairing the authority of the Supreme Court in any way.

Senator SCOTT of Virginia. I believe that every member of this committee and substantially every lawyer in the country would share your thought that we ought to have more stable decisions. I used to practice with a gentleman a number of years my senior—and a very able lawyer—who in a jocular way, if someone asked him a constitutional question, would say, "Do you have a coin?" And he'd flip the coin because he said he never knew what the Supreme Court was going to decide.

Let me ask you this, sir. I believe I heard it said a few moments ago—and if I'm wrong, perhaps Counsel can correct me—that 65 per-

cent of the cases going to the Supreme Court were cases in which the Government was a party.

Mr. GRISWOLD. I was the one who gave that figure in a response to a question from Senator Hruska. I think I may have been a little high. I think it may be 60 to 65 percent, but 60 to 65 percent of the cases heard on the merits by the Supreme Court are what, in the Solicitor General's Office, are called Government cases—that is, cases in which the United States or some officer or agency of the United States was a party.

Senator SCOTT of Virginia. Now, let me ask you. Is there any reasonable way that the Federal Government—and you would probably be one of, if not the best person to pose that question to—is there any way that the number of cases that the Government takes to the Supreme Court can be reduced?

Mr. GRISWOLD. Well, Senator, I didn't say that the Government took 60 to 65 percent of the cases. I said it was a party and half of them, more or less, are taken by the other side.

Senator SCOTT of Virginia. Well, in any event, is there a way to reduce these cases and there still be substantial justice?

Mr. GRISWOLD. Yes. I think there is a way, Senator, by enacting a bill to establish a National Court of Appeals because a sizable number of these cases could appropriately be heard by a National Court of Appeals.

Senator SCOTT of Virginia. Well, is it necessary in the interest of justice that all of these cases be heard?

Mr. GRISWOLD. Yes, Senator. I think it is necessary and that with greater freedom, a considerable additional number of cases would appropriately be taken for final national appellate review on behalf of the Government.

Senator SCOTT of Virginia. Now, is it true that the Supreme Court does hear a much larger percentage of the writs that are filed by the Government than they do by private parties?

Mr. GRISWOLD. Yes. That's true, but misleading, because the negative selection is made by the Solicitor General and he doesn't file a petition unless he thinks there's a very good chance that the Court will grant it. And I can say that I still have bruises, more or less, all over my body from various agencies of the Government for whom I would not authorize a petition, because I thought that, in the overall interest of the Government, that it was desirable not to file petitions which didn't have a good chance of being granted in order to get the good ones in.

If you file them in every case in which any agency of the Government wants to have it filed, you will end up by having the Government in the same position as other litigants—with 1 out of 10 of its petitions granted. And I think that would not be in the interest of the Government.

Senator SCOTT of Virginia. Well, I'm in agreement with what you're saying, Dean. And certainly the Solicitor General's Office has performed—there's no doubt that they have performed the function that you just indicated. And yet I was searching for a manner short of creating a new court in which we could do substantial justice without the additional court.

Do you feel that there would be a way that political questions or habeas corpus or diversity of citizenship cases could be eliminated or

reduced and thereby let the courts that hear the remainder of the cases on appeal have greater time to dig into these cases a little further?

Do you have any thoughts you would care to share with us on that?

Mr. GRISWOLD. I think a lot of those things should be done, but their effect would be almost completely to reduce pressure on the lower courts. They would not materially affect the pressure on the Supreme Court because the Supreme Court, for the last 30 years, has controlled the pressure on the Supreme Court.

They hear as many cases as they think they can and they don't hear any more. They have increased from 1,150 cases per year within my experience and memory to 4,500 cases per year being taken there, but they still hear 150 cases on the merits.

Senator SCOTT of Virginia. Well, I was really thinking of Baker versus Carr as sort of opening up the gates and it may have been a hard case. Yet, perhaps it did make the courts enter the political arena. And it just seems to me that since that time that the courts have been hearing numerous political cases, even telling the House of Representatives whether it should seat a Member of the House and ruling against the House.

And, to me, that's clearly a political question. I don't know just how we should go about making any changes or, in fact, whether we should make a change. But I'm just soliciting your thoughts with regard to this, Dean.

Mr. GRISWOLD. Well, I can only say that neither of the cases to which you have referred—*Baker* and *Carr* or the case involving a Member of the House—was taken to the Supreme Court by the Solicitor General. *Baker* and *Carr* was a State case and the House had its own counsel in the other case—and the suit was brought by the Representative.

Senator SCOTT of Virginia. I have no further questions. Perhaps counsel does.

Mr. WESTPHAL. Thank you, Senator. I have one brief point, Dean Griswold, before we get to our final witness. I'm kind of interested in what your perception of the crystal ball would be and that is this: given this prospect that by the year 2000 we will have 260 million people in this country and given the reasonably foreseeable increase in the complexities of our social and economic problem, do you feel that there is any real prospect within the next 10 to 24 years that the overall quantum of cases within the jurisdiction of the Federal court system will be effectively reduced?

Mr. GRISWOLD. Mr. Westphal, I wish I knew the answer to that question. I've always been a believer in trying to solve the problems you have now, trying to do it in such a way as not to create unsolvable problems in the future, and to leave the problems of the distant future. After all, the year 2000 is 24 years from now. None of us will be around then, I suspect.

I think there will be able people and I hope that I'll be some place where I can look either down or up at them and see them struggling with the problems which they will have, and hope that they can do as good a job as we do now. I certainly do not foresee any easy solution to the problem of the handling of litigation and the developing of a unified national legal system in the year 2000.

I do see a very difficult problem now and I see before this subcommittee two bills which I think will make substantial contributions to that problem. Therefore, I favor those bills, even though I would make it perfectly plain that I don't think that they provide an ultimate or a permanent solution.

Mr. WESTPHAL. Mr. Griswold, we're notified that your office requests that when you finish your testimony that you call them. I think you are finished and I have no further questions, Mr. Chairman.

Senator HRUSKA. I have no further questions. Off the record.

[Discussion off the record.]

Senator HRUSKA. And thank you so much for appearing. You once more embellished the record of the hearing, just as you did before the Commission on this subject.

Mr. GRISWOLD. Well, it's a privilege, Senator, and I would like to express my great appreciation, and not only to this Subcommittee but to the Commission and particularly to Professor Levin, who I thought did, under the Commission's guidance, a very thorough and able and constructive job.

And I would like to see it bear fruit.

Senator HRUSKA. Thank you, sir.

Our final witness today is Professor Terrance Sandalow of the University of Michigan Law School there.

Professor, we welcome you here. You have a statement, I presume.

Mr. SANDALOW. I have a prepared statement. I will submit it for the record with your permission and try to summarize it.

Senator HRUSKA. That'll be fine. It'll be accepted and inserted in the record and you may proceed.

STATEMENT OF TERRANCE SANDALOW

I appreciate the opportunity to appear before you during your consideration of S. 3423, a bill to establish a National Court of Appeals.

Nearly four years ago, a study group established by the Federal Judicial Center and chaired by Professor Paul Freund initiated what has become an important and wide-ranging discussion concerning the federal court appellate system. The discussion reveals a widespread belief that all is not well in the federal judicial system and that the problem rests, in part, in the appellate courts. Although opinions vary as to the seriousness of the problem—whether it is akin to a low-grade infection or whether a point of crisis has already been reached—there appears to be a consensus that the problem is of sufficient importance to warrant the attention of the Congress, requiring remedies that only Congress can provide.

The centerpiece of most of the proposals for reform is a new National Court of Appeals, ranking midway between the existing courts of appeal and the Supreme Court in the judicial hierarchy. Proponents of a new court are not entirely in accord on the details of the proposal—how the court should be constituted and its jurisdiction defined—but there appears to be general agreement among them that a new court is needed to assist the Supreme Court in maintaining a consistent and uniform body of federal law. Because of the growing caseload of the federal courts and the expanding reach of federal substantive law, it is said, the Supreme Court can no longer perform that function alone.

The most recent proposal to establish a National Court of Appeals is that of the Commission on Revision of the Federal Court Appellate System established by Congress in 1972. If the distinction of its members and of its executive director were not alone adequate reason to pay close and respectful attention to the Committee's recommendation, the quality of its report is surely reason for doing so. We are all indebted to the Commission for an important contribution to a significant and vexing problem.

S. 3423 embodies the recommendations of the Commission, with two modifications I believe to be highly desirable, though I shall not pause to discuss my reasons in this statement. With these modifications, the Commission's proposal seems to me the most attractive of the various proposals of this sort that have been put forth in recent years. Not the least of its virtues is its simplicity. Once established, the court would have a stable membership and a determinate jurisdiction, both of which are likely to be important if the court is not to be a continuing source of controversy. The proposal also retains, in all but a few cases, the present two-step appellate process for cases commenced in a federal court and avoids adding any additional steps for cases commenced in the state courts. The advantages of not further protracting the appellate process are too obvious to warrant discussion. Of course, the success of the plan in this respect would depend upon the restraint shown by the Supreme Court in declining further review of cases which it had referred to the National Court of Appeals, but it seems reasonable to suppose that—having itself made the decision to refer—the Supreme Court would, in all but exceptional cases, be reluctant to grant further review.

If Congress is to create a National Court of Appeals, therefore, S. 3423 is, in my judgment, a desirable way of doing so. My reservations about the bill go not to the particular proposal it embodies, but to the question whether an adequate case has yet been made for establishing the new court. The impetus for the proposal is the belief that the Supreme Court is no longer able to provide sufficient direction for the establishment of a coherent body of federal law. Increasingly, the Court is unable to resolve conflict among the circuits. The consequence is not merely that federal law is held to have different meanings in different parts of the country, resulting at times in an unseemly forum shopping, but that both private interests and government lack adequate guidance concerning their rights and responsibilities under the law. In expressing reservation about the Commission's proposal, I do not mean to depreciate the seriousness of these problems. But there are other considerations to which I am not sure that its report gives adequate weight.

First, S. 3423, if enacted, would represent the most significant structural change in the federal judicial system since enactment of the Evarts Act in 1891. It need hardly be emphasized that a change of such importance ought not to be made without the most careful study and deliberation. Experience demonstrates that changes in the structure of the federal judiciary are not easily accomplished and that, once adopted, they are likely to endure for a substantial period.

It is troublesome, therefore, that the Commission's proposal to establish a National Court of Appeals was not preceded by the thorough study of alternatives which a step of such magnitude would seem to require. I hasten to say that I do not intend any criticism of the Commission. In creating the Commission, Congress instructed it not to consider either the jurisdiction of the district courts or substantive law. Witness after witness at hearings held by the Commission objected to that limitation. Their reasons are obvious. The appellate courts are only a part of a longer system. Their problems cannot realistically be considered in isolation from the problems of the federal judiciary in general.

Thus, as Judge Henry Friendly, among others, has emphasized, the problem to which the Commission's proposal is addressed—uncertainty in federal law—might be alleviated by a substantial reduction in the jurisdiction of the district courts and a consequent reduction in the workload of the existing courts of appeal. Further mitigation might be accomplished by reducing or eliminating the mandatory jurisdiction of the Supreme Court, thereby enabling it to review a larger number of cases in which the courts of appeal have come into conflict. No doubt, any reduction in the jurisdiction of the district courts or in the mandatory jurisdiction of the Supreme Court involves other considerations as well and I do not mean at this time to endorse any such steps, much less to suggest that they be taken merely for the purpose of forestalling the need for creation of a National Court of Appeals. My only point is that the question whether such a court should be created ought not to be answered in isolation from other questions concerning the business of the federal judiciary.

My second reservation about the wisdom of S. 3423 is the potential effect of a National Court of Appeals upon the Supreme Court. Although prediction about a procedure with which we have no experience is hazardous, it seems reasonable to suppose that the Supreme Court is likely to use the reference procedure primarily for non-constitutional cases, including a percentage of those over which the Court would otherwise feel compelled to take jurisdiction. My con-

cern is that the consequence would be to strengthen the tendency toward converting the Supreme Court to a constitutional court. Perhaps it is too late to call that tendency into question; as the Commission observes, between one-half and two-thirds of the Court's decisions now involve constitutional questions. Whether or not the trend can be reversed, however, there are many (among whom I count myself) who believe that it is unwise to give it further impetus. Some argue that the quality of the Court's consideration of constitutional issues is likely to suffer if the Court is engaged exclusively or almost exclusively in the consideration of constitutional issues—issues that are typically less structured than non-constitutional issues and in the decision of which craft tradition appears to play a smaller role. The Court's continued involvement in traditional lawyer's work is, on this view, important to maintaining in the Court a respect for those traditions of the lawyer's craft whose existence is essential if constitutional issues are to continue to be thought of as legal issues.

The more important concern, in my judgment, is that *de facto* conversion of the Supreme Court into a constitutional court will continue and perhaps accelerate the "constitutionalization" of our law that has occurred over the past two decades. My point goes beyond agreement or disagreement with the results of particular cases. One may believe, as I do, that many of the Court's decisions over the period were responsive to important problems confronting the nation and yet believe that the tendency to constitutionalize the law is undesirable. When legal doctrines are rested upon the constitution, there is both a centralization of decision-making that inhibits experimentation which might provide useful experience and a transfer of power to the courts from more politically responsible institutions of government. Neither consequence seems to me to be desirable, though obviously there are at times only less desirable alternatives. The extent to which establishment of a National Court of Appeals would strengthen these tendencies in our law is, of course, only a matter of conjecture. No doubt, there are more important influences at work. But it seems worth considering whether establishment of such a court might plausibly be thought to contribute to the constitutionalization of the law and, if it would, whether that price is too high.

My final concern is whether the Commission's report does not weigh too heavily the desirability of achieving an authoritative resolution of difficult issues of federal law. A judgment about how serious a problem is posed by conflicting decisions or conflicting approaches among the circuits requires a command of far more substantive federal law than I claim. Review of the material collected in the appendices to the report suggests that there are areas of the law in which the problem does seem to be serious. But speedy and authoritative resolution of difficult issues is achieved only at a price: "There are," as the report at one point acknowledges, "some issues as to which 'successive consideration by several courts, each reevaluating and building upon the preceding decision' will improve the quality of successive adjudications." There is no problem if it is possible at the outset to identify those situations in which there will be "gain from maturation of thought from letting the matter simmer for awhile" and those in which that gain "is not nearly as great as the harm which comes from years of uncertainty." Unfortunately, I suspect that the category into which a problem falls will more frequently be obvious in retrospect than in prospect.

My impression is that the Commission's report was dominantly influenced by the experience in the field of federal taxation. At least the appendices suggest that the need for speedy, authoritative resolution of issues is thought to be most acute in that area. There are, however, several factors which indicate that such a resolution may be more appropriate in that area than in many others. Initially, it seems especially inequitable that taxpayers in different parts of the country should be subject to different rules. Second, the need of taxpayers for information that will permit them to plan suggests that it will often be true that it is more important that the rule be known than that it be right. Third, the Congress maintains a more active supervision of tax law than it does of most other areas. In consequence, an unwise decision is more likely to be overturned by legislation. In other areas of law, where Congress finds it more difficult to maintain effective oversight, it may well be more important that courts come to the right conclusion. In these areas, the opportunity for a problem to "simmer for awhile" may contribute materially to achieving such a result.

Precisely where this analysis leads is, I admit, not clear. The mere existence of the National Court of Appeals need not prevent successive consideration of the same issue by different regional courts of appeal. If the National Court

exercises its jurisdiction wisely, authoritative decisions can be deferred until experience has yielded whatever benefits it has to offer. As I have indicated, however, I am not confident that the necessary judgment can often be made in advance rather than in retrospect. In addition, there seems to me to be some danger that the court, having been called into existence by a report which places as much emphasis upon the need for speedy and authoritative resolution of issues as does the Commission's report, will take that to be its primary responsibility. Whether the risk of premature judgment is outweighed by the need for more central guidance over federal law than now exists depends, ultimately, upon a judgment as to how serious are the problems created by the degree of guidance which now exists. Although I make no pretense of a sufficient command of federal substantive law for such a judgment, a review of the materials collected in the appendices leaves me unconvinced that a case has been made out, except in connection with federal tax law. Taken together with the reservations expressed earlier concerning the possible impact of the proposal upon the Supreme Court and the failure to consider alternative solutions, that conclusion leads me not necessarily to oppose the creation of a National Court of Appeals, but to doubt that the wisdom of doing so has been established.

## STATEMENT OF PROF. TERRANCE SANDALOW, UNIVERSITY OF MICHIGAN LAW SCHOOL

Mr. SANDALOW. I appreciate the opportunity to appear before you during your consideration of S. 3423, a bill to establish a National Court of Appeals. During the past 4 years, there have been various proposals to establish a National Court of Appeals, ranking midway between the existing courts of appeal and the Supreme Court in the judicial hierarchy.

The most recent of these, of course, is the proposal of the Commission on the Revision of the Federal Court Appellate System established by Congress in 1972. If the distinction of its members and of its Executive Director were not alone adequate reason to pay close and respectful attention to the recommendations of that Commission, the quality of its report is surely reason for doing so. We are all indebted to the Commission for its important contribution to a significant and vexing problem.

S. 3423 embodies the recommendations of the Commission with two important modifications which have already been noted here. I believe those two modifications to be highly desirable, though I shall not pause to discuss my reasons for believing that in this statement.

With these modifications, the proposal seems to me the most attractive of the various proposals of this sort that have been put forth in recent years. Not the least of its virtues is its simplicity. Once established, the National Court of Appeals would have a stable membership and a determinate jurisdiction, both of which are likely to be important if the court is not to be a continuing source of controversy and if it is to develop a sense of itself as an institution.

Now, there are other reasons which I detail in my statement as to why I believe that S. 3423 is desirable, if Congress is to establish a National Court of Appeals. I would prefer to turn to my reservations about whether it would be desirable for Congress to do so.

My reservations about the bill go not to the particular proposal made by the Commission, but to the question of whether an adequate case has yet been made for establishing the new court. The impetus for the proposal, as I understand it, is the belief that the Supreme Court is no longer able to provide sufficient direction for the estab-

lishment of a coherent body of Federal law. Increasingly, the Court is unable to resolve conflict among the circuits. The consequence is not merely that Federal law is held to have different meanings in different parts of the country, resulting at times in an unseemly forum shopping, but that both private interests and Government lack adequate guidance concerning their rights and responsibilities under the law.

In expressing reservations about the Commission's proposal, I do not mean to depreciate the seriousness of these problems, but there are other considerations to which I am not sure that the Commission, in its report, gives adequate weight.

First, S. 3423, if enacted, would represent the most significant structural change in the Federal judicial system since the enactment of the Evarts Act in 1891. It need hardly be emphasized that a change of such importance ought not to be made without the most careful study and deliberation.

Experience demonstrates that changes in the structure of the Federal judiciary are not easily accomplished and, that once adopted, they are likely to endure for a substantial period.

It is troublesome, therefore, that the Commission's proposal to establish a national court of appeals was not preceded by a thorough study of alternatives which a step of such magnitude would seem to require. I hasten to say that I do not intend any criticism of the Commission.

In creating the Commission, Congress instructed it not to consider either the jurisdiction of the district courts or substantive law. Witness after witness before the Commission objected to that limitation. Their reasons for doing so are obvious.

The appellate courts are only a part of a larger judicial system. Their problems cannot realistically be considered in isolation from the problems of the Federal judiciary in general. Thus, as Judge Henry Friendly, among others, has emphasized, the problem to which the Commission's proposal is addressed—uncertainty in Federal law—might be alleviated by a substantial reduction in the jurisdiction of the district courts and a consequent reduction in the workload of the existing courts of appeal.

Further mitigation might be accomplished by reducing or eliminating the mandatory jurisdiction of the Supreme Court, thereby enabling it to review a larger number of cases in which the courts of appeal have come into conflict.

No doubt, any reduction in the jurisdiction of the district courts or in the mandatory jurisdiction of the Supreme Court involves other considerations as well. And I do not mean at this time to endorse any such steps, much less to suggest that they be taken merely for the purpose of forestalling the need for creation of a national court of appeals. My only point is that the question of whether such a court should be created ought not to be answered in isolation from other questions concerning the business of the Federal judiciary.

My second reservation about the wisdom of S. 3423 is the potential effect of the national court of appeals upon the Supreme Court. Although prediction about a procedure with which we have no experience is hazardous, it seems reasonable to suppose—most of the witnesses before the Commission, I believe, contemplated—that the

Supreme Court would be likely to use the reference procedure primarily for nonconstitutional cases, including a percentage of those over which the Court would otherwise feel compelled to take jurisdiction.

My concern is that the consequence would be to strengthen the tendency toward converting the Supreme Court to a constitutional court. Perhaps it is too late to call that tendency into question, as the Commission observes—it has been commented upon already this morning—between one-half and two-thirds of the Court's decisions now involve constitutional questions.

Whether or not the trend can be reversed, however, there are many, among whom I count myself, who believe that it is unwise to give it further impetus. It is interesting to note that Dean Griswold suggested that the creation of a national court of appeals might give further impetus to enlarging the number of constitutional cases to which the Supreme Court addresses itself.

Some argue that the quality of the Court's consideration of constitutional issues—Supreme Court, I'm now referring to—is likely to suffer if that Court is engaged exclusively or almost exclusively in the consideration of constitutional issues, issues that are typically less structured than nonconstitutional issues, and in the decision of which craft tradition appears to play a smaller role.

The Court's continued involvement in traditional lawyers' work is, on this view, important to maintaining in the court a respect for those traditions of the lawyer's craft whose existence is essential if constitutional issues are to continue to be thought of as legal issues.

The more important concern, in my judgment, is that de facto conversion of the Supreme Court into a constitutional court will continue and perhaps accelerate the constitutionalization of our law that has occurred over the past two decades.

My point goes beyond agreement or disagreement with particular cases. One may believe, as I do, that many of the Court's decisions over the period were responsive to important problems confronting the Nation, and yet believe that the tendency to constitutionalize the law is undesirable. When legal doctrines are rested upon the Constitution, there is both a centralization of decisionmaking that inhibits experimentation and a transfer of power to the courts from more politically responsible institutions of government.

Neither consequence seems to me desirable. The extent to which establishment of a national court of appeals would strengthen these tendencies in our law is only a matter of conjecture. No doubt, there are more important influences at work. But it seems worth considering whether establishment of such a court might plausibly be thought to contribute to the constitutionalization of the law and, if it would, whether that price is too high.

My final concern is whether the Commission's report does not weigh too heavily the desirabiilty of achieving an authoritative resolution of difficult issues of Federal law. A judgment about how serious a problem is posed by conflicting decisions or conflicting approaches among the circuits requires command of far more substantive Federal law than I claim.

Review of the material collected in the appendices to the Commission's report suggests that there are areas of the law in which the

problem does seem to be serious. But speedy and authoritative resolution of difficult issues is achieved only at a price. There are, as the report acknowledges at one point, some issues as to which successive consideration by several courts, each reevaluating and building upon the preceding decisions, will improve the quality of successive adjudications.

There is no problem, if it is possible at the outset to identify those situations—that is, the situations in which there will be gain from the maturation of thought from letting the matter simmer for awhile—and those in which the gain is not nearly as great as the harm that comes from years of uncertainty. My own guess, however, is that the category into which a problem falls will more frequently be obvious in retrospect than in prospect.

My impression is that the Commission's report is dominantly influenced by the experience in the field of Federal taxation. At least the appendices suggest that the need for speedy, authoritative resolution of issues is thought to be most acute in that area. There are, however, several reasons why resolution, quick resolution, may be more appropriate in that area than in others.

Initially, it seems especially inequitable that taxpayers in different parts of the country should be subject to different rules. Second, the need of taxpayers for information that will permit them to plan suggests that it will often be true that it is more important that the rule be known than that it be right. Third, the Congress maintains a more active supervision of tax law than it does of most other areas. In consequence, an unwise decision is more likely to be overturned by legislation. In other areas of the law, where Congress finds it more difficult to maintain effective oversight, it will often be more important that courts come to the right conclusion. In these areas, the opportunity for the problem to simmer for awhile may contribute materially to achieving such a result.

Precisely where this analysis leads is, I admit, not entirely clear. The mere existence of the national court of appeals need not prevent successive consideration of the same issue by regional courts of appeal. If the national court exercises its jurisdiction wisely, authoritative decisions can be deferred until experience has yielded whatever benefits it has to offer. As I have indicated, however, I am not confident that the necessary judgment can often be made in advance rather than in retrospect.

In addition, there seems to be some danger that the court, having been called into existence by a report that places as much emphasis on the need for speedy and authoritative resolution of issues as does the Commission's report, will take that to be its primary responsibility. Whether the risk of premature judgment is outweighed by the need for more central guidance over Federal law than now exists depends ultimately upon a judgment of how serious are the problems created in the current situation.

Although I make no pretense of a sufficient command of Federal substantive law for such a judgment, a review of the materials collected in the appendices leaves me unconvinced that a case has been made out, except in connection with Federal tax law.

Taken together with the reservations expressed earlier concerning the possible impact of the proposal upon the Supreme Court and the

inability of the Commission to consider alternative solutions, that conclusion leads me not necessarily to oppose the creation of a national court of appeals, but to doubt that the wisdom of doing so has been established.

Thank you.

Senator HRUSKA. Well, thank you, Professor. That's a well-thought-out paper and it raises many very fine points. I direct my attention now to the material that you discuss on page six of the statement—that your concern is that the consequence will be to strengthen the tendency towards converting the Supreme Court to a constitutional court, namely, a constitutionalization thereof.

We have now reached a point where, as has been pointed out earlier in the hearings, instead of some 40 percent being constitutional questions or 35 percent, they are now 60 or 65 or maybe more. Wasn't that change in percentage, that inverse process, wasn't it accomplished by the Court on its own? And if so, what is there to prevent it from continuing whether we adopt the national court or not, except for this one factor—that the Supreme Court would have the option of resorting to the National Court of Appeals when it saw fit and wise to do so?

Mr. SANDALOW. Senator, I, of course, agree with what I take to be implicit in your statement, that this tendency of the Court to become a constitutional court is responsive to larger forces than the creation of the national court of appeals. My hope is that the continued pressure of nonconstitutional cases on the Supreme Court would prevent that tendency from being pushed even further than it has at the present time, and perhaps that it might be drawn back.

The great danger, as I see it, is that the creation of a national court of appeals would free the Supreme Court to relieve itself of all cases involving other than constitutional issues or virtually all cases and, in consequence, to convert even more of our law into constitutional law.

Senator HRUSKA. Well, of course, we can't control the Supreme Court in that regard. They're an independent branch of the Government. They have their power directly from the Constitution and so if they want to do that, they can. If they don't want to, they don't have to. They could go in the other direction.

And that would be irrespective of the adoption of a national court of appeals.

Mr. SANDALOW. Except, Senator, that one may hope that the sense of responsibility of the Justices, the sense of their responsibility toward maintaining a coherent, uniform body of Federal nonconstitutional law, will lead them to take a certain—one may hope—a high percentage of cases involving nonconstitutional issues, so long as they do not have another alternative—that is, the alternative of the national court of appeals.

Senator HRUSKA. Oh, I see. Now, then, you do get into the subject of percolation. In your testimony you refer to those issues as to which successive consideration by several courts, each reevaluating and building upon the preceding decision, will improve the quality of successive adjudication. It's that idea of simmering for awhile. What better authority is there than the Supreme Court to decide whether or not a given situation has simmered long enough or whether it has launched forth into that vast sea of stagnation which doesn't move at

all? What better authority is there? Shall we say that we know better or maybe that the circuit courts know better?

Mr. SANDALOW. Senator, if I can refer briefly to the statistics in the Commission's report: at the outside, as I understand it, the Commission now believes that perhaps there are 70 cases a year in which there have been conflicts and in which the Supreme Court has denied certiorari. Other analyses suggest a somewhat lower figure of perhaps 35 or 40. So we may take a figure of between 40 or 70 cases in which there are now unresolved conflicts that might involve cases to be referred to the national court of appeals.

On the assumption that the national court of appeals would be kept as busy as the Supreme Court, that leaves somewhere between 80 and 110 other cases in which there are not clear conflicts, but in which the Supreme Court would presumably feel some responsibility—or the national court of appeals would feel some responsibility—to keep that court busy.

And the question is: How is it going to be kept busy? I take it that the answer is by transferring to it a body of cases in which there is not yet a conflict, but in which it is thought desirable that there be a speedy determination prior to a conflict. It does not seem to me that the need for a jurisdiction of that sort has yet been demonstrated.

Senator HRUSKA. Well, I see nothing—maybe you can call my attention to something that would indicate that—but I see nothing in the bill which makes a cardinal point of expendition of cases. I see nothing in there that says, "Dispatch, above all things, is to be considered prime." After all, we make available by this bill another court and the Supreme Court will decide: "Will we get into this or won't we?" I see nothing in there that would be the equivalent of the speedy trial bill that we're trying to put in motion. There is nothing here that makes the essence of the plan expeditious or speedy in nature is there; is there?

Mr. SANDALOW. Not in the bill.

Senator HRUSKA. Not in the bill?

Mr. SANDALOW. But one would expect that the members of the Court would be influenced by all of the considerations which led to the enactment of the bill and that point has been much stressed in the course of the Commission's deliberations, and indeed, in your proceedings today.

Senator HRUSKA. Well, I think we should accord them a goodly degree of good faith and intelligence and intellect. And even if we didn't have this background—which they might not read and might not be governed by—might they not seize on one fashion or proceeding or another? And that's true of all of the courts; isn't it? That's true of all of our courts.

And if we find in the development of that court that they are pursuing a wrong direction or a wrong tangent, the process of legislation, we hope, will continue to function and they can be called into account, because they are subject to the creation by the Congress and subject, of course, to modification by the Congress; aren't they?

Mr. SANDALOW. Oh, yes. Of course, my crystal ball is not very good and I merely point out what I think are some risks. So I'm in no position to guarantee that that's what will happen.

Senator HRUSKA. Well, again, I say that it's a very splendid statement and calls attention to many fine points. Mr. Westphal?

Mr. WESTPHAL. Just a short point, if I might, Senator. Mr. Sandalow, I must apologize. I don't know what the subjects are that you teach at Michigan.

Mr. SANDALOW. Federal jurisdiction, constitutional law.

Mr. WESTPHAL. Talking about the risks that may be inherent in the passage of a bill of this kind, it seems to me that the committee is going to have to—and the entire Congress, of course—is going to have to consider the risks if a bill of this kind is not adopted. I would call your attention to just the fundamental statistics of the problem that we're talking about. I was looking through the Commission's report to see if I could pin down the exact statistics on the number of paid cases filed in the Supreme Court some 20 years ago, or some 30 years ago, and the number of paid cases filed today. I was unable to put my finger on that statistic. There are also a number of IFP cases that are filed and they have increased tremendously. But just in the area of the paid cases, my recollection of those statistics is that they have doubled over this period of time that we've been talking about.

And yet, as Dean Griswold pointed out in his testimony here this morning, and again in his testimony before the Commission, the number of cases heard by the Supreme Court on the merits have remained the same and, as a result, he pointed out that while back in 1951 the Supreme Court was able to hear on the merits 18 percent of the paid cases, that in 1975, it was only able to hear about 6 percent of the paid cases.

And then he poses the question: "What become of the other 12 percent?" Now, doesn't just the sheer numbers of this problem present a certain risk that we've got to take cognizance of in considering this legislation?

Mr. SANDALOW. Mr. Westphal, I could not agree more that there is a serious problem in the appellate system. My difficulty with this bill, in part—and I've not testified to that today, but I dealt with it to some extent with the Commission—is that this bill doesn't really deal with what I conceive to be the main problem. The main problem is that the Federal courts, as a whole, are overloaded for the staff that is available, that is, for the judges that are available.

What seems to me to be necessary is a serious consideration by the Congress of whether the workload of the Federal courts ought not to be drastically curtailed.

Mr. WESTPHAL. Well, we could meet that problem in one of two ways. You either increase the number of district court judges and circuit court judges in sufficient number to handle the workload that is in the courts or you take the Henry Friendly route and try to cut down that jurisdiction. Now, this subcommittee has held extensive hearings on both of these possibilities. But as you try to wrestle with those alternatives, you come up against the fact that the function of government in our democratic system seems to be one whereby the people of the country expect the government to provide remedies for some of the social and economic problems of the country.

Given that nature of the governmental process in this country, under our way of doing things, it seems to me that it is inevitable that in

total quantity the amount of judicial business which would be available for the Federal courts in the future—even though we might take FELA cases and put them under workmen's comp and the same with the Jones Act and maritime matters and maybe we can do something with diversity which would shift some of those cases or all of them back onto the State courts—that in the long run the number of cases to be adjudicated in the Federal courts is not likely to decrease to the point where the problem that we've been talking about today will disappear.

We are still going to have to face either the same problem—that is, of what happened to that other 12 percent—or we're going to have to have some kind of structural changes that you have reservations about. I think members of the Commission have those reservations. I'm sure members of this subcommittee will have those reservations. But the alternatives are very limited and each of them involves a certain kind of a risk; does it not?

Mr. SANDALOW. On this point, Mr. Westphal, I can only say that I would feel more comfortable if a proposal of this sort were to be recommended by the subcommittee after there had been a full consideration of the alternatives that you're discussing. My criticism at this point is simply that the Commission was precluded from even thinking about these other alternatives as a potential solution to the problem. Now, you may be quite right in your prediction of the future, but that is a matter that requires some study and thought.

Mr. WESTPHAL. Just one last thought on that. It wasn't so much that the Commission was precluded by the Congress from considering jurisdiction, for example, or considering the problems specifically of the Supreme Court. That limitation occurred in the resolution creating the Commission for this reason: That this very subcommittee had just spent about 20 days of hearings over a year and a half on the ALI proposal for the revision of the division of jurisdiction between Federal and State courts. And we went into the complete subject matter of the jurisdiction of the Federal courts.

The subcommittee went into the problems of the district courts and the circuit courts, both with reference to the number of judges and the structure and things of that kind. And, mind you, this Commission was charged with the duty of studying these matters and reporting back to the Congress and the Congress felt that since it was in the process of holding extensive hearings on these specific subjects that there was no need for that process to be duplicated, nor to make an additional recommendation.

It was not that that was to be excluded. And I know that in the discussions of the Commission, many, many alternatives, many of which are discussed in here, were considered by the staff.

Senator HRUSKA. Thank you very much, Professor Sandalow, for coming. We stand in adjournment until 10 o'clock tomorrow morning in this same room.

[Whereupon, at 12:55 p.m., the subcommittee adjourned to reconvene 10 a.m., May 20, 1976.]

# THE NATIONAL COURT OF APPEALS ACT

THURSDAY, MAY 20, 1976

U.S. SENATE,
SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL MACHINERY,
OF THE COMMITTEE ON THE JUDICIARY,
*Washington, D.C.*

The subcommittee met, pursuant to notice, at 10 a.m., in room 457, Russell Senate Office Building, Senator Quentin N. Burdick, chairman, presiding.

Present: Senators Burdick, and Hruska.

Also present: William P. Westphal, chief counsel; and Kathryn M. Coulter, chief clerk.

Senator BURDICK. This is our second day of hearings on legislation to create a national court of appeals. The subcommittee is considering S. 2762 and S. 3423. At our prior hearing, I gave a brief analysis of the differences between the two bills.

Without further ado, the Chair is pleased to recognize Hon. Arthur J. Goldberg, who has had a distinguished career as a lawyer, Secretary of Labor, Associate Justice of the Supreme Court, and as Ambassador to the United Nations.

Welcome to the committee, Justice Goldberg.

## STATEMENT OF HON. ARTHUR J. GOLDBERG

Justice GOLDBERG. Thank you very much, Mr. Chairman and Senator Hruska. I have a prepared statement, Mr. Chairman, which in accordance with the request of the committee, I shall ask to be included into the record.

Senator BURDICK. The entire statement will be made part of the record without objection.

[The prepared statement of Justice Arthur J. Goldberg in full follows:]

STATEMENT OF ARTHUR J. GOLDBERG

I appear in response to the invitation of this distinguished Committee to state my views regarding the recommendations of the Commission on Revision of the Federal Court Appellate System embodied in S. 2762.

This distinguished Commission heard testimony, sponsored studies, and, on June 20, 1975, submitted its report and recommendations to Congress for change in the structure and internal procedures of the Federal Appellate System. In my testimony this morning, I shall not deal with the part of the report of the Commission dealing with the internal procedures of the existing Court of Appeals. I shall confine myself to the Commission's recommendations relating to the Supreme Court.

The Commission recommends that Congress establish a National Court of Appeals, consisting of seven Article III judges appointed by the President with the advice and consent of the Senate.

The National Court of Appeals would have jurisdiction to screen or hear cases (a) referred to it by the Supreme Court (reference jurisdiction), or (b) transferred to it from the regional Courts of Appeals, the Court of Claims and the Court of Customs and Patents Appeal (transfer jurisdiction).

Reference jurisdiction. With respect to any case before it on petition for certiorari, the Supreme Court would be authorized:

(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.

Transfer jurisdiction. If a case filed in a Court of Appeals, the Court of Claims or the Court of Customs and Patent Appeals is one in which an immediate decision by the National Court of Appeals is in the public interest, it may 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 the federal courts have reached inconsistent determinations with respect to it; or

(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 any definitive determination of that rule by the National Court of Appeals outweigh and 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.

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.

Among sitting justices, the recommendations of the Commission have, in the main, received the support of the Chief Justice of the United States, Mr. Justice White, Mr. Justice Blackmun, Mr. Justice Powell and Mr. Justice Rehnquist. Mr. Justice Brennan, Mr. Justice Stewart, and Mr. Justice Marshall have, by and large, opposed the recommendations of the Commission.

Among former justices, Chief Justice Warren and Mr. Justice Black, before their demise, and Mr. Justice Douglas and I have voiced opposition to the Commission's recommendations relating to the creation of the proposed National Court of Appeals.

Almost everyone who sits or who has sat on the Supreme Court has indicated agreement that three judge courts and direct appeals in their cases to the Supreme Court should be abolished and that diversity jurisdiction also should be terminated.

The underlying rationale of the Commission's report is that the Court is overburdened and as a consequence is unable adequately to deal with transcendant constitutional issues and resolve conflicts between the circuits and determine authoritively and efficiently National Law.

Let me first deal with the question of the "staggering burden" on Supreme Court Justices.

During my tenure, the Court's case load was not as heavy as it is today; filing has increased from 2,343 during the 1962 term to approximately 4,000 during the 1974 term. It is apparent that the number of filed cases that the Court must screen has risen dramatically. But I am of the view that certiorari petition screening, though highly important, represents one of the less time-consuming aspects of a justice's work. The vast majority of certiorari petitions raises no significant legal issue and, under existing legislation, the Court has discretion to deny petitions without hearing or formal opinions. Indeed, an astonishing number of filed cases present questions that a third-year law student can immediately recognize as inappropriate for the Supreme Court.

The more historically important and time-consuming aspect of a justice's work—the hearing and determination of cases on the merits—has not become correspondingly more burdensome over the years. The number of decided cases

has remained relatively constant, averaging about 150 annually during recent times.

I frankly do not see how the recommendations of the Commission would diminish the work load of the Supreme Court. Rather it seems to me that were this recommended procedure to be adopted the work load of the Supreme Court would be increased.

The Supreme Court would be required to undertake review of certiorari cases twice: first, on the original application for certiorari and subsequently after the National Court of Appeals decides these cases on the merits or by denial of review.

I assume that the Commission is hopeful that the Supreme Court would feel that the second look need not require the same amount of time and additional work that the first look would entail. But my experience teaches that some or even all of the Supreme Court Justices would conclude that a second look of about the same kind as the first probably would be necessary in fairness to the litigants and in discharge of the Court's responsibility. And it seems to me unlikely that the Supreme Court by rule would dispense with the first look in particular cases or in groups of cases.

A concept implicit in the Commission's referral proposal is that the Supreme Court should concern itself primarily with Constitutional issues and that the National Court of Appeals should deal with other important issues of National Law and would resolve conflicts between the regional circuits.

Supreme Court Justices are interested in various areas of the law and rightly so. Questions of statutory interpretation are illustrative of the scope of appropriate exercises by the Supreme Court of its jurisdiction. I doubt very much whether the proposed procedure will materially alter the decision making process with respect to certiorari application of these kinds of cases by the Court.

I further adhere to the view that resolving conflicts between the circuits and therefore necessarily overruling a particular Court of Appeals is a sensitive process even when performed by the Supreme Court. To vest this function in a court, however distinguished but of lesser stature than the Supreme Court would inevitably create tension in the appellate system. Further, the Supreme Court often rightly delays resolution of a conflict situation, until the problem is ripe for adjudication.

In summary, it is my belief that the recommendations of the Commission would not alleviate the work load of the Supreme Court but would add to it. Despite the disclaimer of the Commission, its recommendations would create a "fourth tier" in our Federal judicial system, leading to even greater delays and greater expense than now prevails.

The proposed transfer jurisdiction for the National Court of Appeals likewise seems to me unrealistic. I do not conceive that regional courts of appeal would readily yield their jurisdiction, except to the Supreme Court.

I note that in S. 3423, introduced by Senator Hruska, two of the proposals of the Commission embodied in S. 2762 have been either eliminated or changed. The proposed transfer jurisdiction has been eliminated. Senator Hruska correctly states in his explanatory statement relating to this proposal that it has aroused intense and widespread dissent. My own discussions with various judges of the Courts of Appeal and others confirm this statement by Senator Hruska. It is my opinion that elimination of transfer jurisdiction in S. 3424 is well advised.

The second change from the Commission's Report is in the method of selecting judges for the National Court of Appeals. Here, too, this change would seem to me to be indicated.

The Commission obviously hopes that in the reference jurisdiction the Supreme Court would refuse to review, except in the most summary fashion, decisions and actions of the National Court of Appeals.

I have indicated my doubts that the Supreme Court would act in this manner. But if it did, I am profoundly convinced that grave injury would be done to the great concept engraved at the very entrance of the noble edifice which houses the Court: Equal Justice Under Law.

It is perhaps the greatest virtue of the Supreme Court, as it now functions, that it serves as a guarantee to all citizens of whatever estate, race or color, that our highest court is open for consideration of their claim that equal and relevant justice under the Constitution is being denied them.

I believe that to create a National Court of Appeals would be a grave mistake. The Commission's proposal, if implemented according to its intent, would deny to Americans their historic right to take any case raising substantial constitutional questions or significant matters of National Law to the highest court in the land for sole and final resolution by the Supreme Court.

I profoundly believe that the Supreme Court as it now functions is discharging its great responsibilities under the Constitution as the ultimate guardian of our liberties. Let us leave it so.

Justice GOLDBERG. I shall attempt briefly to summarize its contents.

I have had the pleasure of appearing before the distinguished Commission and as you said in your statement, there are now before the committee S. 2762 and S. 3423. What I have done in preparing for those hearings is to summarize the differences between the two bills and to state my own views about each bill.

Essentially, the differences are the elimination by S. 3423, of the transfer jurisdiction and changes in the method of selection of new judges.

In my brief written statement, I have dealt more fully with the recommendation of the Commission but in this oral statement perhaps it would be most helpful to the committee if I dealt with S. 3423. I appeared before the Commission expressing concern in regard to the recommendations relating to the Supreme Court. I shall not deal in my testimony with recommendations relating to the court of appeals.

Everyone agrees, for example, that three-judge courts serve no purpose at the present time. Direct appeal to the Supreme Court in matters that a three-judge court now decides should go through the normal process of our judicial proceedings—to the courts of appeals and then to the Supreme Court. In my own experience in three-judge court cases, I found an inordinate amount of time spent both by lower courts and by the Supreme Court in determining what case is a three-judge court case and what case is not.

Senator BURDICK. Justice Goldberg, at that point, I was with some lawyers last night and, as you know, the Senate passed the three-judge court bill several times. According to the House Members, they indicated that they want to make an exception for apportionment cases. Would you have any objection to that?

Justice GOLDBERG. I would think, yes. I would adopt as a general principle that all cases should be heard in the normal course, because even in reapportionment cases, the lawyer has the right to go to the Supreme Court and argue that because of the importance of the reapportionment situation and because of time factors, the Supreme Court ought to skip the court of appeals and hear a reapportionment case.

The difficulty, Mr. Chairman, as I have said, is the intricacies of deciding whether or not a three-judge court case fits the prescription laid down by Congress and even by the Supreme Court itself. I can say from my personal experience of three years that an inordinate amount of time is spent in trying to draw the fine lines that the precedents of the Supreme Court have established for such cases.

I also would believe that it would be a very good reform to eliminate the distinction between appeals and petitions for certiorari. There too the line is a very hazy one.

And too, there is a very legitimate protest at the Bar and by the public when the Supreme Court acts, as it has done and has been done recently in making a summary disposition of an appeal.

An appeal is supposed to be a decision on the merits. A summary disposition is not consistent with a decision on the merits. If this were to be changed, then all cases would be considered by certiorari and be subject to the same rule that a denial is not a precedent but represents the exercise of the Court's discretion that certain cases ought not to be reviewed. It is unsatisfactory to have an important case which goes to the Court by appeal decided by a summary order.

And while the Court has intimated that such a disposition does not carry with it the weight of decided cases, there still is a body of precedent that it is supposed to be a decision on the merits.

Now, Mr. Chairman and Senator Hruska and members of the staff, I yield to no one my concern that the Supreme Court should be enabled to perform its great functions. It is the ultimate interpreter of the Constitution and also the body that establishes national law within the area of Federal competence. And if the time has arrived that the present procedures do not permit the Court adequately to perform these two functions, then changes ought to be made.

It has been my feeling that that time has not yet arrived. But, I must immediately add a personal caveat. After all, when I sat on the Court the caseload of the Court was not what the caseload is today. In my prepared statement I refer to the docket then and now.

During my tenure, filings were 2,343 during my first term, 1962; and during the 1974 term, there were 4,000. The increase is very dramatic. And it is important that this committee address itself to the question of whether this staggering increase necessitates a change today.

Now, I have struggled in my own mind with this problem. My reaction reflects a personal work method which may not reflect the method by which the Court now works. The increase in filings is in the certiorari docket. I personally found that certiorari screening was not very onerous, and I reviewed all petitions for certiorari myself, except for part of my first year. I did not have my Clerk prepare memoranda or in any way participate in that process. I did so because I thought it would be a waste of time. I used them for research in argued cases. It was my experience that the vast majority of certiorari petitions raised no significant legal issue. Indeed, most petitions presented issues that a third-year law student could immediately recognize as inappropriate for the Supreme Court to review. This was a personal work habit. I cannot say that it is the work habit of the present Justices.

During my tenure, I did not even know what the work habit was, nor did I inquire, of other Justices. For me, the argued docket was the important docket. This resulted in decisions that established precedents.

My basic reaction to the reference jurisdiction proposed in S. 3423 and also in S. 2762 is this; I do not greatly see how this relieves the burden on the Supreme Court. I shall say why.

Under the proposed bill, cases would go to the Supreme Court and the Supreme Court will grant or deny certiorari. After denial, the Court could send some of the cases in which it denies certiorari to the national court of appeals with direction either to decide the case on the merits or to consider whether or not the case should be decided on the merits.

Both bills then say that thereafter the Supreme Court again shall take another look.

It would seem to me that Justices of the Supreme Court, faced with the responsibility of making the first determination and then the second, would find that this adds to their present workload, rather than diminishing it.

Now, Professor Levin, the distinguished Director of the Commission and I have had recent colloquy about the members of the Court and whether they believe that this would add an additional burden to their work. They are the best judges of that; not me. In light of the fact that I left the Court in 1965, which is a considerable period of time ago, I recognize that changes may have occurred.

Senator Hruska, I think you will recall I suggested that the Justices be polled. It is only right and proper, in the exercise of their obligations to the Congress, that they express themselves. Some of the language in their responses is to me not entirely clear and I think it would be helpful to this committee and to Congress if they were again polled, specifically on the bill and asked directly the question if the proposal of the bills will constitute an additional burden for them or not.

Senator HRUSKA. Would the Justice yield for a comment and a question at this point?

Justice GOLDBERG. Yes.

Senator HRUSKA. It is good to hear you say that. I see it from this vantage point; I have seen this whole proposition develop before it got to the Commission, during the functioning and deliberation of the Commission; and then a bill drawn upon the recommendations of the Commission; and then a modified bill which this Senator put into the record; and which you graciously referred to in your statement.

I take it from what you say, Mr. Justice, that it would be important to you if, in the evolved present status of the bill, there would be an opinion expressed by the Justices and that that would be important to you, is that right?

Justice GOLDBERG. Very important. They are the ones who handle their docket. They know far better than I, at the present time, whether the proposal is well founded.

Senator HRUSKA. Thank you.

Justice GOLDBERG. Were the Justices to say it would not constitute an additional burden; the question would revert to whether or not a national court of appeals should be created or whether, as Justice Marshall indicated in his response, it would be better to handle the problem by specialized courts and making decisions of the specialized court final. I am of the view that rather than create a court of appeals of a little higher status than the existing court of appeals we should opt for specialized courts in certain areas, such as patents, tax and labor cases, admiralty and the like.

I have noted some comments of the bar and the Commission that there is great complaint with respect to the inadequacy of the Supreme Court in formulation and dealing with questions of national law; a feeling that national law, because of the burden on the Court, is not adequately decided or developed.

I have a comment about that and that is this—all of us in life seek certitude in all areas. Lawyers understandably search for certitude in the law.

Well, I fear very greatly, whatever we do, that idea will never be achieved. The nature of law does not permit the certitude that also escapes us in life itself in many, many areas. It is understandable that lawyers would like to be able to say to a client "Now this is the law." The reason why this cannot be achieved under the best of circumstances is, of course, the nature of law. Law evolves, it changes. Facts and law are interwoven so that if you are going to express an opinion, your opinion of the law is inevitably colored by what the facts are. Facts are very important.

Judge Cardoza once stated that in writing an opinion, the statement of facts would determine the law. This demonstrates how interwoven facts are with the law.

So, I have the reaction that a search at the Bar, for absolute certainty will never be realized. Whether this proposal is adopted or is not adopted, there still will not exist that element which makes absolute certainty possible.

Finally, Mr. Chairman, I have been very much moved, as a former member of the Court, by the constitutional argument, there shall be one Supreme Court which Mr. Gressman has eloquently argued.

I have been so moved because of my service on the Court and because of my experience at the bar. There is great reassurance to the public under our constitutional scheme that great questions should be submitted to the Supreme Court, for sole and final determination. The concept in our society that any citizen of high or low estate can knock at the door and have the highest tribunal in the country decide his claim I think is to be carefully safeguarded. I think it is a very important concept and not to be denegrated or tampered with except with the greatest amount of caution.

I have in mind this, for example: I remember when I was in the Court we heard the *Gideon* case. *Gideon*, of course, is well known, involving the right of counsel in a felony case. Now, 22 years before, the Supreme Court had decided that there was no constitutional right to have a lawyer for an indigent in a felony case. When I was on the Court, Gideon had sent a letter to the Court from jail saying that he had been convicted of a felony in Florida, that He was indigent and that did not have a lawyer and his constitutional rights were violated.

We examined his letter as a petition for certiorari. We appointed a counsel to argue the case for him. And we unanimously reached a decision overruling what was decided 22 years before.

I have wondered what would have happened under the present proposal. Burdened with a big docket, would we have adopted a rule that all prisoners appeals from State convictions should be automatically referred to a national court of appeals? And if that were the case, a national court of appeals, reviewing *Betts* v. *Brady* and not being a Supreme Court, might very well have said that *Betts* v. *Brady* should persist. The Supreme Court might not have decided to further review it. It would require the Supreme Court to give appropriate deference to the national court of appeals. And not give the decision

of that court summary treatment, but support it so that it could function, and, so that lawyers would get the signal that if the Supreme Court refers a case there, the decision would be final.

Otherwise there would be floods of petitions to review the national court as there are now, from all kinds of decisions, State courts and courts of appeals.

This bothers me a great deal because of the great significance and the importance of cases like Gideon's being considered by the Supreme Court.

I do a bit of lecturing throughout the country, and there is cynicism about government in general, and there is cynicism about the Supreme Court. When I am asked a question, I defend the Court. I say that I regard the Court, whether I disagree with it or not in a particular case, as a palladium of liberty and a citadel of justice I cite Gideon as an illustration of what the highest tribunal in the country will do to safeguard the fundamental rights of a citizen who is in jail, who has been convicted, who has no money, so the great promise of our Constitution "Equal Justice Under Law" shall be assured.

Thank you very much, Mr. Chairman.

Senator HRUSKA. Thank you very much, Justice Goldberg.

We recall with pleasure your appearance before our Commission a couple of years go and it is also good to have you here.

Justice GOLDBERG. Thank you, sir.

Senator HRUSKA. I thank you.

Senator BURDICK. That is quite a statement about that case that was reversed. But, I want to be a little bit skeptical. Why can't the national court of appeals arrive at the same processing that the Supreme Court did?

Justice GOLDBERG. I did not quite hear you.

Senator BURDICK. Why could not the National Court of Appeals arrive at the same decision that the Supreme Court did in that question?

Justice GOLDBERG. In the *Gideon* case?

Senator BURDICK. Yes.

Justice GOLDBERG. I would be fearful that they would feel restrained from doing so because they would not feel that they had the same latitude as the Supreme Court of the United States in changing Supreme Court decisions. This was a Supreme Court decision in *Betts* v. *Brady*. It would be very difficult for them to say: "We feel that the Supreme Court was wrong."

Senator BURDICK. This legislation seems to involve two basic assumptions—first that by expanding the national appeal capacity from 150 decisions to 300, that this will reduce litigation at the district and circuit court level, because the parties will not have to keep litigating in hopes of creating a conflict of opinion to open a pathway to a national decision. Any comment on that?

Justice GOLDBERG. I think that I touched upon it when I said that the search for certitude persists, and I still believe that when the opportunity presents itself for further review in the courts, as the bill provides, that we will still have lawyers, conscientious lawyers, still feeling that they must seek the other review, and, therefore, I do not see how you diminish this.

Senator BURDICK. The second assumption is that the availability of the new courts for referral would relieve the pressure on the Supreme Court, even though it may not reduce the filings of that Court.

Justice GOLDBERG. If the Supreme Court were to decide that it was going to refer either a body of cases or a number of cases, and then stand by the national court's decisions, by not reviewing them it would relieve the pressure.

My difficulty with that is, at least in my experience, that Justices on the Supreme Court would balk at that. They would say, since the law says we have to review the cases again, we must review them. And therefore, I do not see how the pressure would be relieved. That is one of my fundamental difficulties here.

Senator BURDICK. Now you stated you thought the caseload had increased since you left the Bench. You also stated that while you were there in the Supreme Court that there were many cases that deserved denial of certiorari because they didn't present a real question. But nevertheless, the cases are increasing. If something is not done, is it a fair assumption that more and more certioraries would be denied?

Justice GOLDBERG. Yes; as I have tried to say very frequently, I am not the person to talk to about the present docket. The sitting Justices are. I do, however, read the current dispositions. And what I read confirms my experience that the great flood of cases that come to the Court do not warrant preliminary review. Further, it is not difficult to determine this by even a cursory certiorari examination of those cases.

I once did a demonstration at the Harvard Law School when I was on the Court, Mr. Chairman, because Professor Hart had time-charted us and questioned by a very thoughtful article how little time we spent on certiorari. I took a group of cases which I had never looked at and asked some of the faculty to time-chart me and I will illustrate what I think, at least to me, the process was. I would take a group of petitions and I would look at the petitions. One petition would say this is a diversity case, an accident case, which I do not believe belongs in the Federal court at all. State courts give equal justice to people from outside of the State, as well as inside the State. Unequal treatment is an assumption that comes from the earliest days of the Republic.

In any event, on diversity cases I pointed out that most petitions claimed that constitutional rights were violated, because the jury did not award enough money; or our constitutional rights were violated because the jury gave too much money. I would say denied. That was not a case for the Supreme Court to review. It took about that much time.

On the other hand, I read in the papers that the Attorney General has been directed to bring a lawsuit to determine whether Congress may exercise a one-House veto. If that was the issue, I would look at the issue, I would automatically say granted. The case is of great importance involving the relationship of the government. It involves the right of the President, under article II, the rights of Congress under article I and at that certiorari stage of the consideration, I would just say allowed and little time would be required.

In my demonstration I would have a third category of cases that did take me some time. A conflict in the circuit courts would be charged. I would set that aside and I would read that later, read the second opinion and determine whether there was a genuine conflict.

So that in this little demonstration that I did, I tried to demonstrate that you could dispose of the certiorari docket with great dispatch.

I also found a fourth category of cases, the prisoner's cases. Jailhouse lawyers would copy a successful petition and file it, even though the facts were entirely different. And I got to recognize that, and when I would see that the arguments being made related to facts which had nothing to do with the claim, constitutional claim, being made, I would deny it. And that would not take very long.

Senator BURDICK. Justice Goldberg, we are celebrating our 200th year in the Nation. And during those 200 years, there must have been a large wealth of decisions of law built up. I have also wondered what they have got to appeal about, because we have got so much that the law covers various situations. But, yet Dean Griswold said about 65 percent of the cases now involved the Government one way or the other. Maybe the Congress has generated the new business.

Justice GOLDBERG. That is understandable, because Congress is facing problems which the Founding Fathers and Framers could never have visualized. We are a much more complex society than the society at the foundation of the Republic. So I do not believe that fault lies with Congress. An example is the environmental cases; Founding Fathers had no such problems and would not have understood the terms.

Senator BURDICK. Well, everything in that area of the law might finally be decided before too long.

Justice GOLDBERG. Yes.

Senator BURDICK. Thank you very much for your comments.

Senator HRUSKA. Just one moment. I would like to focus on what we are talking about here. The argument seems to be made here, it is kind of a mathematical argument and has a certain appeal. I would like to get your observations on it.

The argument seems to be that when we have a thousand, let's say, paid cases, the Court determines 150 cases, more or less on the merits. We now have 2,000 paid cases; the Court is still determining 150 cases on the merits. And the argument seems to be that the extra thousand filings in paid cases must necessarily produce cases of sufficient importance so that they should be added to the 150 that we started with. And part of our problem here in determining whether there is any weight to be given to an argument of that kind is that no one of us have had the experience which a Justice of the Supreme Court can have and not even his law clerks can have it because they only see it for one term or two terms. But, how much weight do you think that there is in that kind of a mathematical argument, having sat there for term after term and reviewing all of these petitions in the paid cases?

Justice GOLDBERG. Well, numbers are important, as I have said. I would give great weight to what the sitting Justices say about this increase in numbers.

But, there are many areas where the Court today will not interfere, where the Court of a thousand cases did interfere, for example: The Court was unanimous, in my time, in the decision of *Ferguson* v. *Skrupa* deciding that it is not the function of the U.S. Supreme Court to interfere with congressional, or State legislation in the social and economic areas. In the period where there were a thousand cases, the

Court was very active and, in my opinion, wrongfully active, in trying to substitute its judgment upon matters that really are matters of legislative determination.

That was, as you know, the great controversy of the 1930's. But we were unanimous that it is not the function of the Supreme Court to deal with economic and social matters.

But, nevertheless, the attempt is still made to challenge determinations which properly belong to the legislative body. And my experiences as a Justice teaches that, the Court will remain united in the view that those cases do not belong in Court.

Further, today the Court has better facilities than in those days. Each Justice then had one law clerk; now I believe there are three. And they are very helpful. Although a Justice himself must decide, clerks are helpful in research and a Justice now has greater tools than he had in those days.

I should say a word in this connection. I do not subscribe to the view that the quality of Court work has deteriorated with this increasing caseload. I think never in our history has the Supreme Court had better articulated, and better researched decisions than they are today. And it is to the great credit of the Supreme Court that this is so. All one has to do, for example, is to contrast the opinions of today with opinions even at the time of our greatest Chief Justice, and he is our greatest, John Marshall. He put his indelible stamp on our country. But his Court had no resources, even library resources. It is remarkable that they did as well as they did. They were not as well educated as Justices are today. You have got to compare the quality of the work today with the previous burden. Today it is better.

Senator BURDICK. Thank you.

Senator HRUSKA. No further questions.

Justice GOLDBERG. Thank you very much.

Senator BURDICK. Our next witness is the Honorable Arlin M. Adams, representing the American Judicature Society.

Welcome to the meeting, Mr. Adams.

## STATEMENT OF HON. ARLIN M. ADAMS, REPRESENTING THE AMERICAN JUDICATURE SOCIETY

Mr. ADAMS. Mr. Chairman, the opportunity to appear before this distinguished committee is very much appreciated.

It is important to make clear that I appear before you as a representative of the American Judicature Society and as an individual judge. I do not speak for the court of appeals for the third circuit, of which I am a member.

I would like to begin my remarks with the observation that bills S. 2762 and S. 3423 touch only a portion of the problems relating to appellate review in our Federal judicial system. Although, in my judgment, it is a very important portion of that problem.

Such legislation would help to ameliorate the delay and confusion caused by conflicting interpretations of law among the circuits, but it does not directly address the increasing caseload of the Federal court. I am sure you are aware of that.

The Commission on Revision of the Federal Court Appellate System and its excellent staff have done constructive and important work on the subject of conflicting interpretations among the circuits. It is

unfortunate that the Commission, because of its limited mandate, was unable to deal with a number of the problems created by the expanding jurisdiction of the Federal courts.

Because of a series of far-reaching statutes as well as judicial interpretations, which many regard as rather broad, the Federal courts are doing today far more than their resources allow. Justice Goldberg referred to these resources. They have expanded, but far less than their caseload. I am inclined to believe that much that the Federal courts are doing can be handled by other forums or agencies.

For example, I have considerable doubt that the number of prison cases we are reviewing, those arising from Federal as well as State prisons, can be handled most efficiently and appropriately by the district courts and courts of appeals.

Also, I believe that a better system to review certain administrative decisions—such as in the social security and medicare areas—would be most helpful. I think, too, that much more thought must be given to placing review in patent and tax cases into special tribunals.

I suspect that much material and information has already been submitted to you regarding the advisability of eliminating or at least substantially reducing diversity jurisdiction.

The general jurisdiction of the Federal courts, however, is not the subject of this hearing, so I shall confine my remaining comments to the proposal to create a national court of appeals.

Although it is natural, I suppose, to have reservations about the creation of a new court, any new court, after careful consideration and an overall evaluation, I support the proposal embodied in the pending legislation. And the membership of the American Judicature Society supports it. The society has well over 33,000 members, many of whom are not members of the Judicature Society itself. The society does not include only judges and lawyers, but fortunately now includes many prominent citizens and many grassroots citizens and they appear not only as members, but also as part of the board of directors and of the executive committee in the American Judicature Society.

The U.S. Supreme Court is the only Court with the power of handing 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 to review judgments in cases brought by way of appeal or certiorari.

As the number of cases brought before the Supreme Court for review has increased, as the chairman has just remarked, the number disposed of on the merits after argument has remained relatively constant. The variable has been the number of cases not accorded plenary review. The figures reflecting this are set forth quite dramatically in the report of the Commission.

Because of the demands on the Supreme Court, an increasing proportion of the Court's decisions have involved constitutional issues. This is appropriate. Thus the Supreme Court has handed down as few as 55 cases in any 1 year in areas of Federal nonconstitutional law. I share the concern that this is not a sufficient number to meet the country's needs for an authoritative approach to recurring issues of national law.

Former Solicitor General Griswold has expressed the view that there are at least 20 government cases alone, every year, which are

worthy of review by an appellate court with national jurisdiction, and that the Government and the legal system suffer from the lack of authoritative decisions which would come from such a review and would serve as a guide to governmental agencies and the lower courts. Apparently, Mr. Griswold was thinking of cases in the environmental, civil rights, and consumer protection fields, for example, where several conflicting decisions outstanding in various circuits make it very difficult for the Government or national corporations to know how to handle problems in these areas or to understand what conduct is expected of them. Without such review, the Government appeals similar cases across the country, instead of utilizing a definitive national decision that might have otherwise resulted from such a decision being handed down by a national court.

It now seems clear that at some point the percentage of cases accorded review will drop below the minimum necessary for the effective monitoring of the Nation's courts on issues of Federal statutory law and even of constitutional law. As the Commission's report shows, there are four consequences of the failure of the Federal judicial system to provide adequate capacity for the declaration of national law:

1. Unresolved intercircuit conflicts.

2. Delays in resolving those conflicts and the uncertainty and confusion which such delays may cause.

3. The burden on the Supreme Court, which is often forced to hear cases that represent conflicts but which may not otherwise be worthy of its limited resources.

4. Lack of capacity for a definitive declaration of the national law, causing uncertainty even though actual conflicts have not yet developed. For example, the second circuit decides a case. The loser of the case does not have a complaint, but yet he is not happy with the decision. It may be a large corporation, it may try to get a different answer in California or some other circuit.

The report of the Commission contains examples of these four shortcomings and, therefore, I shall not dwell on them further.

That there is a need for a procedure to meet these deficiencies does not seem to be a matter of great debate, quite frankly, although there are some apparently who believe that the disparity that flows from these conditions is not all bad. Or that it is not of sufficient gravity to require positive action at this time.

What does seem to have stirred considerable disquietitude is the potential disadvantages of the proposed new tribunal:

1. A fear that a new national court would downgrade the present court of appeals.

2. A belief that the problems set forth might be met by a different, alternative route which would be a less abrasive mechanism.

3. A belief that intercircuit conflicts are a problem, but one that is not sufficiently important to form the basis of a major change in our judicial system.

4. The financial cost for establishing and maintaining a completely new tribunal.

As to the downgrading of the present courts of appeals, I believe that that fear is a sincere one, but one that is not justified. In the Commonwealth of Pennsylvania, where I live, there was created an intermediate appellate court at the turn of the century, and another

intermediate appellate court approximately 5 years ago. Without expressing any opinion about the advisability of creating these specific intermediate courts, there is no evidence that these particular tribunals downgraded the trial courts, known in Pennsylvania as the common pleas courts. The reputation of and standing of our common pleas courts turns on their performance. In areas where these courts do a good job, their standing is high. In areas where they do not, their standing, quite frankly, is not high. To the extent that the common pleas courts do not perform well or are unable to resolve disputes fairly and expeditiously, the public becomes dissatisfied and impatient with them, and the standing of these courts does go down correspondingly. But not because of the entire position of the supreme and commonwealth court.

With respect to the alternative approaches to solving the problems already recited, the proposals that have previously been advanced do not appear to represent viable solutions. Thus the suggestion that the Supreme Court be permitted to designate specific circuit courts to resolve specified conflicts among the circuits has received very little support, since such an approach frankly would not be a national solution, one of the more troublesome provisions of the legislation that was originally introduced dealt with a transfer of jurisdiction, that is, cases to be transferred by or directly for the various courts of appeals to the national court of appeals. Senate bill 3423 would eliminate such an arrangement, and I believe that is a very wise step at this time.

Finally, as to financial costs, although all of us are concerned about imposing unnecessary expenses on government, no one would doubt that the additional judicial manpower entailed in a new tribunal is manpower that is required by the increased caseload of the Federal courts.

Indeed, if the national court of appeals serves to reduce the multiplicity of en banc proceedings or perhaps permits the complete elimination of en bancs, the economy achieved in this one phase would be substantial. En bancs are the most expensive proceedings engaged in by the courts of appeals. During the court term of 1974 there were at least 70 such en banc cases, and in 1975 there were about the same number. There is every indication that the number of en bancs will continue to be a substantial burden on the system. Under the proposal that you are considering, many of the cases dealt with by en banc courts could be handled by the national court of appeals. Such a development would remove a considerable burden from the courts of appeals.

It is true that a new facility would be required to house a new national court of appeals. But such a facility would represent a one-time capital expenditure and, in the totality of the budget, it would not appear to be a major consideration. One courtroom would be sufficient, and with a single group of judges all sitting in the same place, expenses for traveling and duplicate libraries would be kept at an absolute minimum.

When I appeared before the Commission I urged that consideration be given to instituting the court on an experimental basis. I am pleased that S. 3423 insofar as it provides for the selection of judges for the proposed court, carries part of that thought into effect. Any steps that can keep political considerations to a minimum—and particularly

in the appointment of the members of the court—will be most helpful. The selection during any one Presidential term of two judges and recruiting the balance from senior active circuit judges would, in my judgment, go far in effectuating that goal.

It is perhaps characteristic of our time to want immediate solutions to our most vexing problems. But I doubt that there is an immediate solution to the intractable problems confronting our Federal appellate courts. Instead, we must utilize a number of approaches. Certainly a national appellate tribunal represents a valid approach.

The facts before us seem to require some action. Men and women of good will have labored hard to suggest practical reforms. I do not suggest that the proposal now before this committee is perfect. In the nature of things, this cannot be. But I do believe the legislation points in the right direction, and that it should be pursued constructively, imaginatively, and vigorously.

Thank you very much.

Senator HRUSKA. Thank you for being here, Judge Adams.

Yesterday, we had testimony here and comments by the Hon. Erwin Griswold referring to this statistic; that about 1 percent of the judgments and decisions of the circuit courts that find their way into the Supreme Court are actually decided by it. In effect, it was inferred that there is really 99 percent of the litigation in which the 11 circuits become Supreme Courts.

Mr. ADAMS. That is correct.

Senator HRUSKA. There is some indication of opposition among some of the circuit judges. Maybe on the grounds that the creation of a national court of appeals, might somehow change their stature while not necessarily degrading it, but nevertheless, they would no longer occupy the same position. There is some testimony in the record that that would be a factor in opposition to the national court of appeals. It becomes necessary to consider the two factors:

One is that it is not so much the personal feelings of any member of the Bench, but it is rather quality of justice that would emanate from the creation of the proposed court.

Second, that if such feelings were a factor on the part of any circuit judge, it would, in due time, become dissipated and indeed probably disappear with the passage of time. Would you have any comment on that?

Mr. ADAMS. I do, sir. I thought a great deal about it, because I have to live with my colleagues, and I respect them and I have a great affection for them.

In the first place, the primary issue, of course, is not the judge, but it is the system and the people. The system has to work or else all of the citizens of the country are disadvantaged by a malfunctioning system that is not working most effectively.

But, I think that the example that I referred to of the commonwealth court and the superior court would be a pretty good answer. I think that a judge, his reputation and his standing, must turn on the quality of work that is done by his tribunal. There are common pleas courts in Pennsylvania that have a higher standing than even appellate courts because they turn out such good work. They deal with their cases effectively and efficiently. And I suspect that has been true in the history of this country.

There have been courts of appeal, for example, the Second Court of Appeals, that at one time had prestige equal almost to that of the Supreme Court of the United States, and the reason was the quality of the work, so that it commanded that type of attention. I don't believe that the higher position of these various courts downgrades the other tribunal. I think that their reputation depends on their performance. I believe with you, that in time this feeling would dissipate. It would not be a major problem.

Senator HRUSKA. Well, I do not know the extent of its existence, but it had been mentioned from time to time, so I appreciate your comments on it.

Mr. ADAMS. Well, I think, sir, it is a real concern. I have no doubt that many judges of the courts of appeals have a sincere feeling that their positions and their role in the judicial process will be eroded some way. But, I have no doubt in my mind, I am quite confident that this will not emerge as a major obstacle.

Thank you very much.

Senator BURDICK. Mr. Westphal, do you have any questions?

Mr. WESTPHAL. I have no questions now.

Senator BURDICK. I will be right back.

Senator HRUSKA. Fine. Then we will get off the record for a moment.

[A short recess was taken.]

Senator HRUSKA. Back on the record.

Judge Adams, you had submitted on behalf of the American Judicature Society your authority as the president of the society to appear and so on. Unless you have objection, we will include that and incorporate it into the record.

Mr. ADAMS. Fine. Thank you very much.

Senator HRUSKA. Judge Adams, further, you had indicated a desire to submit your statement for the record by a later submission?

Mr. ADAMS. I can submit substantially all of what I have done in the next week or so.

Senator HRUSKA. Thank you, Mr. Chairman.

If there is no objection, I suggest that the statement be put into the record upon its submission.

Senator BURDICK. Without objection, it will be received.

[The material referred to follows:]

STATEMENT BY ARLIN M. ADAMS

The opportunity to appear before this distinguished Committee is very much appreciated.

It is important to make clear at the outset that I appear before you as a representative of the American Judicature Society and as an individual judge. Although I am a member of the Court of Appeals for the Third Circuit, I do not speak for the Court.

I.

I should like to begin my remarks with the observation that Bills S. 2762 and S. 3423 touch only a portion of the problems relating to appellate review in our federal judicial system, albeit an important portion of the problem. Such legislation would help greatly to ameliorate the delay and confusion caused by conflicting interpretations of law among the circuits, but it does not directly address the problem of the increasing caseload of the federal trial and appellate courts.

The Commission on Revision of the Federal Court Appellate System and its excellent staff have done constructive and important work on the subject of

conflicting interpretations among the circuits. It is unfortunate that the Commission, because of its limited mandate, was unable to deal directly with all the problems created by the expanding jurisdiction of the federal courts.

Because of a series of far-reaching statutes as well as judicial interpretations, the federal courts are doing today far more than their resources allow. And I am inclined to believe that much that the federal courts are doing can be handled by other forums or agencies. For example, I have considerable doubt that the number of prison cases we are reviewing, those arising from federal as well as state prisons, can be handled most efficiently and appropriately by the district courts and courts of appeals. Also, I believe that a better system to review certain administrative decisions—such as in the social security and medicare areas—would be helpful. I think, too, that much more thought must be given to placing review of patent and tax cases into special tribunals. I suspect that much material and information has already been submitted to you regarding the advisability of eliminating or at least substantially reducing diversity jurisdiction [1] and three-judge court matters.[2]

The general jurisdiction of the federal courts, however, is not the subject of this hearing, so I shall confine my remaining comments to the proposal to create a national court of appeals.

II.

Although it is natural, I suppose, to have reservations about the creation of a new court, after careful consideration and an overall evaluation, I support the proposal embodied in the pending legislation. The United States Supreme Court is the only court with the power of handing 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 to review judgments in cases brought by way of appeal or certiorari.

As the number of cases brought before the Supreme Court for review has increased, the number disposed of on the merits after argument has remained relatively constant. The variable has been the number of cases not accorded plenary review. The figures reflecting this are set forth quite dramatically in the report of the Commission.

Because of the demands on the Supreme Court, an increasing proportion of the Court's decisions have involved constitutional issues. Thus the Supreme Court has handed down as few as 55 cases in any one year in areas of federal non-constitutional law. I share the concern that this is not a sufficient number to meet the country's need for an authoritative approach to recurring issues of national law.

It often happens that one court of appeals decides an issue of law but—however persuasive its opinion may be—its determination is not binding on other courts of appeals. If the losing litigant, or someone in a similar position, is not convinced that the court's decision will necessarily be followed by other courts, he can usually find an occasion to litigate the same legal issues in other jurisdictions, seeking a more favorable interpretation of the law. Such an interpretation will, of course, create a conflict.

Former Solicitor General Griswold has expressed the view that there are at least 20 government cases alone, every year, which are worthy of review by an appellate court with national jurisdiction, and that 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. Apparently Mr. Griswold was thinking of cases in areas such as environmental law, civil rights and consumer protection where several conflicting decisions outstanding in various circuits make it very difficult for the government or national corporations to know how to handle problems in these areas or to understand what conduct is expected of them. Without a review, the government will try a series of similar cases, instead of utilizing a definitive national decision.

It now seems clear that at some point the percentage of cases accorded review will drop below the minimum necessary for the effective monitoring of the nation's courts on issues of federal statutory and constitutional law. As the Commission's report shows, there are four consequences of the failure of the

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[1] If diversity jurisdiction is to be retained, perhaps the amount should be raised.

[2] If three-judge courts are to be continued, in view of the historical background of these tribunals, perhaps they should only be available when requested by the state government or perhaps the requirement that one of the three judges be from a court of appeals should be deleted.

federal judicial system to provide adequate capacity for the declaration of national law:

1. Unresolved inter-circuit conflicts.

2. Delays in resolving the conflicts, and the uncertainty and confusion which such delays may cause.

3. The burden on the Supreme Court, which is often forced to hear cases that represent conflicts but which may not otherwise be worthy of its limited resources.

4. Lack of capacity for a definitive declaration of the national law, causing conflicts have not yet developed. (i.e., the 2nd circuit has decided that litigants are not satisfied that final word is reached.)

The Report of the Commission contains examples of these four shortcomings and, therefore, I shall not dwell on them further.

That there is a need for a procedure to meet these deficiencies does not seem to be a matter of great debate, although there are some apparently who believe that the disparity that flows from these conditions is not all bad, or that it is not all bad, or that it is not of such gravity that it requires positive action at this time.

III.

What does seem to have stirred considerable disquietude are the potential disadvantages of the proposed new tribunal:

1. A fear that a new national court would down-grade the present courts of appeals.

2. A belief that the problems set forth might be met by a different alternative route which would be a less abrasive mechanism.

3. A belief that inter-circuit conflicts are a problem, but one that is not sufficiently important to form the basis of a major change in our judicial system.

4. The financial cost for establishing and maintaining a completely new tribunal.

As to the down-grading of the present courts of appeals, I believe that that fear is a sincere one, but one that is unjustified. In the Commonwealth of Pennsylvania, where I live, there was created an intermediate appellate court at the turn of the century, and another special intermediate court approximately six years ago.

There is no evidence that these particular tribunals down-graded the trial courts, known in Pennsylvania as the common pleas courts. The reputation and standing of the Pennsylvania common pleas courts turn on their performance. In areas where the common pleas courts do a good job, their standing is high. In areas where they do not, their standing, quite frankly, is not high. To the extent that the common pleas courts do not perform well or are unable to resolve disputes fairly and expeditiously, the public becomes dissatisfied and impatient with them, and the prestige of these courts does go down correspondingly.

With respect to the alternative approaches to solving the problems already recited, the proposals that have previously been advanced do not appear to represent viable solutions. Thus the suggestion that the Supreme Court be permitted to designate specific courts of appeals to resolve specified conflicts among the circuits has received very little support, since such an approach would not be a national solution.

One of the more troublesome provisions of the legislation that was originally introduced dealt with transfer jurisdiction, that is cases to be transferred directly from the various courts of appeals to the national court of appeals. Senate Bill 3423 would eliminate such an arrangement, and I believe that this is a wise step at this time.

Finally, as to the financial costs, although all of us are concerned about imposing unnecessary expenses on government, no one would dealt that the additional judicial manpower entailed in a new tribunal is manpower that is required by the increased caseload of the federal courts.

Indeed, if the national court of appeals serves to reduce the multiplicity of en banc proceedings or perhaps permits the complete elimination of en bancs, the economy achieved in this one area alone would be substantial. En bancs are the most expensive proceedings engaged in by the courts of appeals. During the court term of 1974 there were at least 70 such en banc cases, and in 1975 there were almost the same number. There is every indication that the number of en bancs will continue to be a substantial burden on the system. Under the

proposal that you are considering, many of the cases dealt with by courts of appeals sitting en banc could be handled by a national court of appeals. Such a development would represent a considerable economy for the courts of appeals.

It is true that a new facility would be required to house a new national court of appeals. But such a facility would represent a one-time capital expenditure and, in the totality of the budget, it would not appear to be a major consideration. One courtroom would be sufficient, and with a single group of judges all sitting in the same place, expenses for traveling and duplicate libraries would be kept to an absolute minimum.

IV.

When I appeared before the Commission, I expressed some concern about the possible political aspects of appointments to the National Court of Appeals. I am pleased that S. 3423, insofar as it provides for the selection of judges for the proposed court, carries some portion of that thought into effect. Any steps that can keep political considerations to a minimum—particularly in the appointment of the members of the court—will be most helpful. Limiting the selection during any one presidential term of two judges to the new court, and recruiting the balance of the panel from senior active circuit judges would, in my judgment, go far in effectuating that goal.

V.

It is perhaps characteristic of our times to want immediate solutions to our most vexing problems. But I doubt that there is an immediate solution to the intractable problems confronting our federal appellate courts. Instead, we must utilize a number of approaches. Certainly a national appellate tribunal represents one such valid approach.

The facts before us seem to require some action if this magnificent judicial system is not to become mired down by the sheer weight of numbers. Men and women of good will have labored hard to suggest practical reforms. I do not suggest that the proposal now before this Committee is perfect. In the nature of things, this cannot be. But I do believe the legislation points in the right direction, and that it should be pursued constructively, imaginatively, and vigorously.

Senator BURDICK. I was just going to get your opinion of an alternative that I heard about. This would deal with the inter-circuit conflict problem: That a court could be created consisting of the eleven chief judges of the circuits and they would meet occasionally throughout the year. Does that have any merit?

Mr. ADAMS. Well, I think it has merit, considerable merit. It might be that there would be a reaction on the part of the Bar and the citizens that it would not be a good cross section, because the Chief judges of each circuit are the senior judges, not technically senior judges, but the judges who have been in service the longest. So that you would have a court that would have the oldest judges of all of the circuits. I wonder about the reaction of the public to that type of a court.

Senator BURDICK. Of course, regardless of the age, that judge would represent his court and the position of his court.

Mr. ADAMS. No, sir, we do not consider that the senior judge or the chief judge represents our court.

Senator BURDICK. No; but I mean at this gathering he would represent it.

Mr. ADAMS. Well, he would represent, say the third circuit or the fourth circuit, but he would not represent the position of the circuit. He would not represent the court on a particular case. But, I do not think that you could do that quite in line with our thinking, because the judge would not have read it, he would not have heard the original argument. So, he really would be making an independent judgment.

You also do not have the colleagial quality that one would find in a regular tribunal. This would be an ad hoc group of judges, as a matter of fact; there is even such question in the country today about judges, such as Judge Adams who goes out and sits with other circuits. Mr. Griswold thinks that takes away from the colleagial quality and the good effectiveness the court should have.

Senator BURDICK. Thank you very much.

Mr. ADAMS. Thank you very much.

Senator BURDICK. Our next witness is Dean Louis H. Pollak of the University of Pennsylvania Law School.

Dean Pollak, welcome to the committee.

## STATEMENT OF LOUIS H. POLLAK, DEAN, UNIVERSITY OF PENNSYLVANIA LAW SCHOOL

Dean POLLAK. Thank you, Mr. Chairman.

It is a great privilege to be here with you, Senator. I am very happy to have the opportunity to testify on these very important matters which your committee is considering and which the Commission which Senator Hruska has headed has worked on for so long.

I may say, Senator, that I do believe that Senator Hruska is a man in whose debt we all are for his leadership in this very important enterprise.

I may say the same for my colleague, Professor Levin, who has directed the Commission's work.

But I do think that Senator Hruska's leadership of the Commission really is a very fitting cap stone for his extraordinary public career.

The proposals which the Committee is considering are of major consequence. Any alteration of the fundamental structure of our judicial system obviously should be undertaken only with the very greatest thoughtfulness and concern.

I have indicated in the outline which I have submitted into the record, Senator, my views of the revised bill now before you, S. 3423 as it compares with S. 2762.

With your permission, Senator, I would like to, in some way, make sure it appears along with my summary statement.

I will try to recapitulate my thoughts on the proposal. Basically, I think that S. 3423 is a significant advance on S. 2762. The advance primarily lies in the elimination of the proposed transfer jurisdiction.

I was never very impressed by the proposal to give a new national court of appeals transfer jurisdiction. I indicated my reservations in testimony before Senator Hruska's Commission.

Frankly, despite persuasive argument to the contrary, it has never struck me that the problem of conflicts in decisions was as pressing a one at a national level as was asserted by practioners in certain specialized areas of the law who have quite obviously a legitimate interest in seeking prompt disposition of conflicts but not a interest, it strikes me, substantial enough to justify the creation of a new national appellate tribunal.

That is to say none of the arguments that I have seen for a transfer jurisdiction seem to me to justify the creation of a national court of appeals for that form of jurisdiction alone.

Taken together with the fact that the hearings before the Hruska Commission seemed to me at least quite clearly to demonstrate that the judges of the courts of appeal are on the whole very chilly to the proposed transfer jurisdiction. It seemed to me the highest course of prudence to drop that proposal.

What we have left then in S. 3423 is the proposed reference jurisdiction. On balance, this seems to me a useful proposal provided that we are satisfied that the Justices of the Supreme Court, on the whole, themselves, perceive it as a useful proposal. That is to say, if the Justices feel that it would be a useful adjunct to their extraordinary responsibilities to have a court to which they could refer cases, both in small numbers which the Supreme Court specifically selects out for decision by the national court of appeals and in large numbers which the national court of appeals would have discretion to select from.

If the Supreme Court Justices, on the whole, perceive that as a useful adjunct to the process, then I think that would warrant the establishment of the proposed national court of appeals.

Now, I realize that from this morning's testimony from Justice Goldberg and some of the questions put to him, there may be some uncertainty as to what indeed the views of some of the Justices are.

Frankly, my sense has been that there certainly are some members of the Court who have indicated quite positively their sense of the ways in which the proposal could, as it were, strengthen the arsenal of national appellate capacity.

I make this point because Justice White, for example, who is so clearly supportive of the revised jurisdiction, was also as clearly opposed to the transfer jurisdiction.

At all events, if there is any serious uncertainty as to the reaction of the Justices, I think that it would be appropriate if the committee feels that it could do so, to try to clear up any ambiguities on that score, because, as I say, for me the case for the establishment of the national court of appeals depends very heavily on whether the Justices of the Supreme Court would wish to utilize it, subject to one important caveat which I will come to in a moment.

My reason for thinking that the Supreme Court Justices could put the revised jurisdiction to very good use stems from, I believe, a somewhat different perception than that articulated by Justice Goldberg of the work of the Supreme Court Justices.

Now, I advance my perception with some hesitancy because I do believe that the Justice is considerably more qualified than I to speak about the work of a Justice.

He, after all, sat on that bench and sat there with very great distinction.

My perceptions flow from my years as an external observer, chiefly as a law teacher, but initiated by a period of a year as a law clerk, a good deal longer ago than Justice Goldberg was a Justice; namely, 28 years ago. I was honored to be Justice Rutledge's law clerk.

Now, quite clearly, I thought at that time, which was a time at which the Supreme Court docket numbered about a thousand cases, that the work of the Supreme Court was very heavy indeed and that the burden of scanning certiorari applications and statements as to jurisdiction was a very substantial one which left the Justices little time over

for the Court's essential responsibility of determination on the merits of approximately 150 cases a year that were decided at this time.

Given the fact that the docket has now almost quadrupled in the intervening almost 30 years, and that the Supreme Court is deciding approximately the same level of cases on the merits, namely, approximately 150 a year, it is hard for me to draw from those statistics any inference other than that there are a substantial number of cases of very great consequence which are not being decided on the merits by the Supreme Court of the United States. That is to say, the proportion of the cases being decided on the merits has sprung by approximately 75 percent in the generation, and it is hard for me to suppose that there has been a reduction in the number of urgent issues coming to the Supreme Court of the United States; indeed, the opposite would seem to be the case.

My feeling is that there are a great many important cases simply not being decided by the Supreme Court. It seems to me that some of the confirmation comes from the statistics noted by the Hruska Commission that between 1960 and now there has been a sharp change in the number of cases decided on the merits; namely, that instead of one-third of the dockets being focused on constitutional issues and two-thirds on nonconstitutional issues, the portions are reversed, so that the Court is now spending approximately two-thirds of its time on constitutional problems and only a third of its time on nonconstitutional problems. This suggests to me that there is a large number of very significant issues, but issues of nonconstitutionality, which are now not getting the attention at the highest level of judicial capacity which is national in scope, which was their due a generation ago.

So that with that breakdown that I would think that if the Supreme Court Justices would welcome this adjunct judicial capacity, they could make very good use of a national court of appeals by sending to it enough cases, some of them referred for disposition by that Court, but the bulk of them open to that Court's selection so that the national court of appeals might be able to decide on the merits, perhaps another 150 cases of national consequence annually.

In that connection, I would particularly notice the point made by Mr. Justice White in his letter to the Commission suggesting that if the national court of appeals were to be established with such reference jurisdiction, it might even be possible for the U.S. Supreme Court to reduce somewhat the number of cases which it decided on the merits annually. It could go back to a level of approximately 100 a year which the Justice reminds us was about the number of cases resolved between 1955 and 1970.

It is my respectful submission, Mr. Chairman, that Justice White's proposal would be a good thing. I believe it could be reasonably inferred that, as the docket has changed character so that the bulk of the cases before the Court on the merits are now constitutional, the complexity of the problems before the Court has also increased. That is to say, deciding 150 cases in 1976 is a much harder process than deciding 150 cases in 1948 and certainly than in 1925. So that if the Supreme Court were to be able to reduce its own pace to 100 annually, because it had the comfort and support of a national court of appeals, those 100 might be more thoughtfully decided by a Court which, after

all, at the same time is reviewing applications for certiorari and statements as to jurisdiction which now number in the neighborhood of 4,000.

All of what I have said as to the potential advantages of the reference jurisdiction proposed in Senator Hruska's most recent proposal, S. 3423, all that I have said as to the case supporting the proposal is subject to this one, very important caveat. It is not a caveat that I would have any way of writing into the law, but I would urge it, Senator Burdick and Senator Hruska, upon your attention and on your fellow committee members' attention very frankly as something which I would hope to see referred to in a committee report.

If the Supreme Court Justices were to use the reference jurisdiction in such away as to send to the national court of appeals a group of cases which were chiefly nonconstitutional cases and thereby reserve to the Supreme Court an even larger proportion of constitutional cases for decision on the merits, then the two-thirds of their dockets which are now of the constitutional cases, would in my view accentuate what is now already an unfortunate tendency, namely, the tendency to become more and more a constitutional court and that alone. I would not want to expand on this because they are suggested in Professor Sandalow's testimony to you yesterday, Mr. Chairman. I refer particularly to paragraphs on pages five to seven of his testimony, that is to say, his statement submitted to you. He there develops very eloquently and thoughtfully what the implications are of overconstitutionalization of the Supreme Court docket.

Now, what that means to me, Mr. Chairman, is that I would regard it as very important for the Justices in the exercise of their reference jurisdiction to try to see to it that the body of cases referred forward by them to a national court of appeals would be a reasonable cross section of the cases which come before the Supreme Court.

Senator Burdick. Dean Pollak, may I interject at this point? I cannot conceive of how a legislative body could tell a court what cases to take and what not to take. Can you think of any way to do that?

Dean Pollak. No; indeed, Mr. Senator. I certainly do not. I would not regard it as your function to try to declare that in a statute. I would only regard it as a very appropriate matter for you and your colleagues to express in a committee report, indicating your hope that the Justices would perceive that as the optimal way of exercising their discretion. Obviously, the discretion would be there as it has been for a half a century, their discretion on how to decide when and for what reason to grant certiorari.

But, to the extent that it is before you and your colleagues to consider the wisdom of this proposal, it does seem to me to be proper to say, if you agree with me, Mr. Chairman, that: "We see a great value in this potential reference jurisdiction."

But we see a serious cost if the Justices fail to guard against what may be a serious temptation to further put themselves further in a constitutional stratosphere, as it were.

There are indications in Justice Marshall's letter to the Commission commenting on Dean Griswold's views, that the Justice interpreted Dean Griswold's support of the revised jurisdiction as suggesting a course under which nonconstitutional issues would dominantly be referred.

I would urge that this be at least rhetorically guarded against by the legislative branch.

Now, as you will see, Mr. Chairman, and I will try to bring my specific other concerns to a swift conclusion, I am very strong for the separation of powers and I am now about to get to a place where I think it would be a mistake for the Congress to legislate in precisely the way proposed.

My two specific concerns about S. 3423 are related. These go to questions of mechanics in the establishment of the composition of the Court and the legislative definition of what the weight of the Court's decisions would be.

Let me say that I think Senator Hruska was enormously wise in proposing in S. 3423 the modified form of appointment of members to the national court of appeals.

The new proposal for phasing in those appointments over two or possibly even three Presidents seems to me extremely sensible for reasons that have been so well stated in Senator Hruska's introduction of the legislation on the floor that I would not want to impair on that persuasiveness by repeating it here.

Senator HRUSKA. Professor, if you will yield. It was the feeling of the Commission that that part of any bill on this subject should be approached as a political problem to be solved by the Congress according to its best lights. In order to put something into a bill with reference to how the court could be created, we put it into the standard constitutional system of nomination by the President and confirmation by the Senate. Do you understand?

Dean POLLAK. I do.

Senator HRUSKA. The bill which was introduced last week is just one of perhaps several variations that may be considered by the Congress. And so that was the general approach to it. But I am glad to hear your approval of this idea of stretching it out over several administrations, because that takes the essence of the criticism out of it; namely, that no one President will have that vast of a power to determine the membership of that court.

But implicit in the introduction on my part was this commentary of the Commission itself.

Dean POLLAK. I appreciate that, Senator, and I appreciate also that your revised proposal is simply one of several ways in which the same objective could be reached. The importance of the objective is very clear.

Now, the two reservations that I want to express with respect to the present S. 3422, both go to the relationship of the new proposed national court of appeals to our existing Federal judicial structure.

Now, I listened with great care to Judge Adams' very able testimony in which he was responding to Senator Hruska's questions as to the possibility that the creation of a new national court of appeals might, in some way, be regarded as disparaging the existing Federal judiciary. And I, needless to say, was very impressed by Judge Adams' views on that subject.

Obviously, morale depends on judicial excellence far more than the external track record that surrounds the court's operations.

Nonetheless, I do have to express very serious concern about the proposal to establish the new court on a salary level which puts it so far above the present salary level of judges of our courts of appeals.

Clearly, that would be a public statement that the new court is perceived by Congress and the President as a far more exalted tribunal than our existing courts of appeals.

When we think of how important those courts have been and are in our national life, when we reflect, for example, on Judge Adams' own recollection that the second circuit for a long time enjoyed a prestigious status as high as that of the Supreme Court of the United States, I think we ought to think seriously about legislatively creating status differences of such a marked order.

I would regard this as important at any time, but I would regard it as acute at a time when, with all respect to this committee and to the Senate, the judges of the courts of the United States are, in my mind, demoralized, and justifiably demoralized, by the continuously shabby treatment they have received by congressional omission with respect to judicial salaries.

I do not want to belabor the argument to you here, Mr. Chairman, but suffice it to say that our judges, who are among our extraordinarily distinguished public officials, are grossly underpaid.

It is a widespread scandal. It may be a scandal of constitutional dimension. It would be inappropriate for me to make that argument in Justice Goldberg's presence, let alone his absence, since he is of counsel to those judges who have thought it of such very serious concern that they are now bringing it to court.

I happen to believe that the primary place for that grievance to be rectified is right here in the Congress. I am not going to ask you, Mr. Chairman, to make that rectification of salaries in this legislation.

But I urge you as strongly as I can, not to exacerbate that problem by now creating a new subordinating decision by telling the court of appeals judges, let alone district judges, that there is now to be a new tribunal which has a significantly higher salary, a salary I should add which itself is clearly inadequate, clearly insufficient.

Senator BURDICK. You raised that question about salaries and since you raised the question about the lawsuit, since you are a teacher, what judge in the United States could hear that case without having an interest in the outcome?

Dean POLLAK. It is very hard to identify that U.S. judge. I do recall that U.S. judges overcame that problem when they considered the question of judicial liability to taxation.

So maybe that is the escape valve. But I must confess that I would hope that the course of litigation could be avoided by having the responsibility exercised here Mr. Chairman, I mean here in the Congress as a whole, not just in the subcommittee room.

May I put it this way, Mr. Chairman; then I will leave the point. If it is felt that the formal superiority of the national court of appeals, measured by the precedential value of its decision and the nationwide scope of its jurisdiction, requires some symbolic statement which would be measured by a higher salary. If it is felt that a differential salary is necessary simply to make that symbolic statement, then I would urge you to make the differential no more than, say, the $500 which has customarily separated the salaries of Associate Justices and the Chief Justice of the Supreme Court. Perhaps $1,000. Perhaps that could be stated merely as a symbolic observation or because the cost of living is somewhat higher in Washington than in most of the other

cities of the United States; but surely nothing more than that; surely nothing that is a further statement to lower court judges that they are not the equals of the new court.

Now, my final observation, Mr. Chairman, is with respect to the curious provision, and I say curious provision—that may be simply my ignorance—the curious provision that is proposed as section 1272B which is an exposition of the precedential weight of the decisions of the national court of appeals. The purpose of the proposal is presumably to explain that the national court of appeals' decision shall be nationwide in scope and affecting all Federal courts, including all of the courts of appeals of district courts and also all State courts.

I understand that would be the purpose of the provision. But I would be very wary. Let me put it a different way. That purpose can be articulated by the legislative history. I would be very wary about a legislative provision which defines judicial decisions as being binding or as having any other particular described weight.

At that point, my concern about legislative dominance over the judiciary is at least raised to the point where I wonder whether a constitutional issue is not proposed when Congress purports to define the weight which is to be attached to a judicial decision.

If it is necessary in the view of the Congress to make some legislative statement as to the weight to be attached to decisions of the national court of appeals, then I have language which I would propose for that purpose, which I think would accomplish what is needed here, without its possible constitutional difficulties.

Moreover, I suggest the language which I would propose would clear up what I believe is an unintended difficulty about the language which is now in the bill.

The language now in the bill runs as follows:

> Unless modified or overruled by the Supreme Court the decisions of the national court of appeals shall be binding on all courts of the United States, and with respect to questions arising under the Constitution, laws, or treaties of the United States, on all other courts.

Unless I misunderstand ordinary English, I think that language has the unintended effect of meaning that the national court of appeals could not itself reexamine its own decision.

Senator Hruska, I would suggest language which would eschew the term binding and would also, I think, accomplish what is the purpose of yourself and your fellow sponsors of S. 3423.

My proposed language would run this way:

> Unless modified or overruled by the Supreme Court or by the national court of appeals, decisions of the national court of appeals shall have the same precedential weight as decisions of the Supreme Court in all State courts and in all courts of the United States.

That is the end of my proposed substitute language, and I suggest that it has the advantage of not being a legislative attempt to define what that precedential weight is. That is up to the Supreme Court.

Senator, I think that concludes my testimony. Let me simply say by way of a very summary statement that, with the amendments, I have proposed and subject to assurances satisfactory to this committee and the Congress the Justices of the Supreme Court would welcome the proposal. I would favor S. 3423 and would strongly hope that the Justices would exercise the reference jurisdiction in a way that would

avoid the pitfall of the Supreme Court becoming an almost exclusively constitutional tribunal.

Thank you very much.

Senator HRUSKA. Thank you again, Dean Pollak.

In regard to section 1272B, I am taking it as a problem of the language used but not a problem of the intended effect of whatever language is used, is that correct?

Dean POLLAK. Yes; my proposed substitute language has two purposes.

First of all, to avoid the legislative attempt to say what the precedential weight of a decision is by not using the word "binding"; and second, to make it clear that the national court of appeals itself has the same power to reexamine its own decisions that the Supreme Court has with respect to its own decisions.

Senator HRUSKA. I am going to ask you a question now in light of the fact that I am familiar with your activities in regard to the NAACP legal defense fund, because in that capacity you have had occasion to consider and even try to influence a judicial decision one way or another by your briefs and so on.

Now, some concern has been expressed as to the possible erosion of the quality of the Supreme Court product, to put it bluntly. If the load, if the tensions, and if the intensity of the work in which they are engaged continues to increase and to multiply, there is or will be some misgivings in that regard and some concern has been expressed by different people. I think on one occasion Chief Justice himself spoke to that point.

Now, earlier today, you were in the room when Justice Goldberg expressed the opinion that the quality of the Supreme Court's work has never been better than it is now.

Would you have any comment to make on that general subject, on that point?

Dean POLLAK. Senator, with all due respect I disagree with Justice Goldberg. I do not feel that the quality of the Supreme Court's decisions today is on a par with what it was even 10 years ago.

In making that evaluation, I am trying to, if you will, make a professional judgment rather than one that turns on my agreement or disagreement with the particular decision, though I do have to acknowledge that to the extent that I disagree with a decision that, itself, is a judgment with respect to professional craftsmanship.

But basically, I do not think that the Court's craftsmanship, taken on an average, is really on a par with what it has been in periods both recent and past.

I do not want to suggest that I think that the Court, broadly speaking, is on a downward curve, and that we were better off 100 years ago or 50 years ago. On the contrary, I believe that not to be true. But I do have a feeling that the Court's opinions, and I particularly have had this feeling in the last few years, betray signs of haste, and that the dissents and concurrences less often point up the serious omissions in the majority reasons opinions than used to be the case.

I would have to say, indeed Senator, the majority opinions that I agree with not infrequently make me ask myself now why do I agree with that.

I do think that in part this is a function of not having enough time to do a job very well. Now this is an impression based on conjecture from outside of the institution, but, for what it is worth, that is my view. And I very much welcome Justice White's thought that it would be a very good thing if the Supreme Court could get back to a situation in which it would not feel pressed to decide more than 100 or 120 cases on the merits every year if the Justices felt that there was another tribunal in which cases of importance which should be resolved on a national basis would be disposed of.

Senator HRUSKA. Well, thank you very much.

Mr. WESTPHAL. I have one question, Mr. Pollak.

Do I perceive that part of the reason for your objection to the language in section 1272 B rests in the fact that, generally speaking, the binding effect of the decision of a court stems from the fact that, in creating that court, the legislative body specifies that it is a superior court or a court which is inferior to another court.

And also that the binding effect stems from the common law and needs no statutory expression, is that part of your feeling?

Dean POLLAK. Yes, that is part of my feeling. I believe their is no such provision in title 28 now. I may be wrong, and, if so, just betray my ignorance.

I suppose the reason largely lies in what you have just expressed, that when one sets up a hierarchy of courts one understands that the higher court has authority over those below.

Mr. WESTPHAL. Part of the distinction of the superiority of one court from another is the statutory grant of jurisdiction, and from this flows the distinction of the office. This has more or less been traditional. I am not sure that your point that there should be no salary differential between a court of appeals judge and a judge on a national court of appeals is consistent with this concept.

Dean POLLAK. I guess what I want to stress is my feeling that the courts of appeal are all courts of extraordinary or awesome responsibility. And any suggestion that they are less than that, however, inadvertent, would seem to me to be greatly unfortunate.

I can understand that it may be felt that because it has been traditional to pay judges on higher courts somewhat more, or, let me turn it around, to underpay them somewhat less than judges in higher courts, that this differential should be retained symbolically here.

I would not argue about a symbolically stated differential as a way of underscoring the superior precedential weight and the wider precedential domain of the decisions of the new courts.

Mr. WESTPHAL. I would take it that you would agree that whatever may be the decision about the quantum of the symbolism, that there is justification for a higher salary for a national court of appeals judge than for a circuit judge, symbolically at least. And if you believe that, then does not that aid the seven judges of the new court in establishing the position that the legislation would put them in our structure of the courts?

Dean POLLAK. I do not think that the salary differential, however large, is going to aid them in the performance of their duties.

I think a salary differential, however large, will simply tell judges, for example, the judges of a Court of Appeals for the District of Columbia who now are the primary reviewers of our regulatory

agencies, that really the Congress of the United States does not think very much of the importance of their responsibility.

The new court that we are proposing is going to be an adjunct to the U.S. Supreme Court. Nothing less than that, but also nothing more. But I am not disposed to say by legislation that that Court will be significantly more important than the established courts of appeals, thereby different.

This will not be, necessarily, a more important tribunal in some fundamental sense. And that is why I would urge you to keep the symbolic sum at as modest a level as possible.

Senator HRUSKA. Thank you very much, Professor Pollak.

We appreciate your coming to testify before this committee.

Our next witness is Francis R. Kirkham, Esq., from San Francisco, Calif. He is a member of the Commission on Revision. He not only comes from an area of different geographical nature and location than many other members of the Commission but also he engaged in active practice, both at the trial and the appellant level.

It was for these reasons as well as others that he was a very significant member of the Commission. We relied upon him and his experience heavily in many responses. We welcome you here, Mr. Kirkham, and we will look forward to whatever comments you might want to make.

## STATEMENT OF FRANCIS R. KIRKHAM, ESQUIRE, SAN FRANCISCO, CALIF.

Mr. KIRKHAM. Thank you very much, Mr. Chairman.

I am pleased to have the opportunity to testify at this hearing. As a member of the Commission I strongly endorsed each of the recommendations in the Commission's report, the most important of which, of course, is the recommendation for the creation of a new national court of appeals which is embodied in the bill before us today.

With the chairman's permission I should like to discuss this bill not only from the standpoint of the testimony before the Commission and the studies prepared for its consideration, but also in the light of my own experience and of the experience of my brother lawyers in many years of practice before the courts of appeals and the Supreme Court of the United States.

I may say, at the outset, that I wish to address my remarks to S. 3423, which does not include the provisions for transfer jurisdiction which were incorporated in S. 2762.

For the reasons stated in the Commission's report I am convinced that the transfer jurisdiction could be highly effective in providing a prompt national rule of law in many situations where, under our present system, delays incident to pursuing the matter through the courts of appeals and later review by the Supreme Court result in injustice, in needless delay, and in a waste of judicial time.

Further, I cannot avoid the conclusion that the opposition to the transfer jurisdiction rests largely upon the all too familiar reluctance of courts and lawyers to make changes in existing procedures, and the consequent failure to keep the mind open to substantial benefits which can accrue from new means of expediting the declaration of national rules of law on important and recurring problems.

However, the realistic course seems to be to postpone the enactment of transfer jurisdiction at the present time. As Senator Hruska said in his remarks accompanying the introduction of the present bill, when the national court of appeals has been established and has proven its value as an important element of the Federal judicial system, Congress can perhaps better then assess the wisdom of providing for the transfer jurisdiction.

I do urge this committee to keep in mind the considerations stated in the Commission's report on this aspect of the jurisdiction of a national court of appeals, because I am convinced that it can serve a useful and much needed role in our Federal appellate structure.

And may I pause just a moment, Mr. Chairman, to express my appreciation—which I know is shared by every member of our Commission—for our great good fortune in having had Senator Hruska as Chairman of our Commission.

His devotion to our task, his indefatigable work in accomplishing it, his graciousness as a presiding officer over a highly individualistic group, and his inspiration and scholarship in aiding us to arrive at meritorious solutions, could not, I am certain, have been equaled by any other. We, and the whole country, are indebted to him.

The present bill limits the jurisdiction of the national court of appeals to cases referred to it by the Supreme Court of the United States.

It embodies, unquestionably, the most important single recommendation made in the Commission's report. The creation of a court of this type has received the endorsement of a majority of the members of the Supreme Court itself and of virtually every group of scholars which has made a study of the functions of our Federal appellate system.

The need for the immediate creation of such a court cannot be overemphasized, and, in my opinion, the present bill synthesizes all of the best ideas which have been advanced into provisions for a workable court which will supplement, without usurping, the important functions of the Supreme Court.

It would be impossible fairly to analyze the problems this bill seeks to remedy without acknowledging the debt owed by the Commission, and by the bench and by the bar of the entire country, to the penetrating analysis of the problems contained in Dean Griswold's epochal paper delivered in his Frank Irvine lecture at the Cornell Law School in October 1974 and reported in 60 Cornell Law Review, page 335.

Calling upon his unparalleled experience as Solicitor General through six terms of the Supreme Court, he pointed out that the real problem is not whether the Justices of the Supreme Court are overworked or underworked—as to which there had developed some dispute between the members of the Court—but rather, whether the Supreme Court has been compelled to ration justice, with a resulting inadequate final appellate capacity in the vast and complex society of this Nation.

In this regard his showing was overwhelming: The Court today is hearing about the same number of cases on the merits as it heard 25 years ago, notwithstanding a quadrupling of its caseload and the increasing importance of the cases on its docket; it is an "astonishing fact," Dean Griswold's words, and also those of Judge Hufstedler in her scholarly paper, that less than 1 percent of the cases decided by the courts of appeals are reviewed on the merits by the Supreme Court;

conflicts of decisions go unresolved; even in those cases where Congress has provided an appeal as of right, the Court treats the appeal little differently than a petition for certiorari and routinely dismisses it without argument or opinion if the Court feels it is not worthy of its consideration within the bounds of the principles governing the rationing of its time and energies. Dean Griswold continued with these highly significant comments:

> The courts of appeals know that the chance that any decision they write will be reviewed is very slight, and this has led, I think, to a considerable lack of what I would call institutional responsibility on the part of many court of appeals judges.
>
> The district judges keep reasonably well in line because they know that the courts of appeals are reviewing their work. And the courts of appeals can be expected to follow a decision of the Supreme Court which is directly in point.
>
> But with so few cases being reviewed by the Supreme Court, there are, in many fields, few decisions directly in point. The tendency to press beyond what the Supreme Court has done has often been irresistible.
>
> And there is no stability in the makeup of the courts of appeals. Some of them now have 15 judges. What judge will be on a panel is a pure matter of chance. Besides, there are now a large number of roving judges—district judges and judges from other circuits—so that the bench one gets in a court of appeals is a kind of lottery.
>
> Some of the panels pay little attention to the decisions of other panels; and some of the courts seem to have little or no concern for inconsistencies in the decisions of different panels.
>
> This results in increased litigation all along the line, for if the law of the circuit is uncertain, counsel cannot conscientiously recommend to his client that he should not litigate. And where less than 1 percent of the decisions of the courts of appeals are reviewed by the Supreme Court, it is hard to say that there is any national law on many subjects.
>
> Americans who have long lived with their system, which was adequate in the past, do not readily realize how chaotic it has become under current conditions of sharply rationed review by the Supreme Court.
>
> * * * Moreover, I do not think that the public or the bar is fully aware of the extent to which the Supreme Court of the United States has become a civil rights court. This is fine.
>
> It is a terribly important function for our highest court, and this is particularly true in a country which has the constitutionally expressed ideals that we have. I do not denigrate this part of the Court's work one bit.
>
> But I do suggest that it is not the whole of the function which should be performed on a national basis in a highly industrialized country of over 210 million people. If all our Court can do is to handle the most important civil rights cases, and a few others, then we are rationing justice and should be prepared to do something about it.

It is of utmost importance, I think, to emphasize that the Commission put to the test these hypotheses of Dean Griswold.

The appendix to its report contains an extensive study of cases denied review by the Supreme Court notwithstanding the fact that conflicting decisions had arisen in the circuits.

The appendix contains a further study of the expressions by members of the Court itself in dissents to denials of certiorari which point out that those cases, in the opinion of the dissenters, should have been decided in order to eliminate conflicts and uncertainties in the law, or to resolve issues of manifest public importance.

The increasing number of cases in which such dissents have occurred in recent years emphasizes the diminishing capacity of the Court to decide cases deemed by one or more members of the Court worthy of its review.

In the four terms 1949–52 there was an average of only 35 cases in which dissent was noted from the denial of certiorari; in the four

terms 1969–73 the average was more than 10 times that number, 362 per term.

A further study examined the litigation policy of the U.S. Government, pointing out that questions relating to the administration of Government programs or the interpretation of Government regulations are litigated, again and again, in the district courts and in the courts of appeals, because these questions go unresolved 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 what rule will be applied to their transactions.

This, in turn, encourages forum shopping and differential treatment by the Government of persons who are similarly situated.

In this regard, Mr. Chairman, I cannot refrain from repeating what I said once before to this committee. Forty years ago, when I had the great privilege of serving as law clerk to Chief Justice Charles Evans Hughes, Reynolds Robertson and I were able to write concerning the certiorari jurisdiction of the Supreme Court:

> Where the decision of the Court of Appeals sought to be reviewed by certiorari directly conflicts, upon a question of Federal law, with the decision of another Court of Appeals on the same question, the Supreme Court grants certiorari as of course, and irrespective of the importance of the question of law involved.
>
> The importance in such cases lies in the preservation of uniformity of decision in the Federal courts * * * a basic purpose of the certiorari jurisdiction since its inception in 1891.

This is no longer true. There is no doubt that conflicts in our national law now exist and have existed, sometimes for long periods of time and notwithstanding petitions to the Supreme Court to resolve such conflicts.

To me such conflicts are indefensible. I am not persuaded by the view expressed by some writers, and held, I fear, by some members of the Supreme Court, that conflicts should be allowed to "percolate" in the circuits until the experience of those who suffer under discriminatory rules of law "illumines" for the Supreme Court the path it should take.

Statutes imposing different obligations or creating different rights for different citizens or communities would suffer an immediate death under the equal protection clause.

Any rational system of jurisprudence must provide the same result with respect to the adjudication of courts.

Another matter, discussed by Dean Griswold, deserves special comment. The Congress of the United States has provided that in certain classes of cases there shall be an appeal as of right to the Supreme Court. This right has virtually disappeared, due to the pressures brought to bear on the Supreme Court by the great number of cases filed.

With few exceptions, the Court—driven by sheer necessity to ration justice—has taken upon itself to rewrite the statute and to treat most appeals as the equivalent of petitions for certiorari, subject only to discretionary review.

With few exceptions, these appeals, without hearing, are affirmed or are dismissed with only the routine phrase "for want of a substantial Federal question."

Where the appeal is directly from a Federal district court—bypassing the court of appeals—the effect is, not to give a litigant a hearing by the Supreme Court rather than by a court of appeals as intended by Congress, but to deny him any appeal at all as a matter of right.

Further, this practice creates serious problems in the creation of an effective and respected national law. In the time of Chief Justice Hughes where an appeal as of right was dismissed for want of a substantial Federal question, the order included a short explanation, or a citation of the previous decisions of the Court which had already decided the issue, thus rendering its attempted relitigation unsubstantial.

In other words, the Court passed on the merits of the case sufficiently to determine whether in fact it presented a substantial Federal question, and so indicated in its order of dismissal. Such orders clearly established, as binding decisions, that the questions were unsubstantial. In contrast, orders denying petitions for certiorari were expressly held and said to import no decision on the merits.

Today no citation for authority or other ground of decision is given in the case of dismissals of appeals as of right, quite apparently for the reason that the Court simply bases its dismissal, as it does a denial of certiorari, upon a determination of whether it is a case it can review in the light of its docket and its physical limitations.

Nevertheless, these orders are binding on the lower Federal courts, thus creating a body of precedents in a manner which, I respectfully submit, is not considered by the bar or the lower Federal courts a satisfactory method of fashioning a uniform national law.

Now there has been discussion here concerning that and Mr. Griswold referred yesterday to a case that I had not seen where Justice Clark said that these decisions were not to be accorded the same weight as other decisions and yet in American Miranda at 422 United States the U.S. Supreme Court said that they were binding decisions.

But in any event these orders create a body of precedents and a manner which I respectfully submit is not considered satisfactory by the bar.

All of these deficiences, serious deficiencies, in our Federal appellate processes stem not from the lack of the utmost diligence by the members of the Supreme Court in an attempt to perform the essential functions of that Court, but from the simple inability of nine human beings, necessarily acting jointly in the decision of each case, to provide an adequate mechanism for declaring a national law which will secure equal justices under law to the citizens of this vast Nation.

Actually, when one stops to think about it, it is truly more than remarkable that we would even think of expecting one Supreme Court, sufficient to maintain uniformity in the law of the whole Nation in the days of the Founding Fathers, or even in the days of Lincoln, or in the days of Cleveland, to be physically able to maintain such uniformity in today's society, not only as among the numerous Federal courts, but, as to Federal questions, among the Supreme Courts of 50 States—many, if not most of which exceed in population—and certainly in the amount and complexity of litigation—the entire population and court dockets of the Nation when the one Supreme Court was created.

I had intended to relate from my own experience, and that of other lawyers with whom I have discussed these problems, cases in which the Supreme Court denied review where, under any objective standard, the circumstances called in most urgent tones for the resolution of conflicting decisions and the declaration of a national law.

But it seems to me such instances would be merely cumulative. The case has been made: justice is being rationed in our Nation; our present Federal appellate processes are simply inadequate; the need for a further tribunal to declare uniform and binding national law is incontrovertible.

The bill under consideration is the result of years of study, not only by our Commission, which included four distinguished Members of the Senate and four distinguished Members from the House, but also by many outstanding legal scholars, each devoted to the objective of finding a means of expanding the capacity of our judicial processes to provide a uniform national law, and, at the same time, retain in our one Supreme Court the power to exercise unlimited supervision over the formation of that national law.

This bill, Mr. Chairman, provides such a tribunal, a tribunal which can operate effectively to supplement the function of the Supreme Court in declaring binding national law without impairing, in any way whatsoever, the power of the Supreme Court to monitor and to refuse to have reviewed, or to take for review, in its discretion, every decision by every Federal court on every question, and every decision by every State court of last resort on every Federal question.

As a member of the Commission, and as a practitioner for nearly 50 years in the State and Federal appellate courts, I urge Congress to enact this legislation and to do it promptly, for the hour is late.

Senator HRUSKA. Thank you, Mr. Kirkham, for those observations, and thank you warmly for those personal references which you made to your fellow Commission members who are now speaking through you. On the occasion when the second bill was introduced in the Senate, I expressed the thoughts on transfer jurisdiction because there was no provision for it in the second bill which I introduced. I draw attention to the fact that there were members of the Commission and members who felt that there was a great deal of merit to that jurisdiction, that type of jurisdiction. It was not my purpose to detract from their opinion, nor from the quality of their judgment. But it was felt, in view of the fact that there had been so much criticism, it might facilitate the consideration or the creation of the court in its most essential aspects if transfer jurisdiction was deleted.

In the nature of legislative process? Now, this is true, is it not? The deletion of that provision does not necessarily mean that there will be gone forever the idea of adding to whatever jurisdiction that new court has, additional jurisdiction if in the experience of the years the court reaches a point where such additional jurisdiction could be entertained, does it?

Mr. KIRKHAM. I would agree completely with those remarks, Senator Hruska. I think it is a very wise step from the standpoint of the legislative process to confine the bill to the reference jurisdiction at this time to get the court created. That is the important thing.

But I agree with your remarks just made and those you made before the Senate, that after that has been accomplished the further jurisdiction of the court can be considered, and I repeat my urging that

the question of transfer jurisdiction be retained in the mind of this committee, Senator Burdick's very, very fine committee, for consideration when the appropriate time comes.

Senator HRUSKA. Well, that is very happily received by me because we do have the ultimate goal in mind, and we hope that we can make progress toward obtaining it.

A little bit ago you referred to that time in the history of the Supreme Court, when you were associated with some of the proceedings and when certiorari was granted as matter of course in certain of the cases. Would you mind for the record telling us what your association with the Supreme Court was at that time?

Mr. KIRKHAM. Well, I was law clerk to Chief Justice Hughes.

Senator HRUSKA. And what were the years of that service?

Mr. KIRKHAM. 1933 to 1935. That is a long time ago, Senator.

Senator HRUSKA. That has been a long time ago. And, of course, there have been other respects in which the function of the Court has developed since that time.

Mr. KIRKHAM. That is correct. But the obligation of the Court to resolve conflicts of law in this Nation is as imperative today as it was then.

Senator HRUSKA. You draw attention to the fact that it is not right in our Nation to have, in one circuit, a man who will be found guilty of an infraction of the tax law and be incarcerated; and if you happen to live in another circuit, under similar circumstances, he is not incarcerated because there is a conflict of decision on the part of the circuit courts of those two circuits.

Now you said that should not be tolerated. I think I remember your words that this conflict should be "immediately resolved." Is that correct? Did you mean that literally, or would you allow for what we have come to know as a screening of such circuit courts on conflict so that the Supreme Court could probably judge the issue better?

Mr. KIRKHAM. No, I think that that is the very inescapable problem, Senator Hruska. That type of conflict should be resolved.

When Congress passed a law, passed a tax law, it intended that that law should operate equally upon every citizen of the United States.

If it had enacted anything else it would have been in violation of one of our most fundamental constitutional rights, equal justice for all.

Now that law must be construed by the courts. It is construed one way, and up to that point it is imposed equally. It is construed another way, and if you then have two courts of equal jurisdiction, each holding that the act of Congress provides one thing in one case and something else in another case.

Now in the first place you have completely defeated the intentions of Congress. In the second place you have created unequal justice under the law. At that moment there should be a mechanism for resolving that conflict and that does not come within that type of percolation which is required in the courts.

It has percolated to a point where it requires a resolution because of the conflict, and not because of the nature of the problem.

Senator HRUSKA. Well, your conclusions in that regard would apply equally in the cases which were discussed by Dean Griswold yesterday, would it not?

Mr. KIRKHAM. Exactly.

Senator HRUSKA. This was the intention of the Congress, certainly, that one value or another would be eseablished by way of determining

the estate taxes. It did not intend that one part of the country would have one result and another part another result as the interpretation of one congressional enactment.

It is this type of case that is clear and with the existence of that clarity you feel that immediate action should be taken.

Mr. KIRKHAM. Immediate action should be taken and the corollary to that is that the immediate action be taken in the case of that kind by the Supreme Court of the United States.

It should be decided by a court that has the power to establish a national law and resolve the conflict. I could give many illustrations. One that comes to my mind is the case recently decided as to whether or not when attorney's fees have been allowed in a case and on appeal these fees are reduced, whether interest should run on the amount that was held payable from the date of the original judgment or from the date that the court of appeals handed down its decision and liquidated the amount ultimately due. The ninth circuit has held one way and the third has held another.

I cannot think of any case which should less command the attention of the Supreme Court than that case. But that conflict should be resolved because there are a number of other cases where that is occurring and a number of other people are being required to pay money in one circuit that another circuit holds that they do not owe.

Senator HRUSKA. Well, thank you very much and we appreciate your appearing here before the committee.

Mr. KIRKHAM. Thank you very much.

Senator BURDICK. I, too, want to thank you for your contribution. You were Clerk in 1935 for Justice Hughes?

Mr. KIRKHAM. That is right.

Senator BURDICK. Over 40 years has elapsed.

Mr. KIRKHAM. That is right.

Senator BURDICK. And I believe you said that in those days that certiorari was granted to resolve conflicts?

Mr. KIRKHAM. Certiorari was denied in many cases. But certiorari was not denied in cases involving conflict of decisions.

Senator BURDICK. I was going to say that in the last 40 years there has been a considerable body of law established since that time.

Mr. KIRKHAM. No, by far the largest number of cases really, as a matter of fact, I think from having seen many petitions for certiorari and having seen many in Chief Justice Hughes' time, that the petitions for certiorari, the cases that come up on certiorari now are of a caliber more deserving of review than they were of that time.

The certiorari jurisdiction was developing after the 1925 act abolished the writ of error. I think that there was a larger percentage of nonmeritorious decisions for certiorari at that time than there are now.

Senator BURDICK. Now, Justice Goldberg referred to quite a few of them that did not have merit.

Mr. KIRKHAM. Senator Burdick, Justice Goldberg, I thought, in his statement, demonstrated about as clearly as anyone could demonstrate how lacking in actual substance is a statement that the certiorari cases do not burden a court.

He said that I took these cases to Harvard Law School. Then he said he picked up one and it said so-and-so, and I picked up another and it said so-and-so. That is 2 or 3 seconds per case.

Now, cases are not of that kind when they come before the Supreme Court of the United States. It is all very well to say that you can pick up a case and analyze it before you look at any brief to decide whether certiorari should be granted, and that did not take much time.

He looked at another case and he said it is about constitutional rights being denied if the jury brings in in sufficient damages. I never saw a case of that kind, and I doubt that a paid case that simple ever came before the Supreme Court.

And if counsel felt that the type of cases that are brought before the Supreme Court are given that type of summary treatment they would feel even worse than I do today.

Senator BURDICK. Well, I will give you another one. We heard from one of our colleagues yesterday that this might lead to four layers, three layers of appeal. Any possibility of that?

Mr. KIRKHAM. That is a false appraisal of what we are attempting to do here, Senator Burdick. It is not an additional layer. It is the extension of the capacity at what is really the Supreme Court level. If there comes a time when there is a review by the Supreme Court of decisions of the national court of appeals, that will be a rare instance indeed. And cases of such extraordinary character should be reviewed.

Senator BURDICK. Let me give you an example and that is the last question I have for you. Suppose that the Supreme Court refers a case to the new national court, and suppose it is a fairly important case, or they wouldn't have referred it, and that the decision of the national court is divided 4 to 3. Would there be considerable pressure to have that heard in the Supreme Court?

Mr. KIRKHAM. I wish that there were more of a pressure from the standpoint of a practicing lawyer. I do not know how many times I have tried to impress on the Supreme Court of the United States in the petition for certiorari that there were dissents below. It is only the merit of the dissent that makes a difference. In other words, is the case an important case? Has it been erroneously decided? And if you can convince the court, you have a chance.

Senator BURDICK. Well, I am sure that three dissenting judges would say that it is meritorious.

Mr. KIRKHAM. But it is up to the court to decide whether you are right or wrong.

Senator BURDICK. Well, thank you for your comments.

Senator HRUSKA. Mr. Chairman, I am in receipt of a letter from Lloyd Cutler expressing his concern about a proposal for a permanent court of appeals. And the last line of his letter says:

I would be grateful if this letter would be made part of the record of your current hearings. I ask that it be included into the record at an appropriate place.

Senator BURDICK. Without objection, it will be so included.

Senator HRUSKA. Thank you.

[The above material referred to follows:]

WILMER, CUTLER & PICKERING,
*Washington, D.C., May 17, 1976.*

HON. ROMAN L. HRUSKA,
*U.S. Senate, Russell Building,*
*Washington, D.C.*

DEAR SENATOR HRUSKA: I am submitting this letter to express my concern about the proposal for a permanent National Court of Appeals. Since I understand that the 1975 version is now undergoing some revision, I venture to sug-

gest a further modification that might reconcile the deep conflict of widely divergent views among experienced judges and lawyers, all of whom share a devotion to the integrity and improvement of the federal judicial process.

My reasons for opposing the National Court as a permanent institution are essentially those set forth in Judge Friendly's article entitled, "Averting the Flood by Lessening the Flow," 1959 Col. Law Rev. 634 (1974), his letter to Professor A. Leo Levin dated April 22, 1975, and Judge Feinberg's article, "A National Court of Appeals?" 42 Brooklyn Law Rev. 1 (1976). I will not burden the record with a further elaboration.

As you know, the principal objections to a permanent National Court of Appeals are first, that there are insufficient cases involving conflicts between circuits and similar matters to make it a fulltime job (once the present backlog of conflict cases is disposed of), and second, that the creation of the new court will inevitably reduce the status and importance of serving on the present court of appeals. Both of these objections could be met by borrowing a leaf from the very successful Judicial Panel on Multidistrict Litigation, appointed by the Chief Justice pursuant to 28 U.S.C. 1407. There could be a judicial panel on multicircuit conflicts and other appeals of national significance, also appointed by the Chief Justice, consisting of 11 members, one from the membership of each of the present circuits. This panel could have the same reference jurisdiction as the proposed National Court of Appeals. If necessary to divide the workload of reducing the present backlog, the Chief Justice could be authorized to appoint several such panels, each with different members from the various circuits. Judges who had sat on one of the cases creating the conflict being reviewed by the Multicircuit Panel would be recused and someone else from the same circuit designated in their place. In the rare cases which a court of appeals had heard en banc, a retired judge from that circuit who had not taken part in the en banc review could be designated to the Multicircuit Panel.

In this way we could avoid creating a new court with new members, a new courthouse and a panoply of new court officials. Since the members would consist of present court of appeals judges and membership would be widely shared among them, the new court would in no way denigrate their present status. And if the critics who foresee a lack of work for the new court after the backlog is disposed of are correct, a Multicircuit Panel of judges with other duties could readily accommodate to this condition by convening only when the need arises. The prestige of service and the quality of decision should be at least as high as one might expect from a permanent National Court. To whatever extent the net increase in workload would require the appointment of additional judges, no greater number would be needed than would have been named to the National Court in any event.

For the reasons given by Judge Friendly and Judge Feinberg, I share their view that no need has been demonstrated for any National Court of Appeals. But if there is a need and we decide to create one, I submit it would be far better to begin with a Multicircuit Panel, which could accomplish all of the same purposes and at the same time meet the very serious objections that a permanent National Court would present. After perhaps five years of experience with a Multicircuit Panel we would be in a much better position to decide whether a permanent National Court of Appeals should be created.

I note that S. 3423, which you introduced on May 12, 1976, moves at least halfway toward the idea of a Multicircuit Panel, by providing that the initial National Court of Appeals would consist of two judges appointed by the President and five to be designated by the Chief Justice from among the most senior Circuit Judges eligible. I submit it would be much better to go the rest of the way and begin with a Multicircuit Panel along the lines suggested above, with the creation of a permanent National Court of Appeals to be deferred until we learn whether a Multicircuit Panel is sufficient to achieve the objectives we all share.

I would be grateful if this letter could be made part of the record of your current hearings.

Sincerely yours,

LLOYD N. CUTLER.

Senator BURDICK. That is all today until the sound of the gavel.

[Whereupon, at 12:40 p.m., the subcommittee adjourned, subject to the call of the Chair.]

# NATIONAL COURT OF APPEALS

TUESDAY, NOVEMBER 9, 1976

U.S. SENATE,
SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL MACHINERY
OF THE COMMITTEE ON THE JUDICIARY,
*Washington, D.C.*

The subcommittee met at 10 a.m., pursuant to notice, in room 2228, Dirksen Senate Office Building, Hon. Roman L. Hruska presiding.

Present: Senator Hruska.

Also present: William P. Westphal, chief counsel; Prof. A. Leo Levin and Rebel Matera, staff assistant.

Senator HRUSKA. The subcommittee will be in order. The gentleman from North Dakota, Mr. Burdick, is away on official business and has asked me to preside which I happily do.

The hearings today are for the purpose of accommodating the heavy schedule that we are confronted with when the Senate was still in session prior to its adjournment sine die.

These hearings have been called to receive further testimony regarding S. 2762 and S. 3423, bills which would establish a national court of appeals. They are a continuation of hearings held earlier this year. On those occasions representatives of the American Bar Association and the American Judicature Society in each case presented resolutions favoring the establishment of the new tribunal. The subcommittee also heard from other distinguished witnesses, some speaking in favor and others opposed to the proposal.

Today we begin two additional days of hearings. Once again we are favored with distinguished members of the bench and the bar with diverse views on the subject. We are grateful to all of the witnesses who have come to give us the benefit of their thinking. The subject is too important to the functioning of the Federal judiciary, and to the well-being of the citizens of this country which that judicial system is designed to serve for the Congress to fail to consider carefully all arguments, both pro and con, prior to acting on these bills. By the same token it would be wrong to ignore the difficult and troublesome problems for which this legislation attempts to provide a solution.

The debate on these proposals is not limited to testimony before this subcommittee. A rich literature has already begun to appear in scholarly journals and in bar association publications analyzing both the need for a new tribunal in the federal system and the advantages and disadvantages inherent in particular proposals. Our desire is to build as complete and balanced a record as possible in order to inform those who, in the ultimate, will have to reach a decision with respect to this legislation.

As is well known, the first bill introduced, S. 2762, was drafted by the Office of Legislative Counsel to implement the recommendations of the Commission on Revision of the Federal Court Appellate System, which Commission I had the honor of serving as chairman.

S. 3423, which this Senator introduced, departs from the former bill in two regards:

First, it makes provision for a transitional period with respect to the appointment of the judges so that no one President could appoint all members of the new court; and

Second, it provides a more limited jurisdiction for the national court of appeals, in order to avoid objections voiced by judges and Justices to what has been termed transfer jurisdiction. Otherwise, it, too, reflects the views of the Commission.

The proposal for a national court of appeals was designed to increase the capacity of the Federal judicial system for definitive adjudication on issues of national law, subject always to Supreme Court review. In its report the Commission placed some emphasis on the volume of cases which the several United States courts of appeals were called upon to adjudicate, and the resulting difficulties in maintaining clarity and harmony in the national law. That report was issued in June 1975. It is appropriate to pause to inquire concerning the volume of litigation in the Federal courts since that time.

It should occasion no surprise that the filings in the U.S. courts of appeals have been increasing; there has been no year in the current decade in which that was not true.

It is noteworthy, however, that the increase in filings in fiscal year 1976 was 10.5 percent over filings in the preceding year. The data for the courts of appeals hardly tell the full story. The need for harmony and clarity in the national law applies at all levels of the judiciary.

The most recent report of the Administrative Office of the U.S. Courts shows over 170,000 cases commenced in the district courts in 1 year. The task of maintaining clarity and harmony in the system is entrusted to the nine Justices of the U.S. Supreme Court and this, of course, is only a small portion of their obligations because that Court is concerned as well with Federal questions in the various State courts and with the perennially difficult task of developing and refining the basic law of the country.

The most recent data available concerning the docket of the Supreme Court make clear that we cannot look to that Court to do "just a little more" to resolve intercircuit conflicts or to prevent them from arising.

Mr. Justice Rehnquist, wrote the Commission, "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." Certainly, we can agree with Mr. Justice Rehnquist without embracing the suggestion that the Justices of the Supreme Court should be asked to do more than they are currently doing.

We need not here rehearse the evidence of how hard pressed the Justices are. References to the Court's heavy caseload are now appearing in the opinions of the Justices.

In *Bailey* v. *Weinberger* (419 U.S. 593 (1974)), Mr. Justice White wrote: "Perhaps the state of our docket will not permit us to resolve all disagreements between courts of appeals or between Federal and

State courts," adding that he hoped the occasions would not be frequent.

Earlier this term Mr. Justice Stewart, dissenting from a summary disposition in the case of *United States* v. *Jacobs* (No. 75–1883), also took cognizance of the Court's workload.

In the opinions themselves we find that there is literature which has been developed that has dwelt on this same point. A recent study by Professor Levin and Professor Hellman points to a roster of cases disposed of summarily by the Supreme Court and suggests that the cause can be found in the heavy workload of that Court.

That article is to be found in the Toledo Law Review of earlier this year.

There are many difficult problems which must concern us at these hearings. They relate not only to the need for a new court, but also to the proper scope of jurisdiction, to the selection of the judges, to the relationship of this new tribunal to the various State judicial systems. Diverse points of view are to be welcomed. Fortunately, what unites us is our shared concern for the well-being of the Federal judiciary and our shared conviction that vigorous debate and reasoned argument will in the last analysis best serve our common goals.

We have three witnesses this morning, Judge Donald Lay of the eighth circuit, Chief Judge Seitz of the third circuit and Chief Judge Fairchild of the seventh circuit.

We are pleased to call first of all upon my fellow townsman, my brother in the law and a personal friend as well as a professional friend for many, many years, Judge Donald Lay of the eighth circuit court.

## STATEMENT OF HON. DONALD P. LAY, JUDGE, EIGHTH CIRCUIT COURT OF APPEALS, OMAHA, NEBR.

Judge LAY. Senator Hruska, I would like to express my gratitude and to thank you for the privilege of appearing before this committee.

As Senator Hruska knows, I have the greatest respect for the work of this committee and particularly for the gentleman who now chairs the subcommittee work in the many, many years that he has served to improve the judicial machinery. I think I speak for all of the courts of appeals the Federal judiciary in expressing the gratitude for the tremendous work that Senator Hruska has done in demonstrating the interest and concern for the improvement of justice in the Federal judicial system.

Projects to improve the judicial machinery have long been of interest to me. I have now served just over 10 years on the court of appeals. It is hard for me to believe that it has been that long but I know that Chief Judge Fairchild who sits here can recall back—I believe it was about on July 6, 1966—that President Johnson announced our appointments at the same time from Johnson City, Tex. Since that time I have worked to achieve within our circuit and wherever else possible within the Federal judicial system to achieve a more efficient processing of appeals.

I think, Senator Hruska, that you have specifically pointed out the major problems that are facing the Federal courts today can be sum-

med up in one or two statements—the proliferation of litigation and the resulting bulging dockets not only of the Supreme Court of the United States and the court of appeals but the district courts as well.

I recall that back in 1931 in the Harvard Review Mr. Justice Frankfurter reported that the Supreme Court dealt with some 700 petitions for certiorari back in the thirties and that the way things were going this someday would go over 1,000 and he didn't know what the court was going to do if that ever happened.

In the last 15 years there has been, I believe, a 350-percent increase in the dockets of the courts of appeals. In my own circuit when I came on the court in 1966 I think we had about 400 cases pending. Today we have well over 1,000.

This docket problem that has inundated the various courts has created, I believe, two major deficiencies. One relates to the ability of the judges to do quality work on the court. The second, and I think equally and perhaps even more important, is the delay in the process itself; in other words, the denial of justice to litigants simply because of the tremendous amount of delay.

In title 28, section 2254 covering State habeas corpus, before the statute was recently amended I believe there was a period of 20 days for the State to answer the petition for habeas corpus and then the statute provided, I believe, that within 5 days thereafter the district court would provide a hearing.

A least in two of our States we are constantly receiving mandamus petitions from prisoners because in the States of Arkansas and Missouri our Federal courts do not have the judicial manpower in many instances to provide hearings in those cases in less than 1 year. This is tragic.

I mention this as a prelude to my remarks on the national court of appeals. If the national court of appeals could remedy any of the situations that I have pointed out, could remedy the bulging docket problem, the deficiencies that result therefrom, the inability of judges to do quality work or could expedite this process of immediate justice—if the national court could do this, I think it would receive the wholehearted support of this Nation. It would receive my support and I think the support of the courts of appeals.

However, in all due respect I do see in my study of the proposed bill or in the Commission's hearings any attempt in the final resolution in S. 3423 that will in any way alleviate or provide remedies toward solving the docket problem. In all due respect I would borrow the term of former Chief Judge Luther Swygert of the seventh circuit when he wrote "The proposed national court of appeals is a solution looking for a problem."

I think when one analyzes and makes a cost assessment of what the proposed national court will do, one must agree with this statement. I guess this is the basis of my concern and opposition to the bill.

I believe in all sincerity that if the national court of appeals is implemented it will add to the burden of the courts; it will create confusion and uncertainty in the law; it will undermine the finality of the court of appeals; it will be done at a tremendous financial cost; and, finally, it will challenge traditional concepts of the separation of powers.

Let me speak as to why I feel this will increase the burdens for the various courts. I think it will result in a greater number of petitions for certiorari than are presently filed. I think if we follow through with the idea that a new court on a national level will be able to process 150 more written opinions, and I am sure you can increase that to, say, 300 at least by other type of processing because the Supreme Court today handles many more than just 175 cases—if we assume this, it simply means that there is a greater probability for the grant of certiorari, perhaps double with reference jurisdiction. There will be more appeals. Litigants will not give up because the national court of appeals rules in a certain way, they will again attempt to petition to the Supreme Court.

In other words, as I understand reference jurisdiction, it will mean once the decision of the court of appeals is made the petition of the certiorari will follow to the Supreme Court. The Supreme Court will review it and decide, whether this is a good case for the national court of appeals to handle, and if so, there will be a transfer or reference of this jurisdiction to the national court, and the national court will decide the case. Again I would suggest that in every instance when the national court decides the case that there will be a new petition for certiorari by the losing litigants.

This reminds me of the old statement of Mr. Justice Jackson who said, "We are not last because we are right, we are right because we are last."

As long as you provide tiers for losing litigants to go, I think those litigants will go there, particularly indigents who can afford it the most to go on to another court. I can't blame prisoners today—State prisoners, Federal prisoners—who appeal to the court of the highest and last resort. They are going to use every opportunity, whether it is by postconviction or direct appeal, to attempt to escape their confinement.

Now, I said that the proposed national court of appeals will undermine the finality of courts of appeals. I would suggest to you, and I have already heard this expressed by lawyers, that once the national court of appeals is created, the courts of appeals as now structured will become mere "whistlestops" on the way to the Supreme Court or the national court of appeals. In other words, the idea that courts of appeal are no longer going to be in most cases the final court of review, litigants will feel pressed to simply pause at the courts of appeal and go on for further consideration by someone higher than the circuit courts.

I indicated that it would create confusion and uncertainty. This is one of the points that was brought out as Senator Hruska has mentioned. I have read statements by Justice Rehnquist and Justice White that the national court will create more certainty and it will bring greater relief to litigants. I suggest that it will do just to the contrary.

I think, first of all, it will create more delay. I think we are going to add more case law to the existing body of law. We can hardly keep up with split opinions as it is but I think the law will become more complex.

There will be split decisions by the national court of appeals on issues or collateral issues that will then go on to the Supreme Court. There will in some instances, be plurality decisions by the Supreme Court

and then the lower courts are going to have to decipher some way, somehow, how these various offshoots of pluralities of the national court of appeals as well as the Supreme Court will affect the particular decision before them.

Now, one last point. It seems to me the proposed court challenges traditional concepts of separation of powers. The idea that this will provide a broader base for national law misconstrues the judicial process itself.

Appellate courts are not giant legislative bodies which pass laws for the public to read and adhere to or to interpret such as statutory legislation afforded us by the Congress of the United States or any other legislative body.

The judicial processes is an adjudicatory process. When we say that we are going to add more certainty to the law by giving a broader base to national law, I see a picture that since the national court is going to announce some abstract concepts or a particular legal principle that this will bring more certainty to the law and in that way alleviate the litigation in the various courts.

I have read statements by witnesses who have testified before this committee that by bringing more certainty to the law we are going to give relief to the various courts of appeals. There will be less litigation. I suggest to you that is a complete myth.

Justice Holmes once commented "give me a general proposition of law and I will decide the case either way." Cases are not decided on legal doctrine alone. Cases and controversies come to us on an ad hoc or factual basis. We adjudicate controversies by following legal precepts and precedents from higher courts, from our own courts and apply legal reasoning to the individual facts at hand. The concept that we are going to add a broader base and therefore there is going to be more certainty is false reasoning. In my judgment national court decisions will increase litigation, increase legal disputes because there will be a broader base for interpretation and construction.

Now, one of the needs for the national court expressed by the Commission concerns the necessity to resolve conflicts that exist among various circuits. This is one of the basic needs. The other is to give a broader base to national law. I appreciate these two concepts are unrelated.

Let me say, first of all, I have studied the Supreme Court docket in the last 10 years. I am a daily student of the United States Law Week. As an appellate judge I try to understand what are the existing conflicts that are before the court, what are current decisions, and so on.

In my experence on the circuit court of appeals in processing about 300 cases a year I would say that I encounter a major conflict in circuits in those cases of about 1 percent a year. I went back over the decisions I wrote this year and I found only two cases where there was a major conflict with another court of appeals. I suggest to you that the Supreme Court does have the capacity today and is exercising that capacity in deciding conflict of cases between courts of appeal.

In 1973 the commission stated that there were about 70 conflicts among the circuits. The Supreme Court within a year resolved half of those. Now the mere fact that the remaining half were not decided does not mean that there was a major conflict. There are many reasons, as

this committee knows, why the Supreme Court of the United States does not take certiorari. There can be factual nuances and there can be mootness problems. Simply because the court has not taken the problem is not of much significance.

In any event, I do not feel there are enough and sufficient conflicts among the circuit courts today that we should restructure the Federal judicial system at a tremendous cost—a tremendous cost.

One final point. The Supreme Court of the United States is the final arbiter of what our Constitution means. The Supreme Court also resolves disputes that arise from our dual form of sovereignty, the interrelationship of State and Federal Governments. Only the Supreme Court of the United States can do this. The lower courts and the national court of appeals would be a lower court, an inferior court, can only adjudicate these problems as they come to us in the form of cases and controversy. However, only the Supreme Court of the United States can make a policy change altering the law in a dramatic way. An example of this is the recent Stone decision. The Supreme Court held that Federal courts should no longer review fourth amendment cases involving State prisoners if the State petitioner has had a full and fair hearing in the State courts.

This was a major policy decision, a major change in the whole administration of criminal justice. Now, I suggest to you our court or any other inferior Federal court, could not have made that decision, could not have overruled Kaufman versus the United States. The national court of appeals if they were faced with the same problem, could not have made that decision. The only court in the land that could make that decision is the Supreme Court of the United States.

When we talk about giving a broader base to the law, and more certainty of the law and deciding more national decisions and more decisions of policy, that in actuality a national court of appeals is simply going to become another adjudicatory body. This court will have to decide cases on an ad hoc adjudicatory basis—which is the proper role of the judiciary—a national court of appeals will not have and should not have the power to determine judicial policy and change in the same manner that the Supreme Court of the United States has.

On that basis, gentlemen, I respectfully feel that the national court is not a solution for any of the major crises that exist today in the judicial system. We could go on and on and discuss what are some of the ways of improvement that could be done. I think each court of appeals today is constantly working on internal measures to improve our procedure.

I sit on the Judicial Conference Committee for the Revision of the Federal Rules of Appellate Procedure. We have been at work now for 2 years and we are taking all the water we can out of the rules of the appellate procedure to try to expedite the process.

In conclusion, I suggest that the proposed National Court of Appeals as it is presently structured under S. 3423 is going to complicate the problem. Its creation will bring a greater problem and add confusion and uncertainty to the law.

I thank you.

[The formal statement of Hon. Judge Lay follows:]

REMARKS OF HON. DONALD P. LAY, U.S. CIRCUIT JUDGE (EIGHTH CIRCUIT), ON PROPOSAL FOR CREATION OF A NATIONAL COURT OF APPEALS

Projects to improve judicial machinery have long been of interest to me. I have worked actively for the past ten years on committees of my own court, the Eighth Circuit Court of Appeals, to achieve more efficient processing of appeals. In this regard I have followed with keen interest proposals to create a National Court of Appeals. I was opposed to its creation as originally proposed and respectfully request that my remarks in an article in the November 1975, issue of American Judicature, attached to these remarks, be made a part of the record.

I shall attempt to summarize as briefly as possible, speaking frankly, my continuing opposition to the creation of a National Court of Appeals. Today the federal judiciary is besieged with problems of lack of personnel (no new federal judgeship has been created since 1970), bulging dockets, a proliferation and expansion of jurisdiction, and archaic internal procedures. In addition, anyone close to the federal judiciary must appreciate the overall low morale of federal judges today, caused by the decrease of the dollar's purchasing power and no intervening salary adjustment. This not only has caused constant financial worries to every judge, but has affected the ability of the President to appoint worthy and competent successors to judgeships. In view of these crises I am disturbed, along with a substantial number of my colleagues, that emphasis for Congressional reform is being directed to an area where no acute problem exists.

To me and many of by brethren with whom I have talked, this emphasis is most bewildering. The late Honorable Al Murrah, who served for over thirty years on the Tenth Circuit and was its Chief Judge for almost two decades, described the proposal of the National Court of Appeals to me as tragic for the nation and a backward step in the effort to achieve efficient administration of justice. He felt, and I agree with his sentiments, that the creation of the National Court would undermine the integrity of finality in the courts of appeals, giving greater impetus to losing litigants to file petitions for certiorari in the hope that some additional tribunal will grant review.

One of the primary reasons urged by the Commission to create a National Court is the inability of the present Supreme Court to resolve conflicts between circuit courts of appeals. It is difficult for me, after ten years of service on the Court of Appeals, to believe that this is a major issue in the overall administration of justice—that it is considered a problem of such magnitude to solve it Congress is considering spending tremendous sums to create another national court and fund its continued administration. I would estimate that in less than 1% of the cases which I have reviewed in ten years have I encountered serious conflict of decisions by courts of appeals.

When someone tells me that creation of a National Court of Appeals will help deter litigation in our courts of appeals, since there will be greater certainty of the law on a national level, my response is that they simply do not know what they are talking about. In the past year, I personally sat on and reviewed over 300 cases. I authored over 100 opinions and orders. Of those cases, I know of only two where a conflict between circuits existed. Upon recent examination of those files, I discovered those conflicts could be easily resolved on the basis of factual differences in the cases.

It is urged by the Commission that conflicts do arise more frequently on a national level; that the Supreme Court does not have the capacity to effectively resolve all of them; and therefore federal law is in a constant state of confusion. It is my analysis, as a weekly student of the Supreme Court docket, that the Hight Court does take cases where serious conflicts, which are truly ripe for decision, exist among circuits. However, when it does not, there are many policy reasons which explain the failure of the Court to muster four votes to grant certiorari. Quite often the case becomes moot, or, upon closer analysis, a conflict does not really exist, or the cases differ on factual nuances. More importantly, the Hough Court may feel the empirical value of having different viewpoints exist in the courts of appeals over a period of time is more valuable to ultimate resolution of a problem than an immediate, and perhaps premature, Supreme Court decision would be.

It is difficult to determine which important cases the Supreme Court must turn down due to "the pressures of the Court's other work," and which therefore would be handled by a National Court of Appeals. Let's assume that the proposed court would take all cases where the circuits disagree—the Commission's own estimate is that this will run between 50 to 75 cases. Assuming that

these cases actually involve major conflicts, an assumption which I sincerely doubt, it is only proper to believe that the Supreme Court would hear some of them. I respectfully submit this would leave the new National Court with very little to do. Once conflicts are resolved the National Court would necessarily serve simply as another appellate tier, readjudicating cases already decided once by a circuit court or a state supreme court. The Commission itself cites relatively few examples of undecided issues which require national resolution without delay. And, of course, the Commission recognizes that there are many issues where the reevaluation and building upon prior decisions by successive consideration in several courts will ultimately improve the quality of adjudication. In other words, premature adjudication is not a wise course.

The Commission claims that uncertainties in the areas of tax and patent laws have led to forum shopping. As I have previously written, when conflicts exist in these planning and preventive areas of the law uncertainty is unfortunate. However, upon analysis, I sincerely question whether, in any given year, sufficient numbers of conflicts and uncertainties exist in these areas of federal litigation to merit a wholesale restructuring of the federal appellate system. For example, in the patent field, the question of non-obviousness is a mixed issue of law and fact. The law is settled. Today the court of appeal's decision is a judgment analysis of the historical facts. There is no doubt that different judges resolve this issue of non-obviousness in different ways—but adding new judges to another tribunal is not going to create new certainty or uniformity in patent decisions since each case must turn on its own facts and the court's analysis of non-obviousness. To suggest there will be a more uniform analysis by a single court sounds good—but in actuality legal judgment by a single judge must necessarily vary case-by-case.

However, assuming that patent and tax laws are treated so disparately by our respective courts of appeals, which I sincerely doubt, the answer may be in the creation of a special court to review these issues on direct appeal from the district courts. At least in this way some relief, too little, I'm afraid, to make much difference, would be afforded the courts of appeals.

I am privileged to serve on the Appellate Rules Committee of the Judicial Conference of the United States. For the past two years our efforts have been directed toward simplification of our present appellate rules. It seems fundamental to me that if the judicial process is to be meaningful to the nation's people, to encourage them to resolve disputes by a peaceful and just means we need to simplify the process, not make it more cumbersome. The creation of a National Court moves in the wrong direction.

I am fully aware that some organizations have generally endorsed the concept of a National Court of Appeals. The Special Committee on Coordination of Judicial Improvement of the ABA made a report in 1974. On the basis of this report, the House of Delegates of the ABA has endorsed the creation of a National Court of Appeals. This report cited, as two reasons for the imperative need for a National Court, (1) the increased caseload of the regional courts of appeals, and (2) the enormous caseload of the United States Supreme Court.

Oddly enough, however, as critical as these two factors are, the proposed legislation for a National Court provides no possible bases for alleviating the caseload of either the courts of appeals or the Supreme Court.

On the contrary, I am confident that, under the present proposed structure of reference jurisdiction, the creation of the National Court will increase the number of petitions for certiorari on the theory that the probability of obtaining further appellate review is doubled. Common sense dictates that few losing litigants, particularly those who appeal at government expense, will feel restrained from appealing to a higher court if the odds are increased that the higher court will review their case.

I perceive only one possible purpose for the proposed structure of jurisdiction for the National Court of Appeals—to meet the theoretical need for increased capacity for definitive adjudication of issues of national law within the federal judicial system. The proposed court's decisions, incidentally, would still always be subject to review by the Supreme Court. When one considers the proposal in this light, it reminds me of a statement by former Chief Judge Luther Swygert of the Seventh Circuit concerning the proposal to create a National Court of Appeals, describing it as "a solution looking for a problem." I can honestly say that in over 25 years of legal experience, 15 years as a trial lawyer active in diverse cases, and 10 years on the Court of Appeals for the Eighth Circuit, I

cannot recall a single instance where I have heard a lawyer complain of any such need or confusion arising from the lack of stability or certainty in the law. The proliferation of uncertainty created by inevitable split decisions by a National Court of Appeals, combined with a divided Supreme Court on major issues, can only add to the confusion of the nation's lower courts, lawyers and litigants.

Let me approach the proposal of the National Court in a different light. All members of the judiciary are acquainted with the sound principles of judicial restraint. When one hears talk of the need to make greater pronouncements of legal principles on a national level, such discussion confuses the traditional separation of powers between the judicial and legislative branches of the government.

Federal appellate courts are not, and should not be, policy making bodies. Under settled traditional principles judicial tribunals are created to adjudicate existing controversies within the framework of legal reasoning supplied to the courts by precedent. Justice Holmes once said, "Give me a general proposition of law and I can decide the case either way." Settled legal principles guide appellate courts but they do not, by themselves, decide cases or controversies. Courts are inherently different from legislative bodies and are not equipped to make policy decrees governing all people in identical ways. The very nature of the judicial process is that the law evolved in a particular decision is only the law of that case, and a different factual controversy may bring about a completely different result. The increasing vagaries of human experience and relationships, the ascension and fall of conflicting interests and values, and growth of government and population cause proliferation of litigation.

However, to urge the need for a greater base for the declaration of national law within the judicial branch of government makes no more sense than saying that this country will have fewer problems if we create a mini-Congress to pass twice as many bills since the present Congress is too engaged to pass on all policy questions upon which legislation is needed.

If there exists a dire need to have a greater declaration of national law, sufficient to disturb the integrity of our present judicial structure, I am not aware of it. The fact that there has been a great influx in the number of petitions for certiorari does not reflect a need for resolution of more cases on a higher national level. A great many of these petitions for certiorari reflect the upsurge in direct criminal appeals and post-conviction cases. One cannot blame any individual confined in prison for using every legal means available to escape his imprisonment. If there existed a court higher than the Supreme Court one cannot seriously doubt that practically every state or federal prisoner would attempt to appeal to that court after the Supreme Court had denied review. This calls to mind Mr. Justice Jackson's statement that, "We are not last because we are right, rather, we are right because we are last." My point is that the large increase in petitions for certiorari over the past few years does not mean that there are burning issues of national law which remain unanswered.

This brings me back to the discussion of integrity and finality generally afforded to court of appeals decisions and the highest appellate courts of the various states. Judges on these courts are not incompetent to adjudicate the many controversies which arise. Few cases deserve review by more than one judicial body. The traditional role of the Supreme Court of the United States has always been to decide the direction of legal policy and principle in light of the experiences of the lower courts with existing principles of law. Certiorari is seldom granted by the Supreme Court for purposes of correcting an erroneous application of law or changing a lower court's adjudication of the case. Illustrative of this would be the recent case of Stone v. Powell. The Supreme Court ruled that, regardless of the erroneous application of constitutional law by a state court, once a defendant has had a full and fair hearing in the state court, he cannot attempt to have search and seizure questions reviewed in the federal court through collateral attack. This was a marked shift in policy affecting federal and state courts which changed settled legal principles in the administration of criminal justice. Certainly a National Court of Appeals would be bound by decisions of the Supreme Court of the United States just as the courts of appeals are. The point is that cases such as *Stone* v. *Powell* can only be decided by the highest court of the land, and not by some intermediate court of appeals. Thus, the role of the National Court must necessarily eventually be the same as a court of appeals. It could only adjudicate the controversy before it: it could not attempt to usurp the policy-making role of the Supreme Court. In this sense, the National Court could serve little purpose in adding broader bases to national law.

In conclusion, I would like to echo the views of Judge Wilfred Feinberg of the Second Circuit, who has written:

"What is most striking about the Commission's proposal for a National Court of Appeals is that it makes no adequate attempt to assess the costs, in all senses, of the new institution. These costs would be substantial in terms of the diminution of authority and prestige of the courts of appeals; the creation in many cases of a fourth tier of courts, with attendant additional expense and delay for litigants; the significant initial and continuing financial cost of the new court; and the diversion of judicial reform effort from more pressing matters.

"The case made by the Commission for a National Court with a capacity of deciding 150 cases a year must be weighed against these costs. A careful analysis, however, shows that the need is not sufficient to warrant such a drastic and costly step as that proposed by the Commission. The Report admirably serves "the larger purpose of furthering discussion and debate," and the Commission has done a great service by pointing to a problem which has previously received little attention. But a more appropriate response to that problem would be to try any of a number of more limited alternatives before proceeding to the radical changes the Commission proposes."

I urge Commission study and judicial reform in meaningful areas. We need pragmatic tools to make speedy trial a reality. We should strive for expeditious appeals. Delays in many appellate courts occur today simply because we lack the mechanical ability, due to lack of funds, to turn out transcripts for an immediate record. All federal courts can accomplish a great deal internally by modernizing our current processes. We need the aid and cooperation of Congress to achieve these goals. I respectfully submit a creation of a National Court of Appeals is not needed and in fact, in my judgment, would be a step in the wrong direction.

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## Why Rush to Judgment? Some Second Thoughts on the Proposed National Court of Appeals

(By Donald P. Lay)

In the last two decades we have paid increasing attention to the revitalization of constitutional guarantees. We have come to realize that if the courts fail mechanically those constitutional principles rings hollow. Therefore, it is little wonder that we have turned to the practicality of speedy trial, and have become vitally concerned with the capacity of the judicial process to cope with the large volume of human problems which find their way into the courts.

A National Commission composed of a distinguished group of senators, congressmen, laymen and lawyers has undertaken a study of the revision of our federal appellate court system, and has proposed the creation of a new National Court of Appeals.

The proposal calls for a court of seven members with life tenure who would sit en banc in all cases. Their decisions would be binding authority nationally unless overruled by the Supreme Court. Cases would come to the National Court of Appeals in two ways: up, via transfer jurisdiction, from the various regional Courts of Appeals or down, via reference jurisdiction, from the Supreme Court. The National Court of Appeals could decline to accept cases referred via transfer jurisdiction but would not have the power to refuse any case referred down from the Supreme Court. All National Court of Appeals decisions would be subject to review by the Supreme Court on petition for certiorari. The Commission suggests that consideration of such petitions should be expedited so that the finality of the National Court's decision would be speedily established. They expect that it would only rarely be necessary for the Supreme Court to grant plenary review of National Court of Appeals decisions. That, in sum, is the proposed National Court of Appeals.

The Commission's basic premise in arguing for the creation of the new court is that there is a need for greater capacity for uniform resolution of national law than the Supreme Court of the United States can supply. My basic questions are whether the need actually exists and whether the plan is feasible. There is much reason for concern that the new court would threaten the basic values of our present system.

ADDED DELAY

The National Court would be more worthy of support if the goal of the proposal were to diminish the caseload for the Supreme Court and the eleven Courts of Appeals. However, the proposal tends in the opposite direction, that is, toward increasing the judicial burden and adding inevitable delay to the already interminable appellate process. In considering a new National Court, regardless of how it is molded, the forbidding concept of an added tier in the federal appellate structure is ever-present. This is regrettable. Legislative study toward diminishing the burden for the courts and delay for the litigants should be the first priority. Emphasis on means to expedite the appeal, and judicious study and implementation of plans to lessen the input of litigation into the appellate process are more critical concerns. At the same time I appreciate the principle that reform in a particular area should not be discarded simply because overall reform is not forthcoming. I am confident the worthy proponents of the new National Court invite constructive comment since such a revolutionary proposal should not be accepted without critical analysis. These comments are offered in that spirit.

The basic need for a National Appellate Court as suggested by the Commission is directly related to an alleged failure of the federal judicial system to provide adequate capacity for the declaration of national law. According to the Commission's preliminary study, we now suffer from (1) unresolved inter-circuit conflict resulting in contradictory statements of the same rule of national law, each of equal force within specific territorial limits, (2) delay in resolving these conflicts resulting in lack of certainty and forum-shopping by litigants, (3) the added burden on the Supreme Court to hear cases otherwise not worthy of its resources, and (4) uncertainty even where there is no actual conflict among circuit courts of appeals, primarily resulting from a practice of the federal government to enforce policy despite adverse rulings in the circuit courts.

These, then, are the evils which are said to flow from the lack of adequate declaration of national law.

A basic difficulty with the Commission's plan, as shown by at least one commentator, is that there are few conflicts among the court of appeals on substantial questions of national law which the Supreme Court does not resolve within a reasonable time.[1] As a student of court of appeals opinions over the last nine years, I endorse this view. The Commission disagrees. Exploration of the factual basis of their disagreement is warranted.

The alleged lack of capacity for binding declarations of national law is premised on the Supreme Court's finite resources. While the total number of certiorari petitions filed in the Supreme Court has increased almost 400 per cent in the last 30 years, the Court's output has remained roughly the same; about 150 cases each year get full review and a written opinion.

Changing forms of business transactions and enterprises constantly require new interpretations of the tax and antitrust laws. Congress has extended federal regulation into many new areas, such as environmental protection, pension security, and occupational health and safety. Since new legislation often creates new questions, the Commission hypothesizes that there is an ever-increasing chance for inconsistent interpretations among the existing district and circuit courts, and yet no likely increase in the Supreme Court's capacity to resolve those questions.

Of the more than 3,000 1972 and 1973 cases in which the Supreme Court denied certiorari the Commission found about 70 to 75 presented questions on which circuit courts had reached directly conflicting results. In November 1974, more than half of those questions were still unresolved by the Supreme Court. As the Commission itself no doubt realized, it is difficult to attach much significance to this figure of 75 conflicts. The Supreme Court denies certiorari for a variety of reasons, usually without explanation. For example, the Court may think that the issue is one that would be illuminated by further consideration by the lower courts or that another branch of government is planning to act so as to moot the

[1] In its attempt to respond to this problem, the recent Report of the Study Group on the Caseload of the Supreme Court suggested that the proposed National Court of Appeals might exercise some jurisdiction to resolve inter-circuit conflicts. These data suggest that such conflicts are not necessarily the issues in greatest need of resolution. Some cases that present conflicts may have substantially less prospective significance than other cases not now destined to reach the Supreme Court. If a court is to exercise such jurisdiction, this data would tend to indicate that the jurisdiction should not be cast in the limiting terminology of conflict. Carrington, *United States Appeals in Civil Cases: A Field and Statistical Study*. 11 Hous. L. Rev. 1101, 1121 (1974).

controversy. The record in the particular case presented may be ambiguous or otherwise unappealing. Thus, denial of certiorari despite a conflict among the circuits does not necessarily mean that the Supreme Court was too busy to take the question or that the question should have been resolved at the time it was first presented to that Court. A National Court of Appeals would presumably have to reject similar cases on similar grounds.

A second figure cited by the Commission is the number of recorded dissents by Justices from denial of certiorari. It is not unfair to attribute these dissents to divergent views on the Court itself rather than to inadequate appellate capacity.

GOVERNMENT LITIGATION STRATEGY

A third factor allegedly justifying need for a new court is the government's litigation policies, especially those of the Internal Revenue Service and the National Labor Relations Board. It is IRS policy to publish a list of prime issues that it wants to establish through litigation. On these points, it will not compromise but will force the taxpayer to go to court. That much is fine, but if the IRS loses at the circuit court level, too often its response is not to file a petition for certiorari but to continue to litigate in other circuits in hopes of getting a different result. There are clear examples of cases where several circuits have unanimously ruled against the IRS, but it still refuses to accept the decision or petition for certiorari.

The NLRB has an even more extreme policy. As Professor Summers of Yale points out, the NLRB "does not consider itself bound by *any* prior decisions of any Court of Appeals". He cites the Board's "right of control" test in applying the secondary boycott provisions of the Labor Act. The Board's view was squarely rejected by five Courts of Appeals in a row from 1968 onward, but the Board continued to use the same test to decide unfair labor practice cases, even in the circuits that had ruled against it. For example, the Board did ask permission to petition for certiorari in one of the cases, but then-Solicitor General Griswold would not permit it, because (he later wrote) "in his judgment, there was little likelihood that the Court would uphold the Board's position. . . ."[2] The Board nevertheless continues to use the test.

It is not only in labor and tax cases that the government has been slow to accept a court of appeals ruling as binding beyond the particular case. Early in 1971 President Nixon ordered impoundment of funds previously appropriated by Congress for various legislative programs. The first impoundment case to reach a court of appeals was in the Eighth Circuit involving federal highway funds for the State of Missouri.[3] Notwithstanding the appeals court's clear decision that impoundment was not authorized by the Federal Highway Act, the administration failed to seek review by the Supreme Court. Instead, they continued to impound highway funds in all other states but Missouri, forcing each state which desired release of funds to litigate the issue in a federal district court.

The government's explanation for not seeking further review of the Missouri case was that they did not make a good enough record in the district court. It was fairly obvious, however, that the administration did not want to review their impoundment theory under the clear prohibitions of the Highway Act. As events later demonstrated they sought to test their general right to impound funds under the Federal Water Pollution Control Act, whose provisions and legislative history were not so directly opposed to the administration's view. Ultimately the Supreme Court unanimously ruled the impoundment illegal under the Water Pollution Control Act.[4]

There is merit in developing different attacks in various cases on the same issue. The law would not grow if any litigant, including the government, were not free to challenge settled doctrine. However, if the government's intention is to avoid review because it believes the Supreme Court would rule against it, to avoid settling a question so that a policy which is continually declared illegal may nevertheless be pursued, then we have government of men who avow contempt for the judicial process and disregard for the rule of law.

If the government is unwilling to follow the law in one circuit, even where the court of appeals of that circuit has ruled, as in the impoundment case, there

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[2] Memorandum for the NLRB at 3, *J. L. Simmons Co., Inc.* v. *Local 742, United Brotherhood of Carpenters & Joiners*, 404 U.S. 986 (1971).
[3] *State Highway Commission* v. *Volpe*, 479 F.2d 1099 (8th Cir. 1973).
[4] *Train* v. *City of New York*, 43 U.S.L.W. 4209 (U.S. Feb. 18, 1975).

is no certainty that it will universally follow the rule of the National Court of Appeals. Under these circumstances, what we need is not a new National Court of Appeals but a new litigation policy in the Justice Department.

The Commission's studies reveal that the adequacy of our present courts to render nationally binding decisions is questioned mainly in the fields of tax and patent law. Uncertainty in these areas may be particularly unfortunate because they are preeminently areas of planning and preventive law. Whether a new court such as that proposed by the Commission will help, however, is a different and important question. In the area of taxation, the problem is made much worse than it need be by the IRS litigation strategy, but at least the controversies are over what rule of law should apply and thus the issues could be resolved by a national court. In the patent area, however, the problem may be more intractable, for there, as acknowledged by the Commission, "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".[5] These perceived attitudinal differences lead to open and flagrant forum-shopping.

Thus, since the patent problem is not one of defining the rule in the abstract but rather one of applying it consistently to the facts of each case, a new court could add uniformity to patent cases only if it could thoroughly and knowlegeably review a large percentage of the patent cases. Perhaps a specialized National Court of Patent Appeals would answer this need better than any court of general jurisdiction.

POLITICAL FEASIBILITY

There are further practical problems presented by the Commission's proposal. A basic concern is the plan's lack of political feasibility. At the present time we have a Republican president and a lop-sided Democratic majority in Congress. It is doubtful that a Democratic Congress would give a Republican president the opportunity to appoint seven new federal judges with life tenure, especially when the seven would sit on a single court whose decisions would be binding nationally.

The proposal may lack mechanical and procedural feasibility as well. The new court is allegedly designed to reduce delay in national resolution of legal issues. There is reason for concern that the new procedures of transfer jurisdiction would add to the delays and workload of the existing circuit courts. Under the Commission's plan, the circuit courts could transfer any case to the National Court rather than hear it themselves, if the circuit court found that (1) the case turned on an important issue of federal law applicable to a recurring factual situation and the transferring court is satisfied that an immediate national answer is needed, or (2) federal courts have previously reached inconsistent results on the same question. The National Court of Appeals would have unreviewable discretion either to accept and decide a case so transferred or to remand it to the court which sent it.

The Commission has not set out in detail just how the transfer jurisdiction would be handled, but apparently either the parties or the circuit court itself could move for transfer to the national court. If transfer were proposed, the circuit court would seemingly have to undertake a considerable investigation to determine whether there really was a conflict among the courts or an issue of sufficient national importance to justify transfer. Hearings and briefings on this issue could conceivably consume much time and require inquiry into the merits—time that would be largely wasted if the decision were then made to transfer the case rather than decide it on the circuit level.

Extra delay would be built in while the National Court decided whether to take the case or perhaps take only the issue which prompted the transfer, if it were only one among several presented by the case. If the National Court took only certain questions rather than the whole case, additional delay and great expense would burden the parties while they argued their appeal piecemeal in the National Court, perhaps in the Supreme Court if certiorari were granted, back to the circuit court, and finally, if there were a reversal and no further appeals, back to the district court for retrial.

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[5] Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change, A–128 (1975).

NO CERTAINTY

Perhaps if the new court would lead to greater uniformity and certainty, if it could truly make difficult legal problems more predictable, these extra costs would be justified. But the important constitutional and statutory questions that infrequently divide the circut courts, and divide the Supreme Court as well, have no simple, predictable, logical answers. When we seek certainty, uniformity and predictability in the law, we seek a chimera, a non-existent ideal. As Justice Oliver Wendell Holmes wrote:

"The life of the law has not been logic, it has been experience. . . . The truth is, that the law is always approaching, and never reaching, consistency. It is forever adopting new principles from life. . . . It will become entirely consistent only when it ceases to grow".[6]

More judges and more written opinions, even binding opinions rather than those only persuasive in authority, do not necessarily make the law more knowable and uniform. The present Supreme Court is a prime example. Often the justices are split 5–4 or 6–3, and in many instances no single opinion commands the allegiance of a majority. One must read several concurrences, add the votes together on various points, and attempt to construct a rule where the justices themselves could not agree.

There is no reason to believe that a new court would not split as well, casting doubt on the finality of its decisions as well as complicating the reading of them.

A further problem almost certain to occur is that at some point the deeply held views of the majority on each of the two national courts would diverge. The pressure on the Supreme Court to grant certiorari would be greater if it thought that the National Court had erred than if a circuit court had done so because the National Court's decisions would bind everyone. The Supreme Court could refuse to refer cases to the new court in areas of disagreement, but the problem could not be avoided altogether unless the National Court exercised restraint in accepting similar cases through its transfer jurisdiction as well. If the disagreement covered a rather broad spectrum, the National Court's utility would be much impaired and it might become *de facto* a court of specialized jurisdiction, or worse yet, a court with very few cases to hear.

THE BENEFITS OF DELAY

I am also deeply troubled that the Commission has almost entirely overlooked the value of having important national legal questions resolved slowly, allowing many lower courts to approach an issue anew, each considering what others have done and yet rethinking the justice and policy of the question as it is presented on the particular facts before each court. This process of case-by-case adjudication allows the best efforts of many similarly situated litigants to be brought to bear on the problem. It gives time for legal scholars, law review commentators, as well as organizations interested in a particular area of law, such as the National Association of Manufacturers or the Sierra Club, to develop and publish their views as well.

The time lag in national resolution within the present system provides an even more vital impact—practical experience gained by operating under a particular interpretation of the law in question. Where varying results are reached in different federal district and circuit courts, federal law will not be uniform throughout the country for some time. But in many cases the temporary hardship this causes is greatly outweighed by the benefits of being able to observe the practical results of adopting one interpretation as opposed to another. Political leaders can observe whether one method of desegregation works well before it is required throughout the land. Tax accountants and the IRS can determine whether one interpretation of certain deductions tends to distort taxable income in certain industries, or whether a regulation can easily be evaded through some unintended loophole. As Justice Sutherland wrote, "[E]xperience is of all teachers the most dependable, and . . . experience . . . is a continuous process".[7] Justice Cardozo recognized that "[o]ften a liberal antidote of experience supplies a sovereign cure for a paralyzing abstraction built upon a theory".[8]

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[6] O. Holmes, The Common Law 1, 36 (1881).
[7] *Funk* v. *United States*, 290 U.S. 371 381 (1933).
[8] B. Cardozo, Paradones of Legal Science 125 (1928).

The Commission did, to be sure realize that in some cases successive consideration by several circuits could be beneficial. They apparently assumed, however, that such cases were definitely a minority and further that they were readily identifiable as a class right from the outset. Yet surely there are very few issues of which it can be said at the outset that the result will be made no more just, wise or clear if other courts consider it on other facts. Transfer jurisdiction could lead to premature decisions on seemingly simple questions, questions which reexamination would have shown to be more complex and very important.

One further thought about this proposed "rush to national judgment". It has long been the rule that the federal courts do not issue advisory opinions and that constitutional questions will not be reached if there is a narrower ground for decision. This judicial restraint reflects to some degree the separation of powers under our Constitution, a division that gives the primary duty of deciding what the law shall be to the Congress, not to the courts. The duty of implementing and interpreting the law in the first instance is given to the executive branch which must enforce Congress' laws. One value of the delay built into the present system is that it gives the other branches of government time to do their work, to see where problems and uncertainties lurk, and to take action to correct them on their own initiative, rather than under court order. It is not wise to rush to judgment when the judgment should, without undue cost to the parties and others similarly situated, shortly have been rendered unnecessary due to corrective action by a more representative branch of government.

In summary, the Commission's proposal is probably not politically feasible, could lead to less rather than more speed and uniformity, and underestimates the value of successive consideration by lower courts. Assuming for the moment that there nevertheless is a need for increased appellate capacity at the national level, there may be a better solution.

### A BETTER SOLUTION

Suppose that the National Court of Appeals had only reference jurisdiction, that is, it heard only those cases sent down to it by the Supreme Court. Suppose further that this National Court had a permanent chief judge, but that the other six judges were a rotating crew from the existing circuits each sitting on the National Court for three or six months. Suppose further that the National Court met one week a month, hearing 25 cases a week or less if the caseload permitted.

First, this plan might be politically feasible. It would require the appointment of only one new judge, the chief judge, and would not permit any one President to choose the membership of a whole court.

Second, the problems of transfer jurisdiction would be eliminated. The circuit courts would not have to undertake the lengthy but largely wasted exercise of determining whether a case should be transferred and the National Court would not have to spend time deciding whether to accept or to remand the case. The Supreme Court, which through its handling of certiorari petitions has much practice at determining which issues are ripe for decision, which need further consideration below, and which are wholly unworthy of the attention of higher courts, would maintain complete control over which cases would be granted review at the national level. The National Court would be unable to force premature consideration of an issue. The Supreme Court would simply be freer to grant review since it could refer almost as many cases to the National Court as it would choose to hear itself.

Furthermore, because the National Court would be a rotating rather than a permanent body, there would be much less chance of any lasting philosophical divisions between the National Court and the Supreme Court. This would make it more reasonable to assume that the Supreme Court would in fact make good use of whatever aid the National Court could provide.

One more advantage of this alternative proposal is simply that if the National Court of Appeals did not work out well, it would be considerably simpler to remodel or disband altogether a court with only one permanent member than a court with seven permanent appointees. When we consider the tendency of other governmental agencies to cling to existence and appropriations long past their *useful* life, this is no small advantage.

These alternative suggestions do, of course, have their own disadvantages relative to the Commission's proposal. First, a rotating panel would lack the consistency and perhaps the pressures toward unanimity and compromises of a more permanent body. However, a strong chief judge and an able permanent staff could counteract these problems.

A second disadvantage is that, without transfer jurisdiction, there might be less of a deterrent to government abuse of its relitigation strategy. However, as discussed, a new court will not necessarily resolve this problem.

There is another possibility, in certain areas which might be defined, where the issue demonstrated an important question of national law or a conflict of circuit problem. The appellant could petition the National Court directly from the district court. In this way we would avoid the intermediate delay and added burden of preliminary review prior to transfer by the circuit court.

Notwithstanding these suggestions, it is probable that any new National Court would lead to less rather than more speed and uniformity and would undermine the basic values inherent in our system of successive consideration by lower courts.

We should not add to our judicial problems by creation of a new court. There is still much room for improvement within our present system. We should concentrate on innovation from within.

Senator Hruska. Thank you Judge Lay. Mr. Westphal, have you any questions of the witness?

Mr. Westphal. I have a few, Mr. Chairman, that I would like to ask here to try to focus our attention on some problems.

You make the point, Judge Lay, in your presentation here that one of the biggest problems we have today is the fact that because there have been no new judgeships created since 1970 at the circuit level—I don't think any have been created since about 1968—that one of the biggest problems we have is the delay in the processing of a case from original filing in the district courts on through the dispositon at the appellate level. Congress has been working on a lot of legislation that would tend to alleviate that problem. We almost passed a bill that would have created some 45 or 49 district court judgeships, but that bill failed. In the 95th Congress I am sure that it will receive prompt attention.

The Congress also almost passed a bill to create 7 additional circuit judgeships and the proposals to reorganize the fifth and the ninth circuits which would have added about 15 judgeships in total for those 2 circuits and were on the calendar on the floor of the Senate at the time of adjournment. I think again it is likely that those bills will be processed in the next Congress.

A bill which did achieve passage which will be of material help in this area that you talk about was the bill to increase the jurisdiction of the U.S. magistrates. If those matters receive attention from the Congress, they should help to give the district and the circuit courts additional manpower so that this delay that I mentioned can be corrected.

In addition to the things that I have mentioned, it is my understanding that the Judicial Conference of the United States is prepared at the outset of the 95th Congress to recommend that a total of 106 additional district court judgeships be created, and a large number of those may be approved by the Congress. This would go further to solving it.

When that occurs this will relieve the delay problem at the trial level. It could theoretically aggravate some of the problems at the circuit level in the sense that if the district courts with 106 more judges increase their capacity to terminate cases this will just provide a greater crunch at the circuit level.

Now, if that is the scenario for the near future, doesn't this mean that there is a greater need to have a national court of appeals which can create more definitive law which will help relieve the Supreme Court of its function at the top? What is your perception of that?

Judge LAY. Well, I would say to you, Mr. Westphal, that in my 25, 26 years now as a lawyer and judge that I have never known in my practice or in my work as a court of appeals judge that there is a confusion that is of such major proportion that exists as to unsettled legal principles which cries out for the creation of a new national body. I go back to Holmes' proposition. You can give me all the legal precepts and doctrines that you want and it is not going to cut down on litigation, it is not going to decide cases. There is no question that the proliferation of litigation is caused by many extrinsic factors but I do not see that there is a great need, frankly speaking, beyond one judicial review. One judicial review is really all that is needed.

The courts of appeals are very competent bodies, the judges with whom I serve and with whom I have sat with in other parts of the country are able men. I have the greatest respect for these people. They do a tremendous job and fail to see the confusion that evidently the Commission feels. I fail to see any arising from conflicting decisions of the courts of appeals. In the adjudicatory process, we decide the cases and controversies before us and we adjudicate them guided by legal precepts and principles. I think the Supreme Court gives us sufficient guidance. It is very rare where I have found a case where there is no guiding precedent either from the Supreme Court or the courts of appeals. I just can't see this need that we are all of a sudden creating out for some declaration of broader basis of national law.

To give you an example, a year ago the United States Supreme Court decided the case of *Barrett* v. *United States*. This involved the question of whether under title VII of the Gun Control Act the Government had to show the gun was received in the act of being transferred in interstate commerce.

I followed the decision of Mr. Justice Marshall in the *Bass* case that in title VII as distinct from title IV that the Government had to prove that the gun was actually moving in interstate commerce.

A year later the sixth circuit had the same question under title IV and they said, "We disagree with the eight we find that you do not need to show present involvement with interstate commerce, only that the gun has moved in commerce at some time in the past."

The Supreme Court immediately granted certiorari. Here was a conflict. They took certiorari immediately in this case and in *Barrett* v. *United States* they overruled the prior dictum of Mr. Justice Marshall and agreed with the sixth circuit.

Now, I don't think that there was any long-lasting confusion in law enforcement by reason of these inconsistencies. I just have a great deal of difficulty seeing that we do not on the courts of appeals have sufficient legal tools to solve problems.

Mr. WESTPHAL. Dean Griswold, former Solicitor General, when he testified before the committee gave an example of litigation involving the value to be placed upon shares in mutual funds in connection with estate tax problems. He pointed out that it took a period of some 10 years before the Supreme Court granted certiorari to decide that issue despite the fact that there did exist, fairly early in that period of

time, a conflict between circuits. According to Dean Griswold's testimony, the Supreme Court denied certiorari on two different occasions where, according to Dean Griswold, if the Court had just taken jurisdiction of that case and had decided it, decided it once and for all, then it would have cut down on an awful lot of litigation that stemmed from probably 100,000 estates in which that question was involved. It didn't make any difference how they decided the case the Federal Government would have gotten its tax bite at one time or another whatever increase in value there had been in those shares but that what was needed was one definitive decision.

So Dean Griswold makes the argument that in addition to a need to resolve conflicts there is a need to anticipate those conflicts and that will reduce the volume of litigation because as he points out the Federal Government itself is one of the best customers of the courts of appeals, they will frequently litigate a question and keep looking and trying and probing to find a conflict.

Even though two or three circuits may rule against them, they will still strive for further litigation in order to build a conflict and get the question finally resolved in the Supreme Court. So viewed from that perspective, don't you feel there is justification for a contention that the national court of appeals is needed in order to do that which the Supreme Court has rarely done in the last 20 to 25 years and that is grant certiorari where counsel contend that there is a conflict of opinion between the several circuits?

Judge Lay. Certainly, you can pick out I suppose instances where the Court should have resolved something in a much more expenditious way than it has. However, it seems to me under the present system if the Government feels there is an overwhelming policy problem that should be decided, the Court is fairly quick to accept that.

In the recent case of Foster Lumber Co., I think Mr. Justice Blackman dissented on that very basis and said, "Every time the Government loses below this Court accepts certiorari." I think Government policy was involved there and the Court was quick to take it.

I can take examples and you can give examples and we can end up in the middle and never resolve it, but I think there are certain areas of the law which the court and the process requires—I think someone uses the word "percolation" of ideas and experience through the lower courts.

I turn to Mr. Justice Cardoza's statement which said:

> Often a liberal anecdote of experience applies a sovereign cure for paralizing abstraction built upon a theory.

Mr. Justice Holmes' famous statement:

> The life of the law has not been logic, it is experience. The truth is that the law is always approaching and never receiving consistency, it is forever adopting new principles from life, it will become entirely consistent only when it ceases to grow.

Now, I suggest there are many areas of the law where we need experience within the lower courts even though we may have inconsistent results. This does not happen very often but when it does I think there is a purpose to be served within the judicial process. This relates, I think to traditional concepts of separation of power.

When Congress passes a law it is for the agencies to experience and to implement it in the field and see how it is best going to work and

develope experience of interpretation. It may be years later before the courts put there final stamp of approval upon a certain approach based best upon the experience of how it works.

Now, I know the example that Dean Griswold used but it just seems to me that we can't always reach the consistent basis. We do the best we can. I think when you make a cost assessment of what the national court of appeals has now proposed you will find it will cost us in the loss of integrity to the court of appeals, provide added confusion and added uncertainty the law and result in a tremendous economic cost, I think on the scale that it balances the other way.

Mr. WESTPHAL. Thank you, Mr. Chairman. I have no further questions.

Senator HRUSKA. Judge Lay, in that regard is there anything in the proposal contained in either bill that denies or militates against a doctrine or a policy of adequate percolation to which you refer? Is there anything that shortchanges it? Is there anything that abridges it? You make the case so fluently and so eloquently. Can't we assume that the Supreme Court is aware of the necessity for percolation in its wisdom and that the national court of appeals will also? That does not take care of the great body of cases where supervision by the Supreme Court should be accorded and they cannot get to it.

I return to my first question, is there anything in the new proposal that denies or abridges or militates against the doctrine of percolation?

Judge LAY. Certainly not in the structured statement of the bill. I simply make that statement because of the Advisory Committee, the ABA's original satement of principle, and I think throughout some of the findings and statements of the Commission that there is exposed a great need to decide these problems more quickly and that we——

Senator HRUSKA. Which problems?

Judge LAY. Any problem.

Senator HRUSKA. Percolation?

Judge LAY. In order to reach consistency and certainty we should decide it as soon as possible so that there is not this lack of confusion. I would suggest that the Supreme Court will control this in terms of whether they feel the problem is now ripe to pass it on. I simply offer this because I at least read in some of the statements made by the Advisory Committee that preceded the Commission the concept that we should immediately decide those things so that there is not so much uncertainty existing in the law.

Senator HRUSKA. I know of nothing in the Commission's report or recommendations that says all inconsistencies and all differences must be resolved. If there is some such recommendation, I would like to have my attention called to it. I could find nothing in the Commission's report or in the bill that all inconsistencies and all differences must be resolved and speedily.

There is a need. I don't think most reasonable people would say that it does not exist. There is a need for adequate supervision of the cases that come out of the several courts of appeal.

Judge Hostetler put it in these terms. She said the Supreme Court "now hears fewer than 1 percent of the cases decided by the Federal courts of appeal." And she goes on to say that "courts of appeal can neither be right nor harmonious 99 percent of the time."

That indicates that as time goes on and the volume grows that 1 percent will constantly go down. It was the Commission's conclusion that there should be some additional appellate supervision by the Supreme Court or by the national court subject to the Supreme Court's denial or modification or approval of the national court decision so as to result in additional supervision. Otherwise, you see, the alternative is to have a circuit courts of appeal do the very thing and cure the very disadvantages that you suggest exist in a proposed national court of appeals. The Commission didn't think that was right. Have you any comment on that business of necessity for supervision or do you want the circuits courts of appeal to go on unimpeded in their own unsupervised way? It seems to me that is the alternative.

Judge LAY. Well, Senator, I think it is a question of how one views the role of the Supreme Court of the United States and I do not look upon the Supreme Court of the United States as an adjudicatory body to correct errors of the courts of appeals. Perhaps some people do. I am not saying the Commission does but obviously the Supreme Court cannot take certiorari in cases simply because they feel we are wrong. I think they take cases in important areas of national policy which as I say primarily affect the Constitution, primarily affect the relationship of our dual sovereignty of State and Federal Government.

Now, it seems to me that there are not that many burning national issues, at least that I see, that come up through the courts or that reach the docket for certiorari before the Supreme Court. I can say to you in all honesty I think 50 percent of the cases that reach the court of appeals level are inconsequential cases.

Mr. Justice Clark and I were visiting on this the other day. He has sat on every circuit and he says that he is amazed at the inconsequential cases that come to us daily. I think this same level of inconsequential importance reaches the docket for certiorari before the Supreme Court. I study this constantly. There are negligence cases being appealed to the Supreme Court, diversity cases. There are no national principles involved in the vast majority of these decisions, they are simply losing litigants who are seeking further relief from the adverse adjudication of their case.

I think that the Supreme Court of the United States is the only body under our structure that can give us guidance on policy matters. I think 98 percent of the cases that come to us are such that should be adjudicated by one level of review.

Senator HRUSKA. If you will yield, Judge Lay, isn't the proposal that there will be a national court of appeals that will do the spade work and then that case is decided and an opinion is written? The Supreme Court when it either grants approval or acquiesces, isn't that the action of the Supreme Court? There is no attempt here and no one on the Commission has any idea of subtracting one iota from the requirement in the Constitution that there shall be one Supreme Court. But isn't the action of the Supreme Court in either acquiescing to our approving the decision of the national court of appeals an action by the Supreme Court that makes it supreme? It does the same thing now in innumerable actions or petitions of certiorari and no one says that is not the action of the Supreme Court.

As a matter of fact, it still remains the action of the circuit court and the Supreme Court approves it or rejects it as the case may be.

Judge LAY. Unless denial after certiorari takes on new meaning, and today it supposedly has no significance—a national court of appeals decision does not mean that the Supreme Court now approves this decision. I think it will add further confusion so that lawyers will say, "Well, as long as the Supreme Court has not taken certiorari this matter is still up for grabs and we are going to litigate and litigate until hopefully we get the right factual case that the Supreme Court can take."

In this posture I have difficulty seeing the national court of appeals really knowing more than another adjudicatory body deciding theoretical error in particular cases. Granted they are going to be able to resolve certain conflicts that the Supreme Court does not take but I do not think that those seven judges sitting on that court are going to be any more unanimous than any other court of appeals in an en banc decision and we are going to see split decisions come out of there. I think this is going to add to a greater confusion at least for the various courts of appeals.

Senator HRUSKA. Professor Levin.

Mr. LEVIN. Judge Lay, I think we are in agreement on two questions. There is litigation which involves broad policy questions in the Nation were percolation is desirable. I think, too, that you have suggested and we agree that there is a body of litigation which is typically statutory in nature in which there are two choices and on which circuits divide and in which there may be hundreds, sometimes thousands of litigants who would like to know an answer. These are not, I think we both agree, burning national questions but nonetheless they may be of some concern to the litigants. I have two examples I would like to put to you and get your opinion on them.

The NLRB was very proud of the fact that after losing on an issue in five circuits they nonetheless kept relitigating because the only way to come to the Supreme Court would be if there was a conflict. They were proud of the fact that on the sixth try they got a conflict. I suppose my first question is, what is your view of this relitigation of the same narrow statutory issue by the Government or by the citizens? On the other hand the U.S. Supreme Court did take the case involving ICC leases. The question was the validity of a particular clause of indemnification, and a colleague of mine asked why should they take the time when they are so overburdened, so many calls by the justices to reduce the docket, so many calls to reduce the summary dispositions? Why take the time to adjudicate this narrow question of the validity of a particular clause in ICC leases.

The answer is found, I think, in a footnote of Justice Blackmun. There are simply so many litigants who need to know what their rights are and the answers have been different in the different circuits.

Now, what is your view of those narrow questions of relitigation in these types of cases?

Judge LAY. Well, I think under the original plan of the proposed national court of appeals there was going to be a transfer jurisdiction concept which would allow——

Mr. LEVIN. Let's drop that transfer concept, I think it is wrong.

Judge LAY. I appreciate that but it was put in there primarily to take care of the problem of litigation where the Government agencies were not willing to go up on certiorari. At least my understanding

was that there existed cases where the Government was not going to appeal a particular case but go back into the field and still try out their policy.

Now, there is no question that to try to get interpretations of a particular statutory problem there is need for some resolution of how the statute applies. Other than the need to seek to have the experience in the field as we have mentioned before where perhaps on varying interpretation, varying experiences, varying factual problems—other than that need it seems to me that we do achieve a goal and a very salutary one to find some resolve of a problem where there is conflict.

Now, I suggest simply that I feel that when those conflicts come up, just as in the ICC lease problem, that the Supreme Court is acting in major areas where they are affecting a number of litigants and I suggest the Supreme Court is able to take care of the number of conflicts that do arise.

Now, there will always be examples where perhaps they have not done so as expeditiously as posible but I have a great deal of difficulty, Professor Levin, in seeing today such a great need arising from the confusion of litigants in a particular area of law such that we want to restructuure the whole Federal judicial system. I know that it exists in isolated cases.

Mr. Levin. If I may follow that with one question, Mr. Chairman, and I am done. The concern, of course, is the individual citizen, social security cases. There is a case up now in which circuits went all over the lot, some circuits two ways as you know.

Now, in line with exactly what you say, Justice Stewart took the position that he didn't think we had come to the point where we needed it now but he urged the Commission in the formal submission, very strongly to develop a plan because, to use his words, it is likely that the need will develop.

I just want to pursue your last suggestion. Do you share Justice Stewart's view the idea that it is likely that this need will develop?

Judge Lay. You mean the need for the court?

Mr. Levin. For the new court.

Judge Lay. I wish I could be that optimistic in my own views. Really in my own judgment I have tried to think this through. I think there is a tremendous problem within the judiciary and it is a critical one but it is a problem that relates itself to restructuring our internal procedures, restructuring the entry to the Federal courts through some type of restriction of jurisdiction.

I have difficulty arriving at a point where I think we are going to solve any major problems by creating another tier in our appellate judicial system. I wish I could answer otherwise but this is my own sincere conviction. As you know, I have the greatest respect for Senator Hruska and yourself and the members of this Commission.

I go back to Professor Levin in 1948 in a class of civil procedure and Professor Patton and I remember—I think it was perhaps Professor Patton that said—someone said the law is as follows, and recited what the law is. You recall the hysterics that Professor Patton could go through, and I recall a few that Professor Levin went through, and you were bothered by the answer, in such an abstract way, as to what the law "is." But it is the law of the case and we were taught that it is the law of the case and only of that case and this I think impressed

within me the concept of both a lawyer and a judge that the law that is decided by a particular case related only to the facts of that case. There is not an innovative lawyer in this country that can't take a legal proposition that is decided and say:

Well, I can distinguish it and I can show that there are other reasons for another decision that will be more favorable to my client notwithstanding the statutory interpretation or what-have-you.

I do not see the resolution of legal principle on a broader base being any deterrent to litigation and relitigation. I think that we are constantly going to be litigating in peripherial problems. It is constantly amazing to me—and I say this about half a dozen times a year to my law clerks—

Isn't it an amazing thing that as long as we have recognized the common law and as long as we have had diverse interpretations of decisions that we continually run into new problems and new collateral issues that require a different offshoot of legal reason and application of legal principles?

For this reason alone I fail to see that the creation of a national court of appeals really is going to resolve anything. I am sorry.

Senator HRUSKA. Thank you very much, Judge Lay. You have furnished the record with a very fine viewpoint that I know you espouse very vigorously and spiritedly and we are grateful to you for your appearance.

Judge LAY. I regret, Senator, that my position is as it is because I would much prefer to be on the other side but I really speak from conviction. I do add this that I am confident that it is the interest of the committee and the Commission to improve the judicial process and when you are through I am confident that through discussions such as this and debates such as this that this goal is going to be reached. Thank you.

Senator HRUSKA. Thank you.

Our next witness is Chief Judge Collins J. Seitz, Third Circuit Court of Appeals, Wilmington, Del.

You have submitted a written statement for the record. Your entire statement will be printed in the record and you may proceed in your own fashion to testify.

## STATEMENT OF HON. CHIEF JUDGE COLLINS J. SEITZ, THIRD CIRCUIT COURT OF APPEALS, WILMINGTON, DEL.

Judge SEITZ. Thank you, Senator Hruska.

Let me say at the outset, though I am chief judge of our circuit, I speak only for myself because, like the problem we have been discussing, there is in our circuit an intracircuit conflict on the matter of the national court of appeals.

I have been a judge just about 32 years come February 1, State and Federal. I think I bring an understanding of some of the unarticulated concerns because when I served on the Supreme Court of Delaware they passed a constitutional amendment and decapitated some of its members, including your speaker. So I understand the concern about this subject matter in connection with the feelings of circuit judges. I will allude to that a little later.

My premise today, and perhaps—the validity of everything I say, is dependent upon the soundness of that premise, is that the U.S. Su-

preme Court cannot review all the cases they should review and I stand or fall on that basic proposition.

If it is true today, it is bound to be more so tomorrow. I have looked over their statistics for the last three years alone to get some feeling for it and my evaluations really are incorporated in my written statement.

Another thing I would like to say is I do not view Senate 3423 as relieving the Supreme Court's workload. I would not try to defend the bill on that basis whatsoever. I do not believe it will relieve the Supreme Court workload. However, it will give the Supreme Court a vitally important choice. That is referral to the national court without losing the right of ultimate review.

Now, contrary to the previous speaker, it is my experience that there is a growing number of unresolved conflicts in the circuits and the result of those growing conflicts, some of which I could illustrate, is a waste of judicial manpower both at the district and circuit levels as more and more courts confront the same issues.

We see it at a lower level when the circuit court itself does not pass on an issue and in a multidistrict circuit when each district in turn devotes the manpower of its judges to pass on the same issue. It breeds disrepect for the law not to have an issue settled at least circuit wide.

There is a vast amount of forum shopping by litigants and I saw a recent example of it in the environmental cases where there was a split in the circuits and consequently the particular interests involved were doing their best to have their case heard by the third circuit instead of the ninth circuit. The only reason was the prior precedents in those two circuits for one side or the other and the greater hope about the successful outcome. Then there is the expense to the litigants by repetitive litigation in various circuits.

Then, of course, to me of real importance is the lack of predictability by business concerns of national status as to the controlling law. They do not know from one circuit to another whether they are doing the right thing. Again having spoken to many businessmen, and as anyone knows Delaware has a few businessmen located there, they complain to me not so much about the result as the lack of legal uniformity from area to area.

Finally, there is the delay that results from running a legal problem through various circuits and districts before a final disposition is made on a national basis. There are numerous examples of that sort of thing.

One of the most classic cases—and I was trying to think of it on the train coming down—was about 2 years ago. I believe it was under the omnibus crime bill, where the issue arose as to the power of the Attorney General to delegate authority to wiretap, there were 400-some criminal prosecutions pending in the United States that were awaiting the decision on that issue and all those trials were held up.

I don't know how long it was before the U.S. Supreme Court finally got around to resolving that issue. It was a clean-cut issue, it didn't turn on any particular definition as to the facts, it turned solely on a construction of that act of Congress. As a matter of fact, I wrote the Chief Justice of the United States a letter calling his attention to how many of those prosecutions were delayed in our circuit alone because that issue had not been resolved.

Now, I suggest that that is the type of case that really does not need a decision by the U.S. Supreme Court. A national court of ap-

peals could have handled that. It was an important case but it was a construction of the act of Congress and that is all it was, and I believe a national court could have adequately handled that for the whole country and moved all those prosecutions forward.

Senator HRUSKA. Would you yield at that point?

Judge SEITZ. Yes.

Senator HRUSKA. The thought that was expressed was indicated in the report of the Commission that was rendered in June 1975. We addressed ourselves to a proposition published in the Harvard Law Review in 1971 in which it was observed that nonconstitutional holdings "almost uniformly" made up two-thirds to three-quarters of the courts' decisions prior to 1960. In more recent years the proportions have almost been reversed, constitutional cases have comprised between one-half and two-thirds of the courts' plenary decisions.

I am reading now from their report:

> Congressional enactments have imposed Federal standards in such areas as occupational health and safety, protection of environment, product safety, economic stabilization and so on. Thus, while the scope of Federal regulatory legislation typically including provisions for judicial review has been steadily broadened, the number of definitive decisions interpreting that legislation has been diminishing.

That does not involve policy questions, it does not involve constitutional questions, but the necessity for a decision by the highest court in the land is, it seems to me, very urgent because otherwise in Portland, Maine, we will have one ruling in employment and in Portland, Oreg., there will be another and in the meantime the rules and regulations of the regulatory bodies wander all over the spectrum. Is that the type of situation to which you refer?

Judge SEITZ. Exactly, Senator. We had a case the other day involving OSHA and the question of whether a regulation by requiring perimeter protection in buildings applied to the roof of the building. Well, the fifth circuit reached the opposite conclusion from the third circuit. That is going to be litigated all over the country.

Senator HRUSKA. No question about it. Thank you.

Judge SEITZ. I want to say of course the creation that has been indicated of a national court will add another appellate level and disadvantages of additional costs and possibly additional delay to particular litigants but I say that that is more than offset by the nationwide benefit resulting from a decision by a national court to the society generally because the particular litigant of course will bear the brunt of having the matter decided but the national impact of the decision I think justifies that additional level of review.

Now, I won't dwell on this except I know at earlier sessions you have had testimony by other judges on our court who expressed the concern about the transfer provision. I must confess that when that was in the bill I had doubts about it because I detected so much sentiment among circuit judges that somehow the stature of their office would be vastly reduced.

Giving them the benefit of the doubt on that I was also concerned about whether with a reduction or at least an assumed reduction in stature, lawyers of high caliber would be willing to accept positions on the circuit court.

With the removal of the transfer provision I am now fully persuaded that this bill is a desirable bill because no matter how you evaluate the statistics today the hard fact of life is that they can only go one way. They are going one way in our court and that is straight up. Consequently, the number of petitions for certiorari can only go one way and I think they are approaching 4,000 now in the Supreme Court.

Senator HRUSKA. Exceeding 4,000?

Judge SEITZ. Exceeding 4,000 now. So we have this national crisis in litigation. If I can indicate what I think must be going on in the Supreme Court, because it is going on at the circuit level. With this tremendous volume, cases in which we formerly wrote signed opinions, we now dispose of by a judgment order. This is because the judges are working to the limit of their ability in cases. The number of opinions they can write remains rather static because of the time available. But the number of appeals continues to grow. Consequently, I think the same thing must apply to the U.S. Supreme Court. This brings me back to my original thesis that the Court in my view must not be accepting and my experience is not accepting all the cases that should be accepted by some court having the power to establish national precedent.

Now, some people mention to me, including some of my colleagues on my court who oppose this bill, that this is a band-aid approach to the problem of Federal litigation. They say that what is really needed is a severe cut-back on Federal jurisdiction. I think that is so unrealistic that I don't view it as a serious solution to the problem. Indeed, the talk is to remove diversity jurisdiction, for example. Well, that would help our court but I don't think it would help in any of the areas of congressional enactments which we talked about, Senator, as creating a lot of the problems of statutory construction that are now resolved piece meal. I can't believe that in the future Congress is going to give up enacting laws and giving jurisdiction over to them to the Federal court to administer, so I frankly do not believe that suggestion is a serious alternative solution to the problem which confronts our courts.

That concludes my general statement. I have expanded on it, of course, in my prepared statement. I also have raised three specific questions about the legislation which are sort of technical in nature. I don't know whether you want me to address those or not, Senator. I am perfectly willing to rest on my written statement or to mention them, if you care to.

[The formal statement of the Honorable Chief Judge Seitz follows:]

STATEMENT BY COLLINS J. SEITZ, CHIEF JUDGE, U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT

Although I am Chief Judge of the United States Court of Appeals for the Third Circuit which embraces Delaware, New Jersey, Pennsylvania and the Virgin Islands, I represent only myself today.

I would like to thank the Committee and its staff for giving me the opportunity to comment on S. 4323.

I have served on the state and federal benches for almost 32 years—both at the trial and appellate levels. During two-thirds of that period I have been the presiding judge of the court on which I served. The experience has given me a

particular opportunity to see the effects of an ever-increasing caseload in the courts. In my opinion, the proposed National Court of Appeals is a tangible and important response to problems experienced both in the Supreme Court and the lower federal courts as a result of this volume.

The Supreme Court cannot, in my view, handle all of the cases which should be resolved by it on the merits in the interest of providing more certainty and uniformity in the law. I realize that there are those who take a contrary position. However, I think a minimum dosage of realism indicates that the court can review in depth about 175 cases a year. Yet the number of petitions for certiorari will inevitably continue to increase substantially while the size of the court remains constant.

It stands to reason that a certain percentage of the case increase will be worthy of Supreme Court review. I suggest that, even now, the inevitable consequence of the high volume is that the court consciously or unconsciously, becomes more and more discriminating in voting on cases to be accepted for review. The result, in my view, is that many important issues of national import will inevitably be left unreviewed or will, despite their importance, be disposed of in a summary fashion. Indeed, in the last three terms the number of summary dispositions has substantially exceeded the number of dispositions by signed opinions, and this cannot be attributed solely to pending petitions which are summarily disposed of because they are controlled by new determinations. Indeed, Justices frequently note their dissent from the summary disposition of a case.

Although Senate Bill 3423 may not directly relieve the Supreme Court's workload, it will provide other important benefits. It will give the Justices a third choice, particularly in those situations in which they are aware of the desirability of a uniform national rule but must as a practical matter pick and choose among important cases to be heard. That third choice will be a referral to the National Court. Furthermore, and of great significance, a referral will not deprive the Supreme Court of the ultimate choice as to whether or not it desires to review the matter itself after it has the benefit of the National Court's determination.

In my view, the inability of our system, at the present time, to authoritatively resolve important and pervasive issues on a national basis is a partial frustration of our system of justice.

Paramount among the problems which inhere in the current situation is the uncertainty in the law which results when a conflict in the circuits arises over a legal issue of national import which has yet to be considered by the majority of circuits. Until there has been an authoritative resolution of the issue within each circuit, the myriad social and business arrangements which would be affected by the eventual resolution of the issue must proceed at great risk or not at all. Thus, the desire for certainty in the law arises not only from the need to be fair to the immediate parties and to promote efficiency in litigation generally, but, perhaps much more importantly, to permit people to order their affairs so as to avoid litigation with its attendant cost and disruption.

A National Court of Appeals would ease this problem by authoritatively resolving issues of national significance at the earliest possible time. I realize that some issues benefit by the maturation process, but, in many areas of the law, it is as true as it is trite that it is often more important that an issue be settled than settled rightly.

A National Court would also provide greater uniformity in the law which is essential to the even handed administration of justice. One example may suffice. Consider a single accident in which legal actions are filed in several different districts. If there is no transfer of the cases the circuits may apply different legal principles of federal law. This may result in different liability determinations in connection with the very same accident. That very possibility is present in a case now before our court. Certainly the result for persons involved in the same occurrence should not be different solely because different legal principles are applied. The opposite result can do nothing but breed public misunderstanding and disrespect for the law.

Another factor, and one of vital importance, is that the denial of Supreme Court review of many important issues of national significance adds materially to the demands on the time of the Untied States District and Circuit Courts. Permit me to explain.

There has, of course, been a tremendous increase in the number and complexity of cases in the federal system. The district courts and the eleven circuit courts will inevitably divide on more and more important issues.

Why is it necessary to have many different district courts consider the same issue and then have each respective circuit court take the time to decide the issue? Consider the enormous waste of judicial manpower. Does it not make much more sense to have an issue whose pervasive impact is obvious resolved for the entire country once it is decided by a circuit court? Innumerable opinions can be found in the Reports showing that the issue decided has been considered by several other circuits. With due deference, I believe that the Justices of the United States Supreme Court recognize that there are many matters which should be settled on a nationwide basis. A National Court of Appeals would provide a viable means of achieving judicial economy—saving the precious time of the district and circuit courts, and of even greater importance, saving the time and expense of repetitive litigation.

Candor requires me to confess that I have no idea how much time would be saved for the lower federal courts. I think it would not be insubstantial because from my experience many of the issues which provoke splits in the circuits eventually provoke divisions in the panels of the circuit courts and often result in rehearing before the court in banc. The same duplication of effort is often found in the districts within a circuit if that particular Court of Appeals has not settled the matter. Similarly, the district courts often engage in lengthy trials only to find that the complaint should have been dismissed as a matter of law.

One disadvantage which results from the creation of a National Court is the added cost and delay to those litigants whose cases are referred to the National Court and then are directly reviewed by the Supreme Court. These litigants would have to participate in three rather than two appellate proceedings.

This situation should rarely occur, however, since presumably the Supreme Court would refer only those cases which, though of national significance, it does not wish to consider for prudential reasons. Moreover, the advantages of having the law settled, producing fewer trials and fewer appeals, is a real economy which benefits all litigants and which more than offsets the occasional inconvenience of an additional appeal.

I should add that I support S. 3423 because the National Court of Appeals will have jurisdiction only of cases referred to it by the Supreme Court. While I do not desire to beat a dead equine, I must say that by eliminating the earlier transfer jurisdiction from the Courts of Appeals, a real concern has been blunted. I know from my discussions with my circuit colleagues around the country that the now omitted transfer jurisdiction was of very real concern because of the belief that it would result in an undue dimunition of the status of circuit judges.

I would now like to address specific questions which I have concerning S. 3423.

The provision of the bill appearing on page 4, line 8 and which is designated as section 21(b) appears to provide that the presidential appointment of a circuit judge as an associate judge under section 21(a) would disqualify from designation under section 21(b) another judge from the same circuit even if he had been the most senior eligible judge from that circuit or from all of the circuits. Since it is not clear that this result was intended, I thought it might be useful to bring it to your attention. This result would be obviated by inserting the word designated before "associate judge" on line 9.

My next question concerns section 371(2) which appears on pages 10 and 11. This section does not address the seniority of a designated judge who returns to active service in the Court of Appeals upon expiration of his term. However, it would appear that under 28 U.S.C. section 41(b), his seniority in the circuit would be preserved. This could create a morale problem if it were to result in the displacement of a chief judge.

My final question concerns the provision of the bill appearing on page 12, line 5 and designated as section 1259(e) of Chapter 82 of Title 28 U.S.C. Should not the bill provide for appointment of a replacement for the additional circuit judge in the event that he dies, resigns or retires prior to the expiration of the term of the circuit judge whose designation occasioned his appointment?

Senator HRUSKA. The Commission did discuss and did evaluate the impact of diversity of citizenship cases. We arrived at the conclusion that the impact of that would be virtually zero insofar as the volume of work of the Federal court system is concerned.

Professor Levin, am I correct in my recollection?

Mr. LEVIN. Yes with respect to the national court problem.

Senator HRUSKA. With respect to the national court.

Mr. Westphal, do you have a question?

Mr. WESTPHAL. Yes; thank you, Mr. Chairman.

Judge Seitz, we don't have a copy of your written statement. Did you prepare one?

Judge SEITZ. It was mailed last week.

Mr. WESTPHAL. Well, it is probably in the same postal office that Judge Lay's statement is in.

Judge SEITZ. It was mailed last Wednesday from Wilmington.

Mr. WESTPHAL. Well, it is such a long distance from Wilmington to Washington I suppose——

Judge SEITZ. I have some copies with me. Would you like them?

Mr. WESTPHAL. We will get them eventually and, if not, we will ask you for additional copies.

Judge SEITZ. All right.

Mr. WESTPHAL. Let me ask you to help us in this regard. Judge Lay has told us that in his experience it has been his observation that in 1 percent or less of the cases in which he participated over the years that there has existed a conflict of opinion which he felt needed resolution by some national body. His written statement says as he went back over some of those he thought they probably were not conflicts, they might be distinguished factually one from the other.

You have in your testimony here made the statement that there is a growing number of conflicts between the circuits in these areas of Federal law that you have described. Are you able as a matter of observation to try to express that in any terms of percentage or your own experience?

Judge SEITZ. I can't honestly, no. I have not thought of it in terms of percentage. That would be a guess on my part. I know because I have one pending right now that involves a mere question of presumption where I think five circuits have passed on this presumption problem arising out of an act of Congress. I have noticed any number of them and mostly in the cases involving construction of an act of Congress I would say.

Mr. WESTPHAL. The reason I ask that question is because there probably is some question here as to what would be the volume of cases of such importance that they should be referred by the Supreme Court to the national court of appeals in order to constitute that court's workload. I was just looking at the statistics for fiscal year 1976 and they show that out of some 9,351 cases that were decided in all 11 circuits after either oral argument or submission on the briefs that of that number 3,600 were cases decided by a written opinion.

I would assume then that cases involving issues where there might be a conflict of opinion between the several circuits would be decided by a written opinion. So if we are dealing with a 1-percent figure as the number of cases that are of such great importance that, No. 1, the parties would petition the U.S. Supreme Court for certiorari and, No. 2, the U.S. Supreme Court after looking at their petition would decide that while we will not hear it we will refer it to the national court of appeals, that we are then talking somewhere around 36 cases per year; if it is 2 percent, we are talking 72 cases per year; if it is 3 percent 108 cases per year that might constitute the caseload of a national court of appeals.

Now, I would assume that if we get up to 100 cases per year that might be an adequate workload for seven judges on this court. However, if we assume that once we decide these questions by a definitive decision from a court whose decisions constitute a binding precedent and unless, as Judge Lay suggests, the ingenuity of counsel will see to it that there will be further litigation in order to interpret even that decision, that we might eventually reach the point where the national court of appeals would have only 25 or 30 cases referred to it a year and then we would arrive at this question of whether in order to keep a national court of appeals busy that the national court of appeals should be used as a means of correcting error.

Now, if that develops, would you agree then that there would be some substance to Judge Lay's expressed fear that the creation of a national court of appeals would cause a proliferation of petitions for certiorari to the U.S. Supreme Court by litigants in the hope, small as it might be, that some further review by an additional court might change the result in that litigation? Isn't that a problem that there is some substance to?

Judge SEITZ. Well, my initial reaction to that, Mr. Westphal, is that you assume a static society and I think that there is never going to be a shortage of problems. So that as the court solves the old ones they will be replaced by an equal or a greater number of new ones. I don't think there is going to be any lack of business because the national court is able to settle some problems nationally. As long as the Congress sits I think there will be plenty of work for the court to do.

Now, your other question was about encouraging petitions for certiorari. That is practically impossible to answer. I guess each one has his reaction to that. I am sure there will be some more because of the hope that even though it is felt that it might not attract the Supreme Court's attention for its own initial review, it might refer it. I don't see that that is all bad in our society.

Mr. WESTPHAL. But if that occurs, even in a relatively small increment, it then aggravates the current problem of the U.S. Supreme Court, does it not?

Judge SEITZ. It does to that extent, right.

Mr. WESTPHAL. Do you feel that a national court of appeals, if it is created, should be used in sort of a correction of error concept?

Judge SEITZ. It does not disturb me if it is so used as long as it is giving an answer on a nationwide basis. Let me say one other thing that occurred to me as you were speaking. I would be hopeful that there would be decisions arising for the first time in a court of appeals that the Supreme Court would see the significance of and not necessarily wait for a conflict because that is part of what we are trying to avoid. Where a clean-cut issue of national significance first arises, even before a conflict in the circuits, the court would be sufficiently aware of that and they would refer it for a national determination. That would be one of my great hopes. So I think you would have to include an lot of cases of importance before you ever would have a conflict of circuits. I appreciate the maturation process that everybody is stressing but I think you can see a cloud as big as your hand on the horizon with many legal issues.

Mr. WESTPHAL. Thank you, Mr. Chairman. I have no further questions.

Senator HRUSKA. Professor Levin.

Mr. LEVIN. Just one question, Chief Judge Seitz. A professor at Berkeley who did a study originally requested by the Commission has recently published an article of a survey of the review of State court decisions by the U.S. Supreme Court in which he has argued strongly that the U.S. Supreme Court today does not provide adequate review of State court decisions. This does not relate now to the figures coming up to the courts of appeals. He would include in the bill to create a national court a provision that if the U.S. Supreme Court did not take review of these cases coming up from the State courts, they should be obliged to go to the national court of appeals.

Do you have any judgment for the subcommittee on any problems you see or advantages you see in the national court of appeals review of some Federal issues coming up from State courts?

Judge SEITZ. That has been discussed. One of the judges on our court, Judge Gibbons, is very much interested in some of the area that you mention. The big problem is the highest court of a State feels somehow it is demeaning to have its decision reviewed by any court other than the Supreme Court of the United States. I can tell you that from personal knowledge, and I would see that as the biggest objection to such an approach.

Mr. LEVIN. I should note for the record that Judge Seitz was a distinguished Chancellor in the State court system before the Federal system lured him away.

Judge SEITZ. Over 20 years in the State courts so I bring a split personality to bear here.

Senator HRUSKA. Thank you very much.

Judge SEITZ. Thank you very much.

Mr. WESTPHAL. Mr. Chairman.

Just on that point, do you feel that the review of State court decisions should be excluded from the jurisdiction of the national court?

Judge SEITZ. I would not exclude them. I just expressed this concern from what I hear. I would not exclude them, no.

Mr. WESTPHALL. But if cases of that type were selected by the Supreme Court for referral to the national court of appeals, there might be this intangible of resentment that you have suggested?

Judge SEITZ. That is a possible feeling but I personally think that is probably outweighed by the desirability of having a national law.

Thank you, gentlemen.

Senator HRUSKA. Thank you.

Senator HRUSKA. Our next witness is Chief Judge Thomas E. Fairchild of the Seventh Circuit Court of Appeals, Chicago, Ill.

## STATEMENT OF HON. CHIEF JUDGE THOMAS E. FAIRCHILD, SEVENTH CIRCUIT COURT OF APPEALS, CHICAGO, ILL.

Judge FAIRCHILD. Thank you, Senator Hruska.

I hope that my statement got here or will get here in the course of the mails.

Senator HRUSKA. We have received, it your honor. And it will be printed in the record in toto.

Judge FAIRCHILD. Thank you, sir.

Senator HRUSKA. You may proceed in your own fashion to testify.

Mr. WESTPHAL. Obviously Chicago is much closer than Wilmington, Del.

Judge FAIRCHILD. We sent two sets in the mail. I don't know if both sets arrived.

I recall with great pleasure the meeting of the Commission in which, Senator Hruska, you presided at the hearing in Chicago in our courtroom, and the exploration of the questions before the entire Commission at that time.

To summarize a little bit, I think that I certainly agree with Judge Lay and Judge Sietz in their feeling of the great problem that is besetting the Federal court system. I think we have some differences. We do have some differences in our view of the proposals of the national court of appeals but we all see that there is a real problem of great dimension in the Federal court system.

The explosion figures have already been referred to an increase in appeals reaching the courts of appeals of over fourfold in 15 years and yet the Supreme Court's capacity of full-scale decision remains the same, about 150 to 170 cases out of the 4,000 requests for review which reach that court.

This necessarily means that more of the justices' work must be delegated to staff and it means more and more that the decisions of the 11 courts of appeals and of the State high courts on Federal questions are final. This, of course, leads us to the conflicting decisions that have been referred to this morning.

I happen to think that the proposed national court of appeals is a good way to increase the capacity of our system to produce decisions binding on all lower courts. I happen to prefer the second version, S. 3423, because that bill provides that the national court of appeals would get all its cases by reference from the Supreme Court. I do not have much confidence in the additional proposal, in S. 2762, that case also be transferred by the various courts of appeals of the circuits.

I might have an exception to that disapproval of the transfer jurisdiction if it were related to the matter of a case which has been decided by a panel on the court of appeals and then the question of hearing en banc comes up. In our circuit at least we tend to have very few en bancs and to think of that procedure as usually an exercise in a certain amount of futility. Perhaps at that stage we would like to be able to have the option of transfer of the case to a court which had the power to make a nationally binding decision.

One of the often voiced objections to the national court of appeals is that it would introduce a fourth tier in the court system. Really that is an overstatement. It would increase a litigant's chance to get his case before a third level court or tier, and a fourth tier of course would only be possible in the limited number of cases which the Supreme Court might refer to the national court of appeals and the national court of appeals would hear and then open the possibility of the Supreme Court being a fourth level.

Perhaps the national court would somewhat reduce the prestige of the present courts of appeals. I don't think that is a valid objection because to the extent there was any diminution of prestige that is

simply justified by the need to improve the Federal court system as a whole.

In any event, I am not as concerned about the idea of a fourth tier as many others are. I think that unless Federal jurisdiction is somehow curtailed—and I don't see a realistic move in that direction—I think that we must have great additions to the number of Federal judges, district and circuit; many more than are presently being asked of Congress even by the bills, the recommendations of the administrative office and the judicial conference at this time.

I think a very major increase is necessary if the quality of Federal court decisionmaking is to be restored, and I say restored because I think that to the extent that the system has been able to keep up or try to keep up—it, of course, has not succeeded in keeping up—there has, I am afraid, been a necessary diminution in the type of consideration of every case that we like to think is characteristic and should be characteristic of the Federal system.

But with this kind of increase in numbers of judges and courts, perhaps further splitting the circuits and all the things that may go with it, inconsistencies and conflicts are likely to increase and the capacity of the system to make decisions which are binding on all the courts in the nation should also increase. I tend to think that in the long run we will need a national court of appeals or something like it which will have to be larger than is presently proposed and have even broader jurisdiction than is now contemplated in the present bills. I think the expansion at the lower levels—and I think that it is going to continue rather than to be stemmed or to be reversed—compels providing more capacity at the top of the system.

Reference was made here this morning to the possibility of direct review of final decisions of the State high courts on Federal questions by the national court of appeals or some similar organ.

Of course, one of the reasons why we permit district courts through the habeas corpus mechanism to review in a sense and in part simply on Federal constitutional questions, State criminal convictions, is the fact itself that the Supreme Court realistically cannot review the State cases which present Federal questions. If there were a Federal court with not only the legal power but the real capacity to review Federal claims in State cases, we would be much more justified in treating State decisions as really final and that might well reduce the need for habeas corpus jurisdiction at the district court level and change the system in that respect to avoid some of this conflict which State court judges particularly feel there is between the two systems. In this respect, like Judge Seitz, I speak also as a former State court judge having served on the Supreme Court of the State of Wisconsin for about nine years before I came to the seventh circuit.

Just in summary, I have some doubt that in the long run a national court of appeals of seven members acting in a sense as a sort of an assistant Supreme Court with only such cases as are referred to it will prove to be adequate but the creation of it in the near future as proposed in S. 3423 would in my opinion be a step in the right direction. If this device does prove adequate, that will be fine; but if a larger court with broader jurisdiction should ultimately prove necessary, the national court of appeals is a step in the right direction. It would not

be something that would be a commitment of resources in the wrong direction. It could be expanded as needs seem to arise.

I think that in our discussion of the matter we have to recognize something which I think both the previous witnesses, Judge Lay and Judge Seitz, have touched upon. There are different types of questions and I think that is the key perhaps to what the national court of appeals would be and where it would give us the best service. The deep policy type question of constitutional adjudication probably is the sort of thing on which the Supreme Court will always have to exercise the final word and perhaps there would be no great help to the system if many of those cases were referred by the Supreme Court to the national court of appeals.

There is another type of question and that is very largely, as Judge Seitz said, the statutory construction type where often the certainty and uniformity of the answer is much more important than the particular answer that would be reached. If that sort of question were sorted out by the Supreme Court and referred to the national court of appeals the answer would probably be accepted. The danger Judge Lay saw of just almost an automatic application for cert beyond that would not at least be realized by the grant of very many applications for cert by the Supreme Court from the national court of appeals.

There are many procedural type questions. Thinking just of an illustration, circuits differ on the question of the appealability of an order of a district court saying that a case cannot proceed as a class action, different answers, different procedures in different circuits. It does not really make such a lot of difference which way the jurisdictional statutes for appeals are construed in this respect. A national court could decide the question and all circuits would then have a definitive procedure to follow. If they decided it in a way that the Congress felt was too liberal or not liberal enough in terms of appellate jurisdiction, it is of course subject to the correction for the future by Congress.

Similar observations can be made about many of the tax questions where also the conflict tend to arise. I think that there is importance in giving the Supreme Court a third possible answer to a petition for certiorari besides denying it, which the Supreme Court has to do, because of its own limitations, has to do in close to the total of 4,000 cases. Its other option at present is to grant it and it can do that only in a relatively few cases. This bill would give it a third middle ground option of referring given petitions or given cases to the national court of appeals, I think that it is the increase in the capacity of the system to provide nationally binding decisions which is the important contribution this bill could make.

Thank you.

[The formal statement of the Honorable Chief Judge Fairchild follows:]

TESTIMONY OF CHIEF JUDGE THOMAS E. FAIRCHILD OF THE U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT ON S. 2762 AND S. 3423

Mr. Chairman and other Senators, members of the Subcommittee on Improvements on Judicial Machinery, I would like to thank you for inviting me to testify this morning. The Judicial Council of our Circuit has not taken a position on bills S. 2762 and S. 3423. Although I am chief judge, I emphasize that I am stating my individual views, and I do not represent the other members of our

court. I am sure that some of them hold quite different opinions on these proposals.

The need for a national court of appeals is evident to me. There has been a dramatic increase in filings in the courts of appeals and the Supreme Court. In fiscal year 1961 there were 4,204 appeals, yet in fiscal year 1976, only 15 years later, that number had risen to 18,408. This represented a 338 percent increase in filings. The final report of the Commission on Revision of the Federal Court Appellate System has noted the dramatic increase in filings in the Supreme Court. In 1951, about 1,200 cases were filed. By last term, that number had risen to about 4,000.

As the Supreme Court is the highest court of the land, it performs two functions which actually intertwine with each other. The first function is to review the 4,000 cases docketed in its court. The second function is to set forth the law in a particular case, knowing that those principles of law will be binding upon all lower courts and on the legal rights of individuals throughout the country. As to the first function, the justices now review 2,800 more cases than their counterparts did 25 years ago. As to the second function, according to former Solicitor General Erwin N. Griswold, the Supreme Court hears argument in the same number of cases as it did 50 years ago, about 150 (or at most about 170) cases per year.

What has been done within the Supreme Court to fulfill the dual function in light of the increased filings? One remedy has been to hire additional law clerks and a central legal staff, according to the Commission on Revision of the Federal Court Appellate System. A potential for danger here is that by asking the Supreme Court Justices to consider 4,000 cases per year, and probably more in the future as more district and circuit judgeships are authorized and filled, each will need to delegate much of his responsibility of reviewing cases and making decisions to others. At some point on the spectrum of delegated authority, the staff will then be, if not in pay or title, de facto additional justices on the Supreme Court. Another means of coping with the increased filings has been for the justices to spend less time on individual cases before making a decision. These are the types of incremental change that can transform the Supreme Court as an institution. One example of this transformation, according to the Commission on Revision of the Federal Court Appellate System, is that the Solicitor General no longer petitions for certiorari in some cases which he considers "Cert-worthy" because of a sensitivity to the Supreme Court's large docket.

Another effect of the Supreme Court's limited capacity of review is that the courts of appeals become in effect the highest courts in the land as far as most Federal litigants are concerned. Last calendar year our court gave opinion or memorandum decisions in 826 docket numbered cases. During the same year, there were about 200 petitions for certiorari filed seeking review of our decisions, only 10 of which were granted. Thus, for all but 10 cases in which the Supreme Court granted certiorari, our court of appeals made the final decision for the litigants.

I think it is better to create a national court of appeals to review cases referred to it by the Supreme Court than it is to suppose that the Justices can give adequate review to the 4,000 cases filed in the Supreme Court each year.

In my opinion, the provision in both bills for reference of cases to the national court of appeals by the Supreme Court is a desirable mechanism for accomplishment of the desired result. It expands the capacity of the system for decisions which are binding on all lower Federal courts. I think there must be, within the 4,000 cases which the Supreme Court simply cannot afford the time to hear and decide which merit a decision which will be binding on all lower courts. These bills would create a tribunal to decide such cases, without detracting from the authority of the Supreme Court. That court will sort out the cases for decision by the national court of appeals, and will retain power to review the national court's decision if deemed necessary.

As pointed out in the final report of the Commission on Revision of the Federal Court Appellate System, the national court of appeals could resolve conflicts in decisions between the present courts of appeals. Although some of these issues may not have the importance to demand consideration by the Supreme Court, it is necessary that there be a consistent interpretation that would apply nationally.

S. 3423 provides only for the reference of cases to the national court of appeals by the Supreme Court. I think that is the important jurisdiction to be provided.

S. 2762 provides also for transfer of cases to the national court of appeals. Such transfer would be made by a court of appeals, the Court of Claims, or the

Court of Customs and Patent Appeals. I doubt that the transfer provision is a desirable mechanism. In my opinion, these courts do not have the perspective necessary to decide which cases should have the attention of the national court, and I feel sure that the capacity of the national court could be filled by reference of cases by the Supreme Court.

One of the arguments against the national court of appeals is that it would create a four-tiered court structure in the Federal system. This, it is said, would burden the litigants and their attorneys because of the amount of effort and expense needed to process a case through the district court, the court of appeals of the circuit, the national court of appeals, and then the Supreme Court. The argument is, I think, way overstated because the only cases possibly open to four-tier treatment would be those few cases selected by the Supreme Court for reference to the national court, and in addition, if S. 2672 were enacted, those transferred by the courts of appeals. As I will point out, however, I feel that our system has grown to a degree where a fourth tier may well be a necessity in the process of winnowing out of the vast bulk of cases those few which can receive full consideration by the Supreme Court.

I do not consider as a valid objection the fact that the interposition of the national court may reduce the prestige of courts of appeals of the circuits. To the extent that any loss of prestige occurs, it seems to me to be a necessary sacrifice to the needs of the court system.

I support S. 3423.

I so stated in a letter to the Commission on Revision of the Federal Court Appellate System, dated May 8, 1975, and I restate and amplify those views.

I support the proposal because it is a significant step toward a needed improvement of the Federal judicial structure. I refer to my approval as qualified, however, because I think the proposal does not presently go far enough toward meeting the needs of the system If the proposal were to be implemented, it could be readily expanded toward further fulfillment of the need, however, and would not in itself be an obstruction to further needed change. I feel it is better to create the proposed national court and to secure the partial relief it affords than to discard the proposal because it does not immediately fill the ultimate need.

In dealing with the subject, many start out with the rubric that we must avoid a fourth tier of Federal courts, I believe, however, that unless some way is found drastically to curtail Federal court jurisdiction. The Federal court system must be substantially enlarged and a new tier of reviewing courts may well be necessary. Although curtailment of diversity jurisdiction and a requirement of exhaustion of State remedies in section 1983 cases would reduce the Federal load to some extent, I can't believe that such reduction in jurisdiction would be adequate.

If I were to draw the blueprint of the Federal Appellate system, I would keep one direct appeal as of right. This appeal would go, as now, from the district courts and administrative agencies to the courts of appeals. I would prefer to increase the number and reduce the size of circuits, but in any event I would very substantially increase the number of circuit judges. An increase seems imperative if we are to regain and maintain the desired standard of quality of appellate review. I would provide a new national court of review which could, in its discretion, review by something similar to certiorari, the decisions of the Federal courts of appeals and in addition, the decisions involving Federal questions of the State high courts. The Supreme Court could, in its discretion, review by certiorari, the decisions of the national court. In adition, there should be some mechanism whereby the Supreme Court could call an exceptional case before it so as to bypass the national court.

I look at our present Federal court system as a pyramid. At the bottom are the district courts, with 170,000 cases filed last year. Next above are the courts of appeals of the circuits, with 18,000 appeals. In a sense, the courts of 50 states are part of the pyramid, to the extend that their cases present questions of Federal law.

The Supreme Court of the United Sates is at the apex of the pyramid with its capacity to hear about 170 argued cases, but with 4,000 requests for review pushing their way up to it.

What has happened to the pyramid is that the base and middle have greatly expanded, whereast the capacity at the top has remained the same. By inserting another court as an additional tier, reviewing States court decisions on Federal questions as well as lower Federal court decisions, the pyramid's original symmetry can be restored.

Just as only 18,000 appeals come out of the 170,000 filings in the district courts, and only about 2,700 petitions for certiorari arise from the 18,000 appeals, it could be expected that if there were a court reviewing the 4,000 cases now reaching the Supreme Court, there would be a further winnowing process identifying the significant cases, within the capacity of the Supreme Court to decide.

If the Commission proposal of a national court were adopted, it would not be difficult to expand it into a court of adequate size (sitting in panels probably of five or seven to give meaningful consideration to review of decisions of the Federal courts of appeals and of the decisions of Federal questions by State high courts.

The principal reasons why I conclude that these steps must ultimately be taken are as follows:

A. Regaining and maintaining the desired quality of appellate decisions requires a greatly increased number of judges at the court of appeals level.

In the last 10 years, terminations per circuit judgeship have more than doubled. In our court there were 44 signed or per curiam decisions per judge in fiscal year 1970, whereas in fiscal year 1975 that number had risen to 84. This increase in work mandates an increase in judgeships. Increasing the judge's staff will not suffice for, as I said earlier, as the size of the staff grows, the area delegating by judges to staff increases. The result is that the judges' staff in fact performs part of the decisionmaking process, although the staff members are not appointed by the President and confirmed by the Senate.

I am inclined to think, for example, that the needed increases in numbers of district and circuit judges should be greater than the number currently being requested by the judicial establishment itself.

B. In my opinion, it is impossible for one Supreme Court to give adequate consideration to the possibility of review of all the decisions of Federal and State courts which the litigants ask to be reviewed and it must be true that many of the petitions for certiorari which are denied carry a question worthy of decision. It seems to me that a double layer of review in each case at the discretion of the reviewing court is a better system of selecting out the questions to be considered ultimately by the Supreme Court than the Supreme Court is presently able to carry out. It also seems to me that there will be some questions adequately settled by he courts of review with certiorari to the Supreme Court either not being sought by the parties, or being denied by the Supreme Court.

C. We make compromises in our system in order to compensate for the impossibility of the Supreme Court giving adequate review to State decisions. In the criminal field, we require exhaustion of State remedies before resort to Federal habeas corpus, but we do not give the State court decision res judicata effect when the district court begins what often approximates a review of the State court judgment. The dual State-Federal judicial system would, in my opinion, operate more smoothly and on a sounder basis if there were sufficient likelihood of direct Federal court review of State court decisions of Federal questions so as to warrant giving finality to an unreversed State court decision. Often, of course, the facts on which a particular Federal claim is based have not been developed in the State court record. States are beginning, however, to consider providing procedures whereby claims of the type normally reserved for collateral attack can be added to the record after conviction and raised on appeal. Where the final State court decision on direct review disposes of these claims, it would become more feasible to treat the State court decision as final, if, in fact, the defendant had a meaningful opportunity to obtain Federal review of Federal questions but was denied.

A similar problem seems to be developing with respect to State court adjudication in civil cases. Our court has recently seen several section 1983 Federal court actions which in effect are collateral attacks on State court judgments in civil cases. Reliance on the finality of the State judgment would be easier if there were in fact a meaningful opportunity to challenge the State court determination of the Federal question in a Federal court of review.

To summarize, I doubt that in the long term the national court of appeals as proposed will be adequate to relieve the Supreme Court in its task of reviewing the increased filings in that court. The Supreme Court justices will still need to review all of the cases, but they will have the extra option of sending some to the national court of appeals. Nor will the seven member proposed national court of appeals be adequate to review the work of the present courts of appeals. The proposed national court of appeals would always sit en banc, so it would probably be limited to 200 or 300 oral arguments a year. In spite of these defects,

I favor S. 3423 as a beginning. If it should prove adequate, that would be fine. If not, it should not be difficult to transform the court or its procedures so as to be adequate in the light of experience.

Thank you for inviting me to testify this morning. If you have any questions. I will be happy to answer them.

Senator HRUSKA. Thank you, Your Honor. Mr. Westphal.

Mr. WESTPHAL. Judge Fairchild, you have added a new element to the issues that the subcommittee is going to have to consider on this legislation and that is this: You have made the statement that in the long run you think that a seven judge court such as contemplated by this bill might be overtaxed and in effect inadequate to handle the workload that exists or will exist before it but that in the short run you think that it is a step in the right direction.

If we assume that today with 171,000 filings at the district court level there will be enough cases of the type we have discussed here this morning that should be or could be referred to the national court of appeals so as to constitute a reasonable workload for the seven judges on that court, then as we look ahead as you have suggested to a day where we are going to have much, much more than 171,000 cases filed in the district court, the question becomes one of how do we increase the national court of appeals so that it can handle this increased capacity?

Now, of course, if we start with a seven judge court, it is no problem to make it a nine judge court, I assume, except that the more judges you add to a court you do get certain problems. Certainly when the day arrives that there will be a need to increase the capacity of the national court of appeals, you would not think that that increase should come about by way of increasing that court, to, let's say, 15 judges in size. You would not think that to be feasible, would you?

Judge FAIRCHILD. No. No, I certainly shy away from the increase in total number of judges that would be sitting en banc. I certainly would not propose or favor that.

Mr. WESTPHAL. The other possibilities of increasing their capacity then, assuming they reach the number nine, would be to authorize the national court of appeals to sit in panels of less than nine of their number, and there are certain advantages and disadvantages to that. You recognize that, do you not?

Judge FAIRCHILD. Yes, sir.

Mr. WESTPHAL. Another possibility would be to create certain specialized national courts of appeals so that you might have two separate and distinct national courts of appeals but their jurisdiction would be more or less specialized and this has the same disadvantage that any specialized court has. Do you recognize that?

Judge FAIRCHILD. Yes, sir.

Mr. WESTPHAL. Then the only other possibility for expanding the decisional capacity of some national court of appeals at some time in the future would be to organize the national court of appeals into some kind of a regional structure whereby we might draw the line at the Mississippi River or you might draw the line north and south or you might have four segments of it, but again that is very, very different from what our present court of appeals structure is today; isn't that true?

Judge FAIRCHILD. That is right.

Mr. WESTPHAL. But do you agree that this is a question that must be considered by the committee as it tries to evaluate this particular proposal; that is, once we create a national court of appeals, how then do we solve its workload problems and how do we increase its capacity at some point in the future when that capacity may be overtaxed? Do you agree that is a problem you should consider?

Judge FAIRCHILD. Well, in proposing the immediate solution and supporting the bill in whatever form it might finally come out, I would question whether the type of solution that you have indicated as the alternative needs to be dealt with definitively. That is a question I suppose for the future. I do have a feeling that perhaps the division of the national court into panels not of three but of, say, five, seven and so forth without going to the regional court probably might be the best compromise as I see it now, but I do question whether it is necessary at this stage to make the final determination or make a proposal as to exactly how you would settle that.

Mr. WESTPHAL. Whether it would be a factor at this time or not would depend on what one's perception was of the immediacy of this incremental increase that I am talking about.

Judge FAIRCHILD. Surely.

Mr. WESTPHAL. The only think I know that we have to guide our thinking on that is a projection that was made by the Federal judicial center back in 1971 at a time when district court filing was probably 136,000 or something like that. At that time the Federal judicial center made a projection that by the year 1990 the district court filings would total 350,000 cases which would in turn require 1,129 district court judges to handle that workload and would in turn require approximately 250 to 300 circuit judges to handle the appellate load.

Now today, and that is in fiscal 1976, the filings total 171,000 at the district court level. We are almost half way to the projected 350,000. We are almost half way to that projection.

I know nothing else that helps us on this question of perceiving the immediacy of the problem that you suggest to us this morning. Do you have any additional thoughts on that?

Judge FAIRCHILD. I don't consider myself a very apt statistician. I think that we are going to meet this proliferation problem to a degree that we are going to have to face the need for a much larger capacity for nationally binding decisions than even the present proposal would give us. Exactly how immediate that is I really don't pretend to know, but I think we are going to be faced with that. In looking at the proposal which is now before us in terms of the proposed national court, it seemed to me appropriate to try to think whether it would be going somewhat in the wrong direction so that it would not fit into the ultimate solution. It would seem to me that we would be moving in a direction where we would not have to backtrack in whatever period this need for expansion hit us.

Mr. WESTPHAL. Thank you.

Senator HRUSKA. Thank you.

The Chair would like to make a little contribution on the subject covered by Mr. Westphal. I wonder if this committee or this Congress or the next one or the next one after that should be charged with trying to solve problems which may or may not arise 25 or 30 years from now. Given the normal development that the Congress will still be in session

every year, there will be a President, there will be a judicial conference, perhaps as these problems develop and grow we will have a little more removal from the screen of conjecture and the uncertainties.

I am wondering, first, do we have a question saying now how can the national court of appeals be kept busy if they solve all these pending problems and issue the decisions on the Federal legislation and so on.

The next question is how can the national court of appeals be ended? It seems to me on a problem of that kind we should defer to the passage of time and decide what the certainties are, what the facts are.

In the meantime the question that we have to solve is, is this the time to initiate an institution of this kind? Is there a need now for something like that which will be met by the creation of a national court of appeals such as that which is contained in one or the other?

Professor Levin, do you have any questions?

Mr. LEVIN. One brief question if I may, Mr. Chairman.

In your earlier remarks, Mr. Chairman, you had referred to a case of the *United States* v. *Jacobs* which is a summary remand to the court of appeals. It is the one in which Mr. Justice Stewart takes occasion to refer to the heavy caseload which necessarily leads us to dispose of cases summarily.

My question relates to a statement by Mr. Justice Stevens in that case concurring especially with the remand but in the course of it he said that he understands the problem of the summary dispositions because as a circuit judge I had the experience of trying to decipher similar orders. This indicates that really what we have between the various opinions is that the pressure of what the court feels obligated to do is causing them to deal with so many of them summarily. Then the courts of appeals are having some trouble with these summary dispositions which are dispositions on the merits in so many cases. Do you share that perception that this is a problem for the courts of appeals?

Judge FAIRCHILD. Yes; I do. Of course I think all of us have had some experience with the case which has been remanded either after more full consideration or summarily and wondering why they sent it back to us instead of to the district court because the remand to the court of appeals implies more scope of reconsideration than what we could see or dream of. There is a problem of deciphering that.

I know that a similar problem is a summary vacating and remand for consideration in the light of such and such in a recent case, I know that Mr. Justice Stevens has conveyed to the seventh circuit, and I am sure to others, where he has spoken since he became a member of the high court, that it means exactly that, that it means reconsideration and not that you have to go one way or the other.

I claim one distinction. Perhaps other Federal judges at the appellate level have it but a particular case in which our court was split 2 to 1 on the panel, I was in the majority and it went to the Supreme Court and they sent it back for reconsideration in the light of a given case. I could not see very much room for reconsideration, I thought it was a strong hint that it should go the other way, so on our second round I was in the majority but on the other side. The original dissenting judge wrote the majority and I joined him and the original majority judge was a dissenter and it went up to the Supreme Court again and they reversed us the second time. I don't know if anybody else can claim a case where he was wrong both ways. At least my brethren were each right once.

Senator HRUSKA. Well, thank you very much.

Judge FAIRCHILD. Thank you. I have enjoyed being here.

Senator HRUSKA. Thank you for your appearance here.

We will now recess until 1:45 when we will hear Chief Judge Frank M. Coffin, First Circuit Court of Appeals, Portland, Maine; and Professor Maurice Rosenberg of the Columbia Law School.

[Whereupon, at 12:05 p.m., the subcommittee recessed, to reconvene at 1:45 p.m., the same day.]

AFTER RECESS

[The subcommittee reconvened at 1:45 p.m., Hon. Roman L. Hruska presiding.]

Senator HRUSKA. The subcommittee will come to order.

Our next witness is Chief Judge Coffin of the First Circuit Court of Appeals.

We are pleased to note that we have attending the meeting this afternoon one of the witnesses who will testify tomorrow, Prof. Paul Freund. We are happy to have you.

Judge Coffin, you were kind enough to file with the committee a written statement and it will be placed in the record in its totality. You may proceed in your own way to highlight it or read it or present principal thoughts.

## STATEMENT OF HON. CHIEF JUDGE FRANK M. COFFIN, FIRST CIRCUIT COURT OF APPEALS, PORTLAND, MAINE

Judge COFFIN. Thank you, Mr. Chairman. I will try to give principal thoughts. I sat here this morning knowing that Judge Lay had testified and after him Judge Seitz and then Judge Fairchild and then after me Professor Rosenberg and Professor Freund tomorrow and they take varying views. Some are for this legislation and some are against. They are all friends of mine. Having once been a member of the other body, I would say that I am for my friends.

I suppose that the only purpose we are called here for is to give our deepest thoughts concerning this legislation. I preface my remarks by saying that I think only rarely are we very good at creating durable institutions. We have done some great things that way.

Apart from the achievement of the founding fathers, in more recent times I suspect that the creation of the system of administrative agencies was a lasting contribution and also of course before that the regulatory agencies. Perhaps the World Bank was an institution that the times demanded. Perhaps also the newer institution of public interest law firm may be such. Certainly the private creation of the foundation has proven a valuable innovation but when we think of creating an institution in the judiciary which shall be second only to the Suprme Court, we are really taking on a monumental task about which we had better be sure before we take definitive steps.

My question today is whether it is wise to do this before we know what the parameters of the need are and before we have assessed the impact of steps that already have been taken and steps that may well be taken toward freeing the time of the Supreme Court. I feel somewhat the way Adlai Stevenson felt when he was chiding his opponent

in the 1956 campaign and it was meant as a mark of derision of his opponent's program but I think it has some wisdom for us at this time. He said that his opponent's slogan was "Don't just do something, stand there." Well, that is more or less in my opinion at the present time the path of wisdom.

I think the proponents are under the heaviest burden of proof. We have been well served by a very cautious approach to institution building. You and your colleagues on the committee will know far better than I the long history that preceded the formation of the courts of appeal in 1891 or even the work that had to be done before the judges bill of 1925 was passed. I think it is almost as important as a constitutional amendment.

Now, technically Congress, of course, has the power to do this but in terms of magnitude I don't know that it is too much different from a proposal that instead of differences between the House and the Senate being settled by conference committee that there should be a third house. That would certainly be a most basic change. Well, this change is perhaps not of that order but I think it is within the general area.

In my statement I have listed three nonissues which I go through very quickly. One is the prestige of courts of appeals. I feel it necessary to say this because in talking with other judges and professors and others who are very strongly for this proposal I always get a knowing, cynical look saying "Well, of course the reason that you are skeptical or opposed is that this affects the prestige of the courts on which you sit."

Well, I have thought about this and I know it is not easy to separate one's built-in biases and vested interests from his own judgements. Of course, the judges who will speak to you in opposition care very deeply about their courts and I suppose to some—perhaps to many—being next to the top means something but this very fact, to the extent it is true, is still a reason for taking a long pause before creating another institution which so many other judges might see as diminishing the importance of their work.

More importantly, though, I think the gambit of impeaching motives of the judge critics is a bit on the cheap side, it eases the challenge of debate by enabling defenders of the proposal to avoid meeting the issues on the merits. I suspect that at the bottom it bothers; the judges are motivated by their views of the merits, whether they be critics of proponents who speak to you from courts of appeal or communicate to you from the Supreme Court, who are those who know most about the internal implications of this legislation.

I suspect from talking with many circuit judges that they do not feel threatened by the new court. Possibly they are influenced by their image of what it would be, a court primarily occupied with civil and I think quite possibly business type cases with its important agenda being perhaps 5 to 10 or 7 to 10 opinions per year even though it could of course fill up its docket with many other cases. Of course, this court will know that a case of true importance will likely find its way to the Supreme Court. So I don't think that there is any sense of being threatened but basically I am just pleading with you to discount the subconscious eyebrow arching that says, "Well, of course many of these circuit judges oppose this because after all that is where their bread is buttered."

The new court will not be of any assistance to the Supreme Court as an institution. The hope is that it would be of assistance to the national system in making more national decisions than the Supreme Court can attack. This is an ironic development in a way. We have in the room the author of the Freund committee report which started out to come up with an idea that would help save time of the Supreme Court. Well, this proposal will not help save time. The Supreme Court will have the very significant task of reviewing petitions for certiorari from the national court's decisions.

I know that other judges have spoken about this and it is a matter of guess work as to the amount of labor that reviewing petitions will encompass. I cannot myself refrain from believing that reviewing a petition from an important national court decision, particularly one which might be a split opinion, reviewing new petitions for cert plus the opinion itself knowing that if you deny cert you—that is, the Supreme Court—are by that action decreeing that a decision will stand as the law of the land with no further room for exploration or development. It is a decision of quite a different order from reviewing petitions from the circuit courts of appeal.

Finally, as far as assistance to courts of appeal is concerned, I suspect that with the surrender of transfer jurisdiction these courts will be little affected except of course that we will have to keep up with their decisions—not only their decisions but we will have to remain responsive to their dicta whether we are legally obligated to or not just as we should be responsive to the dicta of the Supreme Court.

My next subtopic in my catechism is the changing scene and the first point I wish to make is one which undoubtedly others have made and that is the abolition of the three judge court statute.

The Freund report stated that about a fifth of oral argument time was consistently year after year devoted to these cases, and indeed the Chief Justice referring to the 1972–73 term numbered these cases at 46. I figure that this amounts to about 2 of the 9 months of argument time and roughly the same or slightly less proportion of the number of plenary opinions. It is true this is not a net saving because eventually some of these cases will make their way to the Supreme Court and they will be argued and they will require plenary opinion.

I suspect that a substantial time saving will be made available to the Supreme Court because of the abolition of this act. How much we don't know, but I say let's try to assess the impact and see what time has been freed for the Supreme Court for additional national decision-making.

Beyond this there are the proposals which the Solicitor General has forwarded to the President and these are far-ranging. I think even though the Presidency has changed hands as the result of last week that the ideas will still, many of them at least, remain alive. The Solicitor General has included the abolition of compulsory jurisdiction for the Supreme Court, the almost complete abolition of diversity jurisdiction, increase in jurisdictional amounts, the requirement of exhaustion of State remedies for prisoner rights cases and an interesting proposal to put under article I courts fact oriented repetitive cases such as social security and mine safety; that is, to submit these to administrative tribunals.

The Solicitor General has reported to the Judicial Conference that he thought that this might result, if all of these were adopted, in a 40 percent reduction of traffic into the Federal courts. This, of course, does not mean traffic to the Supreme Court because many of these cases perhaps would never reach the Supreme Court in any event, although I dare say petitions for cert for many of these cases have been attempted, but nevertheless it would have an effect on the work of the court and on the work of the courts of appeals.

These two developments, the three judge court and the proposals for changes in ground rules of jurisdiction, really determine the scope of the need, and to think now of the type of horse we need to draw the cart before we know quite what the size of the cart is seems to me reverse logic.

Now, I know that the committee—not the subcommittee, but the Judiciary Committee of this body and of the other body by no means are convinced of their omnipotence and they have not been successful in pushing along legislation on jurisdiction. Nevertheless, I think that that should not be an excuse for doing something of secondary importance before we do something of primary importance.

Coming now to the immediate need without changing laws, I would say that we do not have a good handle on the extent of that need, although I have the respect for the work that Professor Feeney did for the Hruska Commission. It was a good beginning but I think only that. He has analyzed unresolved conflicts. When I talk of needs I am talking about resolving conflicts and correcting errors and reducing litigation.

Well, the conflicts reported by Professor Feeney are a mixed group of conflicts. I think many of them are conflicts which may endure for a short time but are resolved as soon as a court reads one or two opinions from another circuit. Professor Feeney counts as conflicts disputes between the circuit in one circuit and a district court in another circuit. Well, of course, this is natural and to have such disagreement and many times when the district court case is appealed, the other circuit will act in a way that eliminates the conflict.

Many of these are conflicts that need never be resolved. We in the first circuit require a motion for a new trial to be filed in the court of appeals once an appeal has been taken. The fifth circuit requires that the motion go to the district court. Well, that is a conflict all right but as long as you are practicing in one circuit or the other and know what the ground rules are, there is no crying national need for uniformity.

The second circuit case was cited as an instance of a conflict where it refused to follow and it was in conflict with a 1944 sixth circuit case which had since been rejected by three other circuits and finally in 1970 was limited to its facts by the sixth circuit itself. That, it seems to me, is a conflict which might really have been a serious one at one time but no longer was at the time of the study.

I won't go into the remaining data as to conflicts. I would just underscore the fact that if the committee relies on conflicts as the basis for this new court, a great deal of additional homework needs to be done.

Now, once we identify the conflicts we still have the problem of estimating how many of those will arise each year assuming that a backlog at the beginning has been cleaned up. Well, Professor Feeney

suggests 50 or 60 direct and strong partial conflicts per team but once the backlog has been resolved I would estimate that the steady diet is 12 to 15 direct and strong partial conflicts per term, a number which would keep one judge very busy indeed but not seven.

Moreover, if the number is of that magnitude or even more, the question arises whether indeed the Supreme Court itself may not have time to address those cases. In terms of correcting errors, I would say that the chief complaint is that of the patent bar. Unlike the tax practitioners who complain about conflicts, it is the patent bar which complains about different attitudes in different circuits resulting in different outcomes and it may well be that at some point in time we will need a court of patent appeals at the top level. I would point out that even this past term the Supreme Court had occasion to decide a couple of patent cases, the first in some time, but effectively telling the circuit court in question that its approach to obviousness was not in harmony with what it, the Supreme Court, considered as the proper doctrine.

I would doubt that the function of correcting errors is alone enough to justify a national court of appeals. We do allow errors to exist so long as there is a mechanism for correcting them, and whether the court of appeals or the reviewing court is absolutely right or not is perhaps less important than that there is some certainty.

In terms of producing litigation, I know that some proponents say that if we had a national court it would make a final decision that would jut the burden on litigants, perhaps Government litigants who seek to go to one circuit after another in the hopes of overturning a precedent.

Well, in the first place, it seems to me that if I have a case in my court and several other circuits have acted upon it, usually it is not a very difficult task to dispose of the matter and usually we will find that the other circuits have explored the law, canvassed the alternatives and have provided a sound basis for our decision.

The national court would not help in the one situation where I think we would face the most difficult cases and that would be cases where we are of the first or second circuit to consider the issue fully.

I said the national court would not help us. Well, I suppose it would if it decided the question but I am not sure that we as a Nation would be ahead of the game by having the national court decide questions just as soon as they arise. There is a need particularly on matters of social policy for circuits to explore, to express their views, their majority opinions, their dissents and then the stage is set for a national decision with some chance of gaining long-term public assent.

For example, if the national court had had the DeFunis matter and decided it, then that would be an end to the matter. We would not have the almost deliberate period of percolation and rumination which followed the action of the Supreme Court. I think it is important for businessmen to have answers and to have answers as quickly as they can, but as I have said, I think that the pressing matters in the business field are not so many and that the Supreme Court might very well have time to address those.

My own feeling is at this juncture, with the data being what it is, the importance of the institution being what it is, that if we are going forward actively to address the problem of increasing our national

deciding power, that for a time we ought frankly to be temporizing and we ought to do something that by definition is not intended to be a permanent solution.

When you were wearing your other hat, Mr. Chairman, as chairman of the Hruska Commission, I did propose a make-shift measure, the analog of the much criticized three judge court measure, and suggested that there be panels of judges at the courts of appeal assigned on an ad hoc basis to one or two panels a year and decide cases that have been identified as those in greatest conflict. My estimate would be that two panels of 14 circuit judges sitting on each panel less than a week a year perhaps hearing 12 or 15 cases with each judge writing two to four opinions could dispose of the cases in conflict where a decision is needed.

Cumbersome as this may be, it may be worth trying until we know what the magnitude of our needs are and whether or not a national court of appeals structured as it is presently envisaged is the answer. In your Commission report you have appropriately criticized this and measures like this as not establishing the sense of stability and continuity that a real bona fide permanent life tenured national court of appeals would have and you also pointed out the difficulty that would occur to judges sitting on panels who then would have to return to sit among the colleagues whose actions they had reviewed.

These two criticisms are, however, just as applicable to the national court of appeals at least in the first years of its existence when the appointment of the judges will not all be made by the President and therefore it will not have the stability and continuity which the court ultimately might have and where the judges of the court of appeals sitting on it for terms of 4 years will eventually return to their colleagues.

The suggestion I made is obviously temporizing but I think we are in a time where something very modest and pragmatic is better to play with than to commit ourselves irrevocably to the greatest innovation in our judicial institutions since 1891 if not 1789.

A final footnote. I appreciate the Commission's suggestion that in order to avoid giving the President the power to appoint all members of this new court if it comes into existence it would be approached on a staggered basis but in pursuing this gradual approach to getting on board a complete membership appointed by the President and confirmed by the Senate you have the spectacle of the national court for its first formative 4-year period constituted of two judges appointed by the President and confirmed by the Senate but the remaining five are on that court because they have to be senior circuit judges with sufficient seniority but not too much and no more than one to a circuit, and to have the important infancy of this court made up of a majority on whom the Senate has had no chance to pass. I think that would be an innovation that I am not sure would be found acceptable.

Having said that, I confess I don't know how to answer the question. How do you avoid one President having undue influence unless the law were to be such that in the initial composition there would be a certain ratio among the parties to which members had formerly belonged or some other means of assuring that a whole court is not so dominated by the one President who appoints them.

Thank you, Mr. Chairman.

80-731—77——12

Senator HRUSKA. Your honor, the statement you just made about the method of selection of the judges is greatly appreciated. As you know, the Commission did not get into that field at all because it was felt that is a political decision which was referred to a political body to treat it: to wit, the Congress.

The proposal in the second bill, of course, does result in a temporary arrangement as to five not receiving confirmation by the Senate for service on that forum. I would make two observations in that regard and would ask you for your comment on them.

In the first place, is it an innovation? We had the practice and the procedure now of inviting district judges to serve on circuit courts. The Senate has never considered that type of temporary assignment in their approval and confirmation of the district judges, so I doubt very much that it is an innovative thing at all. That is item one.

Item two is this. What are the alternatives? Is it so bad to have an arrangement of that kind when there is no plausible, acceptable alternative?

Judge COFFIN. Well, I agree if there is no plausible alternative maybe it is not so bad. This idea probably is not worth saying because it is just prompted by your own remarks. I would think that we have to have a court which has its full membership all at once; that is, could you begin with a small court and then have it enlarged by successive holders of the Presidential office as time goes on? Start with three, go to five, end up with seven, but have all of them at all times appointed by a President and confirmed by the Senate.

Senator HRUSKA. But that, you see, gets back to the vice that we tried to eliminate by the provision in the second bill, the vice being that one President would appoint the entire court.

Mr. COFFIN. This would not necessarily be one President. You mean one President would appoint the beginning complement of the court?

Senator HRUSKA. Yes. The beginning complement, but if there is a time interval involved, until that time interval expires the entire court will have been composed by the appointees of a single President.

Judge COFFIN. Quite right.

Senator HRUSKA. That is the vice we tried to avoid.

Judge COFFIN. Quite right.

Senator HRUSKA. You have also commented about percolation and observed that you feel that the national court of appeals should not decide cases as soon as they arise. I believe you were here this morning when I suggested there is nothing in the act that I see, and I know it well, in either bill that requires the national court of appeals from abandoning this doctrine or this practice that cases should percolate for a while before they come to final judgment.

Now, if that position that you describe, if the idea of percolation is so clear to you and to me and to Judge Lay and to other people, are we warranted in assuming that we have a monopoly on the awareness of the necessity and desirability of percolation? Isn't it reasonable to suppose that the Supreme Court would be aware of it and it will determine the parameters of the cases that will be heard by the national court of appeals? The court has some very talented people that will be acquainted with this percolation theory and the same with the national court of appeals. So how does the desirability of percolation apply as a criticism of the bill? I can't quite get the relevance.

Judge COFFIN. Well, because if that is true, if the Supreme Court still keeps its fingers on cases it feels should percolate and those cases do not go to the national court, I would say this takes away many of the cases that would go and I am left with the feeling that this is a court with very little to do.

Senator HRUSKA. Well, the Supreme Court would have the power to say when they reviewed petitions to make their choice of 100 to 150 cases, they have the power under the bill to say to the national court of appeals "We do not approve your consideration of such and such a thing." If they see in a case the situation where further percolation is needed or desirable, they could so state.

Judge COFFIN. They sure could. I would just say that in terms of the conflict data of Professor Feeney I do not see a caseload for the national court. I do not know the content of the petitions for cert, how many cases there should really require imminent or expeditious national decision. I discount data on dissents from denial of certiorari. I suspect that they are not really an indicator of the number of important issues that are lurking, waiting for decision and so I cannot say whether in the denials of cert there are 130 or 140 cases worthy enough of national decision to justify the new court. It may be, but I have yet to see it.

Senator HRUSKA. Of course, that is central to the whole proposition, isn't it, the statement you just made. Because the major justification for this national court of appeals is this, that there is not sufficient capacity in the Supreme Court to treat the cases that should be treated.

Judge COFFIN. That is the question.

Senator HRUSKA. That is the question.

Judge COFFIN. Although I am from Maine, I am from Missouri on this one.

Senator HRUSKA. Well, perhaps so. Then how would you comment on Judge Hufstedler's interpretation that only one percent of the appeals the Supreme Court now hears are cases decided by the Federal courts of appeal? Now, some 15 years ago there were only 1,000 filings in the Supreme Court and there are now over 4,000. There is every reason to believe that number is going to go up and one percent of a large number is even fewer. Now, she says it cannot be, it is not reasonable to believe that the circuit courts could be right and correct in 99 percent of the cases.

Judge COFFIN. Well, of course, one flip answer is that given by the Toledo Law Review commenting on Judge Hufstedler's comment: if 1 percent is so terrible, 2 percent is not going to change the situation dramatically; that is, the best we are talking about is increasing the percentage.

Senator HRUSKA. I am not so sure. Now, you take a half dozen cases, for example, in the field on environmental law which is going to plaque the court from now on in great volume, and the same is true of the Mine Safety Bill, the same thing is true of these consumer bills and the class actions and so on, even a half dozen decisions in those fields which do not involve constitutional matters would be important. It is a matter of interpretation of the words that we approved in the Congress and sent to the President for signature. Now,

even a half dozen of those would be very, very important and it would certainly be more than that.

Judge COFFIN. Remember that I am saying that we don't know yet what time the Supreme Court will have available in view of the full impact of the three-judge court bill and assuming that measures to change jurisdictional grounds have been enacted. Maybe at that time the Supreme Court will be unable to take on any more cases but I am not sure of that at this point.

Senator HRUSKA. Are you suggesting that they could take on more cases than 150?

Judge COFFIN. No, I am saying that they have got some slack now because of the three-judge court bill. We don't know how much the slack is.

Senator HRUSKA. What slack is there? I don't know of any proposed or any extrapolated reduction in the number of their decisions. It will still be in the neighborhood of anywhere from 130 to 170.

Judge COFFIN. Yes, but instead of, say, 30 of these decisions being directed to a three-judge court, the direct appeals from which it has to hear, the number of appeals would be somewhat less.

Senator HRUSKA. Well, by the same token you say if 1 percent is increased to 2 percent it is not very much. Well, if we reduced the number of 4,000 cases before the Supreme Court down to 3,800 or 3,600, are we much better off? The Supreme Court is still more than amply supplied with material with which to work, is it not, more than it can do?

Judge COFFIN. I would be disinclined to conclude from the numbers of cases which the Supreme Court cannot hear that there is need for a new court. That is, I would not like to jump from the fact there were 4,000 unreviewed cases to the fact that we need a new court. I would like to see to what extent within those cases there are questions substantial and important and exigent enough to require decision in the very near future.

Senator HRUSKA. Well, what is your comment on the question I asked this morning based upon the Harvard Law Review paper in 1971 that prior to 1960 nonconstitutional holdings of the Supreme Court were almost uniformly two-thirds to three-quarters of the product of the Supreme Court and the balance were constitutional questions. Now, that proportion is reversed so that what had been two-thirds and three-quarters is now only one-third or one-quarter in the field of what we call nonconstitutional questions.

Now is it because nonconstitutional questions are not important? For example, interpretation of congressional language is not necessary, you just dispense with it? Would that be your thinking?

Judge COFFIN. No; but I don't know until I see what the cases are how important they are. That is, the data on conflicts do not convince me that there are cases of excruciating importance which are over, say, a couple of years old. I am not sure that there is a significant number of real important cases that have not been decided.

Senator HRUSKA. Well, I won't pursue the point any further, but I think we are in agreement that the need has to be demonstrated.

Judge COFFIN. Yes.

Senator HRUSKA. The justification for an additional court would have to rest upon the proposition that the present supervision of the

Supreme Court is not adequate to take care of those things that should be taken care of; is that the question?

Judge COFFIN. I would certainly agree with that basic statement, Mr. Chairman.

Senator HRUSKA. Mr. Westphal, have you any questions?

Mr. WESTPHAL. Just a couple, if I might, Mr. Chairman.

I think in your statement you have given us some help in that you attempt to analyze Professor Feeney's report on the number of conflicts that he found in his particular study. On that question of conflicts I suppose if we were to ask a large number of practicing lawyers in the country of their perception of the extent to which the Supreme Court has granted certiorari in order to resolve conflicts of opinion among the several circuits that the reaction would be from those members of the bar that the Supreme Court has all but abandoned that basis of jurisdiction. Would you agree with that sort of a perception, that the average practicing member of the bar who has petitioned for certiorari feels that the mere existence of a conflict as he alleges it is not a basis?

Judge COFFIN. And he is going to think his case is a very important one for the country and he does not know why he does not get an answer.

Mr. WESTPHAL. Do you have the same perception that Judge Lay had this morning that even on his own cases where he thought that there might exist a conflict that if you looked at them again with a little bit of hindsight you might see that they might be distinguishable on their facts and that really a conflict does not exist?

Judge COFFIN. I think undoubtedly there are some important cases in conflict but I think this is data for the second stage of the inquiry and your job is to take a pretty hard look at the kernel of the conflict problem.

Mr. WESTPHAL. On the conflict point. That is really all you are suggesting to the committee. As you say, you are from Maine but you would rather be from Missouri on that—you would like to have a little more demonstrative proof from a statistical standpoint of the need for this resolution of conflicts. What would be the volume of work of this court if we were to create it? Isn't that your point?

Judge COFFIN. Exactly, Mr. Westphal.

Mr. WESTPHAL. You also make the point in your statement, and it is akin to something Judge Lay mentioned in his testimony this morning and I am not sure whether you were here when he testified or not.

Judge COFFIN. No.

Mr. WESTPHAL. He mentioned this matter of correction of error and expressed some views as to whether correction of error should or should not be a basis for the jurisdiction of this national court of appeals. In your statement you say that the primary purpose of the circuit courts of appeals is the correction of error, and it hardly seems worthwhile to create yet another layer of review to do the same job.

There are two thoughts in that. No. 1, if the circuits are to correct the errors of the district courts then the errors which the national court of appeals would correct would be the errors of the circuits and then we would have the Supreme Court there to correct any errors that the national court of appeals might make in those cases that are referred to it.

So from that standpoint as you talk about a broad concept of correction of errors it can be a never-ending cycle so that you finally resolve that by saying we are final because we are the last.

Judge COFFIN. Exactly.

Mr. WESTPHAL. But also involved in this concept as we talk about correction of erorrs is this idea, as Judge Lay seemed to express it, that if in the absence of a sufficient volume of conflict resolving matters or interpretation of congressional acts as being the basic jurisdiction and workload of that court that there might be a tendency by this referral jurisdiction to use a national court of appeals as an additional error-correcting level of the judiciary and if that were to occur this would result in a great increase in the number of petitions for writ of certiorari filed with theh Supreme Court just in the hopes that some perceived error at the circuit level could then finally be corrected at an additional level. So if that were to occur and if correction of error were to creep into this jurisdiction of the national court of appeals, it might in fact result in an aggravation of the Supreme Court workload problem rather than a diminution of it.

Judge COFFIN. I think there is no question that it will add to the Supreme Court's work both in selecting cases to refer and then as you pointed out receiving petitions if it gets into the correction of error business as I suspect it will if its backlog is not——

Mr. WESTPHAL. Would you say that the national court of appeals should not be used as an error correcting level of the judiciary?

Judge COFFIN. I would unless it is put frankly on that basis. I would personally think that we would be paying quite a price for two levels of mandatory correction of error.

Mr. WESTPHAL. Now, it is kind of hard to take that position because if you take the position that judicial error should not be corrected, it seems to me that you are almost saying you are against motherhood and apple pie. You have to deal with that question philosophically or systematically and that is, does the one appeal as of right now suffice philosophically as the means of correcting the error. Do you see the point I am trying to make?

Judge COFFIN. Yes; I do. I have to be in a position of saying we should not have perfect law and perfect justice but I would say that we have endured for a long time with just one level for the correction of errors except in unusual cert granted cases.

Mr. WESTPHAL. So as I would interpret the testimony you have given us it would be that the committee should weigh its final decision as to the need of this court principally on this conflict resolving basis of jurisdiction and not on any concept of a correction of error?

Judge COFFIN. I think so, Mr. Westphal. If I understand the practitioner who is strongly for the proposal, he would not say that if he goes into a circuit court of appeals and that court enforces a labor board order based on an illegal discharge for antiunion animus—that circuit court may be dead wrong and the record might be read by the national court of appeals to show that there was not substantial evidence to support the board. But that lawyer and his businessman behind him is interested in another court, not to correct that kind of error but what really bothers him is that the law under which his client is operating has not been clarified and he wants somebody to do that.

But I think he realizes that he has got to take his lumps with an occasional court that just did not read the record correctly and that is part of the system that he has to live with, the alternative being if he does not have to live with it, then we are really in a position where we increase the judiciary immensely and refine the appelate process to the point where it just would not be, I think, tolerated by the people or by the Congress.

Mr. WESTPHAL. Thank you, Judge Coffin.

I have no further questions.

Senator HRUSKA. Professor Levin.

Mr. LEVIN. Just a few little questions.

You offered a temporary solution which I think ought to be tried to take care of the demonstrated need and I would like just to probe a few little things in that connection.

The first is in your judgment the business of avoiding conflicts. For example, we have environmental litigation which raises some procedural questions but procedural on a national level—what belongs in the record created by EPA, for example. Things of this sort. In your view is it desirable to avoid the creation of conflict on this when it is bothering the national agencies and is it possible to fashion a temporary solution which would do so?

Judge COFFIN. It would be desirable to have an answer but I don't know how important it would be. That is, if you are in a case where the District of Columbia circuit has jurisdiction and they make a decision that governs litigation, there at least in the agency you know what is required. In some other circuit you may have something different required. I would have to know more about it to know whether that was a burning issue.

Mr. LEVIN. Let me proceed a little further with your notion of the term that was used this morning—the burning issue—because maybe one thing that separates the proponents and the opponents of some of the proposals is the notion of how burning an issue has to be before we ought to be concerned about it. How important is it to you, for example, if no conflict ever develops but businessmen remain uncertain on an issue, like tax liability, for a period of 10 to 15 years until enough circuits have spoken so we know the answer. Is that a matter of concern or is that one which you would sort of pass off?

Judge COFFIN. No, I would not pass it off. Of course, there is no certainty. There is certainty in death but the taxes part of it is sometimes not certain. You can't be absolutely clear about liability even if there is no conflict.

If a number of circuits have treated allocated income in a different way or collapsible corporations and businesses have been differently treated in a sizable part or in several parts of the country are uncertain, this, I think, is a need. I can understand the business lawyer who says that there should be an answer.

Mr. LEVIN. And therefore you would recognize the need even though ultimately no conflict developed if there were the uncertainty of this for a decade?

Judge COFFIN. No. If there is no conflict, what is their problem?

Mr. LEVIN. The problem is you have a new statute. One circuit has spoken and this comes from an actual survey of lawyers. A lawyer has

to advise his client and he says: One circuit has spoken, our circuit has not spoken. I cannot give you an answer but I can tell you there it is. Two years later another circuit speaks in support. The conflicts that develop frequently take 10 to 15 years to resolve. Now, sometimes it takes close to this period to find out that there is no conflict and I just want to gain your perception of the importance of the burning issue. Are these factors that ought to concern us?

Judge COFFIN. Certainly. You are saying that certainty in tax matters is more important than certainty in complying with the National Environmental Protection Act.

Mr. LEVIN. No, no, no. I am sorry. I have not suggested that is more important. I am just inquiring whether in your view, not a kind of certainty, you know that there are no questions left, but the kind of relatively reliable interpretation of a particular section on the discreet question, just whether that is a matter of significance.

Judge COFFIN. I would say it is.

Mr. LEVIN. And therefore even if a conflict didn't develop, if it had the business community or a substantial part of the concerned with the uncertainty, is that a matter of concern?

Judge COFFIN. Yes.

Mr. LEVIN. And therefore even in fashioning a temporary solution you would like to see to it that this new instrumentality could avoid conflict, if it were possible, in reasonable cases which don't need percolation.

Judge COFFIN. I would say that is a fair assumption.

Mr. LEVIN. I would just like to pursue it. We heard the divided views on whether it was a matter of moment or of no moment that a social security claim in one section of the country would have a different answer than in another section. Some people have taken the position it is a national law, there ought to be equality. Others have taken the position that life is that way. I think that sheds some light on the notion of how important it is to have this kind of harmony. In your view is that a matter of some moment?

Judge COFFIN. Yes. My answer is almost meaningless because I can say these matters are significant and of some moment but the crunch comes in saying how much you are willing to pay to achieve this desired goal. I think I would have to say that to reach that desired goal—that is, to have what we are talking about—is to have every similarly situated litigant treated in the same way under Federal law in every circuit of the country and I think that is not really a goal we are apt to see in this century.

Mr. LEVIN. We are not really suggesting that the national court would achieve quite that. I suppose it would be the question of avoiding some of the major disparities. The answer is helpful.

Two little further questions and I am done, Mr. Chairman, if I may.

The first, I would like to pursue the question of patent review that you have raised. It seems to me there are two types of error to correct and I would wonder if you agree. One is the type of error correction which is correction of error that is discrete and involved in the particular case. The other is what you refer to here in your most helpful submission with one suggested solution of systemic error of one circuit by all kinds of measures, subjective and objective, viewed as out of line in patent cases with the other circuits. The only way to correct

that kind of thing, I suppose, would be by fairly frequent systemic review until we get hammered out a patent: a visual formula does not do it.

In your view, even if we should say that a national court or some temporary alternative that you propose should not be involved in the business of error correction generally, would you think it appropriate that it should undertake the kind of systematic review in areas of the law where a particular circuit was out of line with the other circuits?

Judge COFFIN. If it exists, I would think that it might undertake that and depending upon the filing for cert the decision might be final, but if it were really important I think even if it were a matter of correction it would find its way into the Supreme Court. The Supreme Court certainly felt with all the pressures on it that the *Sakraida* case was one that was worth taking. That case said if you have water to flush off the floor of the stable, why that is not exactly the most nonobvious thing in the world.

Mr. LEVIN. I think it remains to be seen whether this changes or does not change the forum shopping which you now characterize as this "mad and undignified race to the courthouse" but that is a helpful response.

The last of the questions, if I may, Mr. Chairman, is this. There have been a lot of data and a lot of indications that the Supreme Court as a result of its pressure, one, is disposing of many, many cases on the merits summarily because there is a right of appeal and the court insists that these must be viewed as precedent. By the same token, they have been disposing of others and taking the conflict on occasion in response to demands from within the court that that is their job, they had promised it in 1925.

My question is this, just with another preface. That some members of the court—Justice White particularly and Justice Powell—have called for a sharp reduction in their caseload in the cases they take. Justice White has called for a reduction back to the figure of 100 to preserve the quality. The Chief Justice has referred to the risk of "erosion of quality" suggesting that it just has not started. Would you care to comment from your perspective as a Chief Judge of the circuit whether some of this summary disposition on the merits and in some of the curtailed procedures are at this point having the kind of adverse effect on the utility of Supreme Court review from the point of view of the circuits?

Judge COFFIN. I can't speak with the vigor and conviction of some of my other colleagues where they were under more direct influence. Maybe it has been some of their cases where they read this and they have really wondered what it meant. Of course, we would look not only at the summary's affirmance or reversal, we would look at what the petition for cert said and try to see what the parameters of the decision might be. It is not the mist helpful way to proceed and I could nominate other of their cases for summary treatment, but I see a place for that treatment. I do think that probably this is just a matter of judgment about particular cases. I think that just as we dispose of some of our cases with a much shorter opinion than others and a State court might have the system of allowing a miscript opinion, there certainly is room for the Supreme Court to have gradations. However, clarity is, I would say, always a desired quality in the final court, so I am concerned about this.

Now, I certainly am not qualified to speak on whether the caseload should be reduced or not. I merely made the point that I think there is some new freedom as a result of three-judge court action and if the President or the President-elect becomes serious about taking a relook at the division of litigation between the Federal and the State courts that may affect the workload of the court in not a major way but a substantial way. We would know better then what its permanent workload at least for a while is apt to be.

Mr. LEVIN. I am grateful for your response. I think you will find, shortly, that much of the saving that will come from abolition of mandatory jurisdiction, much of the saving from the three judge court abolition, either because of the importance of the questions which the court would have to hear anyway or because of the summary procedures, is going to be absolutely no reflection or direct proportion of the volume of cases. There are already indications of that, but we shall see and we shall be hopeful.

Judge COFFIN. I think that may be so. I don't really see how we can take a fix on it at the moment. This is three months after abolition of the three judge court started, and three judge courts of course are still being appointed because the complaint was filed earlier.

Mr. LEVIN. Thank you, Mr. Chairman.

Senator HRUSKA. Thank you, Your Honor.

Judge COFFIN. Thank you.

Senator HRUSKA. Pleased to have had you.

Judge COFFIN. May I say that I wish you well in your well earned retirement. Particularly those from the Judiciary will miss you in this body. All health to you, sir.

Senator HRUSKA. Thank you for your kindly thoughts. Your statement will be placed in the record in toto.

TESTIMONY OF CHIEF JUDGE FRANK M. COFFIN, U.S. COURT OF APPEALS FOR THE FIRST CIRCUIT

Mr. Chairman, I thought it well, in the interest of both clarity and succinctness, to organize my remarks in the form of a catechism. I therefore propose to discuss the issues relating to a National Court of Appeals by first posing the question as I see it, then by addressing the burden on proponents; I next discuss matters which I term non-issues, certain external changes which should be given thought, the case which has been made for the need for such a court, and the case which can be made for a more tentative, experimental approach. I append a footnote, commenting on the present proposed method of choosing members of the new court, when and if established.

*The question*

Is it wise to establish a new permanent National Court of Appeals to provide a significant additional institution before we know that there is a compelling need for additional decision capacity and before we have assessed the impact of major present and possible steps toward freeing the time of the Supreme Court?

*The Proponents' Burden*

My statement of the issue implies my view that any proponent of the National Court has the heaviest burden of proof to meet. Our nation has been well served by an experimental, cautious approach to institution building. The proposal in question is a fundamental change in the structure of the judiciary. It is far more basic than the Judges' Bill of 1925 or the formalization of the intermediate courts of appeals in 1891. It is analytically not too different from a proposal that there be a third house of Congress to perform the function of conference committees. Such a basic change in the structure of the judiciary should be made only after the clearest showing that the new institution is needed now.

*Non-Issues*

1. Prestige of Courts of Appeals. I have sensed that a knowing, head-nodding cynicism meets judges or entire circuits who oppose this legislation. One judge who heard me express my doubts recently at our semi-annual meeting of Chief Judges in Washington asked me: isn't your position really based on a fear that courts of appeals will be considered less important? I have thought about this deeply, because it isn't easy to separate one's built-in biases and vested interests from his objective judgments.

Of course the judges who oppose or question the proposal care about their courts. To some, perhaps many, being next to the top means something. This very fact, if true is a reason for taking a long pause before creating an institution which, to the extent circuit judges are so motivated, will be seen as diminishing the importance of the work of the hundred federal appellate judges. More importantly, the gambit of impeaching the motives of the judge-critics is a cheap one; it eases the challenge of debate by enabling defenders to avoid meeting the issues on the merits. Those critics who speak from the most intimate experience with the appellate process are discounted heavily because of their presumed self interest.

But I intend to question whether circuit judges generally feel threatened or diminished by having a court of supposedly greater prestige superimposed on them. Of course this reveals my view of what the new court would do. I envisage it as primarily occupied with civil, particularly business-oriented cases, its primary agenda requiring perhaps seven to ten opinions per judge a year. Perhaps it will also select other cases from those applying for certiorari, but it will always know that any vital cases will go to the Supreme Court.

2. Assistance to the Supreme Court. We know now that no claim to this effect is made. Indeed, the Supreme Court will have the added task of selecting cases to give to the new court. This is an ironic development when we remember that the Freund Committee was concerned about giving help to the Court for screening its own cases. The Supreme Court will also have the significant task of reviewing petitions of certiorari from the new court's decisions; this means reading new briefs and at least one new opinion—more if the national court is sharply divided. As Judge Friendly has pointed out, a Justice faces a problem in this kind of review which is absent in reviewing petitions today. For denying certiorari means letting a decision stand as the law of the land, with no room for further court exploration and development. Congress has just seen fit to relieve the Supreme Court of most direct appeals from three-judge courts. These were a burden on the Court primarily because only it could reverse, and because even a summary disposition would be a binding national decision on the merits. Creating a National Court of Appeals could revive this problem in a more virulent form.

3. Assistance to courts of appeals. With the surrender of transfer jurisdiction, these courts are not affected at all. (Admittedly, there would be twice as many national decisions to read and digest.)

*The Changing Scene*

The three-judge courts have at last been abolished. This liberates part of the time the Supreme Court formerly spent hearing and deciding these cases. This is, by any count, a substantial amount of time. The Freund Report (p. 29) stated that 22 per cent of oral argument time had consistently been devoted to these cases. The Chief Justice, referring to the 1972–73 term, numbered these cases at 46. In concrete terms this amounts to about two of the nine months the Court hears argument.[1] Even if we assume that a substantial number of these issues are important enough to claim oral argument time, I think it reasonable to suppose that at least a month's worth of argument time has been saved for other cases. But no one knows. And we shall not know for a year or so until the pipeline has been emptied.

Beyond this, there are the proposals which the committee chaired by the Solicitor General has forwarded to the President. These are far-ranging. If ultimately accepted, their impact on federal courts in general and on the Supreme Court in particular would be most substantial. The abolition of compulsory

[1] If one computes the relief in terms of plenary opinions that the Court will not have to write, the result is very nearly the same. During the 1974 term, more than 25 of the cases given plenary treatment came directly from the federal district court. The Court granted plenary review in 174 cases that term. *See* Owens, "The Hruska Commission's Proposed National Court of Appeals," 23 USLA L. Rev. 580, 596–97 nn. 98 & 104 (1976).

jurisdiction for the Supreme Court, the almost complete abolition of diversity jurisdiction, the increase in jurisdictional amounts, the requirement of exhaustion of state remedies for prisoners' rights cases, and the relegation of fact-oriented, repetitive cases such as social security and mine safety to administrative tribunals—all this, if and when acted upon, will have a tangible effect both on the business of the federal courts and on the Supreme Court's workload.

*The Need*

The remarkable thing about the Commission's proposal is that no one seems to know what the new court will do. Certainly, we should not take this step with our eyes closed. We need to take a closer look at some of the justifications advanced for a new court and at the kind of caseload these justifications will produce.

1. *Resolving conflicts.*—The Commission's report relies heavily on the work of Professor Feeney, who has analyzed the unresolved conflicts in federal law. The report cites the number of unresolved direct and partial conflicts as evidence of inadequate capacity.

(*a*) Some of the conflicts uncovered by Professor Fenney are arguably serious matters. But I observe that some of these conflicts are not infrequently resolved without a national decision. It is not unheard of for a circuit to be persuaded by another court that its earlier position was wrong.

(*b*) Also, Professor Feeney counts as "conflicts" disagreements between a circuit court and a district court in another circuit. This is no cause for alarm. If courts of appeals did not disagree on occasion with district courts, there would be no reason for appellate review. These "conflicts" are frequently resolved when the district court's decision is appealed.

(*c*) Many of the conflicts unearthed by Professor Feeney, moreover, need never be resolved by a national court. It does not matter that the First Circuit requires a motion for a new trial to be filed in the court of appeals once an appeal has been taken, while the Fifth requires that the motion go to the district court. These are local housekeeping rules; differences among the circuits are unimportant, so long as the rule in each circuit is clear. Nor is it at all a subject for concern that the Second Circuit has refused to follow a 1944 Sixth Circuit case which has been rejected by the Fifth, Third, and Ninth Circuits—and which in 1970 was confined to its facts by the Sixth Circuit itself.

This leads me to a further observation. If the National Court will have as its primary duty the resolving of conflicts then this mountain of testimony, reports, and studies will have labored to bring forth a very small mouse indeed. Once the existing backlog of unresolved conflicts is cleared up, how many conflicts will reach the new court each year? I think a rough estimate can be made using Professor Feeney's figures. The Commission report suggests that the National Court will be presented with 50 or 60 direct and "strong partial" conflicts per term. But this is based on Professor Feeney's figures, which assume that none of the conflicts will be resolved by a National Court. Looking more closely, we see that only about a quarter of the conflicts unearthed by Professor Feeney arose within a year of his study (table 21). In other words, once the new court has resolved the existing backlog, it can look forward to a diet of 12 to 15 direct and "strong partial" conflicts a term.[2] This caseload will keep one judge busy, but what will the other six do?

2. *Correcting errors.*—Of course, there are other reasons for a national court, ones less susceptible to statistical measurement. Some practitioners have complained of "attitudinal" differences among the circuits. They believe that the courts of appeals differ, not in the rules they announce, but in how they apply those rules. The Patent Bar has been the loudest in condemning this development.[3] Patent attorneys want a National Court of Appeals to correct errors in the application of settled law.

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[2] Like the Commission, I have left out of my computations any conflicts involving constitutional questions. Many of these conflicts arise because the Supreme Court lets an issue "percolate" through the lower courts before making the final decision.

[3] I recognize that practitioners in other fields have also claimed that their specialty suffers from the Supreme Court's neglect. Tax, antitrust, and labor law are particular areas of concern. But the complaint about the uncertainty of law in these fields is at bottom a complaint about unresolved conflicts. As my earlier discussion showed, no National Court of Appeals could create a full docket from unresolved circuit conflicts. The claims of the Patent Bar are different, however. The difficulty in patent law is not disagreement over the rules, but disparity in applying settled rules to particular facts. I therefore treat the problem of patents separately.

First, this complaint may have been mooted by the reforms that have already been made. These changes, and the others that have been proposed, may permit the Supreme Court to monitor patent decisions more consistently. Even without reforms, I am not sure that the Supreme Court has shirked its duties so badly that the country needs a National Court of Errors. The Supreme Court reversed two circuit court patent decisions last term, and a principal effect of each reversal was to let the circuit court which was reversed know that its philosophy was out of step with the rest of the nation.

More fundamentally, I doubt that a whole new institution is needed simply because circuit courts are making errors in applying patent law. Our system frequently tolerates errors in the application of law. A district court cannot be reversed for misapplying the proper standard unless its decision is "clearly erroneous". A jury's errors are corrected only if no evidence supports the verdict. The primary purpose of the circuit courts of appeals is the correction of errors; it hardly seems worthwhile to create yet another layer of review to do the same job. If there is something about patent law that makes the courts of appeals untrustworthy, and that makes it impossible for the Supreme Court to monitor the area, why not seek a less grandiose solution: a special court for patent appeals?

3. *Reducing litigation.*—A final justification I have heard for the National Court is that it will reduce the amount of litigation in the country by settling recurring issues once and for all. At present, litigants, like the government, frequently press claims in a circuit even when their position has been rejected in several other circuits. Although it is undeniably true that a national decision on point will eliminate or simplify some litigation, I think any argument that the proposed National Court would substantially lighten the workload of the lower courts is greatly overstated. In the first instance, it has been my experience as a circuit judge that issues which have been resolved one way by several circuits are relatively easy to decide. The suggestion that a national decision on point will make a material difference is not accurate in most cases.

Indeed, it is probable that some decisions of the National Court—like some decisions of the Supreme Court—will create or complicate litigation, since they probably will contain language making certain claims sound far more plausible. While we seldom have qualms about discounting dicta in the decisions of our sister circuits, we naturally are disinclined to do so when the opinion is that of a superior court.

The cases which are most difficult for me as a circuit judge are those in which my court is the first or second circuit to consider the issue fully. In these cases, a National Court of Appeals would hopefully provide no assistance. I say "hopefully" because I think that in most cases it would be unfortunate and even pernicious for a National Court to render national decisions on issues before they had been considered by several regional courts. Part of the genius of the present system is that we look not only to the states as promising laboratories on matters of social policy but also to the collective, if delayed, judgment of several circuits before reaching a final decision. Because there is so little present need for a National Court of Appeals, I fear that the new court will be tempted to short-circuit this process. One of my strongest reasons for opposing the new court is the danger that it will reach out for issues that have not yet been carefully considered by the courts of appeals and that the quality of its national decisions will suffer in consequence.

*The Need to Experiment*

**To summarize:**

1. We do not know how much help the Supreme Court needs, now that three-judge courts have been largely eliminated and other major reforms have been proposed.

2. We do not know what the National Court will do. It may resolve a handful of conflicts each year; it may evolve into a national court of errors; it may come to specialize in business cases; or it may do none of these.

The National Court of Appeals has been called a solution looking for a problem. In light of how much we do not know, it might be wiser to choose a more experimental solution. A National Court, once it is established and once the judges are chosen, will not lend itself to experiment. All institutions, including the courts, develop vested interests. It will not be easy, ten years from now, to confine the National Court to patent cases, even if it turns out that only patent

law is in need of national supervision other than that provided by the Supreme Court.

Instead of a solution cast in institutional concrete, we should be pursuing a honestly makeshift answer. I proposed one such answer to the Commission last year. In essence, the suggestion was a national court composed of panels of circuit judges. I will not now discuss the details of that proposal.[4] The point of such a temporary solution is that the details could be changed, without bruised feelings and institutional resistance. For more details, see "Second Phase Hearings of the Commission on Revision of the Federal Court Appellate System," vol. II, p. 805. This would not be a step without precedent. From 1789 until 1891 the circuit courts were staffed with varying combinations of district judges, Supreme Court justices, and, after 1869, a handful of circuit judges. There is no doubt that the circuit courts finally created in 1891 were more suited to modern litigation than they would have been if Congress had staffed them in 1789.[5]

Senator HRUSKA. Our next witness is Prof. Maurice Rosenberg of the Columbia Law School in New York.

Your statement will be put in the record. You may proceed in your own fashion.

## STATEMENT OF PROF. MAURICE ROSENBERG, COLUMBIA LAW SCHOOL, NEW YORK, N.Y.

Mr. ROSENBERG. Thank you, Mr. Chairman.

I shan't make a lengthy opening statement. Seeing Professor Freund here reminds me of a story that he loaned to me, and thinking of my situation, the story I think becomes appropriate. It is about Abigail in Maine who is a great churchgoer. She esteemed the preacher very much. She rushed up to him after one of his sermons and she said: "Preacher, I don't know how you do it. Every one of your sermons is better than your next." I have that same feeling about the sermon I am going to deliver, it is well down the line so far as you gentlemen are concerned.

I do want to speak to the question of need for this court or for a construct of some sort in the Federal judicial system. The need that I refer to is particularly the need to get the statutory law settled and clarified with as much uniformity as necessary across the country.

The proof of need is hard. Mr. Justice White said that the proof comes down to a sophisticated judgment, and sophisticated judgments are hard, they don't lend themselves to very clear-cut demonstrative evidence as I believe Mr. Westphal called it.

I would like to get into the proof of need through expert testimony, through direct evidence and through circumstantial evidence. The experts I would invoke are five of the Justices of the Supreme Court whom you have invoked—that is, the Commission has invoked—in its final report. I think that Professors Levin and Hellman in their To-

[4] It is worthy of note, however, that many of the objections voiced by the Commission to proposals like mine can also be made about the proposal we are now discussing. For the next four or eight years, this National Court will lack "the stability and continuity that are essential to the development of national law." Commission Report, p. 31. And the temporary members will find themselves reviewing the decisions of colleagues on courts to which they will soon return.

[5] I think a brief comment on the method of choosing the new court's members is appropriate. The method proposed succeeds in insuring that no single President will determine the court's composition. In so doing, however, it also deprives the Senate of its traditional power to advise and consent to the membership of each federal court. Apart from the two judges initially appointed by the President, the remaining five will be determined by seniority, without regard for ability, energy, or geographical diversity (except for the provision that only one judge from any circuit be named). The first four years would be critical ones. I wonder whether the Senate is, or ought to be, willing to let the direction of the new court be determined by chance rather than the traditional scrutiny that attends decision to approve a judicial nominee.

ledo article correctly summarized the views of five of the Justices as now acknowledging that the Supreme Court cannot meet the demands upon its energies and time.

Since the demand to settle the national law is one of the heaviest demands, I would think, upon the Supreme Court's energy and time it seems to me that five of the Justices have admitted a great deal in saying that the court is not up to meeting the demands. Of course, Mr. Justice White, joined by Mr. Justice Powell and by Mr. Justice Rehnquist and implicitly to some extent by Mr. Justice Blackmun, have said that there are enough cases which the Supreme Court should decide after plenary consideration but which it now either declines to review or resolve summarily.

Mr. Justice Blackmun spoke of those cases which the Supreme Court barely does not take, the almost taken cases which the Supreme Court worries about because it does not take. I read the Chief Justice's statement as somewhat wistful when he says:

> The Supreme Court has no desire to avoid a resolution of important cases of broad, general and national concern and significance but the capacity of nine human beings has a finite scope.

In sum, the way I read the experts on the question, viewing the question and the evidence from where they sit, there is good evidence that not enough national law is being made to satisfy the demands that can properly be placed upon the Supreme Court. By that law let me say that I would like to stress statutory law as against constitutional law. The point has already been made this afternoon, by the chairman, of the inversion of the ratio of allocated time as between constitutional and nonconstitutional cases.

Whereas some decades ago perhaps two-thirds of the court's time was spent on nonconstitutional cases, now only one-third is spent on it. That is, outside of the Constitution, nonconstitutional law has not grown that much in interval but the statuory law certainly has. So the scanting of the statutory law is more than that inversion of allocated time would suggest.

I would like to go to the question of direct evidence. It is very difficult to array the cases that should have been, but were not, taken by the Supreme Court and to prove to the unpersuaded that these are the cases that some other facility in the Federal judicial system would have handled. It is very difficult to do it. It is only natural that people who are not persuaded or who have genuine reservations about what comes next will say those cases are distinguishable. I am not sure anyway that taking that particular case that was not taken would do very much about settling the law because the next case along would have an extra wheel or be of a different stripe.

It is very difficult on a case-by-case basis to make a direct showing than there are omitted cases that should have been taken. The supporting studies in appendix B to the final report did as good a job as we have ever seen or are likely to see at trying to get at direct evidence, yet it remains elusive and not completely compelling when you read it for some of the reasons that Chief Judge Coffin advanced.

I, myself, coming into it persuaded, think that it is a very fine addition to the available evidence. My chief reliance, however, is on the circumstantial evidence rather than in the direct evidence that involves case-by-case analysis. The circumstantial evidence has already been

alluded to several times and is well familiar to you. I hate even to burden the record with it, but it is that. This year in fiscal 1976, the year that closed June 30th, the United States courts of appeals will have received approximately 18,600 filings. That was estimated on the basis of the first half-year's filings.

That represents an increase of about 12 percent over the year before. So the picture has gone year in and year out until we know what a change has been worked in the volume load of the U.S. courts of appeals over the last two decades or so—a multiple of perhaps four in their caseload.

Yet, the number of cases involving important questions of national law embedded in those 18,600 filings that the Supreme Court will review, will not come to more than, I would surmise, about 70 give or take. One hundred eighty-six would be 1 percent. Seventy is a far cry even from 1 percent. Although it is true that 2 percent is not much more than 1 percent, it is twice as much and it is true that by playing fractional percentages—that is, by dealing in fractional percentages—it is possible to diminish the impact of what the Supreme Court's review of an additional 25 or 50 cases would do for the monitoring and the oversight of the Federal system. I, nevertheless, think it is important because at some point surely the Supreme Court's loosening of its grip on the stewardship of the lower courts becomes so apparent that they realize that there is no appeal, not for correction of error nor for institutional review, nor for clarifying the law.

So, the figures that Dean Griswold has called to our attention, that is, that in a short period of 20 years from 1953 to 1973, there was a drop from 18 to 6 percent in the filed paid cases that the Supreme Court took on full review. Judge Hufstedler's figure to which the chairman has already referred, and these figures that I have been adducing, all suggest to me that the shrinkage that is going on in the review of national statutory decisions at the highest level, can't go on without intolerable consequences for the system.

Now, why is it so bad to allow cases to percolate through the circuits? That question has come up here as it always does in this discussion. I would like to invoke a case that I am going to argue before the Supreme Court in a month or two, I guess in January, in which the Supreme Court granted certiorari after a period of percolation which went for more than 10 years.

I have discussed the case briefly in the written statement so I won't dwell on it. I want to make just a couple of points about it. The case is a Social Security Act case involving a claimant's effort to get a rehearing or a reopening by the Administrator of his claim for disability benefits. The circuits are sharply split on the question raised. The question raised is whether there can be review in a district court of the denial by the Administrator of a reopening. Actually, however, the case has tenticles that grab at problems and this seems to me quite serious in understanding the problem of uncertainty even in the absence of head-on conflict.

The problem I want to address is that decisions by a court of appeals on a particular question can lead to uncertainly in respect to some other question because the decision of the court of appeals will strike the second questioin tangentially and will be far worse than a head-on collision with another circuit's decision. At least if you know in a de-

fined case that the law of your circuit differs from the law of some other circuit, you may be able in planning or litigating to do something about it, at least there is a certain amount of stability in the contradictions.

If what has happened in your circuit is that something has been said in a slightly removed context from the one that you are now in, a truly distinguishable context, but if what has been said reads on your case in some respects more uncertainty may be generated in that array than by a flatout statement about your case whether it consists with or does not consist with what some other circuit has said.

In this case that I am arguing the circuits are split. I say, somewhat jocularly 9 to 8 on the question. Now, how can they be split 9 to 8 on the large question on which the Supreme Court granted review? For just the reason that I am adverting to; that is, the question of whether the Administrative Procedure Act as an independent grant of jurisdiction to the Federal courts has come up in a myriad of contexts. In the same diverse context the same circuit will say "yea" and "nay" to the question.

I think that about a half dozen times circuits have come down on both sides of the question of whether the APA does or does not grant jurisdiction independently to the Federal courts. But once it has come up in a labor context, another time in a social security context, another time in the Vietnamese babies' suit to be returned to their rightful parents and so on.

So where the factual pattern is removed from the one at hand, the law may read with a great deal of uncertainty and ambiguity. It is that kind of thing which I believe eludes us when we start looking into the cases that should have been but weren't reviewed by the Supreme Court. So the percolation continues and in this case it continues, as I said, for over 10 years until finally the Supreme Court said, "Well, we will grant certiorari in this case and resolve the conflict." That took quite a long while and quite a lot of percolating, quite a lot of misery for many, many people, some of them with social security disabilities of the kind that is involved in this case.

I think that percolation does fine as a theoretical proposition, and in practice, as long as it is not the pot that decides how long it has to percolate. If it is the cook who decides when the pot percolates, that is fine. The cook in this case is the Supreme Court or the court that has the power to stop the percolating and to say, "Let's decide this issue once and for all." That is not what is happening now. The cases are brought because it suits litigants and their lawyers to bring them. It may be that it will be a fine thing if a case were brought that would raise the question and allow the Supreme Court to take it so that it could settle the matter.

The Supreme Court has no power to require that the question be raised and so the percolation goes on sometimes without the Supreme Court being entirely willing about it but simply because either it is not ready to decide the case or because it is too ready to decide other cases—that is, it does not have the time or because the matter is not raised in the form that it thinks is an appropriate one for decision.

What I have tried to say is that percolation ought to be under greater control than the Supreme Court can now exercise over it. That

is why I think that serious consideration ought to be given to the kind of proposal embodied in Senate 3423.

Beyond answering your questions about the question of need I am content to rest on the statement that I have submitted. I have accompanied the statement with some comments on S. 3423 and here I picked up a few critical comments that have been directed at it, some of which we heard this afternoon. I have tried to say a few things about a few of those comments but I will spare you a repetition of those items unless you would like me to dilate on them.

[The formal statement of Professor Rosenberg follows:]

STATEMENT OF MAURICE ROSENBERG TO THE SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL MACHINERY, COMMITTEE ON THE JUDICIARY, U.S. SENATE

This statement presents my own views. It should not be understood as conveying either the agreement or disagreement of the Department of Justice, or any other of its personnel.

In my opinion, S. 3423 is based upon a correct premise: there is a clear need to enlarge the capacity of the federal court system to settle the national law and this need goes beyond the ability of the Supreme Court alone to do so. Last year five members of the Supreme Court individually expressed views embracing that premise, in several instances doing so explicitly.[1] Of the present members of the Court, only one said he was unpersuaded of the need for a new national court. Mr. Justice Stevens joined the Court after the Justices' views had been made known to the Commission on Revision of the Federal Court Appellate System. Quite understandably, considering how recently he took his seat on the Court, he has not joined publicly in the debate. Even so, a majority of the present Justices of the Court are on record that the Court's capacity is no longer adequate to meet all the demands being made upon it. I read the statements of five of the Justices as a strong concurrence in the finding that there is in fact an numet need—the one which is the predicate for S. 3423.

Mr. Justice White's response to the Commission's request for comments on its Preliminary Report is the fullest. It deserves careful notice. He wrote: "I am convinced that there * * * are enough" cases "which should be decided after plenary consideration but which the Supreme Court now either declines to review or resolves summarily" to "warrant the creation of another appellate court, at least on a trial basis." [2] Mr. Justice Powell said his views were in substantial accord. Mr. Justice Blackmun reported the Justices' "worry" over the cases the Court now "barely" does not take but surely would have taken 20 years ago. Mr. Justice Rehnquist thought the case was documented for the conclusion that the Supreme Court's capacity to decide important issues of national law is no longer adequate to the need. Chief Justice Burger's view was to the same effect, but more wistfully phrased:

"The Supreme Court has no desire to avoid a resolution of important cases of broad general and national concern and significance, but the capacity of nine human beings has a finite scope * * *." [3]

THE PROOF OF NEED

All will agree that before major structural changes are made in the Federal appellate system, a clear demonstration of need is essential. Certainly, the opponents of S. 3423 are insistent that need be shown before change is made—even more modest change than creating the proposed National Court of Appeals. As one who is convinced that there is a need, I nevertheless concede that the case is not an easy one. In Mr. Justice White's phrase, it "comes down to sophisticated * * * judgment." [4]

It is not possible to prove by direct evidence that there is a shortage of nationally binding decisions on particular issues or in closely specified areas of the

[1] Levin and Hellman, The Many Roles of the Supreme Court and the Constraints of Time and Caseload, 7 Toledo L. Rev. 399, 428, n. 94 (1976).

[2] Letter of Mr. Justice White to the Commission on Revision of the Federal Court Appellate System, Appendix to Final Report 181 (1975).

[3] Letter of Chief Justice Burger to Commission, id. at 174.

[4] White, The Case for the National Court of Appeals, FB News 134, 142 (1976).

national law. To do so would require a parade of specifically identified appeals and applications for certiorari, and calling attention in each to the unsettled issue it exemplifies. Intercircuit conflicts would, of course, be prime exhibits. However, those who are unpersuaded of the need (and those who are unpersuadable) could distinguish the assertedly conflicting decisions, quarrel about their relative importance, about the desirability of having them "percolate in the circuits," etc. In the end the proof would disintegrate into a series of arguments about how essential it is to the nation's welfare that a particular question be taken up and authoritatively settled at the highest judicial level.

Even when the argument is shifted from particular cases and issues to the entire output of the Supreme Court, it is infeasible to prove conclusively that the Court is not laying down a sufficient number of authoritative interpretations of national law. We have no absolute measures for such a quantum. Comparison with other systems is not particularly useful because of the uniqueness of the question of how much superinteudence by a nationwide judicial authority the national law requires. To answer mathematically would involve the same kind of subtle, difficult and subjective considerations one might meet in trying to determine as a statistical question how many congressional statutes are enough to satisfy the nation's need for legislatively-declared rules.

When it embarked on its excellent and productive efforts to assess the need for an enlarged national law-declaring capacity, the Commission's staff correctly went beyond merely taking a census of fully matured intercircuit conflicts, direct or indirect. Careful research succeeded in identifying more than 150 matters in which it would be desirable to settle the law definitively, without waiting for the luck of the litigation process to cast up inconsistent circuit decisions in the areas. In my opinion the staff's work is the best effort we have had in this field. Even though it did not produce conclusive direct evidence of a shortage of uniform, judicially-declared national law, it assembled abundant circumstantial evidence of persuasive quality. Cumulative annual statistics showing a remorseless drop in the proportion of review-seeking cases the Supreme Court is able to consider fully before deciding to furnish the core of the evidence.

The Supreme Court's output in recent years has been running at a fairly constant level, averaging 150 dispositions after plenary review. That does not take into account the larger number of cases disposed of summarily or by dismissal. However, the 150 cases afforded plenary review provide that best sense we can get of the volume of national law the Supreme Court has been making and will continue to make so far as anyone will forecast. Against that constant figure is the familiar, dramatic contrasting set of figures on the steep growth in the number of cases brought to the Court for review—from about 1200 25 years ago, to more than 4,000 today. In the courts below the same meteoric rise in caseload has also occurred. Particularly relevant is the sharp climb in court of appeals filings to an estimated 18,600 in the 1976 court year—more than four and one half times the figure 20 years ago when the Supreme Court was disposing of about the same number of cases on plenary review that it disposes of today in that manner.

In the 1973–74 court year, the Supreme Court handed down decisions with full opinions in only 75 or so cases that turned directly on questions of national law, other than constitutional ones. At the same time thousands upon thousands of similar questions were being finally disposed of at the intermediate appellate level. In realistic terms, regardless of how clean the lines of judicial authority seem on paper, our system is one in which the essential function of interpreting and enunciating the national law is in effect entrusted to eleven regional courts that come under no coordinated influence except infrequently and haphazardly. To make matters worse, the judges of these free-floating courts sit in randomly-composed panels of three, with the make-up of the panel often predetermining the outcome of the appeal.

The great dilution of the Supreme Court's capacity to superintend the national law is apparent from other figures. Thus, Dean Erwin N. Griswold has called attention to the shrinkage in the chances of Court review on the merits of non-indigent cases—represented by a decrease from an 18 per cent review figure in 1953 to a 6 per cent figure in 1973. Dean Griswold quite properly asks: What became of the vanished 12 per cent?

Adding another dimension to the figures showing shrinkage in review odds is Judge Shirley M. Hufstedler's reminder that the Supreme Court now hears less than 1 per cent of the cases disposed of by the federal courts of appeals.

Those figures, and others that the Commission presented in last year's report, show vividly and irrefutably that the national law is not being as closely moni-

tored and integrated by the Supreme Court as it was a few decades ago. Inevitably, there is an erosion in the coherence, uniformity and knowability of the national law. The consequences are serious. For one thing, a significant volume of repetitive litigation ensues, entailing a needless cost to litigants and a wasteful burden on the courts. For another, there is an unsettling effect on planning of legal transactions, with especially mischievous results in the most intricate, most intensively litigated areas of the national law. Among these are taxation, patents, utility regulation, environmental protection, securities and antitrust law. "Even if a conflict never develops," when issues of such broad impact are involved, the Commission's final report warns that "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." [5]

COSTS OF THE SHORTAGE OF CAPACITY

The injury that results from an inadequate capacity in the federal appellate system to harmonize and unify the national law is not confined to the havoc wreaked on efforts at business planning and commercial transactions. Injustices befall everyday citizens in everyday pursuits when the nation's law is unsettled in areas where it should be uniform and knowable. A clear case of this is one now pending before the Supreme Court, *Mathews* v. *Sanders*.[6]

The issue presented is not of cosmic dimensions: When a person who has unsuccessfully applied for social security disability benefits has asked the Administrator to reopen his claim and been refused, may a federal court entertain the claimant's suit to determine the legality of the Administrator's refusal? After at least ten years of hopeless division in the circuits—a split compounded by the involvement of the broad question whether the Administrative Procedure Act is a jurisdictional statute—the Supreme Court at last granted certiorari earlier this year.

So far as I can determine, no good purpose was served by allowing the issue in the *Sanders* case to "percolate" within the circuits for years. This example speaks to one of the arguments made by those who assert there is no need for an augmented capacity to settle and harmonize national law—the contention that percolation of an issue can lead to close study by the lower courts and a more mature understanding of the opposed arguments when the case ultimately is taken by the highest Court. While maturation is a desirable quality, the trouble at present is that the decision as to how long an issue percolates—or even whether it percolates—is left, so to speak, to the pots rather than to the cook. Under existing procedures the Supreme Court does not start the process, control its continuation or determine the pace. The litigants and their lawyers do that for reasons of their own, which generally have to do with prevailing in the dispute. That is a respectable enough motive, but it does nothing to advance the day of clarification and uniform application of the national law.

The great bulk of the national law is statutory. Nearly all statutory law applies uniformly throughout the country. Congress does not deliberately legislate different rules for different circuits. Yet we know that in applying and interpreting Congressional legislation, the federal courts in most circuits may, and often do, arrive at inconsistent interpretations of the meaning of the provisions of statutes. When that happens—or when the threat it will happen is a credible one—the consequence is not merely an affront to symmetry. It is not simply a blow to our illusions about the unity and uniformity of the national corpus juris. It is an affront to our idea of justice. For that idea assuredly requires uniform and equal treatment of citizens under the national law without regard to which court of appeals in which circuit happens to get the case for decision.

The need for authoritative decisions that settle the national law is a need that exists independent of whether or not there is a conflict among circuits as to the meaning of a particular statute. It should not be necessary to litigate to the point of conflict to get the question authoritatively resolved.

Another cost is borne by the judges who sit on the panels of the courts of appeals. Their role is highly ambiguous. On the one hand, they know that they are not constitutionally authorized to pronounce the last word on important questions of national law. On the other hand, they know that the chances are minuscule that any decision they render will be reviewed by the Supreme Court. Hence,

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[5] Commission on Revision of the Federal Court Appellate System, Final Report, p. 77 (1975).

[6] *Mathews* v. *Sanders*, —— U.S. —— (October Term, 1976, No. 75–1443).

they know they are effectively the last resort of the litigants. It is not surprising that they follow their separate lights and that in reaching a decision they do not view it as urgent that they resolve a national law question conformably to the decision given by a panel of another circuit.

The gap between the theoretical and the actual in the role of judges of the courts of appeals is not a desirable circumstance, either abstractly or practically. No mere enumeration of notorious intercircuit conflicts, whether they number exactly 20 a year or exactly 100, or some figure in between, addresses this problem. The judges do not know how strenuously they should try to guess what the Supreme Court would do it if could, or how far they should subordinate their honest differences of view for the sake of reaching results harmonious with decisions made by colleagues in other circuits. There is in fact little they can do to achieve uniformity in a structure that theoretically speaks through one supreme voice, but realistically babbles with many heads and even more mouths.

COMMENTS ON S. 3423

Of critical comments that have been directed at the structure and procedures proposed by S. 3423, six are selected here for enumeration and brief comment.

1. "The proposed National Court of Appeals will not help the Supreme Court, for it will not relieve it of any present burdens."

Indeed, some argue that the plan may hurt the Supreme Court by assigning it the task of screening cases for referral to the National Court of Appeals and giving it the further duty of deciding whether or not to command that court to make a decision, regardless of what the new court would prefer to do. Further, the argument goes, the Supreme Court will be required to give double handling to some cases it could now dispose of on single consideration. This applies to cases the Supreme Court might decide to refer and that afterward become the subject of a petition for certiorari to the National Court of Appeals.

2. "The Supreme Court will appear to be overruled if the National Court of Appeals denies review under Section 1273(a) to a case the Court refers to it."

On the surface that outcome is possible. Although the Supreme Court will probably not object strenuously if the National Court of Appeals decides to reject review, the impression might be created that the inferior court had somehow vetoed or interdicted the course of review chosen by the Supreme Court, and thus thwarted the Supreme Court's will. This objection should be overcome.

3. "The plan would burden the Supreme Court with the task of making rules for the operation of the new court."

That appears a valid objection. It might be answered by encouraging some group—for example, one under the aegis of the Federal Judicial Center—to draft rules for the National Court of Appeals. The Supreme Court would have them available in the event the legislation creating the National Court of Appeals is enacted.

4. "The National Court of Appeals would reduce the prestige of a judgeship on a regional Court of Appeals."

It is true that instead of being one tier and nine heartbeats from the pinnacle, judges of the regional Courts of Appeals would be two tiers and 16 heartbeats away. That of itself does not seem a momentous objection, but it deserves consideration for the point made goes to the attractiveness of a circuit judgeship.

5. "Complex problems of designating judges are raised."

The solution advanced in S. 3423 seems a fair and workable one.

6. "The new court makes a drastic change in the structure of the federal court system and should be deferred until available alternatives are exhausted."

This is for me the most troublesome of the objections. I hesitate to elongate the judicial process by adding a fourth tier and I am reluctant to modify the structure in so dramatic a way, even on a temporary try-out basis, until alternatives have been exhausted. A particularly attractive alternative is to assign judges of the present Courts of Appeals for a term of years to a nation-wide or intercircuit division of the United States Courts of Appeals. They would sit in panels of five, each panel to be assigned categories of cases. These categories would be selected by the Supreme Court under enabling legislation. The system would have the advantage of flexibility in its creation and dismantlement. The Supreme Court would not be burdened with the trouble of referring on a case-by-case basis, for it could make referrals en masse—by assigning categories of cases. After decision by a nation-wide panel, the Supreme Court could grant review. No fourth tier would be involved, because cases going to the intercircuit panels would bypass the regular regional panels.

Mr. WESTPHAL. Mr. Chairman, if I might ask a question at this point that logically follows what Professor Rosenberg's last point was.

Senator HRUSKA. Yes.

Mr. WESTPHAL. At least chronologically it follows. Whether it logically follows remains to be seen.

My point of inquiry is this, Professor Rosenberg. There seems to be in your last statement a suggestion that the national court of appeals could fulfill a function which Dean Griswold, at least, describes as one of anticipating conflicts and thereby avoiding an actual conflict. You seem to suggest in a little bit different terminology that with a national court of appeals the Federal system would have increased its decisional capacity at the highest level so that it can to a greater extent obviate the necessity for the percolation of legal issues awaiting an ultimate decision by the Supreme Court.

I would like to just explore that a little bit. First of all, are you and Dean Griswold talking about the same thing; that is, the anticipation of possible conflict and getting an early resolution of it as distinguished from the full-blown percolation?

Or is my question so convoluted you don't understand it?

Mr. ROSENBERG. I think I understand the question. I am not sure I can be very helpful on it.

Mr. WESTPHAL. Let me try to narrow in on it a little bit more. It seems to me that it is difficult in a court system such as ours to do this degree of anticipation which would avoid these tangential conflicts or tangential swipes that you complain about, because of the reluctance of our courts at all levels to decide issues beyond that which is squarely presented by the case before them. I see a natural reluctance in certain courts and in Supreme Court itself to go beyond the issues presented squarely to them and to decide something sort of obiter dictum.

Now, is my perception correct that there is a natural reluctance on the part of our courts to go beyond the issues squarely raised in the case?

Mr. ROSENBERG. I believe so.

Mr. WESTPHAL. So that from that standpoint the only way that an increased decisional capacity might aid us is that it might increase the ability of a high level appellate court to seize upon a case of first impression and even though it might agree with the result below to grant certiorari because it is a case of first impression and try to put at least that issue to rest with a degree of finality. At least to that extent then no further litigants will try to relitigate that particular issue which was raised generally within the scope of that particular fact situation under that new law or new remedy as the case may be. Do you see what I am trying to say?

Mr. ROSENBERG. Yes. I think that is entirely so and I think that Chief Judge Coffin mentioned the DeFunis case as an example of one which it would have been unfortunate to decide on that record. I believe we have had six cases on the same or similar questions since then and we are better informed but no wiser. We can see approximately what we could at the outset as to what the issues are. There has been a lot of discussion in the law reviews and that sort of percolation has also helped but the issues still remain very brutally harsh and very apparent. I am not saying that there is never a case for percolation and I am not nominating DeFunis as a case that would have been

better decided the way you suggest on the first round, but I am suggesting that it is not always so that percolation makes you wiser and lets you see more about how to decide the case.

Senator HRUSKA. Would counsel yield for a possible illustration that might be a basis for comment by our very fine witness?

Mr. WESTPHAL. Yes.

Senator HRUSKA. Within the past 5 years there was enacted an Environmental Protection Act. There are some who say that all powers connected with the environment have been deposited with the Environmental Protection Agency by reason of that act.

Considering the scope, even a casual consideration of the Environmental Protection Act shows that it has impact on future lawsuits and upon future actions of virtually everyone in the United States. It will be very, very important. The litigation based upon it will be tremendously important.

Now then, how long are we going to let the sort of a dispute kick around in the several circuit courts where sometimes environmental decisions made in the eighth circuit impinge upon those that are made in the seventh and there will be an overlapping. Now, I have every confidence that the members of the Judiciary would be cognizant of something like that and would say:

> Percolation in this kind of a case is nonsense, let us decide the case, let us decide who is going to have jurisdiction and then we can go to work in executing the law one way or another.

Would that be helpful to your line of question here, Mr. Westphal?

Mr. WESTPHAL. It would, Mr. Chairman. I think that the example you give is a classic illustration of the point where it is a matter of public pressure regardless of whether another circuit agrees or disagrees.

Senator HRUSKA. It does not make any difference.

Mr. WESTPHAL. We should decide whether EPA or the Corps of Engineers has jurisdiction. That should be decided the first time it comes up. I don't think anyone said that a national court of appeals by its ability to decide a case, can say that because it is a case of first impression we would take it and consider it and write some full-blown written opinion on it that may hopefully be definitive. That is not going to resolve conflicts even in that particular area because of this ingenuity of counsel to point out to a succeeding court that the facts are a little bit different here, and it is a little nuance here, which will justify a different result. So that we will always have conflicts in the law. It seems to me that what you and the Commission has said is that those conflicts must be resolved at the earliest opportunity and that the Supreme Court does not have the capacity to do that, therefore we need a national court of appeals. Is that basically the argument?

Mr. ROSENBERG. Yes. I guess I would prefer to rely on "uncertainty" as the key word rather than "conflict." I was trying to make the point that you can have conflicts that are very certain. You know what the law is in the third circuit and you know what it is in the fifth circuit and there are conflicts but they may not hurt anything. You get to the first impression where you have the chance that the radiation from one decision will overlap into another circuit or will prevent the operation of a national agency such as in the dispute between EPA and the Corps of Engineers. In that event the people in

charge of allowing percolation can say, "No percolation here, it has to be resolved," and the reason for that is that you cannot tolerate dissimilarity, disharmony in national law throughout the country.

Now, in the case that Chief Judge Coffin gave with respect to the differing rule about whether or not the court of appeals has jurisdiction on the motion for a new trial in his circuit as compared with the fifth circuit, that is not a matter to which Congress would have addressed itself or written a uniform law of general application throughout the country. So it is rather easy for me to say that the Congress not only would tolerate but would not interfere with differences in local practice that don't have the same sort of complex radiations that your EPA-Corps of Engineers case does. So if you do see the overlap possibility from the radiation affects of the decision, then you have the principal candidate for acting now rather than waiting.

If the complexities, or if the intermeshing, is such that you don't see trouble in acting later, then you can let the case stew but I think the test is whether Congress would likely have allowed a nonuniform rule to exist as to this matter. If the answer to that is no, then it probably suggests that as soon as the possibility of nonuniformity develops either from direct conflict or from these tangential conflicts, the sideswipes, then the court ought to start trying to get the law straightened out and made uniform throughout the country.

I have problems of course in having the Supreme Court try to do all of this both fore and aft; that is, having it make the decision first that it is going to refer this matter, the next decision that it is going to defer either from mandatory decision or from discretionary review of the court of appeals and then after a decision or while the case is in the national court of appeals having to make a decision again as to whether the Supreme Court will allow that case up.

I understand that there would be few cases in which the Supreme Court would in fact allow a case referred to the national court of appeals on discretionary review to come back to the Supreme Court. On the other hand, the same problem of tangential decisions that cut into the problem from an unexpected angle may plague the Supreme Court in that sort of situation and may make it necessary for the Supreme Court to consider again the case that it has already considered in a rather different context.

So although I know it is not the purpose of this proposal to spare the Supreme Court work, I do think we have to be alert to the fact that if we give the Supreme Court added work they may not thank us for it and it would be better to try to think of something that would avoid that. Obviously I think I have thought of something.

Mr. Westphal. As you have just said, it raises a rather interesting question. It seems likely and if the bar is attuned to these decisions and the possibiilty of attempting tangential problems arising, isn't it quite likely that after a decision by a national court of appeals that the second petition for certiorari in the Supreme Court to review that decision of the national court of appeals is going to be supported by some amicus briefs on both sides of the issue? Isn't that a possibility, that we are going to have that additional problem created?

Mr. Rosenberg. Yes. Once the Supreme Court has singled this case out as an amicus case though not an "A" case, I believe that very much

can happen thereafter that will promote that case into contention for an "A". For example, the national court of appeals may divide sharply in its decision or the case may pick up these trails of amicus glory that you mentioned or other cases may be decided or other events supervene that will make the case look a little different the second time around particularly in light of the first two points; that is, that there has been a decision and that a lot of people have joined the fray on my side. So I believe that once the Supreme Court has indicated that it thinks highly of this case, it may just be virtually guaranteeing that it will see the case again.

Mr. WESTPHAL. And if it does not see the case again, then isn't it inevitable that its refusal to look at the case again would be given a much broader scope than the denial of certiorari is at the present time?

Mr. ROSENBERG. I am not sure of that, Mr. Westphal. That, it seems to me, will be a matter for self-discipline on the part of the court.

Mr. WESTPHAL. There is a problem there as to the possibility that the denial of the secondary view would mean more than the denial of certiorari does today at the present time.

Mr. ROSENBERG. That certainly is possible.

Mr. WESTPHAL. That is all.

Mr. LEVIN. Just a few brief questions. Would you agree with the selection of the cases going from the U.S. Supreme Court to the national court? It is not that we are bringing all the cases on the same scale, amicus B plus. It is a little bit like selecting voices for a choir, you don't say which is the best and then which is the next best and which is the third best. You may need a tenor, you may need a base, you may need an alto. Would you concur that in the event the U.S. Supreme Court referred a case to the national court for a decision because it thought it was important there be a decision such as these ICC leases, the indemnification, some of the tax cases, certain procedural questions in the environmental situation, some of the record problems in OSHA or other similar problems? Would you not agree that once the national court had given a national answer the Supreme Court probability of further review would be fairly low?

Mr. ROSENBERG. Yes; I agree in the cases such as you put to Chief Judge Coffin on making a record, one that you put just now and cases of that sort where it is terribly important that the rule be settled and that it be uniform more so than what the decision is. In cases like that I am sure the Supreme Court would be content with the decision whichever way it came out.

Mr. LEVIN. Then much of the question really may turn on the kinds of cases for which we are finding real difficulty in terms of the citizens not knowing for a long period and the need for some answer.

Let me, though, move to another question and ask you this. I was intrigued by your suggestion 6 and would just like to pursue it briefly at pages 15 and 16 of your statement only for the purpose of understanding it better. As I understand it, one alternative kind of either a transition or a temporary device to meet these needs without creating a new court of a permanent nature would be to create the so-called intercircuit division of the U.S. court of appeals. Now, I take it from what you say, correct me if I am wrong, that cases would go to this

division of th court of appeals directly from the district court or the administrative agencies?

Mr. ROSENBERG. That is correct.

Mr. LEVIN. That would be the first review. I take it, second, that they would be determined to go there not at the option of the litigants but by way of a rule cast in terms of categories by the U.S. Supreme Court?

Mr. ROSENBERG. That is correct.

Mr. LEVIN. Is it correct, too, then, for example, one category might be all tax cases?

Mr. ROSENBERG. Yes.

Mr. LEVIN. All patent cases?

Mr. ROSENBERG. Yes; although I am just answering hypothetically. I think the tax cases would outrun the capacity of this court if all of them went so I would not send them all tax cases but some subcategory of tax cases.

Mr. LEVIN. Now, each of these divsions is in a sense a specialized court. Is what we would have there, a series of them?

Mr. ROSENBERG. They would have several heads of categorical jurisdiction to avoid undue speculation.

Mr. LEVIN. Each panel would have that?

Mr. ROSENBERG. Yes.

Mr. LEVIN. Now, would their decisions have nationwide effect, precedential effect?

Mr. ROSENBERG. Yes. The decision made by the panel would become the national law unless and until overruled in that case or another case by the Supreme Court. The decision would go automatically to the Supreme Court to lay before it for a stated period of time during which period the losing litigant would ask for Supreme Court review but even failing that the Court could on its own motion, if it wanted to, take the case up. There would be an integration of jurisdiction.

Mr. LEVIN. Then the heart of the proposal, correct me if I am wrong, is the lying on the table proposal?

Mr. ROSENBERG. To keep the channel open to the Supreme Court; that is correct.

Mr. LEVIN. It would also be sent to the Court but part of it would be the lying on the table proposal?

Mr. ROSENBERG. I believe that is right.

Mr. LEVIN. Or an essential ingredient of it?

Mr. ROSENBERG. I think that is right.

Mr. LEVIN. Then that raises the whole problem of lying on the table. Now, I understand the proposal.

Mr. WESTPHAL. Is it also true that the subject matter categorization and the jurisdiction of that intercircuit court or division, that it was an integral part of it? This would obviate the role of the Supreme Court in reviewing $x$ number of petitions for cert in order to refer cases.

Mr. ROSENBERG. Yes. Let me say that this idea has two gross advantages so far as I can see them over the creation of a national court of appeals as an independent structure. One is the one that you have heard so much about from Chief Judge Coffin and many others and that is that this is a tremendous wrench in the history of our institutions and you should avoid that wrench unless the case is truely acute.

The second is that it would spare the Supreme Court from extra

work. It would not have to have fore and after monitoring of the cases. If the Supreme Court chose not to take any case that lay before it, the failure to take it would have no significance so far as the Supreme Court in any later case raising the same or related points is concerned, and in the meantime the action of this Court would have settled the national law for the time being.

Mr. LEVIN. Let me pursue a detail or two. You envision several of these panels, not just one?

Mr. ROSENBERG. Three.

Mr. LEVIN. Now, integral or significant in your thinking, let me put it this way: We know that the Justices of the Court have spoken on the question of whether they would have a burden by this referral jurisdiction and all who have spoken, whether they favor the plan or not, say they see no undue burden and I think we can understand the reason for it because it gives them an option in cases and categories of cases as well.

If the Justices of the Court were to speak on the issue of lying on the table as affirmatively creating unhappy burdens on them, that would be fairly significant I would take it in evaluating this alternative.

Mr. ROSENBERG. Yes. If they thought that that would give them a great deal of trouble, that would be very necessary.

Mr. LEVIN. Thank you very much.

Senator HRUSKA. Thank you very much, Professor.

Mr. ROSENBERG. May I add to what Chief Judge Coffin says in wishing you Godspeed and thanking you for your attention to the administration of justice in your time here.

Senator HRUSKA. Well, thank you very much. It is witnesses like you that made it all worthwhile and possible to say that some measure and degree of achievement has occurred.

Mr. ROSENBERG. Well, certainly there are many, many who think so.

Senator HRUSKA. We will stand in adjournment until 10 o'clock in the morning in the same room. At that time we will hear Harold E. Tyler, Deputy Attorney General, Washington, D.C.; Barnabas Sears, Esq., attorney at law, Chicago, Ill.; and Judge Henry J. Friendly, Second Circuit Court of Appeals, New York, N.Y.

[Whereupon, at 3:50 p.m., the subcommittee recessed, to reconvene at 10 a.m., Wednesday, November 10, 1976.]

# NATIONAL COURT OF APPEALS

**WEDNESDAY, NOVEMBER 10, 1976**

U.S. SENATE,
SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL MACHINERY,
COMMITTEE ON THE JUDICIARY,
*Washington, D.C.*

The subcommittee met at 10 a.m., pursuant to notice, in room 2228, Dirksen Senate Office Building, Hon. Roman L. Hruska presiding.

Present: Senator Hruska.

Also present: William P. Westphal, chief counsel; Professor A. Leo Levin, and Rebel Matera, staff assistant.

Senator HRUSKA. The subcommittee will come to order.

It will be noted for the record that the chairman of the subcommittee is otherwise engaged on Senate duties and asked me to take the chairmanship for the day.

We are resuming the hearings that we commenced in the final round yesterday on bills S. 2762 and S. 3423.

Our first witness this morning is Harold R. Tyler, Jr., Deputy Attorney General.

General, your statement will be printed in the record in toto. You may proceed now in your own way to testify.

## STATEMENT OF HAROLD R. TYLER, JR., DEPUTY ATTORNEY GENERAL, WASHINGTON, D.C.

Mr. TYLER. Thank you, Mr. Chairman.

It is a pleasure to appear here this morning after a number of learned and experienced witnesses who I know have been here in the last day or so and to express the views of the Department of Justice on S. 2762 and S. 3423.

Admitting some personal discomfort and pain in that I know both you and the vice chairman as well as other distinguished people who worked on the Commission and came up with the proposed national court of appeals for consideration and discussion, I have to say that I appear this morning as an opposition witness. We feel that the national court of appeals, as proposed, should be opposed for several reasons. Let me summarize those reasons as follows:

First, it is our view in the Department that the proposed national court as proposed would only aggravate many of the problems it is intended to relieve.

Second, we are concerned that the court as proposed would tend to diminish the prestige of other Federal courts, most particularly the courts of appeals.

Third, we are of the view that this proposal probably is deficient in that it fails to go to the root problem; that is to say, it does not look at the Federal court system as a whole, where we know that there are burgeoning caseloads. Those caseloads inevitably put pressures on the High Court.

Fourth, we are of the view that the consequences of the unresolved intercircuit conflicts—which, of course, as you know, Mr. Chairman, is one of the major arguments of the proponents of this proposal—are really not sufficiently serious, so far as one can make objective and statistical measurements, to justify creating a national court as proposed.

Fifth and last, we are concerned that the national court's transfer jurisdiction would restrict the High Court's authority to determine what legal issues should be left unresolved at the national level.

Now, if I might just rather informally sketch some of these problems that we claim to see. First, as to our view that there might be an aggravation rather than a resolution of a lot of the problems which the Commission found, we believe that the suggestion that there would be a reduced delay in resolving uncertain question of law is by no means a certain proposition. Indeed, as I see it, there are some reasons to believe that there may be increased delay. For example, when the Supreme Court receives on a request for review, we lawyers are all used to the fact that the Court may grant plenary review, it may summarily dispose of the case or deny review. Obviously, the creation of the proposed national court would make a fourth option available.

The time spent in determining whether a case should be reviewed by the High Court itself or by the national court or not at all we think might add to the burdens of the Supreme Court. In this connection I point out that this problem might be exacerbated by the inability to know at the jurisdictional stage precisely the issue on which a case might turn.

Furthermore, it seems inescapable that each decision on the merits by the national court of appeals would have to be scrutinized, presumably with great care, by the High Court to insure that an issue has not been definitively resolved, or are dicta expressed, contrary to the views of the High Court. Now, I could go on in this area but I think it is unnecessary save possibly for questions by the committee.

Turning to the second argument, that is, the concern about diminished prestige for the lower Federal courts, it is a commonplace and certainly known to this committee and its staff, that we are in a period where we are losing people from the Federal courts. There are distressing bits of evidence that we are finding it increasingly difficult to interest persons of true merit in accepting membership on our courts. I am afraid, based on my experience in the last 2 years, that creating a national court, at this time particularly, might aggravate an already serious situation. We know that we have not only excessive but still rising caseloads. We know from this morning's paper and recent events that there is present concern about the inadequacy of judicial salaries and so on. I think that the creation of a national court would put our 11 courts of appeals and their members in a very ambiguous position and a position which they might find very difficult and demeaning in their role as intermediate appellate courts, panels and individual judges.

I might suggest, Mr. Chairman, that we have within the Department some concern also that a national court of appeals might challenge the prestige of the Supreme Court. I would speak most bluntly about this by this example. Let us suppose that by chance we were to staff a national court of appeals with a number of judges who by their writings and other activity in the judicial framework were to appear more intellectually capable than members of the High Court in dealing with issues which the High Court by transfer and referral put in the hands of this national court of appeals. Now, I realize that one can speculate that this is only a speculative concern, but on the other hand, I would suggest gently but firmly that it could be a very practical concern as the years rolled on.

Turning to the third argument, and that, of course, is the argument that this proposal, carefully conceived and drafted as I know it was, in our judgment really does not get to the root problem of Federal jurisdiction or, put differently, the root cause of ever increasing caseload problems at all levels of our Judiciary. In 1972, for example, about 60 percent of all the High Court decisions on the merits came from statutory appeals. Many of those were appeals which we think probably did not warrant consideration by the highest court in our country. Therefore, it is the view today in the Department, for example, that eliminating all or most of those statutory appeals would be a good way of enabling the High Court to increase very significantly the number of important authoritative decisions it issues each term without the necessity of setting up a fourth tier of Federal courts.

It is also, of course, our view and the view of many in the Congress, the American Law Institute, and the American Bar Association, that a reduction in the caseloads of lower Federal courts, and thus to some extent an easing of pressure on the High Court, would be achieved by abolishing Federal diversity jurisdiction.

I might say parenthetically, Mr. Chairman, that obviously this type of reduction in the burden on the Federal system would have the additional benefit or dividend of decreasing the likelihood of inter- and intracircuit conflicts. I could go on to say that one could theorize and, perhaps more than that, experiment with a few special courts—that is, article I courts—to remove some of the burdens from not only the lower courts of the United States—that is, the traditional article III courts—but the High Court as well.

The fourth argument can be stated in several ways. Let me here just pause and say that, though I realize it is very hard to come down with hard and fast quantifications and statistics, we in the Department are of the view that intercircuit conflicts are not so a severe problem as has been argued. There are many ways of putting this. We think that the significance of these conflicts is very easy to exaggerate. Many of these conflicts in the years during which I have been admitted to the bar concern nonrecurrent issues or issues that really do not affect substantial rights. I might also add that one could even give an argument that in a pluralistic country such as ours it may not be an entirely bad thing to have certain conflicts between the circuits which reasonably reflect the diversity of the regions of the United States of America.

Maybe it is not such a bad thing that in the West, for example, there is one interpretation as opposed to another interpretation of that same

statute in New England or the Northeast. I realize this is a philosophical, and, to say the least, speculative argument, but I don't think it can be entirely ignored.

Now, the Commission's own studies—and I must say that this Commission is to be commended for this in my judgment because, as far as I know, they are the only serious studies of recent vintage—appear to show that unresolved intercircuit conflicts pose a serious problem largely in the specialized areas of taxation and, perhaps to a lesser but still significant degree, patent law.

Now, although the Commission apparently does not favor the establishment of specialized courts of appeal to resolve intercircuit conflict in those areas, it might be argued that the considerations against the creation of such courts have not perhaps been thoroughly thought through by any of us in the profession or indeed even by the Commission in its excellent work. I know there are arguments against specialized courts, and I confess that in my time I have espoused some of those arguments. But there is much to be said in favor of specialized courts dealing with tax law, which we already have in any event. This may be a better and more effective avenue than the national court of appeals.

Turning to another of our arguments I would say, Mr. Chairman, in regard to transfer jurisdiction, that under the proposals the national court of appeals would have jurisdiction to decide a certain category of cases transferred to it by the courts of appeal as we know them. We feel that this specific provision is exceedingly unwise and indeed, as you know, is not included in or, put differently, has been purposely omitted from S. 3423. The trouble with it is that it would remove the Supreme Court's existing authority to insures that certain cases raising political or other types of very sensitive issues remain unresolved at the national level.

Mr. Chairman, I think that it might be discreet and wise for me to say nothing further by way of statement. I would rest on our written statement and simply add that if there is anything that you or Professor Levin or anyone else would like to ask, I would be glad to try and do my best under the circumstances.

[The formal statement of Mr. Tyler follows:]

STATEMENT OF HAROLD R. TYLER, JR., DEPUTY ATTORNEY GENERAL, BEFORE THE SUBCOMMITTEE ON IMPROVEMENTS IN JUDICIAL MACHINERY, COMMITTEE ON THE JUDICIARY, U.S. SENATE

I very much appreciate the opportunity to appear before this distinguished Subcommittee to present the views of the Department of Justice on S. 2762 and S. 3423, both of which provide for the creation of a National Court of Appeals.

I. JURISDICTION OF PROPOSED NATIONAL COURT OF APPEALS

In June, 1975, the Commission on Revision of the Federal Court Appellate System recommended the creation of a National Court of Appeals. As conceived by the Commission and proposed in the bills under consideration this morning, the court would consist of seven Article III judges appointed by the President with the advice and consent of the Senate and would sit only en banc. Its decisions, unless modified or overruled by the Supreme Court, would constitute precedents binding upon all other federal courts and, with respect to federal questions, upon state courts as well.

Under the jurisdictional scheme contained in S. 2762, the National Court of Appeals would hear two types of cases. First, it would have jurisdiction over

cases referred to it by the Supreme Court (reference jurisdiction). With respect to cases before it on petition for certiorari, the Supreme Court would be authorized to:

(1) Deny certiorari and refer the case to the National Court of Appeals for that court to decide on the merits; or

(2) 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.

The Supreme Court would also be authorized to refer cases within its obligatory jurisdiction, excepting only those which the Constitution requires it to accept. Referral in such cases would always be for decision on the merits. And, of course, the Supreme Court would retain its present power to decide a case on the merits or to terminate litigtaion by denying certiorari.

Second, the National Court would have jurisdiction over cases transferred to it by one of the Courts of Appeals, the Court of Claims, or the Court of Customs and Patent Appeals (transfer jurisdiction). Transfer jurisdiction would include only cases whose immediate resolution by the National Court is in the public interest, and which turn on a rule of federal law:

(1) on which federal courts have reached inconsistent conclusions; or

(2) which is applicable to a recrurring factual situation, and a showing is made that the advantages of a prompt and definitive determination of that rule by the National Court outweigh any potential disadvantages of trannsfer; or

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

The National Court could refuse 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. In contrast to S. 2762, S. 3423 does not provide for transfer jurisdiction.

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.

## II. JUSTIFICATION FOR THE NATIONAL COURT OF APPEALS

The underlying justification for the National Court of Appeals is the Supreme Court's alleged inability to render a sufficient number of decisions establishing nationally binding precedents. While the number of cases docketed annually with the Supreme Court has increased from 1,200 in 1951 to over 4,000 in the latest term, the number of cases which it hears on the merits annually has remained at approximately 150.

Two undesirable consequences of this limited capacity for adjudication are stressed by the Commission and other proponents of the National Court:

(a) uncertainty in the law because many intercircuit conflicts go unresolved for many years or even forever;

(b) pressure upon the Supreme Court to hear cases not otherwise worthy of review solely to resolve inter-circuit conflicts.

The National Court of Appeals is proposed as a means of ameliorating this situation. Its proponents assert that such a Court might decide about 150 cases annually.

## III. DEPARTMENT OF JUSTICE OPPOSITION TO THE NATIONAL COURT

The Department of Justice opposes creation of a National Court for several reasons. First, a National Court would aggravate some of the problems it is intended to relieve. Second, it would diminish the prestige of other federal courts. Third, it fails to address the root problem by reducing the caseloads of federal courts at all levels. Fourth, the consequences of unresolved inter-circuit conflicts are insufficient to justify creating a National Court. Fifth, the National Court's transfer jurisdiction would restrict the Supreme Court's authority to determine what legal issues should be left unresolved at the national level.

### *A. Aggravation of problems*

One of the reasons advanced in support of a National Court of Appeals is a reduced delay in resolving uncertain questions of law. However, such a result is by no means certain and there is ample reason to believe that its establishment might actually increase delay.

With the creation of a National Court, the Supreme Court's task at the jurisdictional stage would in every case become somewhat more difficult. At present, the Court may deal with requests for review in one of three ways: it may grant plenary review, summarily dispose of the case, or deny review. Creation of a National Court would make a fourth option available. The time spent determining whether a case should be reviewed by the Supreme Court or by the National Court or not at all might add significantly to the Court's workload. This problem would be exacerbated by the frequent difficulty of knowing, at the jurisdictional stage, precisely the issue on which a case may ultimately turn.

Furthermore, each decision on the merits by the National Court of Appeals would have to be scrutinized very carefully by the Supreme Court to ensure that an issue has not been definitively resolved or dicta expressed contrary to its own views.[1] It may be anticipated that many of these decisions, especially on cases where the National Court has itself been divided, would be reviewed on the merits by the Supreme Court, adding a fourth tier to the judicial system and actually delaying the definitive resolution of issues.

The necessity for Supreme Court review may arise frequently if the judicial philosophies of the respective benches differ from each other to any significant degree. The accidents of the appointment process guarantee that they often will. Although the staggered appointment procedure embodied in S. 3423 represents an improvement on S. 2762, no appointment procedure could ensure the philosophical compatibility of the two courts. When their philosophies diverge significantly, the Supreme Court could properly either withhold important constitutional and statutory cases from the National Court or routinely exercise its discretionary power to review that court's decisions, in order to make certain that definitive adjudications of issues of national law reflect the considered judgment of the court of last resort. Under these circumstances, the utility of a National Court would be effectively destroyed.

*B. Diminished prestige for Federal courts*

The presence of a National Court would decrease the prestige of the Courts of Appeals and District Courts and thus the ability to attract talented individuals to membership on them.[2] Creating a National Court at this time would aggravate an already serious situation; excessive caseloads and inadequate judical salaries have caused resignations from the federal bench and restricted the pool of able and experienced lawyers willing to accept a federal judgeship.

A National Court might also challenge the prestige of the Supreme Court. That Court's statute would be substantially undermined if the National Court of Appeals were occupied by judges intellectually more capable than its own members and whose opinions reflected more sophisticated analysis.

*C. Failure to address problem of Federal jurisdiction*

The proposal for a National Court of Appeals fails to address the problem of federal jurisdiction, the root cause of ever-increasing caseload problems at all levels of the federal judiciary. In 1972, 60 percent of all Supreme Court decisions on the merits came from statutory appeals. Many of those did not warrant Supreme Court consideration. Eliminating those appeals would enable the Court to increase substantially the number of important, authoritative decisions it issues each term.[3]

The caseloads of lower federal courts could be substantially reduced by abolishing federal diversity jurisdiction. Such a reduction would have the additional benefit of decreasing the likelihood of inter- and intra-circuit conflicts. Consideration should also be given to establishing administrative courts, not subject to judicial review, to dispose of social security and similar cases. Serious scholarly and public debate is needed on the question of whether omnipresent judicial review is a requirement of a fair and equitable legal system. To paraphrase Justice Jackson, courts are not final because they are infallible, but infallible only because they are final.[4]

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[1] See, e.g., *Zweibon* v. *Mitchell*, 516 F. 2d 594 (D.C. Cir. 1975) (dicta concerning national security wiretaps).

[2] Judge Henry Friendly has written to the Commission: "Petty though it may be, a judge of a court of appeals does take satisfaction in the fact that he is, and is publicly known to be, subject to correction only by the 'one Supreme Court' we all revere." The higher salary proposed for National Court judges in S. 3423 underscores their higher status.

[3] The recently passed legislation amending the three-judge court statute is an encouraging development.

[4] *Brown* v. *Allen*, 344 U.S. 443, 540 (1953).

A major change in the structure of the federal judicial system such as that proposed by the Commission, a change with significant implications for the operation of the Supreme Court, the lower federal courts, and the burdens borne by litigants, should not be made without a comprehensive study of the present functioning of the entire federal system. This the Commission was not impowered to do and thus has not done. The result, necessarily, is that problems far more serious than inter-circuit conflicts have been ignored and alternative reforms entirely overlooked. Structural change on the basis of a study so seriously limited would be unwise, if not irresponsible.

*D. Intercircuit conflicts are not a severe problem*

The justification for a National Court of Appeals essentially rests on the existence of unresolved inter-circuit conflicts with respect to which the Supreme Court has denied certiorari on one or more occasions; the National Court of Appeals is proposed principally to provide prompter resolution of such conflicts. Although the problem of unresolved or long-standing inter-circuit conflicts does exist, its significance is easy to exaggerate. Many inter-circuit conflicts concern non-recurrent issues or questions that do not affect substantial rights; though the resolution of such conflicts would satisfy an abstract interest in jurisprudential tidiness, it is not essential to the fair and efficient administraton of federal law. This is not to deny that many existing inter-circuit conflicts affect substantial rights. But I think it fair to say that in most areas of the law true inter-circuit conflicts on important questions are resolved by the Supreme Court without undue delay.

The Commission's own studies appear to show that unresolved inter-circuit conflicts pose a serious problem only in the specialized areas of taxation and, perhaps, patent law.[5] Although the Commission apparently does not favor the establishment of specialized National Courts of Appeals to resolve inter-circuit conflicts in those areas, the considerations militating against the creation of such courts are not stated by the Commission. There is, of course, much to be said in favor of such specialized courts, particularly in tax law, which would presumably develop considerable expertise in their respective subject matters. The Department urges that explicit consideration be given to the establishment of such courts as an alternative to a National Court of Appeals of general jurisdiction.

*E. Transfer jurisdiction*

The National Court of Appeals would have jurisdiction to decide a certain category of cases transferred to it by the Courts of Appeals. This specific provision is exceedingly unwise and has in fact been omitted from S. 3423. It would remove the Supreme Court's existing authority to ensure that certain cases raising political or other types of very sensitive issues are left unresolved at the national level.[6]

Senator HRUSKA. Thank you, Mr. Tyler.

Your faculty for stating briefly but very definitely, logically and persuasively arguments which you espouse has not dulled one bit since you first appeared before this committee. In fact, it seems to have improved. We appreciate your coming here and addressing yourself on this subject.

At the outset may I refer to the last point of your five reasons why you have stated your opposition to the bills, that of transfer jurisdiction.

Mr. TYLER. Yes, sir.

Senator HRUSKA. That perhaps has reached a point of considerable opposition, not only among the circuit courts but likewise in the Supreme Court as you noted.

Mr. TYLER. That is correct.

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[5] See Final Report, App. B, pp. A–160 to A–213.

[6] Only Justice Powell has expressly endorsed some types of transfer jurisdiction, although narrower than that proposed by the Commission. Justices Brennan, White, and Rehnquist have indicated opposition to any transfer jurisdiction. Chief Justice Burger and Justices Douglas, Marshall, Stewart, and Blackmun did not address the issue of transfer jurisdiction.

Senator HRUSKA. It is the purpose of the second bill on this subject to eliminate that feature of it so, if that would be the will of the Congress, it would be eliminated from the consideration. So I won't spend any time on that because the reasoning is clear and the choices clear and not too difficult.

In your statement and in your testimony you have suggested that perhaps a fourth option to that which is now available to the Supreme Court in dealing with the docket which is before it might add significantly to the court's workload. That is not what the justices seem to think. Justice Stewart, for example, at page 180 of the report of the Commission said that in his opinion the proposed reference jurisdiction would impose no undesirable burden on the justices of the Supreme Court.

Some of the reasoning along that line has been that most of the cases undertaken by the national court of appeals will be addressed to the questions where maybe there are intercircuit conflicts; if not, there are definite, delineated positions one way or another on a legal question which must be resolved. Dean Griswold and other witnesses have pointed out that in many of those cases, and perhaps most of them, particularly dealing with interpretation of Federal statutes, there would be ample ground for holding either way but the important thing is that that question be decided.

Would not there be a tendency of the Supreme Court in reviewing these cases that are decided by the national court of appeals to say "Very well, there is a question here that has been decided," and we will go along with acquiescing to the national court of appeals absent only the intervention during the course of the appeal some argument or some position which had not been contemplated. If that is a fact, would not that be the basis for the opinion by the Justices who have commented on it that it would not add to but would supplement the capability of the Supreme Court.

Mr. TYLER. Well, that gets to the heart of a lot of this. You are quite right also in suggesting that about five of the Justices have pretty much echoed in one way or another the view of Justice Stewart.

With all due respect it seems to us that this would be a very difficult, expensive and time-consuming way to be sure of lightening the burdens of the high court. For example, just to take one illustration, Mr. Chairman, let us assume that a very important national issue unresolved by the courts of appeal were presented to the high court. Very frequently in these cases as they come up, it is hard to say whether or not they will dispose of the supposedly important national issue at stake. So somebody is going to have to take a hard look; that is to say, the justices of the high court are going to have to take a hard look to be sure that it is an important issue and a dispositive case. That makes some time at least.

Then assume a reference to the national court and a close decision. With the sense of public responsibility that our present justices have, I am sure that they would have to review that result very carefully. So one can easily come out, it seems to me, with the rather definite surmise that a great deal of time will still have to be expended by the high court even after this procedure is gone through.

Now, I grant you none of us can be sure. It is also difficult for one, like me, for example, who is an outsider to testify precisely as to what

the burdens will or will not be in such an institution as the Supreme Court of the United States. But I maintain that the case for the national court as a device to ease these burdens is very difficult to make, partly because of such examples as I have tried to mention here just a moment ago.

Senator HRUSKA. Of course, the justice is saying that no undue burden would be occasioned by the reference jurisdiction, either by coincidence or otherwise. Justice Marshall's position is well known and highly respected but he says this reference jurisdiction proposal should get earnest consideration if any proposal is going to be——

Mr. TYLER. That, of course, I think, is perfectly fair and appropriate.

I think as most decisions come down it is a balancing problem. It just so happens that the Supreme Court at the moment, as we understand it, is disposing of about 150 cases by opinions each year. Coincidentally, the number of cases presenting intercircuit conflict closely approximate that figure.

I suppose that, if you assume that each year about 150 cases would have to be looked at by the high court with a view to deciding whether or not to refer them to the national court, a good many of them would perhaps not be so difficult to evaluate. There might be relatively few cases of the kind in my example of a moment ago. But then one has to look carefully at whether or not the expense, the added tiering, the time of the national court judges, the support facilities and people for them are really worth the achievement.

I know the Commission has thought about this, of course, and thought hard. Our argument here probably could be expressed simply by saying, "The five Justices or so who support this proposal, certainly they are witnesses we cannot ignore, still from the point of view of the national good and the retention of a reasonably rational judicial system without undue tiering and expense, is it really worth it?" Of course, as you know in our submission we come down and argue "No" most respectfully.

Senator HRUSKA. The other question, Judge Tyler, is, whether there sufficient supervision by the Supreme Court of all the decision of the circuit courts of appeal. In considering any additional burden that might be cast upon the Supreme Court, we have to consider not only what you point out, but also is it worth it as against what? Is it worth it as against what we now have and what the future would be?

Now, Judge Hufstedler said that only 1 percent of the cases decided by the Federal courts of appeal are now heard by the Supreme Court and she contends that this is inadequate and it should be greater. She suggests that the courts of appeal can neither be right nor harmonious 99 percent of the time; that is tasking the imagination a little bit to think that they could be. She uses that as a basis, and as one of the reasons, why it would be well to consider a national court.

Well, suppose you increased that figure to 2 percent instead of 1 percent. It is not very much. However, it is more than in the first place. Second, it would double what you have now and the doubling is probably justified and maybe highly desirable: namely, in the nonconstitutional cases that are considered by the court. It has been documented and demonstrated that some years ago about two-thirds to three-fourths of the cases and opinions of the Supreme Court were

nonconstitutional questions that were resolved and the balance were constitutional. Now that has been completely reversed and it means that there has been a deterioration and reduction in nonconstitutional cases in an era where the floodgates of congressional action have opened to create many new laws.

Consider the event of the past week or so. I have an idea the floodgates are going to be entirely removed and we are going to be faced with even more. Who is going to take care of that? The Commission decided that that was one of the reasons why we do not base our recommendations for a national court of appeals solely upon the intercircuit conflicts. There are other considerations.

Mr. TYLER. That is true.

Senator HRUSKA. What comments would you have on Judge Hufstedler's view of the problem?

Mr. TYLER. I think statements such as that made by Judge Hufstedler indicate how appropriate and necessary it was for the Commission to look into this problem. I would go further and say that in addition to her remarks one of the witnesses who appeared here yesterday, my friend and current colleague in the Department of Justice, Professor Maurice Rosenberg, made an analogous point when he mentioned that because of this switch that you were just describing it is almost impossible now to get important business and commercial decisions to the high court for resolution on a national basis even when a national statute is at issue.

I cannot deny the force of those points or those arguments but I would say that even though it would be desirable to have more cases decided by the Supreme Court, and I am sure most lawyers would always like to have their cases heard by the high court, it is not totally a bad thing to have our courts of appeal resolve what are called national issues.

You will have important issues which are decided differently by a number of circuits, or really by panels of those circuits, that is 3 out of the 9, 12 or 15 judges making up the courts of appeal in question. But over a period of time a lot of those issues are resolved because I think most of our court of appeals judges are aware of the point, that Judge Hufstedler made, and aware of the point that Professor Rosenberg made, and try to act most responsibly and to consider other opinions and resolve those conflicts in the normal evolution of case law.

I for one would say that that is not totally a bad thing in a large and pluralistic country such as our own. I am sure that when I go back to the practice of law I will complain about it in a given case. Yet again I would come down and say that we in the Justice Department remain unconvinced that this additional tiering proposal of a national court of appeals would be an efficient device for resolving this problem, in view of the other burdens and tensions it would create.

In other words, Mr. Chairman, I am conceding the force of the argument. I still would say that after all the careful work of your Commission—which no matter how we come out, by the way, will have been a worthwhile exercise in my judgment—the national court proposal as such would not be so efficient an engine as is suggested.

Senator HRUSKA. The point is made in your testimony, Judge Tyler, of the impaired prestige of the circuits courts of appeal. One of our witnesses yesterday very persuasively argued that that is one of the

nonissues in the case. The issue is, is there a real need? Is there a real need?

You introduce a new element here, when you say "might challenge the prestige of the Supreme Court." I wonder if there is any dulling of the prestige of the Supreme Court in some of the circuit courts of appeal? That argument undoubtedly was made 75 years ago or in 1891, a little more than 75 years ago. Somehow or another we not only survived in this country with the creation of the circuits but we now know that it had to be. It just had to be.

Now, in what way would there be a dulling of the Supreme Court's prestige by the addition of an additional piece of equipment with which to increase the appellate judge capacity of the judiciary system?

Mr. TYLER. I would argue this way, focusing only on the point insofar as the Supreme Court is concerned. I have grave doubt that tiering the Federal judiciary is beneficial in this regard at all. The more tiers your have, the more likely the total coin is going to be diminished.

Now, as to where the trouble might come so far as our high court is concerned. Surely one will continue to revere the Supreme Court of the United States as an institution, but what I think is potentially embarrassing and difficult is to allow another court just below the high court of the United States to resolve important questions and then have the high court remain silent. We must assume that if that happens the high court is really saying, "Look, we have reviewed the matter and we think they have spoken wisely and well."

Senator HRUSKA. That is not what they do when they act on writ of cert. That is not what the Supreme Court does when it remains silent or denies a writ of certiorari.

Mr. TYLER. At the moment that is correct.

Senator HRUSKA. Because the Supreme Court has said repeatedly that when we deny the writ that does not mean that we approve. We are satisfied with the result perhaps but not with the reasoning.

Mr. TYLER. But now it seems to me that that point will not be very persuasive. When the Supreme Court makes a referral of a case and then lets that decision stand, that seems to me quite a different bit of business from the old familiar rule you were just enunciating of how we lawyers and citizens should view a denial of a petition for certiorari without opinion and so on. It seems to me, the very nature of the proposal here makes this a bit different business.

Let me add further the point I hinted at, or at least elliptically referred to, in my remarks or statement earlier. I as a lawyer would worry if we came down in this posture. I assume that if this national court proposal is accepted by the Congress of the United States it will be our duty and the Congress and in the Department of Justice and everywhere else where there is interest and concern about these matters to see that the national court is staffed with the best available people.

Now, let us assume that these ladies and gentlemen establish for themselves a good record, which we hope they would, of high intellectual achievement in their opinions and in their other work. Let us assume that many of their opinions are left standing by the high court as stating the national law of the land.

I recognize that these are practicalities that probably are not often discussed openly but I think now is a good time to at least advance the thought opened. I think it would put crucial burdens on our system if

we got into a situation where the national court was thought to have greater intellectual and legal capacity than the High Court of the United States.

I think the likelihood that this situation I am describing would develop is less than the likelihood that the national court would tend to diminish the prestige of our courts of appeal and their judges. I agree with Judge Friendly and others who said that it is a concern, and I think it is a proper concern, of members of our intermediate courts of appeal to know that the only tribunal that can possibly review their judgment is the highest court of the United States. It is not just a sense of amour propre on the part of the individual court of appeals judges. I think it is an institutional desire and concern.

Senator HRUSKA. Is that impaired at all in the proposal of the national court of appeals? The Supreme Court still speaks. There is only one Supreme Court and neither of these bills would impair that concept one bit.

Mr. TYLER. I understand that that certainly is the intention of this proposal. What I am expressing is a concern that it would not work out that way as a practical matter. I happen to be of the school that feels that just an additional tier is bad.

I also happen to be of the school that adding more judges to the system is somewhat damaging to the prestige of the Federal judiciary as a whole. I am still very concerned particularly for the courts of appeal of the United States. I also have a needling concern, if I may put it that way, Mr. Chairman, even for the high courts under this specific proposal.

Senator HRUSKA. We come back to the central point, however, and the basis of the recommendation of the Commission and that is simply stated: There is need for additional appellate capacity in our Federal judiciary. That need is not being met sufficiently.

Now, in your testimony you speak of the loss of prestige of the Supreme Court. Might there not come a time that the prestige of the Supreme Court will be dulled and impaired because they are not producing sufficient appellate capacity? Does not that enter into the picture? I have every consideration for the Supreme Court. I revere them greatly. But there is also the citizenry of this country—not the lawyers alone but the litigants and all the citizens in this country and they are entitled to a uniform application of all the Federal statutes in all the 50 States. When it becomes known that that will not be possible because of the inadequate appellate incapacity of the judiciary system, what then will happen to the prestige of the Supreme Court?

Mr. TYLER. Well, I cannot deny that I share your concern. That is a perfectly valid point. Now, of course what we would argue here is that the thing to do is to take a look at the system as a whole with this point that you just made most forcefully in mind, that is, to ease the burden for the entire judiciary rather than attacking piecemeal the burdens perceived to bear on a specific tier of the system as it now exists, even when that tier is the very highest; to wit, the Supreme Court of the United States.

I would think for the short and the long pull the better approach would be to look at the judiciary's burdens as a whole and try to constructively adjust burdens in the whole system which could only benefit the high court as well as the lower courts. As I have suggested

earlier, diminish Federal jurisdiction or at least diminish that jurisdiction in the article III courts. That is why I say I would prefer to see us abolish certain mandatory appeals to the Supreme Court of the United States. I would prefer to experiment with some specialized or article I courts for certain issues such as social security. When I was a district judge I heard food stamp cases where the litigants get a full plenary trial administratively and simply because they didn't like the result they can come into the United States courts and have another plenary trial with full right of appeal to the court of appeals. Frequently the issue involved not to exceed $500. The point I am trying to make by that type of illustration is simply that if we look at the system as a whole and did discreet and constitutional surgery on the whole, inevitably we would benefit the high court of the United States.

Senator HRUSKA. Well, you do make a point of the root cause of the ever-increasing caseload problems. I call your attention to the fact that the Commission did not restrict its recommendations to a national court of appeals. In fact, the bulk of the printed pages of its report and much of its hearing record embraces some of the root causes.

Mr. TYLER. That is right. As a matter of fact, if I can interrupt, Mr. Chairman, as you and I also know the Congress this year made a start in the three-judge court area which I can only assume is a good start.

Senator HRUSKA. It is not a substantial start, it is a good start and yet its impact will be minimal. There is one question that I would like to ask you about the statement in your testimony. "The caseloads of the lower Federal courts could be substantially reduced by abolishing Federal diversity jurisdiction.

That might be true as to the lower Federal courts, but we did not get into that too much. Maybe Professor Levin would have some information of Mr. Westphal, but Chief Justice Burger pointed out that the elimination of Federal diversity jurisdiction would have no impact upon the Supreme Court and very little on the appellate court. Very, very little.

Mr. TYLER. Well, it would have some impact. It would minimize burdens on our courts of appeals but the way things are going in recent years you are quite right, it would not have an impact on the High Court. On the other hand, if you approach the problem across the board, I want to make clear that I don't advocate diversity jurisdiction abolition standing alone.

What I was trying to suggest in the statement was that this is just one small example of many things that could be done, no one of which I think would alone ease the burdens of the High Court particularly. I would have to concede that. But I still think the broad approach to the whole system is preferable. You were quite right, the Commission, in its work, has reflected that approach and has offered some contributions already.

Senator HRUSKA. Well, thank you very much for responding to these questions. They do point out some of the focal points which have to be considered and the last consideration on that will be by the Congress of the United States because it is going to have to consider this bill and make a decision.

Mr. TYLER. Its task will not be easy.

Senator HRUSKA. I ask Mr. Westphal if he has any questions.

Mr. WESTPHAL. I do, Mr. Chairman. Thank you. Mr. Tyler, I have been intrigued by what has occured here in the first hour this morning. I have always adherred to the view that the most important part of the hearing process is not the prepared statement of the witness but the dialog that goes on after that prepared statement has been summarized by the witness and I think the opportunity we have here this morning justifies my belief in that process.

You suggest that we should take a look at the Federal judicial system as a whole and I think your suggestion is a valid one. There is no doubt that this proposal to create a national court of appeals is a very fundamental change in the Federal judicial system. Is there any doubt in your mind that it is a fundamental change akin to the creation of the circuit courts back in 1891, the Judges Act of 1925?

Mr. TYLER. That is really part of our argument, you are right. In other words, Mr. Westphal, I do not feel that I am a witness who is qualified to come in and say that there is no need established for something to be done. I think the Commission's work is eloquent. So far as the Department which I represent is concerned, need has been shown to do something. What I am worried about, and what we are arguing about, is this new tier, as I keep somewhat simplistically referring to it.

Mr. WESTPHAL. The proposal that is contained in this legislation, and which implements the recommendation of the Commission, basically is a proposal to increase only the discretionary appellate capacity of our Federal judicial system; isn't that true?

Mr. TYLER. That is the proposal basically as we understand it.

Mr. WESTPHAL. That is but a part, altough an important part relatively speaking. It is a small part of the total of the voluminous problems of the Federal judiciary; isn't that true?

Mr. TYLER. That is correct.

Mr. WESTPHAL. In other words, this dialog that we have now on this proposal for a national court of appeals has its latest impetus stemming from the so-called Freund report of about 1972 which then was supplemented by this very valuable study and work that the so-called Hruska commission made. What this legislation deals with is a problem at the highest level of the Federal judiciary and a problem which stems from the caseload of 4,500 and more cases a year which has been generated from an incoming caseload of approximately 140,000 to 160,000 filings per year at the district court level; isn't that true?

Mr. TYLER. Yes, sir.

Mr. WESTPHAL. In fiscal year 1976 the filings in the district courts made another incremental increase up to 171,000 filings and I assume that in 1 or 2 years the circuit courts and the Supreme Court itself will begin to feel some additional pressure because of the number of appeals generated by that incremental increase in filing; isn't that true?

Mr. TYLER. All signs point to just that.

Mr. WESTPHAL. Of course, we are all aware of the fact that the district courts were swamped when the filings were 135,000 per year and they are even more swamped today because of the fact that there have been no additional judgeships created, even though the caseload has increased to these rather astronomical figures that I have

mentioned. Furthermore, the courts of appeal have these problems that we are all aware of and which are particularly acute in the fifth and the ninth circuit and would be acute in the second circuit except for the fact that they are blessed with a large number of senior judges who give them a larger manpower.

So when you suggest that perhaps a look should be taken at the system as a whole, it is some of these problems that you had in mind that could be addressed and perhaps remedied by the Congress as they consider making a fundamental change which would in effect involve a fourth tier in our Federal judiciary. Is that basically true?

Mr. TYLER. I would put it this way, Mr. Westphal. You observed earlier that this proposal as I understand it really involves what you call discretionary jurisdiction of the Supreme Court or in terms of numbers, as best we can tell a relatively small number of cases per year, let us say in the neighborhood of 150—which is about the same number of opinion cases that the High Court renders now. What I am saying is that that is only one of the problems. Admittedly it affects our highest court and I don't want to see us ignore it and I know we won't. But it is only one of our problems and it is only one of the problems of that Court, the Supreme Court of the United States. As for this additional tier with all the complications, the problems of support, the personnel problems of salary and everything else, all the procedures which will be entailed both in that Court and in the High Court itself, it seems to me that as a matter of judgment and balance it is not a good idea.

Mr. WESTPHAL. Frequently in some of these hearings I make reference to a projection made by the Federal Judicial Center back in 1971 that by the year 1990 the district court filings would reach a level of 350,000 cases with an incremental increase at the court of appeals level and I assume therefore some additional pressure on the Supreme Court.

Now, if in fact that is the level of filings which we can anticipate in a relatively short period of time, it seems to me that that projection, especially at a time now when we are almost half way there with 171,000 filings really is what forces the Congress and the Government as a whole as well as the bench and bar to take a good, hard look at what type of fundamental changes we should be making in our structure if we are going to have to accommodate in our traditional fashion the huge volume of litigation that would be presented to us here in another 15 years. I would like to suggest to you two possible models and see if you have any views on that.

One of the models is one that is suggested probably by the Federal Judicial Center's report itself. At the time they made their report there were 400 district court judges. They projected at that time that to handle a caseload of 350,000 cases at the district court level we would require something like 1,100 district court judges. If you had 1,100 district court judges, this would generate enough appeals so that you would likely have a need for 250 to 300 circuit court judges which very likely would have to be organized into—well, if you were to stick to 9 judges per circuit, you would have something like 27 circuits; which would then increase the likelihood of intercircuit conflict or you would have to have some other structure for the courts of appeals if you are going to stay to 11 or 12 circuits.

Now, in that model there is no question but what there would be more pressure on the Supreme Court and if you had interjected in there a national court of appeals with seven or more judges, you might well then come to a question of whether a national court of appeals would be sufficient to handle even the discretionary appellate caseload that would result in that kind of an increase. Do you understand that model that I have suggested to you?

Mr. TYLER. Well, I think I understand you and again what you are stating underscores the point I have been trying to make. If we take these projections as anywhere near likely to be achieved, and I think we have to take them seriously, it points up that this could be a very narrow kind of solution for a very narrow kind of problem, which sort of pales into insignifiance when considered and compared with the scenario that you have just been unfolding as to what might happen in the next 15 years.

Mr. WESTPHAL. Let me suggest a second model and that model would be constructed this way. Assuming a need for somewhere between 1,000 and 1,500 judges of the law or the fact as the case may be at the district court level, let me suggest a model in which you would have a bifurcated district court level. There could be a magistrate's trial division at the district court level with review of decisions by a magistrate made by district court judges sitting on an appellate division of the district court.

Also in this bifurcated model it is likely that some of the trial jurisdiction at that level would continue to be assigned to a single district court or article III judge. In that kind of a model any review of a magistrate's decision would be an appeal of right would be had in the appellate division of the district court. This, in turn, would permit a great deal of the court of appeals' jurisdiction to be of a discretionary type by writ of certiorari and then there would always be, of course, the right to petition the Supreme Court for ultimate review in appropriate cases.

Now, in that model, you would have greatly expanded the trial capacity. You would have greatly expanded the initial appellate stage which would be in effect the appeal of right, and you would have increased the discretionary appellate review by placing it in a group of courts, the courts of appeals that are organized on a regional basis.

Now, do you think that that, as roughly as I have sketched it, is an alternative model that would accomplish a fundamental change in the Federal judicial system and would have advantages as well as disadvantages from the model that I previously described?

Mr. TYLER. Well, I think it is a model that ought to be thought about, particularly because it would ease some burdens, I assume, for the courts of appeal as well as for the district courts. As you know, Mr. Westphal, some of our States have a model very much like this. For example, my own State has an appellate term of its court of general jurisdiction which we call the Supreme Court of New York and certain cases are appealed to that appellate term as opposed to the intermediate court of record known as the Appellate Division.

Very simply I would think that three things ought to be thought of and I would say that this model you have just sketched would be one of them. Second, and most important, I think that the Congress, the legal profession, and the judiciary ought to think of removing from

the article III courts a lot of the cases which are now before them. In that process hard attention ought to be given to the statutes which allow special classes of litigants to have two plenary trials, for example. No other country I know of is that generous. Why do we have to be in the name of due process? Why should our courts of appeal, for example, be hobbled with the review of a social security case after the district court has reviewed the Secretary's people who have given review? Three pieces of review of the same record seems to be a little excessively fair to a litigant. It is certainly unnecessary to get our regular courts of appeals involved. Those kinds of things I think should be carefully looked at.

I think special courts or article I courts should be experimented with. Notice I use the word "experiment." I would not want to see the Congress or the judiciary get into a system where all of a sudden we had a whole host of special courts spring up, because there are problems with that. But I think some discreet experimentation with pilot courts, if you will, that are article I courts would not only ease the burdens in the courts of appeal but also to some extent in the High Court.

Finally, I would think that it would be wise to consider the kind of thing that the Congress is already considering and that is the rearrangement of the circuits which I think will be of some help, albeit not much help so far as the High Court is concerned.

Those are the three kinds of things that I think would be very useful, particularly the second one which I think is long overdue in the United States. There just is not any necessity that we have quite as many Federal questions or cases thrown before the article III courts as we now know them.

Mr. WESTPHAL. Fundamental changes of the type that are being discussed here in our dialog, if they are a simple proposal, can be, I suppose, enacted and implemented quite readily and others of the type that we have discussed would probably come about as an evolutionary process over a period of years; isn't that true?

Mr. TYLER. I think that is right, but I think the time to start is long overdue. One of my concerns, incidentally, taking the projections which you exposed here on the record a little earlier, is this. The thought of our system having some 1,100 U.S. district judges and 450 maybe, even 500 U.S. court of appeals judges—I think will present enormously difficult problems of practicality and human conduct. For one thing, will people of merit want to be serving in a vast legion like that?

They will be faceless legions at best, and we will have enormous difficulty. Does American society want to have a large Federal judiciary, given the nature of our federal system and our recognition that the State courts should be nourished and encouraged even more than they have been? These are very difficult problems.

Mr. WESTPHAL. Well, I don't want to steal any of Judge Friendly's remarks, but in his book on Federal jurisdiction he quotes Felix Frankfurter's warning when he was a professor back in about 1928 and renewed later in some of his opinions while serving on the Supreme Court that this constant increase in the number of judges, whether we are talking about the Federal system or a State system, has its own Gresham's law, it just cheapens the judicial currency. I

think that is a point that has to be considered as we discuss this fundamental change.

Thank you, Mr. Chairman. I have no further questions.

Senator HRUSKA. Thank you, Professor Levin.

Mr. LEVIN. I would ask a question or two. As you put it, it is almost impossible to get commercial business cases before the Supreme Court. As a lawyer you may take a different view of the philosophical problem of differences between the circuits than one who views it simply from the theoretical point. This is helpful.

You suggest alternatives. One of them involves the use of specialized courts, especially in tax and patent cases. Of course, the Commission addressed itself to this at pages 28 to 30 of the report and said they considered it carefully and for reasons articulated rejected it.

The point I would like to focus on is this. One of the real reasons they rejected it, was that one of the very strong submissions was by the Department of Justice saying that they were philosophically opposed to specialized courts. It came from the antitrust division particulary. They sent us a full copy of Judge Rifkin's famous article that adverted to tunnel vision and there was this strongest presentation saying, whatever else you do don't adopt this. Does this now represent a change in the viewpoint of the Department?

Mr. TYLER. Well, your question is most pointed. I have to confess that I personally recall arguing against a system of specialized courts. There are many problems if we were to go down that road. You will notice that earlier in the dialog with Mr. Westphal I was careful to say that we should "experiment."

This is very difficult. I would say, however, that if you take the projections of the Federal Judicial Center, the Administrative Conference, this committee and others who have been working on this just within the last months, and if you assume those projections are anywhere near likely to come true in the next 15 years, then I think we have got to do a little bit of discretionary balancing.

In other words, Professor Levin, I am not sure that I would like to see a new system of specialized courts or article I courts festooning Washington or New York or some other center. What I do think, though, is that we might take a cautious approach, take some of these cases that we know are a statistical burden.

One of our proposals to the President recently was that we do this with social security cases. I mentioned those a moment ago. They are not generally thought of by most lawyers and judges as being quite as statistically voluminous as they in fact are. I don't have with me in my mind the recent statistics, but there are a lot of them. They take an inordinate amount of time.

In my 13 years as a district judge every year I was appalled even though I only would pick up, say, a half of dozen of these. The records are voluminous, but I was even more appalled by the fact that I had to do exactly what the Secretary's people had already done, and then after I wrote a splendid, windy opinion—which usually you have to do because otherwise you put burdens upon the court of appeals and because I hoped by writing something it would enable them to know a litle bit more what it was all about. But, even then they had to go into this and there were pressures on them to read the record.

This seems to be an unnecessary bit of business, of no consequence to the body politic, really of no consequence to the litigant because all he is getting is a three tiered review of the same record. Now, this to me is just one of the things I have never been able to understand.

Now, that is one area. Of course, we already have a patent court, but it does not seem to me to be too extreme to tinker with their jurisdiction.

Mr. LEVIN. That is precisely what was opposed by the Department.

Mr. TYLER. I know, but the Antitrust Division does not speak for the entire Department. Individuals and divisions have taken different views within recent years; indeed, all during my professional life. I can't deny that. I confess I have taken different views. What I am saying, is in 1976 considering the projections we have at hand which seem pretty good, considering the burdens at all levels, the three levels of our system, I think we have got to take a hard look. I would not make specialized courts the major trail to go down, but I think it is worth revisiting that trail to see what we might do.

Senator HRUSKA. Would the Professor yield? With the exception of one of the members of the Supreme Court all of the Justices expressed strong opposition to a specialized court and the American Bar Association in considering this——

Mr. TYLER. I am fully aware of that.

Senator HRUSKA. The Commission did consider that subject very thoroughly in pages 28 to 30 in the summary of its report. So it is not a question that had not been canvassed and it was canvassed from an overall standpoint. That is not to say that you are not sincere and perfectly well convinced.

Mr. TYLER. Senator, I will make a full confession. When I went on the bench in 1962 there were just, I think a few over 230 U.S. district judges in this country. I swore formally and informally that now that I had the pleasure and honor of being a U.S. district judge I thought specialized courts, including even the ones we had in existence then, were just a very bad thing. But over the years as we have seen the number of judges increase and the omnibus bills that we are all familiar with and as we have seen projections fulfilled and sometimes exceeded of the kind that Mr. William Westphal and I were discussing a moment ago and you both are familiar with, . . . Frankly what I am saying is that I am having second thoughts as a lawyer. I really think that I would hate to see, as I put it earlier somewhat simplistically, the whole City of Washington festooned with special courts. All I am suggesting is a modest reappraisal with some experimentation in certain fields, particularly where we know by experience that there really is not any need from a social and political point of view to have a U.S. district court and a U.S. court of appeals spend much time.

Mr. LEVIN. Could I have one last followup question, if I may?

I am really appreciative, Judge Tyler. I think you are 100 percent right. In many decisions, the Commission deserves rethinking in terms of the importance of the question. In your statement the notion of doing something about social security cases, by creating an article I court to decide them, without further judicial review is suggested. Does it concern you at all that the rate of reversal in those cases is among the highest by subject matter floating around?

Mr. TYLER. No, it does not and I can't prove this, of course, Professor Levin. One of the reasons why I suspect that that reversal rate is quite high—I am not exactly sure what it is now, but I know that over the years your point is quite valid and goes to the root of what I think we are discussing—my suspicion is, quite frankly, that these cases are not handled with the efficiency and thoroughness that surely they deserve on a case-by-case basis simply because the administrative people know that, whatever happens, it is going to be poured over by a U.S. district judge and his law clerks and probably by a panel of three of the court of appeals judges. I have a deep suspicion that we all sort of throw up our hands and say, "Oh, well, if we don't catch something, somebody else will." Now, I can't prove that, but I am worried about just that kind of thing.

Mr. LEVIN. I think there is much to support what you said and I find it encouraging that there is a major study dealing with the details of that problem which should lead to very substantial reform regardless of whether we get into judicial review. Of course, we both agree that really does not affect the U.S. Supreme Court at all.

Mr. TYLER. No, but you see again this is a matter of dynamics and experience which no one of us, no matter what we have done and are doing, can really contain within ourselves. One has to favor a total approach to the problems and burdens of Federal jurisdiction as we now know it in the books. If we take a close look at the whole situation, we will inevitably in some way ease the burdens not only of the courts of appeals and the district courts but, to some measurable extent, of the Supreme Court. You are quite right, though, if you take something like social security, of course, or diversity as Senator Hruska pointed out, you are not really going to the problems of the Supreme Court of the United States under current practice.

Mr. LEVIN. Thank you, Mr. Chairman.

Thank you, Judge Tyler.

Senator HRUSKA. Thank you, Judge, for being here. This probably marks the last time that you will sit at the witness table. We want to thank you for the contribution you have made repeatedly in the last 2 years.

Mr. TYLER. I can almost think, Mr. Chairman, that it is quite likely that I will be asked down on something or other next year as a private citizen.

Thank you very much.

Senator HRUSKA. Very likely.

Our next witness is the Honorable Barnabas Sears, Esq., an attorney-at-law from Chicago, Ill. We welcome you here, Mr. Sears.

## STATEMENT OF BARNABAS SEARS, ESQ., ATTORNEY AT LAW, CHICAGO, ILL.

Mr. SEARS. Thank you, Mr. Chairman.

Mr. Chairman, I want to begin my remarks by paying my deep respect and appreciation for the gentlemen that have worked on this national court of appeals proposal. I happen to know quite a few of them and I entertain a great deal of respect for their professional judgment and scholarship.

It might be a little presumptuous for me to be here discussing this question in the light of the erudition that the subject has already received but after 50 years at the bar, in and out of courtrooms, both trial and appellate, which has been about 80 percent of my practice, I find that the law on paper and the law in action are frequently two different worlds.

Now, I agree with most of the statements that Judge Tyler made before he was being interrogated by you gentlemen, and I think that perhaps it would be a waste of your time for me to repeat what he said because most of it is in the statement that I have submitted, so I just want to make a few brief prefatory observations.

Now, we are all aware of the fact that we deal here with an unique institution in the annals of Anglo-Saxon jurisprudence and we are proposing that we have a national court of appeals. I address my remarks only to the question of reference jurisdiction under which the Supreme Court of the United States may refer questions of national interest affecting national law, and one of the premises for such a suggestion is the need for additional appellate capacity on a Federal level.

I am not at all sure of the need for additional appellate capacity on a Federal level but I am perfectly willing to assume arguendo that there is such a need and I observe, therefore, that most things in life are relative and a thing is good or bad in relation to something else. I mean, you just can't look at the thing itself abstractly and from that determine, therefore, that it is a remedy for our conceived egos.

I won't go into the technical matters involving the reference jurisdiction or the fact that for the purpose of really making an intelligent, thorough reference the Supreme Court might just as well decide whether they ought to take certiorari or deny it in the first place, but I speak to this question. The premise, that we are going to have a national court of appeals that is going to decide issues of national law that the Supreme Court is too busy to decide, is to me, and with all deference to everybody, prety much of an illusion. A judicial opinion, like a judgment, must be read as applicable to the facts involved and is an authority for only what is actually decided. That is settled.

I am sure those of us who practice in the courts know that cases are decided on the facts for the most part. After the court has decided how the case should be decided on the facts, I say this with all deference, they find the cases to support the proposition. I could give you a very interesting anecdote about that that I learned when I was first admitted back in 1927 and I thought what a terrible thing because what has happened to the doctrine of stare decisis that I learned at Georgetown Law School from a very distinguished professor.

So the national court of appeals decides a question. Let's say it decides a question four to three. What has it decided. Has it decided that national question for all time? What reason do we have to assume that this national court of appeals is going to decide national questions with the predictability and a definiteness that is going to make it possible for me as a practicing lawyer to advise my client in a particular set of facts what the court is going to do?

Now, I am no particular student of the Supreme Court of the United States, but I have had a sort of fascination to try to read in my spare time some of the history of that great tribunal and I find that as far as my being able to predict with any degree of certainty what that

distinguished tribunal might decide in relation to my client's case, I simply can't do it. I tell my client, "Well, I hope you have not come to me to find out what the law is because frankness requires me to tell you at the outset that all I can give you is an educated guess." So we have sought predictability and certainty in law; I mean, it is not there any more than it is any place else in life.

So why do we seek to—I won't use the word "disturb," I will just use the word "supplement" the work of that distinguished and unique tribunal? Why do we do that? Well, we in the first place have started at the top instead of the bottom and this has been a subject that I have discussed for a good many years—without any success whatever, I might add—and that is that our entire judicial structure needs over hauling; it needs overhauling from the ground up and yet many assume that the Federal Rules of Civil Procedure came from Mount Sinai. I can recall what was told me as a practicing lawyer when the Federal Rules of Civil Procedure were enacted. They were going to expedite litigation, lessen its expense. We were going to get away from all of these technicalities that plagued us. Yet look what we have now with all of the motions. I am talking now at the trial level because we have to clean up the trial level before we can clean up the appellate level in my opinion. A lawsuit has become a little less than an exercise in frustration and that, my dear friends, is not an overstatement.

If I earn $50,000 a year and I have two children in law school or college, can I afford to litigate in a Federal court? I can afford to litigate in the Federal court only if I can get a lawyer to take my case on a contingent fee basis and I am hopeful that I will have enough money to pay the reporter in the first 2 or 3 years of play.

Now, this is not off the point. Before we disturb the Supreme Court of the United States there are lawyers like myself in active practice that have almost a reverence for that Court. Now, before we disturb the structure of that Court and run into these 4 to 3 opinions of the national court of appeals and after we have read all the opinions of the national court of appeals with the footnotes and analyzed it with respect to the facts of the case and then read what the dissenting judge said about it—before we add to the embroidery of our present Federal judicial system, let's start at the bottom.

I think in my view of the subject that two things are necessary. We have got to have a simplified method of procedure and we have got to have a certified trial bar. I am a member of the American Trial Lawyers Committee to implement the matters suggested at St. Paul, the Pound Conference. There are many suggestions coming out of that. The matter is going to be studied very carefully in the next year or two.

One further matters and then I am going to shut up because I usually talk too much. Before we do anything about this national court of appeals proposal, regardless of the merits or demerits, we ought to at least pause. We have had the system now not 200 years, about 1789 as I remember. We ought to pause and wait a while until we see what comes out of that.

Thank you very much. I will be glad to answer any questions you would like to ask me.

Senator HRUSKA. Mr. Sears, your statement based upon a half century of devotion to our profession and to civic activity, is really very

fine. We would like to draw upon that experience, and have to, if we are going to make any progress in developing our system. I am reminded, however, that in a recent talk Chief Justice Burger commented upon the adoption of the circuit courts of appeal concept and structure which was started in 1891. That proposal, or one like it, was first advanced 75 years before 1891, I think it was in 1825, and there was almost 70 years of pause. I wonder what would have happened if we had continued to pause in 1891 and still had no circuit courts of appeal?

Mr. SEARS. Well, I think it would have been a great mistake if we had paused. It depends on how long we pause but I don't equate the passage of the Circuit Court of Appeals Act with this present proposal at all. I mean I don't seem to equate the two. Now, when I say "pause" I am not saying that we should pause for 15 years. I am not saying we should pause for 5 years. I am saying that we ought to pause long enough at least to see if there is not some way that we can reform our basic Federal judicial structure from the bottom and I think if we do that that will take care of the top.

Senator HRUSKA. That is a very valid point. However, when we consider the idea of remaking the system from the very bottom to the very top, Congress faced that 5 years ago when they decided to create the Commission that did go into this whole thing and it was determined then as congressional policy that the Commission should not consider the trial and the district courts, all that it would consider is the appellate court system.

Now, maybe that was a mistake. We don't think so. In retrospect certainly this Senator does not think so but that was a policy deliberately adopted and it has been pursued. That does not mean that the Commission started and stopped with the creation of the national court of appeals as you know because this report is quite comprehensive and embraces many other aspects, nor does it foreclose the Congress from stepping in as it already has and abolish the three judge court in the meantime. We hope similar progress will be made in other areas, but your point is a valid one. My only comment is that it was considered and Congresss decided to go the other way.

Mr. SEARS. I realize that.

Senator HRUSKA. So we were inhibited from getting into other areas.

Mr. SEARS. I am perfectly aware that you were inhibited and I consider it unfortunate that you were. I mean, you had to work with the Commission that you had and you did a very excellent job. As I say, I feel a little presumptious in questioning some of my distinguished friends who I think really are better scholars than I am and more learned in the law by far. I am perfectly willing to admit that.

Senator HRUSKA. Mr. Westphal, have you any questions?

Mr. WESTPHAL. I just have one, Mr. Chairman.

I have been tempted to ask it, and I would like to ask it of Mr. Sears because of his long experience as a trial and appellate lawyer and that simply is this: That even if we assume the existence at some time of a certified trial bar as you have mentioned in your testimony and if we are to give part of our thinking to making some changes or improvements at the bottom, at the trial level, do you think that the time has come where the trial courts, the trial judges have got to exercise more control over the preparation for trial and the advancing of the case to

the point where it is ready for trail or should we continue, by and large, to leave that pretty much to the control of the trial attorneys?

Mr. Sears. I think the trial judge should do the job but I think the trial judge if he did the job now—if you will pardon a personal reference, I was appointed a special Federal master to state an account in damages in an antitrust case.

I had two lawyers on each side, both of them very capable lawyers. Well, in the first 30 days of the trial I had motions for this, motions for that about that thick—[indicating]—in front of me. I serve notice on them that on a certain day I was going to hear all the motions. I listened to all the motions and let them argue those motions as long as they wanted to and at the end of it I overruled all the motions.

I stated for the record: "I am perfectly aware of the fact that with respect to this I am not following the Federal Rules of Civil Procedure, but we will try this case the way we used to try a chancery case. You are going to start at a certain time and you are going to put your case in and then we are going to recess and you are going to start to put your case in and then we are going to go back and have rebuttal."

I said: "I want you to understand that you have each been on your side of the bar and this thing is not inflexible and I want you to know I would not do this except that you gentleman are very capable lawyers. If at any time during the course of these hearings anyone can show that he is prejudiced by reason of the ruling, I will stop right now and correct it. Now, you are going to produce this to the plaintiff and you are going to produce this to the defendant and there are going to be no documents offered in evidence that have not been produced by either party."

Well, we proceeded to try the case. We had about 30 days of hearings. I gave them about 2½ days of oral argument and we got the case finished. Not once during that hearing was there ever any objection to the ruling nor was anybody taken by surprise nor was anybody prejudiced by any of the rulings. We went ahead and tried the case.

The judges could do that now. The judges could do that now except certainly they have got crowded dockets. We all know that. We have got procedures like every time I file a motion I have to file a memorandum of authority to support the motion. I can argue the motion in 10 minutes, it takes my junior counsel 2½ or 3 hours to prepare the motion and the client pays for that.

Now, if we had a simple method of procedure, why we could take care of a lot of this and we could, I think, remove a great many burdens not only on the court of appeals but on the Supreme Court.

Mr. Westphal. Thank you, Mr. Sears.

I have no further questions.

Mr. Sears. It has been a pleasure.

Mr. Levin. Just one question, Mr. Sears. Certainly we respect your reverence to the Supreme Court and there is reason to pause always before, as you put it, we disturb the structure which may affect it. I would take it, though, that in your view if a majority of the Justices were to come to the conclusion that reform at the trial level, trying cases like you succeeded in doing as a special matter, as distinguished from what we have now, would not give them the relief and that there was need for relief and then that same reverence for the Supreme Court would say that that ought to count fairly heavily in the congressional decision.

Mr. Sears. Well, I tell you, I would be a long time coming to that conclusion, with all deference, and I would have to know more about the facts than those that are contained in your question. I would assume that if there was no other possible way and that we have to have two Supreme Courts—I quoted there what Lord Bryce said in my memorandum that "the Supreme Court is the conscience of the people." If we have to have two consciences, one the national court of appeals the other the U.S. Supreme Court, I suppose we would have to have two, but I would regret that day.

Mr. Levin. I would, too, if it were two consciences. I don't imagine that you would view a nationally binding decision on the applicability of a subsection of the tax code on corporation as embodying the national conscience if it were decided by the national court of appeals.

Mr. Sears. On what question?

Mr. Levin. On the subsection of the Internal Revenue Code in a particular situation of a recurring nature. Does that involve the national conscience, with the right of review by the Supreme Court?

Mr. Sears. Well, that in and of itself might not.

Mr. Levin. Your testimony has been very helpful.

Mr. Sears. You cannot pick something out in isolation, though.

Mr. Levin. Fair enough.

Mr. Sears. You have to have the totality, I think you would be right about that.

Mr. Levin. Very well.

Mr. Sears. Thank you. It has been a real pleasure.

Senator Hruska. We thank you for your contribution.

[Prepared statement of Mr. Sears follows:]

Statement of Barnabas F. Sears, Esq.

I am Barnabas F. Sears, of the Illinois Bar, and my office is at One IBM Plaza, Chicago, Illinois. I am a graduate of Georgetown University Law School, class of 1926 and was admitted to the Illinois Bar on October 14, 1926 and to the Bar of the Supreme Court of the United States on April 28, 1937.

I am a Past President of the Illinois State Bar Association, 1957–58, and for six years prior thereto was Chairman of the Joint Committee of the Chicago Bar Association and the Illinois State Bar Association created to draft a new Judicial Article for Illinois. The present Illinois Article is substantially the result of the Committee's efforts, except for the method of selecting judges. The Committee draft provided for merit selection, but that part of it was defeated in the legislature.

I am a Past Chairman of the American Bar Association's Committee on Judicial Selection, Compensation and Tenure, a Past Chairman of the ABA Section on Labor Relations Law, and have served in its House of Delegates for over 25 years. Up to last year, I served as the Illinois State Delegate to the American Bar Association for 15 years and was Chairman of its House of Delegates for two years, 1968–70.

I have been a member of the American College of Trial Lawyers since 1953, served as a Regent of the College for four years (1961–65) and was its President for one year, 1970–71.

I am also a member of the American Law Institute, the American Judicature Society, the Society of Trial Lawyers of Illinois and the International Academy of Trial Lawyers. I have been a member of each of these societies for over 20 years.

My practice since my admission has been at least 80 percent trial and appellate, in all fields, civil and criminal. I was the Special State's Attorney of Cook County in 1961 and prosecuted the Summerdale Police case. I was also Special State's Attorney of Cook County charged with the duty of investigating and prosecuting the so-called "Black Panther" case, which arose out a police raid at 4:00 A.M. on a Black Panther apartment, and resulted in the deaths of Fred

Hampton and Mark Clark, two members of the Black Panther party. I spent about two-and-one-half years on that assignment.

I appear today to testify in opposition to S–3423, which establishes a National Court of Appeals and gives the Supreme Court reference jurisdiction. I understand that S–2762, which provides for transfer and reference jurisdiction, has been abandoned.

I begin by assuring this Committee of my very high regard and respect for the gentlemen who comprise the members of the Commission chaired by the distinguished Senator from Nebraska, and I express my appreciation for their scholarly and dedicated efforts. In fact, I may appear somewhat presumptuous in disagreeing with them. I can only say that, after 50 years at the bar, in and out of various courtrooms, both trial and appellate, I have found that the law on paper and the law in reality are frequently two distinctly different worlds. This is particularly true in the case of the National Court of Appeals, in my humble opinion.

The reasons why I believe the proposal should be strongly opposed include the following:

1. The need for such a major change in the historic structure of the federal courts has not yet been demonstrated. The case for the proposal rests largely on abstract propositions to the effect that we do not have enough "national law" because the Supreme Court can only dispose of about 150 cases a year. The new court would mean that we could have about double that number of nationally-binding decisions. As far as I can see, no one has any theory about what the "right" number of such decisions would be, or much evidence as to the concrete harm presently resulting from the fact that we don't have more. Former Solicitor General Griswold, one of the main proponents of the new court, has argued that there are many cases of conflicts among the circuits that the Supreme Court does not now resolve. The Hruska commission made a study that purports to support Mr. Griswold's position. From my reading of it, that study suggests that at most there are 45–60 such cases a year, that many of them are of a kind that need not or ought not to be resolved by a quick "national" decision, and that substantial additional research and thought should take place before concluding that the "conflicts" problem is serious enough to call for drastic new measures;

2. The new court would not relieve any of the present burden on the Supreme Court. On the contrary, it would increase that burden by requiring the Court to consider (a) on every petition for certiorari or appeal, whether to refer the case to the National Court, and (b) in every case decided by the National Court, whether to review the judgment of the National Court;

3. The new court would create a national court in competition with the Supreme Court. Judges being as they are, there would likely be a strong tendency for the new court to develop its own position on major issues, to "show up" the Supreme Court or to force the Supreme Court to reconsider its decisions. Thus, if at any given time there was a divergence in the jurisprudential philosophy of the two courts, an unseemly rivalry might well emerge that could hardly be beneficial to the authority and prestige of the Supreme Court or of the federal courts generally;

4. To the extent the foregoing tendency developed, the Supreme Court would be forced to add to its docket a substantial number of cases decided by the National Court. This would (a) add a fourth tier of review for such cases, (b) add to the Supreme Court's present "overload," or, alternatively, (c) force the Supreme Court to decline review in an equivalent number of other cases of the kind it presently accepts, thus making our present situation even worse;

5. The insertion of an additional layer of review above the present Court of Appeals will diminish the prestige of those courts, and in the long run, I fear make it even more difficult to attract the best talent for those courts. That effect, which would extend to the whole present appellate level, would be much too high a price to pay for the uncertain benefits of the National Court. Another possible adverse effect on the present Courts of Appeals is that the increased possibility of review by a higher court may diminish the sense of responsibility felt by the existing courts and subtly impair the quality of their work-product;

6. The proposed new court would not significantly alleviate the workload burden on the Courts of Appeals—which was the major problem the Commission was supposed to address. And if the so-called "transfer" jurisdiction is eliminated from the proposal—as the ABA recommendation would apparently do, and as S 3423 provides—there would be *no* relief to the Courts of Appeals;

7. The proposed National Court of Appeals is built upon a judicial structure that needs a complete overhaul if we are to solve the serious problem of overload in the federal courts. It has been suggested that increasing the number of judges or restricting federal jurisdiction are the only ways to solve that problem. Many proposals were suggested and discussed at the Pound Conference in St. Paul. As I expressed myself on that occasion, the real problem is our rules of practice and procedure, both trial and appellate.

Reading "The Bleak House," one will find a striking similarity between the 19th Century rules of Chancery Pleading and Practice against which Dickens inveighed and its 20th Century counterpart, our federal system of procedure with its plethora of motions, notices, interrogatories, unlimited discovery, pretrial and post-trial written briefs, to mention some facing a litigant seeking a trial court judgment. The result is a procedural labyrinth which renders at least 70% of our citizens legally indigent. As one distinguished young federal judge described it to me: "We substituted for trial by surprise trial by avalanche." There must be a better way. Neither time nor space permits a meaningful discussion of this problem, but it boils down to two things: a vastly simpler method of procedure, plus a certified trial bar, patterned after the English system, which the Chief Justice has been advocating for many years.

Back to reference jurisdiction. It is the subject of a scholarly treatment by our former Chief Judge of the Seventh Circuit Court of Appeals, the Honorable Luther M. Swygert, in an article, "The Proposed National Court of Appeals: a Threat to Judicial Symmetry," in Volume 51, No. 2, Indiana Law Journal, pages 328–334; a copy of which I attach as an appendix. I am in complete accord with the views expressed by that distinguished jurist and others to whom he makes reference in that article; the Honorable Henry J. Friendly of the Second Circuit; the Honorable Justice Samuel J. Roberts of the Supreme Court of Pennsylvania and Professor Robert Dixon of George Washington University. I also agree with the views expressed by Solicitor General Robert H. Bork at the Pound Conference in St. Paul. (See 70 FRD at pages 235, 236).

Finally, particularly at this crucial time in our history, the last thing we should do is to dilute the prestige and image of our Supreme Court, which this proposal obviously does. For the Supreme Court of the United States is indeed a unique institution, as its illustrious annals attest. It is, in the words of Lord Bryce, "the living voice of the Constitution . . . the conscience of the people who have resolved to restrain themselves from hasty or unjust action by placing their representatives under the restriction of a permanent law." And now, after 200 years, are we to have two consciences: the Supreme Court of the United States and a National Court of Appeals?

I appreciate being accorded the opportunity of expressing my views on this important subject before this distinguished Subcommittee. I thank you for it.

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APPENDIX—INDIANA LAW JOURNAL

REFERENCE JURISDICTION

Section 1271 of S. 2762 provides: "The National Court of Appeals shall have jurisdiction of cases refered to it by the Supreme Court." Section 1259 reads in part:

> (a) After denying certiorari or in lieu of noting probable jurisdiction of an appeal in any case before it, the Supreme Court may refer any such case to the National Court of Appeals. The Supreme Court may, and in cases subject to review by appeal shall, direct the National Court of Appeals to decide any case so referred.
>
> (b) Any case in the National Court of Appeals may be reviewed by the Supreme Court by writ to certiorari granted upon the petition of any party to any such case before or after rendition of judgment or decree.

Section 1273(a) provides: "The National Court of Appeals may deny review in any case referred to it by the Supreme Court unless directed by the Supreme Court to decide the case."

The provisions permit the Supreme Court a number of choices as the *Commission Report* indicates:

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;

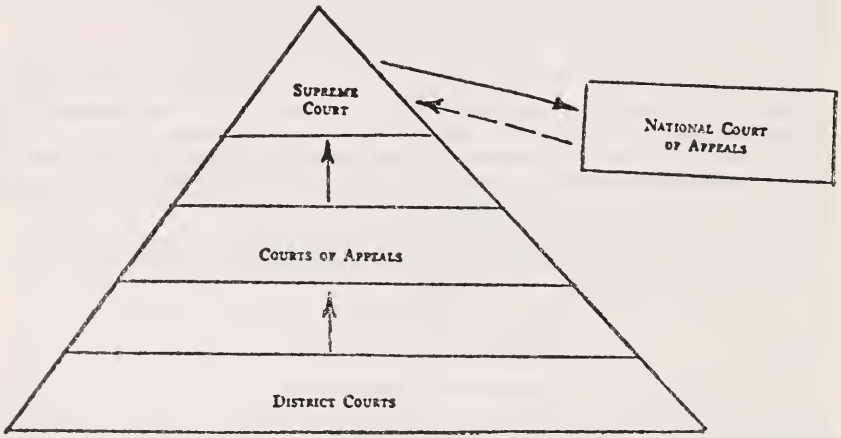
(4) to deny certiorari and refer the case to the National Court, giving that court discretion either to decide the case on the merits, or to deny review and thus terminate the litigation.

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.[4]

The Commission Report states, in regard to Supreme Court review of the decisions of the National Court of Appeals: "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. Access to the Supreme Court would not be cut off in any individual cases or class of cases." [5] An analysis of the proposed reference jurisdiction demonstrates that the Commission's conclusion that "[t]he appellate process would not be unduly prolonged[; t]here would not be, save in the rarest instance, four tiers of courts." [6] is not likely to be true. As the diagram below illustrates there are actually four appellate procedural processes involved in reference jurisdiction: (1) the appeal from the proceedings in the district court to the regional courts of appeals; (2) the initial certiorari procedure in the Supreme Court; (3) the reference procedure to the National Court for a decision by that court on the merits; and (4) a second certiorari procedure in the Supreme Court.




As this analysis illustrates, it may be that the Justices of the Supreme Court are quite likely to consider petitions for certiorari twice in the same case. It is also apparent that the time involved for both the Justices and counsel will be considerable, not to mention the extra cost and delay in the appellate process.

It is not presumptuous to suggest that the proposed plan involves two additional expenditures of time. The Justices must first consider whether the case should be referred and then, after a subsequent decision on the merits by the National Court of Appeals, whether the case merits review by the Supreme Court.

The Commission's report states, in regard to Supreme Court review:

> We anticipate . . . that few decisions of the National Court in cases which came to it from the Supreme Court would in fact be reviewd thereafter by the Supreme Court. To avoid prolonging the appellate process any more than absolutely necessary, the Commission recommends that in such

[4] Commission Report at 32–33.
[5] *Id.* at 38.
[6] *Id.* at 39.

> 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.[7]

In its conclusion, the Commission Report projects that: "[t]here 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." [8] Implicit in this statement is the assumption that the decisions to refer or to review will not consume much time and will lessen the present burden of the Justices.

The Commission by its suggestion has rendered a disservice, no doubt unwittingly, to the Justices. Whether to exercise the options the reference procedure provides is a question which will surely consume a considerable amount of time, particularly the decision whether to refer the case to the National Court or to hear and decide the case themselves. Even more burdensome will be the time required to consider a petition for certiorari after the National Court has spoken on a case referred to it for decision.

That a denial of certiorari has not represented a tacit affirmance of a decision is constitutional dogma. That dogma could not apply to a denial of a request for certiorari in a case decided by the National Court on referral. Decisions of the National Court made after referral by the Supreme Court would take on a dimension far different from those rendered by the courts of appeals. A decision not to review such an opinion by the National Court would imply that the Supreme Court not only adopted the result in the case but also tacitly approved the reasoning of the National Court in reaching the result. Will not deciding whether to review under such circumstances increase rather than decrease the burden of the Justices? Judge Henry J. Friendly of the United States Court of Appeals for the Second Circuit has noted:

> Equally serious are possible difficulties in the relationship between the National Court and the Supreme Court. The Commission's anticipation (p. 51) "that few decisions of the National Court in cases which come to it from the Supreme Court would in fact be reviewed thereafter by the Supreme Court" seems to me to be unfounded. The problem of conscience that would be faced by a Justice when confronted with a decision of the National Court with which he tentatively disagrees would appear to me to be very serious. At present he can justify voting to refuse such a decision of a court of appeals or a state court on the grounds that the Supreme Court is a tribunal for the making of law and not the correction of error and that if the law that has been made in the particular case is really bad, some other court will disagree and the Supreme Court will have another chance to correct matters. When he is confronted with a decision of the National Court which he tentatively thinks to be wrong, refusal to exercise his powers would mean that he was allowing bad law to be made on a nation-wide basis and with no possibility of subsequent disagreement (unless some particularly enterprising litigant should pursue a battle for overruling, with the further problems which this creates). I would find this a hard ethical pill to swallow. Beyond this, I predict that as a practical matter, the Justices simply will not refrain from reviewing decisions, especially divided decisions, of the National Court on any issues of real importance even though they were willing to let the National Court have a first crack at them.[9]

If, however, the Commission's "anticipation" is correct, will not this result in a lessening of the prestige and standing of the Supreme Court? The answer seems obvious. The Supreme Court's sharing of the power to declare constitutional and national law with the National Court is bound to dilute the prestige of the Court. A mystique has developed in America surrounding the United States Supreme Court relating to, and derived from, its standing at the apex of our governmental structure and as the guardian of the Constitution and its amendments. That standing is very likely to be diluted by sharing the pinnacle with a National Court of Appeals which will, through the back door, decide constitutional and

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[7] *Id.*
[8] *Id.*
[9] Letter from the Honorable Henry J. Friendly to Professor A. Leo Levin, Executive Director of the Commission on Revision of the Federal Court Appellate System, April 22 1975. *Hearings 1974–1975*, Vol. II, at 1313 [hereinafter cited as *Hearings II*].

federal law questions which are in need of resolution on a national level, but for which the Supreme Court does not have time to devote itself.

It is anticipated that the National Court of Appeals will hear 150 cases a year.[10] Presumably, the Supreme Court will continue to hear its average caseload. Therefore, if the Justices agree with the result reached by the National Court of Appeals, pressure will be generated on them to deny certiorari even though the doctrinal development is not exactly as they might have set forth. Legal arguments are constructed through analogy and through the extension of principles previously expounded. Even though the Supreme Court will not have guided the development of the law in the opinions of the National Court, the analytical approaches and philosophy set forth in those opinions will have the same effect as if pronounced by the Supreme Court itself.

If in fact the National Court of Appeals process evolves into one in which there is only expedited review of its decisions by the Supreme Court, an additional question raised in the hearings[11] is presented. This concerns the constitutionality of the reference jurisdiction.

The Constitution commands that there shall be "one supreme Court."[12] The argument is made that except for those classes of cases over which the Constitution grants original jurisdiction to the Supreme Court, final appellate jurisdiction is vested in the Supreme Court and that it cannot constitutionally be delegated.[13]

The proponents of the National Court idea assert that the "Exceptions and Regulations" clause of article III allows Congress to authorize the Supreme Court to refer a case docketed in that court to the National Court for a decision on the merits, particularly in light of the fact that any decision of the National Court would still be subject to review on certiorari by the Supreme Court. There is a vast difference—and perhaps a constitutional one—between the Supreme Court's denial of certiorari of an appeal from a regional court of appeals, the Court of Claims, or the Court of Customs and Patent Appeals, and its reference to a National Court of Appeals of a case initially docketed in the Supreme Court with subsequent summary treatment of a second petition for certiorari after the National Court's decision on the merits. In the latter case can it be logically disputed that the Supreme Court by a denial of certiorari has impliedly adopted the National Court's decision as its own, and thus divested itself of the duty imposed upon it by the Constitution?

It is important to note in this connection that Section 1273 of the proposed legislation provides that the National Court "may deny review in any case referred to it by the Supreme Court unless directed by the Supreme Court to decide the case." It is difficult to imagine a clearer delegation of power despite the fact that theoretically the Supreme Court could grant certiorari on a second round of petitions after the denial of review by the National Court. In essence then the National Court, while not formally designed to perform a screening function for certiorari petitions as proposed by the Study Group on the Caseload of the Supreme Court (the Freund Committee), would in fact share with the Supreme Court the important task of selecting those cases which would be used as vehicles to pronounce constitutional and national law.

In the final analysis, of course, the constitutionality of the National Court of Appeals with regard to reference jurisdiction will have to be passed upon by the Supreme Court, should that jurisdiction be challenged. In that connection, we

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[10] Commission Report at 39.

[11] *See* prepared statement and testimony of Eugene Gressman, *Hearings 1974–1975*, Vol. I, 56–85 [hereinafter *Hearings I*]; statement and testimony of Arthur J. Goldberg, formerly Associate Justice, United States Supreme Court, *id.* at 161–78; prepared statement of Professor Robert Dixon, George Washington University, *Hearings II* at 1259–72. *See also* Black, *The National Court of Appeals: An Unwise Proposal*, 83 Yale L.J. 883 (1974); Note, *The National Court of Appeals: A Constitutional "inferior Court"?*, 72 Mich. L. Rev. 290 (1973).

[12] U.S. Const. art. III, § 1:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

[13] Article III reads in part:

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

should keep in mind the famous remark of Charles Evans Hughes that the "Constitution is what the judges say it is." [14]

Another aspect of the criticism concerning the National Court of Appeals relates to federalism and was characterized by Professor Robert Dixon of George Washington University as "quasi-constitutional." [15] *Cohens v. Virginia*,[16] and *Martin v. Hunter's Lessee*,[17] established the constitutional position of the Supreme Court in regard to constitutional questions arising in decisions made by state tribunals. In *Cohens*, Mr. Chief Justice Marshall, in broadly construing the authority of the Supreme Court to review such decisions, declared:

> Let the nature and objects of our Union be considered; let the great fundamental principles, on which the basic stands, be examined; and we thing the result must be, that there is nothing so extravagantly absurd in giving to the Court of the nation the power of revising the decisions of local tribunals on questions which affect the nation, as to require that words which import this power should be restricted by a forced construction.[18]

Even if the objection based on the nature of our federal system does not rise to constitutional dimensions, a serious policy question will still remain. The establishment of a National Court of Appeals would permit the Supreme Court to delegate its duty to pass on the constitutionality of the decisions of the highest courts of the states to an inferior tribunal. As noted by Justice Samuel J. Roberts of the Supreme Court of Pennsylvania:

> A proposal for direct review of decisions of the highest state court by any federal tribunal other than the Supreme Court of the United States will be greeted with less than enthusiasm by state judges. It is a drastic change and one which should be pursued only after the strongest of justifications and only after we are certain that it will further the proper relationship between state and federal courts.

Thus an impairment of the concept and workings of federalism will likely result if the Supreme Court is empowered to refer to a National Court appeals from the decisions of the highest courts of the states.

Senator HRUSKA. Our next witness is the Honorable Henry J. Friendly, judge of the Second Circuit Court of Appeals.

Off the record.

[Discussion off the record.]

Senator HRUSKA. We will recess now and reconvene at 1:15.

[Whereupon, at 12:02 p.m., the subcommittee recessed, to reconvene at 1:15 p.m., the same day.]

AFTER RECESS

[The subcommittee reconvened at 1:15 p.m., Hon. Roman L. Hruska presiding.]

Senator HRUSKA. The subcommittee will come to order.

As previously announced, our next witness is Judge Henry J. Friendly, of the second court of appeals.

Your entire statement will be put in the record, your honor, and you may proceed.

## STATEMENT OF HON. HENRY J. FRIENDLY, JUDGE, SECOND COURT OF APPEALS, NEW YORK, N.Y.

Judge FRIENDLY. Thank you, Mr. Chairman.

I will address my remarks to the revised bill, S. 3423. I take it, it is no secret that my position is of opposition and so I would like to get

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[14] Speech at Elmira, New York, May 3, 1907.
[15] *Hearings II* at 1273.
[16] 6 Wheat. (19 U.S.) 264 (1821).
[17] 1 Wheat. (14 U.S.) 304 (1816).
[18] Cohens v. Virginia, 6 Wheat. (19 U.S.) 264, 422–23 (1821).

on the record right at the beginning that in view of my esteem for you and other members of the Commission and the friendship of many of them and your extremely able executive director, my task is not entirely a pleasant one. However, as a Federal judge and a lifelong student of the Federal judicial system, I conceive that my duty is to speak out against the national court proposal. As has been my general custom, I will speak plainly and in the interest of brevity will not include apologies along with every critical remark.

The first point to be made is one that Judge Tyler emphasized this morning which is that almost by concession the national court proposal does practically nothing to alleviate the major problems of the Federal courts, mainly the explosion in the caseload. Part of that failure is due to the point that the chairman made; namely, that Congress in its wisdom did not give the Commission jurisdiction over the intake at the district court level. This is to my mind a very serious mark against the proposal. Despite the complete candor of the report that in effect it does nothing or very little, at least, to deal with the problems of the district courts and the courts of appeals, I am very much afraid that the Members of Congress who are not so well informed might not see it that way and will believe that by passing this extremely important piece of legislation they had done something and about all that they were going to for some period of time.

Of course, beyond that, as a practical matter, realizing the pressures that operate on the limited time that Congress has, pressures which surely will be greater with the new administration, Congress cannot be realistically expected to give major attention to the Federal judiciary at frequent intervals. We had to wait for 34 years between the Court of Appeals Act of 1891 and the judge's bill, certainly a more modest piece of legislation than this, in 1925.

I think Professor Frankfurter as he then was and Professor Landis made that point in their book that the judicial legislation just can't be expected at frequent intervals.

To put the matter another way, it seems to me that this is a case of misplaced emphasis, that the real job is to tackle some of the fundamental problems that came up in Mr. Westphal's questioning of Judge Tyler and see how this matter looks after those problems have been tackled and hopefully some progress has been made.

Instead of doing that the Commission's proposal is addressed to something that had rather escaped notice until a few specialists convinced themselves that they had detected it a few years ago; namely, an alleged inadequate appellate capacity in the federal system to decide cases on a basis that will have nationwide effect.

In an effort to solve what some people have called the nonproblem or what I prefer to call a miniproblem, the report proposes something that has long, and in my view rightly, been condemned as an anathema; namely, the creation of a fourth tier in the Federal judicial system. That is enough in my mind to show that this proposal is no piece of cosmetic surgery which merits adoption because it is better than proposals that preceded it and may do some good and do no harm as some of the proponents have tried to depict.

Since 1891 we have had a three tiered Federal court system and since the very beginning in 1789 we have had a system in which with the exception of the relatively recent expansion of Federal habeas corpus

jurisdiction only one court, the Supreme Court, can review the decision of the State courts.

Under the national court proposal the procedure after decision by the Federal court of appeals or by the highest court of the State could include seven stages, if the Supreme Court chose to refer to the national court the question whether to decide the case, and six if the Supreme Court instructed the national court to decide the case. That contrasts with a system at the present time where the vast bulk of petitions are ended by a denial of certiorari, and in a few where certiorari is granted only one more stage exists.

Now, it is quite true that no one can tell in how many cases this added delay would exist and we cannot tell it because we don't know what reference procedures the Supreme Court would adopt. There would be nearly 4,000 cases of this serious added delay each year if the Supreme Court were to adopt one proposal; namely, to refer all cases which it did not want to take for decision and allow the national court to consider whether to take them itself.

Probably, as is intimated in your report, that figure is unrealistically high. As Mr. Justice Brennan informed us in his article in the Chicago Law Review 3 years ago, 70 percent of the petitions for certiorari are so plainly unworthy of further consideration that they are not even discussed by the Supreme Court. It would seem likely that in a rather curious reversal of roles the Supreme Court could weed these out so that the national court would not be concerned with them. But the remaining 1,200 are still a disturbingly large number in which to have further delay, particularly since a good may of them will be criminal cases with the defendant still at large. Fewer cases would be delayed, of course, if the Supreme Court never exercised the option to allow the national court to consider whether to take the case but, as I will come to in a moment, this would create other problems.

I turn now from this matter of delay to the added burdens which in my view the proposal would place on the Supreme Court and some problems that are associated with them. The first is the added burden produced by the increase from two to four in the number of choices on how to deal with petitions for certiorari.

The Commission lightly refused to face up to the problem of how the Supreme Court would exercise the reference jurisdiction and did not even suggest how many votes should be required to refer whether for decision or for decision whether to decide.

In my view, and this, of course, was also Professor Rosenberg's testimony before the Commission, I don't know what he said here, until it knows how the referral jurisdiction would be exercised, I do not see how Congress has a proposal that it can responsibly consider. Now, this is in sharp contrast to the situation in 1925 when it enacted the Judges' bill which carried the unanimous endorsement of the Supreme Court and Congress had before it a definite statement from the court of what its practice with respect to certiorari would be.

In my view a closer look than that taken by the Commission would show that the reference choice or choices present difficulties comparable to those which similar scrutiny revealed in the transfer proposal which has now been jettisoned, very wisely in my view. The enormity of those difficulties is perhaps best illustrated by the comment of Mr. Justice White that he would prefer that the Supreme Court

not be required to select the new court's docket because of the burdens involved and that he would simply throw the 4,000 cases which the Supreme Court does not take over to the national court for it to decide whether to decide.

Well, of course that kind of sweeping everything over to the national court would save time of the Justices and avoid arguments among them but I think the costs would be wholly unacceptable and the delay of 4,000 cases a year that I previously mentioned, a complete duplication of the screening burden and, most important of all, preventing the Supreme Court from exercising the vital function of determining that a particular issue should not be decided at a particular time or on a particular record.

However, as I have already suggested, it may be that Justice White made the problem a bit harder than needed because I do recognize the validity of the Commission's remark that without very much difficulty the Supreme Court could screen out the clearly frivolous petitions and deny them directly. That would indeed mitigate the factors of delay and the duplication—mitigate but not avoid them, but it would not meet the consideration that any reference by wholesale rather than retail would prevent the Supreme Court from exercising the function of deciding that a case should not be decided at a particular time or on a particular record. Peformance of that function would require the court to examine each of the nonfivolous petitions that might otherwise be referred and to deny some of them outright.

That would make the group of cases that were not referred a very curiously mixed bag, most of them the frivolous petitions but with some of them cases of the very greatest moment which would have attracted considerable public attention. While you gentlemen and I would understand why the Supreme Court had done that, I think the public would understandably regard the exclusion of those cases as indicating a lack of faith by the Supreme Court in the wisdom of the national court.

Although the plain fact is the Supreme Court would exercise the referral jurisdiction, my guess therefore is that in order to maintain its control and to prevent decision of cases that the court thinks ought not to be decided at the present time, the Court would decide to refer on a retail rather than a wholesale basis and that, of course, leads right into the burdens that Mr. Justice White so rightly feared. There is an article in the UCLA Law Review which describes the pulling and hauling which retail reference jurisdiction would create. Professor Owens, the author, in what seems to me a good deal of understatement says that even if consideration of these questions did not lead to friction among the Justices and I believe it would lead to a great deal, it would nonetheless absorb some of their limited time.

Furthermore, the report claims that one of the benefits of the national court would be to stimulate the filing of more petitions for certiorari which would again add to the Supreme Court's burden.

So much for the burden incident to the referral jurisdiction itself, which I think are significant. However, what worries me a great deal more is what happens after the national court has decided.

The very cornerstone of the report is the voiced expectation of the Commission that few decisions of the national court in cases which came to it from the Supreme Court would in fact be reviewed there-

after by the Supreme Court. But the report gives no reason for that expectation. If it is based on the low rate of grants of certiorari to the courts of appeals, the analogy is false. Apart from the fact that the national court would not be making any decisions on the trivia that constitute a large portion of the courts of appeals decisions, it seemed to me that, as I said in my letter to the Commission, the problem of conscience that would be faced by a Justice when confronted with a petition to review a decision of the national court would be very different than now when he is asked to review a decision of a court of appeals or a State court. Since the Supreme Court is a tribunal for the making of law and not the correction of error, a Justice is not now obliged even to consider whether the decision below is correct and he can be pretty confident that if the law made in the particular case is really bad, some other court will disagree and the Supreme Court will have another crack at the matter. But surely he could not conscientiously take that position when asked to review a decision by the proposed national court which will be the law of the entire land if the Supreme Court refuses to intervene. Arriving at a tentative conclusion of the correctness of the national court decision will of course take time.

Moreover, if the Justice should conclude the decision to be incorrect, I do not see how in good conscience, except perhaps on some few cases that are really miniscule in importance, he could refuse to vote to review it thereby allowing bad law to be made on a nationwide basis with no possibility of subsequent disagreement except of course, as Mr. Sears pointed out, later disagreement by the Supreme Court itself. That compulsion I should think would be particularly great if the national court's decision were divided. However, that is only the beginning of the problem of Supreme Court review of decisions of the national court. Since the cases the Supreme Court would take would be primarily ones where it thought the national court had erred, the reversal rate would be extremely high, I would guess something of the order of 75 percent as compared with the reversal of 63 percent of the decisions of the courts of appeal.

However, that differential would not be alarming in and of itself but it vastly understates the case. A 63-percent reversal rate for the courts of appeals in effect means that little more than half of 1 percent of the decisions are reversed only since 1 percent are reviewed as we have so often heard. If half of the national court's decisions were taken on certiorari—and of course you can make up your own figure whether it is 50 percent, 60 percent, 40 percent—but taking the 50 percent, a 75-percent reversal rate for the national court would mean tha 37.5 percent of its decisions would be reversed.

Moreover, and I think this is a terribly important point, reversals of the national court would attract far greater public attention than the dispersed reversals of various courts of appeals. It is clear of course that any such frequent reversals would damage the prestige of the national court as they did that of the commerce court of ill-fated memory. But what appears even more serious is that if these reversals were in emotionally charged areas they would impair the prestige of the Supreme Court as well since many critics would think the national court was right and the Supreme Court was wrong.

To me the danger of a running battle between a conservative Supreme Court and a liberal national court or vice versa is sufficiently

frightening that the proposal should be rejected on this ground alone. The willingness of the American people readily to accept decisions of the Supreme Court even when rendered by a 5 to 4 vote and on issues with respect to which the text of the Constitution or even the history of the Constitution affords no real guidance is one of the most precious assets of this country and we must not place this at the slightest risk.

I noticed Judge Tyler seemed to be more concerned that the national court may be kind of a coequal spokesman of national law. I am less concerned about that although I think there is something to it and the two fears are not mutually exclusive.

Now, I would imagine that about this time you gentlemen would be thinking of asking me how do I reconcile all of these views with the statements of the Justices. Just to be sure that I deal with the problem I will do it right now. I have talked to some of the Justices, I would prefer not to mention names. I am confident that two of them are strongly opposed and I have good reason to believe that two others are opposed. I have not discussed the matter with the Chief Justice, but I rely on his letter which seems to me somewhat ambiguous. He suggested that other alternatives should first be exhausted and one of those was the abolition of the three-judge courts for which he fought so valiantly and, ultimately, successfully. That has now been accomplished but we have not seen its effect since it was passed only last summer.

I should like to observe also, without any suggestion of criticism, that the Justices who did approve did not hear the other side of the Commission's report which is a very persuasive document as one would expect from the quality of the Commission's membership and the ability of the executive director. It would seem to me that the time has come to recanvass the matter with the Justices, particularly in light of what I regard as the very great change effected by the elimination of the three-judge court.

I might say also that it does not seem to me that this is the kind of matter where a 5-to-4 vote of the Justice is very significant if that it what the vote should be. When the Judges' bill came before the Congress, it had the unanimous vote of the Court saying that nothing less than that would do. It does not seem to me that a 5-to-4, or even 6-to-3 vote is the kind of endorsement that one would need in order to proceed with confidence.

I am going to skip over the portions of my statement dealing with the effect of the proposal on State courts and courts of appeals, not because I think their consideration is unimportant but because I do agree with what someone said this morning that they are among the least important of the objections.

Now, let us look at the case for the proposed national court and this matter of inadequate appellate capacity. The conclusions rest in part on statistics and in part on illustration. I want to address myself straightaway to this phrase that has gotten so much currency, namely, that the Supreme Court now hears fewer than 1 percent of the cases decided by the Federal courts of appeals and that such courts can be neither right nor harmonious 99 percent of the time and that therefore 1 percent supervision is patently inadequate.

Well, I am a great admirer of the lady who authored those remarks, but the 1 percent figure is not the ratio of grants certiorari to applications for certiorari. It is the ratio of grants to decisions, from the great bulk of which there is no application for certiorari at all and should not have been. I don't quite understand why the courts of appeals need supervision with respect to the great bulk of their decisions where nobody wants to have review. The Commission does claim that more people would seek certiorari if more petitions could be granted and that just because the petition is not filed does not mean it would not be meritorious. My own experience is that except for a handful of Government cases where the Solicitor General exercised control the reverse is much closer to the truth.

Even the 6-percent supervision figure understates the degree of supervision exercised by the Supreme Court once account is taken of the large proportion of the petitions for certiorari that are filed solely for purposes of delay, notably in criminal cases where bail is usually continued pending the decision on the petition or to protect assigned counsel from a charge of failure to render effective assistance or just to salve wounded feelings or to stave off the payment of a judgment.

Then there is another statistic that is going the rounds. This I owe to another good friend and one of longer standing than Judge Hufstedler; namely, Dean Griswold. He points out that about 18 percent of paid cases were heard on the merits 20 years ago while about 6 percent of paid cases were heard on the merits during the 1973 term and he says those 12 percent were lost simply because of inadequate appellate capacity to hear cases on a national basis.

Now, even if those figures are correct, and some people have challenged them, the conclusion simply does not follow. The report itself suggests another explanation for the loss; namely,

> 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.

I would simply alter that to read "should not" instead of "need not."

You will find in my statement just a few illustrative gems that I had one of my clerks pick out from the 1955 term, where the Supreme Court had no business taking those cases. I think the Court is now doing a much better job in selecting what cases it should take.

There was some discussion this morning that the Court is becoming exclusively a constitutional court, or nearly exclusively, and there are figures that gave this some credence. Yet when you take a general look at what the Court has been doing in the last few years, there does not seem to be any real question about this. Take the field in which our circuit has had a particular concern which certainly is of concern to businessmen and business lawyers, securities litigation. Until about 10 years ago the Supreme Court had never taken a Securities Act fraud case. Within the last 4 or 5 years they have decided probably 10 cases of the greatest possible significance. I don't think you will find the securities bar complaining that the Supreme Court is not giving adequate attention to the securities field. Of course, some like the results and some don't, but some of the big questions that were knocking around have now been decided and I think this was also an instance where the Supreme Court was extremely wise to get some percolation of opinions from the courts of appeals before they decided whether the "in connection with" phrase of section 10 of the Securities Exchange

Act of 1934 meant what it seemed to say and what the test of culpability should be in damage actions under rule 106–5.

I think I will skip the portions of my statement where I deal with dissents from denials of certiorari and conflicts analysis and so forth and rest on what I have said there.

What I do want to say about conflicts is simply to advance a series of propositions about them.

No. 1, whatever the number of conflicts now existing, they represent something of a backlog. That would move down as the national court went to work.

The second point, no true resolution would be effected by the proposed national court since the Supreme Court not only may—and I believe often will—reverse the decision in the case at hand but also may rule otherwise in some subsequent case if a sufficiently persistent litigant is willing to prosecute it and succeeds in getting the Supreme Court's ear. Moreover, I think one may confidently predict that the ability and desire of courts of appeals to distinguish cases of the national court of appeals will greatly exceed their wish to make similar distinctions of decisions of the one Supreme Court.

Third, the nonconstitutional conflicts deal primarily with the construction of Federal statutes where certainly the best solution for the future lies not in guessing by any court, including the Supreme Court, but in clarification from the Congress. The proposals that are going to come before the next session of Congress for the intensification of Congressional oversight of regulatory agencies should enhance the probability of this. I think also some attention could well be given to the proposal of my colleague, Judge Feinberg, for the designation by the Judicial Conference of the United States of groups of law professors to bring conflicts speedily to Congress attention. I am not under any illusion that Congress is going to act in a split second fashion everytime one of these problems is brought to its attention but it does seem to me there is some hope for progress in that field.

My next point is that the largest single component in the list of conflicts consists of tax cases for which I think a court of tax appeals would furnish a far better solution. Many tax lawyers fear that the national court would not take on a sufficient number of tax cases to satisfy their desires for conflict resolution.

While I am not going to go into the matter of specialized courts at great length at least in my direct statement I can't resist making a comment about this phase, which I think is another bedeviling one, about tunnel vision. I can tell you gentlemen of the committee that in tax cases I am the one who has the tunnel vision. When I take a tax case, I take it without knowledge of the great body of tax law. I do the best I can with it with the sections of the Internal Revenue Code that happen to be involved and then I try to forget it as soon as possible. Contrast that with some of the great tax lawyers of the country, of some great tax law professors like Professor Bittker of Yale, Professor Wolfman, and Professor Succery and so forth who would come to such a case with a perspective of how the particular problem fit into the whole field of tax law. They are the ones who have the wide view. I don't see that it helps a bit that I have just decided a case of general average or unfair labor practice when I come to deal with a difficult tax case.

Another important category consists of patent cases. The Commission honored me with a quotation from what I said about forum shopping but to my mind that misses the point. The forum shopping is not primarily done because of differences among the circuits on principles of patent law. It is done because different circuits and even different panels within the same circuit take a different approach to such vague concepts as novelty, usefulness, nonobviousness, and what constitutes infringement. A few patent decisions on those subjects each year by the national court will no more bring about uniformity than did the Supreme Court's decisions in the trilogy of 1966.

The only way I see to achieve uniformity of that kind and also to avoid requiring general judges to decide increasingly complex technological issues which they simply do not understand is the centralization of all patent appeals, or in my view all patent litigation, in a single court. Of course, I have read what the Commission has said about specialized courts. I simply don't agree. However, the main point to consider, it seems to me, on the merits and demerits of the national court proposal is that the conflicting legal interpretations that now go unresolved for a while are just not important enough to outweigh the disadvantages of the proposed national court.

In my statement I cite the two first examples which our skilled draftsman of the report put as presumably his best cases. I won't take the time to read them but I just doubt that the ordinary American lawyer is lying awake at night brooding about the fact that those problems are unresolved and have been for a while; or would favor creating a new tier of courts to promote a speedier resolution of them.

Furthermore, there just are not enough of those fairly unimportant conflicts to keep the court busy. In my judgment, in addition to the conflicts cases, now that the transfer jurisdiction has been abandoned, the Supreme Court would have to find something like 100 other cases every year to refer to the national court and that is going to result in the greater likelihood of review and reversal of its decision with the consequences that I have previously discussed.

Of course, I am willing to admit and do admit that there would be some benefit in an expansion of the appellate capacity to decide questions of Federal law in a nationally binding fashion. But I assume we also would all agree that the best place, in fact the only place, to provide that capacity in a fully effective way, is in the one Supreme Court of article III, section 1. Here I come back to the point I have already made about the fine efforts of the Chief Justice now endorsed by the Congress to expand that capacity by the abolition of mandatory review of orders setting aside or refusing to set aside orders of the Interstate Commerce Commission, a very large curtailment in the Supreme Court's jurisdiction over Federal civil antitrust cases, both categories which are not large in number but heavy and difficult, and most important of all, last summer's legislation on abolishing the three judge court in most constitutional cases. I was not quite clear why someone referred to that as not a substantial achievement. It seems to me that it has been a very substantial achievement. The Chief Justice said in his 1972 message on the state of the judiciary that appeals of the three judge district courts now account for one in five cases heard by the Supreme Court and I have seen more recent figures indicating that that estimate is considerably on the low side. Of course,

that can easily be checked with the Supreme Court. It would be imprudent in my view to create a new national court to augment final appellate capacity before we have had a chance to see how these three important pieces of legislation have accompanied that very objective.

To summarize, the national court proposal would do almost nothing to ease the pressures on the district courts and the courts of appeal. In my view it would increase rather than diminish the burden on the Supreme Court and put its prestige seriously at risk. It would cause added delay and expense to litigants in an amount and to a degree that cannot be quantified until we know how references by the Supreme Court will be handled. And it would do all that in order to provide a court to decide some rather esoteric issues which rarely enter into the life of the ordinary citizen and which the Supreme Court will handle when and if their importance is sufficiently demonstrated, and would do this precisely at a time when the Congress has taken important steps to relieve the Supreme Court and thereby supply what added capacity seems to be needed in the place where all of us would most like to have it.

Congress can always create a national court of appeals if this should seem wise. There would be much trauma in abolishing one. In my view, the case for taking this drastic step has not been made and with all respect to the work of the Commission which has rendered an invaluable service whether this proposal is enacted or not.

Thank you.

[The formal statement of Judge Friendly follows:]

TESTIMONY OF JUDGE HENRY J. FRIENDLY

My name is Henry J. Friendly. I was appointed as a judge of the United States Court of Appeals for the Second Circuit in 1959 and served as Chief Judge from May, 1971 to May, 1973. On April 15, 1974 I took senior status when I was designated as Presiding Judge of the Special Court under the Regional Rail Reorganization Act of 1973. While I have continued to sit on the Second Circuit insofar as my duties on the Special Court permit, my status as only a part time court of appeals judge may relieve me from the insinuations, made by some proponents of the National Court of Appeals, that the high degree of opposition the proposal has encountered from judges of the courts of appeals is founded on personal considerations which should have no place in a debate of this sort. I shall address my remarks to the revised bill, S. 3423, rather than to its predecessor, S. 2762. May I say also that, in view of my esteem for and friendship with many members and the executive director of the Commission on Revision of the Federal Court Appellate System, the role of opposition is not a pleasant one. However, as a federal judge and a life-long student of the federal judicial system, I conceive it to be my duty to speak out against the National Court proposal and, as is my custom, I will speak plainly.

The first point to be made is that, almost by concession, the National Court proposal does practically nothing to alleviate the problems of the federal courts which were doubtless the principal reason for the Commission's creation. Those problems are the exploding caseload at all three levels of the federal judicial system. Filings in the district courts have grown from 89,112 in 1960 to 160,602 in 1975, an increase of about 80%. The increase for the courts of appeals was much more dramatic, from 3,899 in 1960 to 16,658 in 1975—an increase of over 300%. Dispositions by the Supreme Court rose from 1,787 in the 1959 Term to 3,847 in the 1976 Term, an increase of somewhat more than 100%. Whatever one may think of the feasibility of handling the increases at the district court level by the appointment of more judges—and I do not regard it very highly, this solution is not workable for the courts of appeals as the Commission recognized in its earlier proposal to split the Fifth and Ninth Circuits and no one seriously recommends this for the Supreme Court.

The National Court proposal makes no pretense of having a favorable impact on the problem of the district courts, except perhaps that the prospect of earlier resolution of a few instances of actual or potential conflicts might have a minimal tendency to reduce the flood of cases. With the proposed transfer jurisdiction now abandoned, it similarly does nothing to lessen the burdens of the courts of appeals, except again for the minimal aid furnished by earlier resolution of actual or potential conflicts. With respect to the Supreme Court, the report states candidly (p. 9) :

"It should be emphasized that the primary focus of our inquiry has not been the burden on the Supreme Court."

In fact, as will be shown, the net effect of the proposal will be to increase the Supreme Court's burdens, in spite of the Commission's recognition that this is something it ought not to recommend (p. 9).

This failure to address the major problems facing the federal judicial system, part of which (the intake of the district courts) was not within the Commission's jurisdiction, is itself a serious mark against the proposal. Despite the proponents' candid disavowals, Congress could be pardoned for thinking that by enacting this important piece of legislation it would be providing the federal courts with what they need. Beyond that, as a pratical matter, Congress cannot be realistically expected to give major attention to the judiciary at frequent intervals.

Instead of tackling these real problems, the Commission's proposal is addressed to something that had escaped serious notice until a few specialists convinced themselves they had detected it a few years ago—an alleged inadequate appellate capacity in the federal system to decide cases on a basis that will have nationwide effect. Someone has called this a "non-problem." I will consider later how much of a problem it is and how much the National Court would help to solve it; for the moment let me call it a "mini-problem." In an effort to solve this mini-problem, the Report proposes something that has always and rightly been regarded as anathema—the creation of a fourth tier in the federal judicial system which would also result in a two-tiered federal review of cases that may already have passed through three tiers of state courts. This alone is enough to show that the National Court proposal is no piece of cosmetic surgery which merits adoption because it is preferable to worse proposals that preceded it, may do some good and can do no harm, as some of its proponents have tried to depict it. It is the most important piece of proposed judiciary legislation since the Courts of Appeals Act of 1891 and thus deserves calm consideration and thorough debate and carries a heavy burden of persuasion. In my view its potentialities for harm vastly outweigh what little good it would accomplish.

It is pertinent to begin further analysis by observing that the proponents have already abandoned one of the Commission's two proposals for jurisdiction of the National Court. This was a procedure whereby a court of appeals, faced with a case where there was already a conflict or where it though it might be creating one or where it considered early decision on a national basis to be desirable for other reasons, could transfer a case to the National Court in advance of hearing or decision. That proposal was not open to the added tier objection and was the only part of the Commission's recommendations that afforded some relief to the courts of appeals. Presumably the Commission had given thorough consideration to this proposal before advancing it. Yet it was speedily abandoned—wisely in my view—because when the bright lights were turned on, it was found to be unworkable. The proposal is thus left standing on only one of its two legs. Moreover, the rapid demonstration of the unfeasibility of one of the two heads of jurisdiction proposed for the National Court suggests some caution with respect to the other.

Since 1891 we have had a three-tiered federal court system; since 1789 we have had a system in which, with the exception of the relatively recent expansion of federal habeas corpus jurisdiction, only one federal court, the Supreme Court, can review the decision of a state court. Under the National Court proposal the procedure after decision by a federal court of appeals or by the highest court of a state could include (1) a petition to the Supreme Court for certiorari, with a response by the opposing party; (2) consideration by the Supreme Court whether (a) to grant the petition, (b) to deny the petition, (c) to refer the petition to the National Court for grant or denial, or (d) to instruct the National Court to decide the case; (3) if the Supreme Court chose the course designated as (c), consideration by the National Court what to do; (4) if certiorari were granted by the National Court or if the Supreme Court instructed the National Court to

decide the case, briefing, argument and decision there; (5) a petition for certiorari to the Supreme Court by the losing party in the National Court with a response by the opposing party; (6) a second consideration by the Supreme Court whether to grant certiorari; and (7) if certiorari were granted, briefing, argument and decision by the Supreme Court. If the Supreme Court instructs the National Court to decide a case rather than to decide whether to decide it, the only saving would be the omission of stage (3). At present the vast bulk of petitions are ended by a denial of certiorari at stage (2); in the few where certiorari is granted, only one more stage is needed. Obviously this change would produce substantial delay in the final disposition of cases.

In how many cases would there be added delay? No one can tell until we know what reference procedures the Supreme Court would adopt. There would be nearly 4,000 a year if the Court were to adopt one proposal—to refer all cases which it did not want to take for decision and allow the National Court to consider whether to take them. Probably that figure is unrealistically high. Since, as Mr. Justice Brennan has informed us, 70% of the petitions for certiorari are so plainly unworthy of further consideration that they are not even discussed by the Supreme Court, it would seem likely that, in a rather curious reversal of roles, the Supreme Court could weed these out so that the National Court would not be concerned with them. The remaining 1,200 are still a disturbingly large number in which to have further delay—particularly since many will be criminal cases with the defendants at large. Fewer cases would be delayed if the Supreme Court never exercised the option to allow the National Court to consider whether to take the case, but this would create other problems, as we shall see. I see no escape from the proposition that the more the Supreme Court should exercise the option to allow the National Court to decide whether to decide—what I call wholesale referral—the greater will be the number of cases in which there will be serious delay, and that the more it declines to exercise that option and engages in retail referral, the greater will be the problems for the Supreme Court. In short, while one cannot calculate the delay factor with precision, it is a substantial argument against the proposed National Court. More delay, especially in criminal cases, is what the judicial system needs least.

I turn now from delay to the added burdens the proposal would place on the Supreme Court and problems associated with them. The first is that produced by the increase from two to four in the number of choices on how to deal with petitions for certiorari. The Commission refused to face up to the problem of how the Supreme Court would exercise the reference jurisdiction. It stated, politely but unhelpfully, that it "would not presume to instruct the Supreme Court on the procedures and standards that should govern the exercise of the reference jurisdiction" (p. 33). Instead it envisioned "a process of rulemaking"—the usual formula when one does not really know what to do. It did not even suggest how many votes should be required to refer, whether for decision or for decision whether to decide, although Professor Rosenberg of the Columbia Law School, an advocate of the proposal and of rulemaking, correctly stated in the hearings that "Rules about the numbers needed to take action conceivably can become highly charged questions" and that answers to the question of the method of referral "must be made in advance of the certain and start-up of the proposed National Court." (Hearings, Vol. II, pp. 1087–88). Until it knows more about how the referral jurisdiction would be exercised, Congress does not in fact have a proposal it can responsibly consider. In 1925, when Congress enacted the Judges' Bill, which carried the unanimous endorsement of the Supreme Court, it had before it a definite statement from the Court of what its practice with respect to certiorari would be. Testimony of Mr. Justice Van Devanter in Hearings before Senate Committee on the Judiciary on S. 2060 and 2061, 68th Cong., 1st Sess. p. 29 (1924). Here Congress knows simply nothing about how the Supreme Court's referral jurisdiction would be exercised. While the Commission's reluctance to instruct the Supreme Court how to exercise a jurisdiction which several Justices do not want is understandable, Congress should not even consider conferring such jurisdiction unless and until the Court explains, if it will, how this would be exercised if Congress were to grant it.

A closer look than that taken by the Commission would show that the reference choice or choices present difficulties comparable to those which similar scrutiny revealed in the now jettisoned transfer proposal. The enormity of these difficulties is illustrated by Mr. Justice White's comment (p. 181):

"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."

While this sweeping of everything to the National Court would indeed save the time of the Justices and avoid arguments among them, it would do so at a wholly unacceptable cost—the delays of 4,000 cases a year previously mentioned, complete duplication of the screening burden, and, most important of all, preventing the Supreme Court from exercising its vital function of determining that a particular issue should not be decided at a particular time or on a particular record. As the Commission correctly said (p. 33), the Court must be "free not to refer any case in which the Court determined that a nationally-binding decision should not be made at this time."

Perhaps, as I have already suggested, Mr. Justice White made the problem a bit harder than need be. Without too much difficulty the Supreme Court could probably screen out the clearly frivolous petitions and deny them directly. This would mitigate although not avoid the factors of delay and duplication. But it would not meet the consideration that any reference by wholesale rather than retail would prevent the Supreme Court from exercising its important function of determining that an issue should not be decided at a particular time or on a particular record. Performance of this function will require the Supreme Court to examine each of the non-frivolous petitions that might otherwise be referred in bulk and to deny some of them outright. And this would mean that the cases to be withheld from the National Court's power to decide whether to decide would be a strangely mixed bag—a large number of cases so trivial that certiorari should never have been sought and other cases of high importance some of which would have attracted wide public attention. The visibility of these cases and of the Supreme Court's determination that they should not be decided would be far greater if they were excluded from a group of a thousand or more cases referred for the National Court to decide whether to decide than now, when they are simply a part of the long list of denials. The public would understandably regard such exclusion as manifesting a lack of faith in the National Court.

Perhaps sensing the objection to this kind of wholesale referral, the Commission advances as an alternative (p. 33) that the Court "could refer all cases in particular categories in which certiorari had been denied." Here again, in order to avoid delay and waste of the National Court's time, the Supreme Court would have to screen out clearly unmeritorious cases. Moreover, how can one say that there never can be a bankruptcy case or a private antitrust case or an environmental case that merits review by the Supreme Court without being first sieved through the proposed National Court or that should not be decided at the particular time? And what of the many cases not fitting within the categories? I am thinking especially of state and federal criminal cases—unless these were to be a category for wholesale referral, which I would think most unwise.

Although the plain fact is that no one now has any notion how the Supreme Court would exercise the referral jurisdiction, my guess is that for the reasons I have outlined and generally in order to maintain its control, the Court would decide to refer on a retail rather than a wholesale basis. In other words, the reality would be just the opposite of Mr. Justice White's suggestion, with the attendant burdens he so rightly feared. Professor Owens of the University of California Law School has well described the pulling and hauling which the reference jurisdiction would create (see 23 UCLA Law Rev. 580, 604). Since the National Court undoubtedly would develop a judicial philosophy of its own, "some efforts to refer would be designed to obtain a result in the National Court unlikely in the Supreme Court; and some efforts would be made to grant Supreme Court review . . . solely to avoid a decision by the National Court." This again acutely raises the unanswered question of the number of votes required for a referral. Professor Owens adds that "even if consideration of these questions did not lead to friction among the Justices," which it surely would, "it would nonetheless absorb some of their limited time." The short of the matter is that whatever procedure is evolved, the increase in the Court's options will increase its work and heighten tensions among the Justices; Professor Rosenberg correctly characterized these added burdens as "consequential, if not crushingly onerous." (Hearings, Vol. II, p. 1088). Furthermore the Report claims one benefit of the National Court to be that it will stimulate the filing of more petitions for certiorari because of the better prospects of grant (p. 7); this would further increase the burden on the Supreme Court. Even without considering the still more important type of increase in burden, namely, the cases the Supreme Court

would have to consider after decision by the National Court, to which I will come in a moment, the increase in the Court's work incident to performing its job of referring cases far outweighs the decrease from the ability to shunt a few not terribly significant intercircuit conflicts for initial decision by the National Court.

A much greater increase in the burden on the Supreme Court, and adverse side effects of the highest moment, would come from its duty to entertain petitions to review decisions of the proposed National Court. The Report minimizes this, erroneously in my view, and I fear that this error may have escaped those Justices who have endorsed the proposal.

The very cornerstone of the Report is the expectation of the Commission "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." (p. 39). The Report gives no reason for this expectation. If it is based on the low rate of grants of certiorari to the courts of appeals, the analogy is a false one. Apart from the fact that the National Court would not be making any decisions on the trivia that constitute a large portion of the decisions of the courts of appeals, the problem of conscience that would be faced by a Justice when confronted with a petition to review a decision of the National Court would be very different than when, as now, he is asked to review a decision of a court of appeals or a state court. Since the Supreme Court is a tribunal for the making of law and not the correction of error, he is not now obliged even to consider whether the decision below is correct, and he can be confident that if the law made in the particular case is really bad, some other court will disagree and the Supreme Court will have another chance to correct matters. But surely he could not take that position when asked to review a decision by the proposed National Court which will be the law of the entire land if the Supreme Court refuses to intervene—unless it be said that, by voting to refer the case he had irrevocably endowed the National Court with the power to make bad law, a view which, I should suppose, would—or in any event should—seriously inhibit referrals.

Arriving at a tentative conclusions of the correctness of a National Court decision will, of course, take time. Moreover, if a Justice concludes the decision is incorrect. I do not see how, in good conscience, he could refuse to vote to review it—thereby bad law to be made on a nationwide basis with no possibility of subsequent disagreement by a lower court. The compulsion for Supreme Court review would be particularly strong if the National Court's decision were by a closely divided vote. Moreover, it seems certain, for reasons I shall develop later, that the Supreme Court, in order to keep the National Court reasonably occupied, will feel bound, particularly now that the National Court has been shorn of transfer jurisdiction, to refer cases raising truly significant issues, including constitutional ones. Solicitor General Bork was thus correct when he told the Ninth Circuit Conference last July that the Supreme Court would "not infrequently have to take back cases to review decisions, or even dicta, that it regards as incorrect." When the Supreme Court should come to realize how many National Court decisions it must review, there would be only two means of exit—both of them bad. One would be that, by adding review of National Court decisions to its present plenary docket, the Court would hear more cases than it now does. The other would be that, in anticipation of the cases that will require hearing on rebound from the proposed National Court, the Supreme Court will take on fewer than it now does—thereby making the supposed increase in appellate capacity from creation of the National Court illusory to that extent.

However, this is only the beginning of the problem of Supreme Court review of decisions of the proposed National Court. Since the cases the Supreme Court would thus take would be primarily ones where the Supreme Court thought the National Court had erred, the reversal rate would be extremely high. A study of four Supreme Court terms showed that 68 percent of the lower court cases where certiorari was granted were reversed, 83 percent of the state court cases and 63 percent of the federal court cases. Stern & Gressman, Supreme Court Practice § 4.18 n. 43 (4th ed. 1969). Since the latter included cases where the ground for granting certiorari was simply the existence of a conflict, I should except the reversal rate in cases taken from the proposed National Court to be substantially greater—of the order of 75 percent of the cases taken. However, this vastly understates the case. Whereas a 63 percent reversal rate for the courts of appeals means that little more than half of one percent of their decisions are reversed since only 1 percent are reviewed, a 75 percent reversal rate for the National Court would mean, if half of its decisions were reviewed, that 37.5 percent of its decisions would be reversed. Moreover, reversals of the National

Court would attract far greater attention than the dispersed reversals of various courts of appeals.

Such frequent reversals would damage the prestige of the National Court, as they did that of the Commerce Court in 1910–13 to the point where that court had to be abolished. What is still more serious is that if these reversals were in emotionally charged areas (e.g., criminal procedure, civil rights, environmental law), they would impair the prestige of the Supreme Court as well; many critics would think the National Court was right and the Supreme Court wrong. The danger of a running battle between a "conservative" Supreme Court and a "liberal" National Court, or *vice versa*, is sufficiently frightening that the proposal should be rejected on this ground alone. The willingness of the American people to accept decisions of the Supreme Court, even when rendered by a five-four vote and on issues with respect to which the text of the Constitution affords no real guidance, is one of the most precious assets of the Republic. We must not place this at the slightest risk.

Before I proceed to consider the case for the proposed National Court, let me say a word concerning its adverse effect on the prestige and institutional strength of the courts of appeals and on relations with the state courts.

As to the latter, it suffices for me to state that all the talk of intercircuit conflicts should not lead Congress to overlook that the proposal clearly anticipates that the National Court, like the Supreme Court, will have the power to review, and if need be to reverse, decisions of the highest court of a state insofar as a question of federal law is concerned, a large category of cases these days. This is a proposal which Mr. Justice Roberts of the Supreme Court of Pennsylvania characterized as one which "will be greeted with less than enthusiasm by state judges" and "should be pursued only after the strongest justifications and only after we are certain that it will further the proper relationship between state and federal courts." (1 Hearings at 1125). I assume that state court judges will present further views on this subject.

It must also be obvious that creation of the National Court would significantly erode the prestige of the courts of appeals and the consequent attractiveness of membership on them. While I do not give this a high place on the list of objections, it deserves consideration at a time when necessary increases in judgeships on these courts and inadequate federal judicial salaries have already impaired the desirability of membership on the courts of appeals to a considerable degree. It might be said in attempted answer that creation of the National Court ought not to have such a downgrading effect since the plan would simply raise the percentage of cases review from the present 6 percent say to 12 percent and that this would still be less than the percentage reviewed by the Supreme Court twenty years ago. But such figures ignore the vastly increased proportion of court of appeals cases that decide themselves. If we assume that only a third of the cases in which certiorari is sought are of real legal interest, the figures would be more like 18 percent now and 36 percent if the National Court were established. Beyond that, the psychology of judges is not measurable by statistics. Review by the Supreme Court is one thing; review by the National Court would be another. Petty though it may be, a judge of a court of appeals does take satisfaction in the fact that he is, and is publicly known to be, subject to correction only by the "one supreme Court" we all revere. Of course, a diminution in prestige of the courts of appeals would simply have to be borne if the National Court were really needed. But this is one more advantage that must be weighed, since these courts will continue to be the work-horses of the federal appellate process.

Now let us look at the case for the proposed National Court, namely, that there is an inadequate capacity in the federal system to decide cases on a basis that will have nationwide effect and that the National Court will provide this.

The Commission's conclusion of inadequate capacity rests in part on statistics and in part on illustrations. One statistic that has played a mischievous role is the statement, quoted on p. 12 of the Report, that the Supreme Court "now hears fewer than 1 percent of the cases decided by the federal courts of appeals" that such courts "can be neither right nor harmonious 99 percent of the time," and therefore that "[o]ne percent supervision is patently inadequate." The trouble with this seemingly impressive argument is that the oft repeated 1 percent figure is totally misleading in this context. It is the ratio of grants of certiorari to all cases *decided* by the courts of appeals, not the ratio of grants to applications. For the year ended June 30, 1975 the ratio was 5.9 percent. This is fairly typical; over the past five years the range has been from a low of 5.6 percent to a high of 6.4 percent. I do not understand why the courts of appeals need supervision

with respect to the roughly three-fourths of their decisions as to which no one seeks it. The Commission claims (p. 7) that more would seek certiorari if more petitions could be granted, and that just because a petition is not filed does not mean it would not be meritorious. Except for a handful of Government cases, the reverse is much closer to the truth. While six percent supervision is already quite a different thing from one percent, the six percent figure itself understates the extent of the Supreme Court's supervision once account is taken of the large proportion of petitions for certiorari that are filed solely for purposes of delay (notably in criminal cases where bail is usually continued), or to protect assigned counsel from a charge of failure to render effective assistance, or just to salve wounded feelings.

Faced with this, although never quite recognizing it, the proponents fall back on another statistic, namely, that the ratio of grants to applications for certiorari has declined. Pointing out that "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," former Solicitor General Griswold asks what became of the other twelve percent and concludes "they were lost in the 1973 Term simply because of inadequate appellate capacity to hear cases on a national basis." (Report p. 6). Even if we take these figures as correct, which may be open to some question, the conclusion does not follow. The Report itself (p. 8) suggests another explanation for the loss, namely, "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." I would substitute "should not" for "need not." I have had a law clerk pluck some such instances from the 1955 Term. A few gems are *Petrowski* v. *Hawkeye-Security Ins. Co.*, 350 U.S. 495 (1956), a diversity case where the Court was concerned with whether a stipulation amounted to a waiver of a previously pleaded claim of lack of personal jurisdiction; *General Box Co.* v. *United States*, 351 U.S. 159 (1956), a condemnation case which turned on an esoteric point of Louisiana law and the debate was whether greater deference should be paid to the local-law knowledge of the district judge or of the court of appeals; and *Cahill* v. *New York, N.H. & H. R.R.*, 351 U.S. 183 (1956), requiring three decisions by the Court, which involved, in addition to the omnipresent question of sufficiency of the evidence of negligence in a Federal Employers' Liability Act case, the issue whether evidence of previous accidents at the particular crossing was wrongly admitted. FELA and Jones Act cases involving sufficiency of the evidence are an important chunk of Dean Griswold's "lost" cases; if the Court ever should have entertained such cases, it no longer has to since the lower courts have gotten the message. In short, the proferred statistics as to the decline in the certiorari grant ratio furnish no more support for the claim of inadequate appellate capacity than does the much-cited 1 percent figure. They may show that the Court is now acting differently than 20 years ago, but not that its performance is inadequate.

I turn now to the claims that inadequate appellate capacity is shown by the increase in dissents from denial of certiorari, the existence of unresolved inter-circuit conflicts, and the identification of some issues which the Commission believes should have been sooner resolved by the Supreme Court.

The first of these need not detain us long. Obviously there has been a change in the attitude of the Justices with respect to the desirability of recording their dissents from the denial of certiorari. Moreover, as Professor Owens has pointed out in the article already cited, the increase from the 1969 Term to the 1973 Term is fully accounted for by the increased output of dissents from Justice Douglas and, in a lesser degree, Justices Brennan and Marshall—all opponents of the National Court proposal, and "are a way of expressing displeasure with the inclinations of the current Court." A large number of the dissents are in two areas—obscenity and double jeopardy—where some or all of these Justices, joined in the obscenity field by Justice Stewart, simply are in disagreement with the existing majority and, presumably to protect the record for the future, feel constrained to keeep recording their disagreement by dissenting from denials of certiorari. Some of the dissents relate to issues plainly not suitable for adjudication by the proposed National Court, e.g., *Sarnoff* v. *Shultz*, 409 U.S. 929 (1972) (Report, p. 127), involving the question of the constitutionality of the use of funds to pursue the Vietnam War, and *Albers* v. *C.I.R.*, 414 U.S. 982 (1973), raising the question whether a 1970 decision of the Supreme Court should be overruled.

With respect to the very first case cited in this section of the Report (p. 19), *Bailey* v. *Weinberger*, 419 U.S. 953 (1974), concerning the reviewability of HEW

refusals to reopen decisions concerning Social Security benefits, the Court, on June 1, 1976, granted certiorari to resolve this question, *Matthews* v. *Sanders*, 44 L.W. 3685. Doubtless it would have been better to have done this on October 21, 1974, but I cannot feel that the delay seriously imperiled the functioning of our legal system.

The conflicts analysis is not very impressive on its face. The Commission finds (p. 18) "that the number of 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." To this the Commission would add some 22 to 24 "strong partial conflicts," whatever that may mean (see p. 97). Of course, these figures do not take account of cases, like the one just cited, where the Court has since taken steps to resolve the conflict.

In a recent article entitled Reservations on the Proposal of the Hruska Commission to Establish a National Court of Appeals, 7 Toledo L. Rev. 431 (1976), Mr. William Alsup has raised questions about certain instances cited by the Commission. Among other things he takes (at pp. 438–41) what seemed to be perhaps the most impressive case (p. 24)—the delay allegedly of "more than 25 years of appellate litigation," in settling the priority to be given to withholding taxes on prebankruptcy wage claims against a bankrupt employer—and shows that the Supreme Court resolved the conflict in the very first instance where it had an opportunity. Leaving such details for examination by your staff, I submit the following comments:

(1) Whatever the number of conflicts now existing, they represent something of a backlog; the number arising anew each year should be smaller.

(2) No true resolution would be effected by the proposed National Court since the Supreme Court not only may—and I believe often will—reverse the determination in the case at hand but may rule otherwise in some subsequent case if a sufficiently persistent litigant is willing to prosecute it and succeeds in getting the Supreme Court's ear. Moreover, one may confidently predict that the ability—and desire—of courts of appeals to "distinguish" decision of the National Court of Appeals will greatly exceed their wish to make similar distinctions of decisions of the "one Supreme Court."

(3) The non-constitutional conflicts deal primarily with construction of federal statutes, where the best solution for the future lies not in guessing by any court but in clarification from the Congress. Proposals that will come before the next session of Congress for the intensification of Congressional oversight of regulatory agencies should enhance the probability of this. Attention should also be given to the proposal of my colleague, Judge Feinberg of the Second Circuit, for the designation by the Judicial Conference of the United States of groups of law professors to bring conflicts to the Congress' attention, 42 Brooklyn L. Rev. at 627 (1976).

(4) The largest single component in the list of conflicts consists of tax cases, for which a Court of Tax Appeals would furnish a far better solution. Many tax lawyers fear that the National Court would not take on a sufficient number of tax cases.

(5) Another important category consists of patent cases. The Commission has done me the honor of quotation to support its statement that "he perceived disparity in results in different circuits leads to widespread forum shopping." (p. 15). What it does not say is that almost all such disparities do not result from conflicts about the proper rule of law but come rather from applying such necesarily vague concepts as "novelty," "usefulness' and particularly "non-obviousness," and determining whether there has been infringement, in a myriad of different factual situations. A few patent decisions on such subjects each year by the National Court would no more achieve uniformity in the disposition of such cases by the courts of appeals than did the Supreme Court's decisions in the trilogy of 1966, 383 U.S. 1, 39. Despite a general consensus that these opinions, by Mr. Justice Clark, admirably stated the law, there was as much difference among the circuits after, as before. The only way to achieve uniformity in approach and also to avoid requiring generalist judges to decide increasingly complex technological issues which they do not understand, is the centralization of all patent appeals—or, in my view, all patent litigation—in a single court.

However, the main point to consider in weighing the merits and demerits of the National Court proposal is that these conflicting legal interpretations that now go unresolved for a while are just not important enough to outweigh the disadvantages of the proposed National Court. Rather than choose my own examples, let me place before you the two illustrations first put by the skilled an-

thors of the Report (pp. 22–23). These are "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" and "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). . . ." I somehow doubt that the ordinary American, even the ordinary American lawyer, is lying awake at night brooding about such problems or would favor creating a new tier of courts to promote speedier resolution of them. Furthermore there are simply not enough of these conflicts or lack of resolution of similar issues of less than nation-shaking importance to keep the proposed National Court busy.

Taking the Commission's figures of thirty-odd true conflicts and twenty-odd strong partial conflicts per term, we would reach a total of only some fifty-five cases a year. When we take into account that the number of such cases would decrease as the backlog was worked off, that the proposed National Court would not, or in any event should not, have anything like the screening burden now shouldered by the Supreme Court, that the general level of difficulty of its cases should be significantly less, and that the National Court now will not have the transfer jurisdiction envisioned by the Commission, the Supreme Court would be obliged to find a minimum of 150 cases a year in order to justify the creation of a new layer of seven judges with the attendant ancillary expenses. This would mean that, over and above the actual conflicts and strong partial conflicts, the Supreme Court would have to feed the proposed National Court 100 other cases a year. I see no escape from Mr. Alsup's analysis (7 Toledo L. Rev. at 447–48) that the more important are the cases referred by the Supreme Court, the greater will be the frequency of Supreme Court review and the likelihood of reversal of decisions of the National Court, with the baneful consequences to both that have been previously depicted.

Despite the fallacies in some of the Commission's statistics and the unimpressiveness of the illustrations, I am willing to admit there would be some benefit in an expansion of appellate capacity to decide questions of federal law in a nationally binding fashion. Presumably the Commission would agree that the best place to provide that capacity is in the only place where it would be really effective—the "one supreme Court" of Article III, § 1. An easy method to enlarge that capacity, repeatedly urged by the Chief Justice, was for Congress to complete the job begun by the Judges' Bill of 1925 and eliminate all mandatory appellate jurisdiction of the Supreme Court. While Congress has now gone most of the way in this direction, the most important step was not taken until after the Commission had reported and the effects of Congress' actions have not yet been felt. Congress had abolished three-judge review of orders of the Interstate Commerce Commission which entailed mandatory Supreme Court jurisdiction on appeal, and has restricted direct appeals to the Supreme Court in Government civil antitrust cases. Far more important was the enactment of PL 94–381 on August 12, 1976, which largely repealed the three-judge requirement in constitutional cases. The Chief Justice stated in his 1972 message on the State of the Federal Judiciary, 58 A.B.A. J. 1049, 1053, that "appeals from three judge district courts now account for one in five cases heard by the Supreme Court." I have seen some figures indicating that this estimate is on the low side. Of course, a number of these cases—review of I.C.C. orders, Government civil antitrust cases and attacks on statutes on constitutional grounds—will come before the Court after decision in the courts of appeals and some of them will be heard. But even as to those cases that bear a "constitutional" label, it simply is not true that anything like all of them will ultimately reach the Court for plenary hearing any more than do all cases involving the constitutionality of ordinances or acts of state officers, which have never been subject to the three-judge requirement. It would be imprudent in the last degree to create a new National Court to augment final appellate capacity before we know the effect of these salutary steps Congress has already taken to relieve the Supreme Court. These promise to afford just about the amount of added capacity the Commission finds to be really needed, and afford it in the Supreme Court itself.

If further increases in the Supreme Court's appellate capacity are desired, two other reforms are easily available. One is for Congress to finish the job of abolishing jurisdiction by repealing 28 U.S.C. §§ 1257(2) and 1254(2). Another, which the Justices can take at any time if they wish it, would be to refer petitions for certiorari to shifting three member panels, with one vote sufficient to bring the

petition before the full Court and, should the Court so wish, a unanimous vote sufficient to grant. This could save perhaps 50% of the time now devoted to certioraris, as well as reduce the psychological burden which the mere sight of those petitions must cause.

In summary, the National Court proposal would do almost nothing to ease the pressures on the district courts and the courts of appeals. It would increase rather than diminish the burden on the Supreme Court and seriously risk its prestige. It would cause added delay and expense to litigants in an amount and to a degree that cannot be quantified until we know how references by the Supreme Court would be handled. It would do all this in order to provide a court to decide some rather esoteric issues which rarely enter into the life of the ordinary citizen and which the Supreme Court will handle when and if their importance is sufficiently demonstrated. And it would do this precisely at a time when the Congress has taken important steps to relieve the Supreme Court and thereby supply what added capacity is needed, in the place where all would like to have it.

I thus submit that this proposal should be tabled and that Congress should abolish the few remaining instances of mandatory Supreme Court review. At the same time the proposals for a Court of Tax Appeals and for a Patent Court or at least a Court of Patent Appeals, which will supply a high degree of finality in these areas and will bring substantial relief to the overwhelmed courts of appeals, should be given the consideration they will receive once the National Court proposal is put behind us, and methods for reducing intake at the district court level should also be explored.

Congress can always create a National Court of Appeals if this should seem wise; there would be much trauma in abolishing it. The case for taking this drastic step has simply not been made.

Senator HRUSKA. Thank you, Judge Friendly, for your very thorough and very relevant statement.

Mr. Westphal, have you questions of Judge Friendly?

Mr. WESTPHAL. Just a few, Mr. Chairman. Judge Friendly, in your recent book on Federal jurisdiction you advocate a curtailment of the input in the Federal court system by a variety of ways, some of which you have tangentially mentioned in your presentation here. Many of your proposals undoubtedly have merit and many of them, even though they have merit, may be difficult to accomplish because of political considerations. On one of your proposals, which is the abolition of diversity jurisdiction, I am reminded of some testimony that Chief Judge Brown of the fifth circuit gave before us, in one of our many hearings over the last several years, to the effect that the complete abolition of diversity jurisdiction insofar as the caseload of the fifth circuit was concerned would at maximum affect about 10 percent of the caseload of the fifth circuit.

Judge FRIENDLY. I don't know where Judge Brown gets his figures. The figures in the 1975 report of the administrative office—unhappily the 1976 report arrived just the other day and I have not had a chance to check it—showed that for the Federal system as a whole it was in the neighborhood of 25 percent of all civil cases, including as civil cases habeas corpus, Section 2255 and prisoner civil right actions and that if you took those out of the civil caseload since they are civil more in name than in substance, the percentage would be up something like 35. Now, whether there is something peculiar about the Fifth Circuit that makes its percentage so low, I don't know.

Mr. WESTPHAL. I think Judge Brown's percentages deal more in terms of the caseload at the court of appeals level rather than the caseload at the trial court level.

Judge FRIENDLY. Well, it is lower in the appeals court. It is nothing as low as 10 percent on a nationwide basis. I had those figures in a lecture that I gave at New York University Law School and my recol-

lection is—don't hold me to this—that for the courts of appeals it was something like 18 percent rather than 25 percent in the district courts.

Mr. Westphal. There are other areas where there is merit to the proposal from a philosophic standpoint. For example, the suggestion that the Federal court should not have to be the forum in which essentially workmen's compensation type cases of railroad workers, seamen, longshoremen and so forth must be decided. I suppose changes in that area have certain political problems as to whether those cases will or will not be removed from a tort aspect and transferred over to a workmen's compensation aspect. Even assuming that some of these reductions in input could be achieved, is there any doubt in your mind that whatever void is created by such changes is going to be more than filled by additional remedies created by the Congress in various fields involving energy, ecology, human rights, civil rights, whatever field Congress may legislate in?

Judge Friendly. Well, I would like to deal with that on a little broader basis. Let's take first the business about changing FELA and Jones Act cases to a workmen's compensation basis and the argument that it is politically impossible. Well, it is not politically impossible because Congress has just done it in the 1972 amendments to the Longshoremen and Harbor Workers Compensation Act and the way they did it was to give the union something in the shape of a liberal but not, from what I have seen, too liberal a scale of benefits and really bring the Federal act up to the level of some of the better State acts and that was the tradeoff. In return for that the unions are ceasing their opposition. This is not a hopeless thing.

Furthermore, I don't think you should minimize the effect of abolishing diversity jurisdiction; 25 percent is an awfully big percent. Really, as I said, it is more. Moreover, there are other things Congress can do on the intake problem. One which certainly Congress is going to be looking at when it gets around to the revision of the Federal Criminal Code is to cut down Federal criminal jurisdiction by two methods, decriminalization and defederalization. Another thing which would help a great deal would be requiring persons, especially State prisoners complaining under the Civil Rights Act, to exhaust the State administrative remedies.

Another one would be to reform Federal habeas corpus as to both State and Federal prisoners so that, save in some exceptional cases, the prisoners must make a colorable showing of innocence. That was an idea I advocated in 1968 and apparently it got enough votes to become the subject of this Court's decision last June or July, whichever it was, in Stone against Powell. I also believe that in the long run, and this is a much longer range proposal, that we just are going to have to rely more on a scheme of administrative agencies subject to judicial review rather than initial action in the courts in a great variety of fields. So when you take that whole package I would say that we would be able to keep abreast of whatever new problems are going to come into the Federal system. We are not going to get all these changes through at once but if we can get a process started. I would be optimistic for the next quarter of a century and I guess I am not much interested in what happens after that.

Mr. Levin. Sure you are. Would Mr. Westphal like to yield for the statistics?

Mr. WESTPHAL. Well, if I can just complete a point here.

I think my point is this, Judge Friendly. Even assuming that the Congress would eventually address itself to the accomplishment of a great number of these things on this so-called punch list you just gave us and looking ahead to this period, whether it is 15 or 20 or 25 years hence, are you willing to concede that at that point in time it is much more likely that there will be an increase in the judicial business of our Federal court system rather than a decrease in the judicial business of our Federal court system as it stands today?

Judge FRIENDLY. Oh, very likely there will be an increase but I don't think there has to be an increase of the order of magnitude that was being discussed this morning. Furthermore, I come back to Judge Tyler's point. Assuming all that is true, what does the addition of this 150 so-called but not real final appellate capacity do? What good is it? I don't see much relation between the two problems. It seems to me the first problem is how we are going to manage the whole Federal court system which is so important that all our energy should be addressed to that rather than spending so much time and controversy over a proposal which at best would do very little.

Well, I think we have arrived at the point in our dialogue that we keep hearing, in one form or another, from the various witnesses that Congress can always create a national court of appeals if this should seem wise. There should be much trauma in abolishing it.

Mr. WESTPHAL. Now, you will recall this morning that in my questions to Judge Tyler I proposed two rough models of what the situation might be some 15 years hence if the projections of the Federal Judicial Center are true, one model whereby you would have 1,100 to 1,500 district court judges building on up from there and the other a bifurcated model.

Now, do you concede that as the Congress considers making a fundamental change in our court structure such as the creation of a national court of appeals as proposed in S. 3423 that at the same time Congress should be thinking about the entire Federal judicial system and what kind of a model we might have to have some 15 or 20 or 25 years hence as a solution of the judicial business that will then be presented to our court system?

Judge FRIENDLY. I think Congress should be thinking about the model and put S. 3423 on a back burner. The Commission has done a good job on that, that bill could be passed in a couple months any time it seems to be needed. The important thing is to get Congress thinking about these major problems and not doing something which a great number of us think is going to be harmful rather than helpful.

Mr. WESTPHAL. Well, let's talk about the front burner then. If the national court of appeals is going to be relegated to the back burner, let's talk about some of the things that are on the front burner. The new Congress will receive in January a recommendation from the Judicial Conference for the creation of 106 additional district court judgeships which would then bring the total of judges in regular activity service up to 504. This would then solve the needs of the district court system with 170,000 filings. At some point in time when the full implication of the Speedy Trial Act is felt and at some point in time when the level of filings increases beyond 170,000, assuming that this reduction of input which you suggest does not occur, the Congress at

that point in time, which may be as little as 4 years at the next quadrennial survey or it may be 10 years or 8 years, the Congress will have to then again consider to what extent the number of district court judges would be expanded beyond the number 504. Now, projecting that sort of a model on into the future, does this give you any pause for concern?

Judge FRIENDLY. Of course, it gives me enormous concern. If Congress just goes on forever creating new heads of Federal jurisdiction and does not withdraw any, you are going to have catastrophe and this bill is not going to be of any help at all.

Mr. WESTPHAL. At what point in time must Congress sit down and make a decision on what type of approach it is going to take to the prospect of an ever-increasing addition to the judicial business of our Federal court?

Judge FRIENDLY. You should have done it 5 years ago but since it wasn't done you should do it next year.

Mr. WESTPHAL. That is all the questions I have.

Senator HRUSKA. Professor Levin.

Mr. LEVIN. Judge Friendly, first, let me start with just a very few details, the diversity statistics, only because I think they had an element of humor maybe.

In the second circuit—this is 1976—of all the cases, criminal and civil, which came up from the district courts, that excludes the total number for that year which was 1,467 and the diversity of citizenship cases was 147, 10 percent.

Judge FRIENDLY. In the court of appeals?

Mr. LEVIN. Yes.

Judge FRIENDLY. That reflects the success of our new civil appeals management plan.

Mr. LEVIN. Yes, but I think there was a confusion between the two of you on which data you were discussing.

Judge FRIENDLY. Judge Brown was talking about the court of appeals?

Mr. LEVIN. Yes.

Judge FRIENDLY. Oh, well then, I apologize.

Mr. LEVIN. On the other hand, in his circuit he was low. It was higher nationally in August, of course, the administrative appeals. Nationally it is about 11 percent, including administrative appeals but that is a detail.

Judge FRIENDLY. I was thinking in terms of the district court. I misunderstood Mr. Westphal's question.

Mr. LEVIN. I wanted to clarify it on the record.

Judge FRIENDLY. On the district court figures my 25 percent is right.

Mr. LEVIN. I just wanted to clarify and harmonize it and also because I thought it was somewhat amusing.

Let me turn to the patent area briefly. I am dealing with details. In the patent area it has been suggested, exactly as you have suggested, that what is really needed to harmonize and get away from the "mad and undignified race to the courthouse," because that is creating a disrespect for law, in some form continuing appellate supervision. Short of that, no rule of law is going to do it.

It also has been suggested that the national court of appeals will have the time, and I think it would, in the early stages take 20 to 25

such cases a year and as a result could provide over a period substantially enough supervision to create an uniformity of attitude at least with respect to the kind of result to get us out of this mad and undignified race to the courthouse.

Now, my question is this. If we are not to have what you would prefer, a single unitary U.S. Court of Customs or Patent Appeals—and we will get later to the tax area—isn't this national court of appeals a tenable way of improving the "mad and undignified" situation we have today?

Judge FRIENDLY. Well, it is very difficult to answer when I am in such disagreement with the premise. I just don't think that six patent decisions a year on what constitutes nonobviousness will do any more good than Justice Clark's splendid opinions in the trilogy. Everybody said those were magnificent. With my limited knowledge of the patent law, I thought they were. They did not help a bit.

Mr. LEVIN. Or 20 opinions a year?

Judge FRIENDLY. No; I don't think it would help in the slightest.

Mr. LEVIN. You are getting me to worry that a single court of patent appeals, won't help very much.

Judge FRIENDLY. Oh, yes; I think it would if it sat en banc. Of course, there is the worry it might be too propatent and/or too antipatent and that is why I certainly would preserve Supreme Court review if it went wild. But I don't really think it would go wild for reasons that I indicated in my lecture with which you are familiar; namely, that the patent bar is not composed of one set of people who are always fighting in favor of a patents and another set of people who are always fighting against them. The same fellow will be fighting for the patent 1 day and against the patent the next day and so they have a very balanced view.

When you are fortunate enough to get a good patent lawyer on a court, you ought to see what difference it makes. We have one now in the Southern District of New York, Judge Conner. He sat on the court of appeals one time and wrote a patent opinion that none of us could come near. More amusingly, we had an appeal from a case that he decided at the district court where the criticism was that he decided it too fast because he knew too much patent law. Well, you can imagine how much shrift that got. When you get a real expert like Judge Conner you get some good patent decisions, far better than you are going to get out of any of the rest of us.

Mr. LEVIN. Let me move briefly to mention the tax cases and then proceed to some broader questions. In the tax area I think two things are worthy of note. The first is that the tax cases, although constantly going to one of the areas where it is a matter of real disturbance to the citizens, is an area which in terms of the statistical studies by Professor Feeney shows up with less than 2 percent, as I recall, and there are a number of reasons for it. The needs are probably far greater than reflected in simply the motion of existing conflict study at any given point of time. In considering the alternative Tax Court the Commission was very much persuaded by the testimony of one of the men whom you mentioned as a specialist, Professor Wolfman, who urges in the strongest terms that we do what we want about this or that but at the very least don't force upon he tax lawyers and scholars a tax court. We need a generalized court as opposed to a specialized court.

There is tremendous division in there. I take it from your comments, including the comments of the tax attorneys who feel this would not provide an adequate amount of review, that there is something of a problem in that area.

Judge FRIENDLY. Well, I would have to say that I think the national court would do more good in tax appeals than patent appeals because in the tax area you deal with pure or impure questions of law and once the National Court decides it, then it is decided unless the Supreme Court reviews either that case or some subsequent case.

Mr. LEVIN. Let me just turn very briefly, to the present functioning of the Supreme Court. This may not be a very well phrased question, it may not be an appropriate one, you may not want to answer it. The suggestion has been made that cases that were decided by opinion a few years ago, certainly a few decades ago, are decided today summarily. The appellate jurisdiction conferred by Congress on the Court no longer is an appellate jurisdiction in a real way, it is a certiorari jurisdiction for practical purposes. What is your judgment in terms of what the Court is doing now with its 170 opinions, and may be, this past term, close to 100 summaries? Is that something you would like to see continue at the present level or do you share the view of those Justices who urge a cutback by fully a third or more of the cases the Court deals with?

Judge FRIENDLY. Well, I really don't think I am competent to speak about these summary dispositions. I have enough confidence in the Justices to believe that when they do it that way they think they are doing the right thing, and of course obviously some of them don't think the others are doing the right thing.

A very striking example just this week which I know about only from the newspapers—the seventh circuit ruling about guest statutes where cert was denied. Sometimes I think the Court just feels that it has decided a point in a previous case and that there is no particular virtue in writing more about it. Other Justices think the law has changed and something more should be written about it. I think one would really have to examine those cases in much more detail than I have been able to do or I suppose that anyone could do who was not on the inside to know why it was done as it was done and, if so, whether it were done rightly.

Mr. LEVIN. Does it concern you that there are reflections this Monday by Justice Stewart that to a certain degree summary actions are taken as a result of the Court's overcrowded docket?

Judge FRIENDLY. Well, I know the case you mention. Frankly, I didn't see that what the Court did there was as bad as Justice Stewart thought.

Mr. LEVIN. Or Marshall.

Judge FRIENDLY. If I had been on that panel, I think I would have understood what the Court meant.

Mr. LEVIN. You refer of course to Mr. Justice Stephens. Let me just move on to just two brief things.

I would take it from your comments that if this thing were to go forward and the views of the Justices of the Supreme Court were to be sought once again and if the Justices were to conclude. and I am not sure what number you want, that (*a*) this is desirable and (*b*) it is feasible and (*c*) it would not create either excessive delay or

workload, would this be an important ingredient for the Congress to consider in terms of its ultimate decision in the national court?

Judge FRIENDLY. The answer to that has to be "Yes."

Mr. LEVIN. I thought I would ask one that we would agree on.

It was not entirely clear to me about the point where you said that if it were just 6 to 3 you don't know that you should be persuaded.

Judge FRIENDLY. I moved to 6 to 3 in a moment of enthusiasm.

Mr. LEVIN. All right.

Judge FRIENDLY. I really think it is not a matter of counting heads. I think when I said 6 to 3 I would not want to just take it as a vote, I would assume the three would explain why they were against it and that the six would explain why they were for it and I would want to at least look at that. I would not take the vote as a raw vote, I would want to see the reasons behind it.

My point was this is not a matter where the mere nose counting should be decisive. The views of the Justices are extremely important, the most important.

Mr. LEVIN. I will make one observation and it may or may not call for a response. Just in the interest of time I don't think we should pursue it. It seems to me in listening to the hearings there are two major factors which divide the proponents and the opponents. The first is their conception of the types of cases to be dealt with by the national court and along this line I think some had one kind of a model with the statutory questions or the procedural questions and a number of others which could be of great significance in the ultimate but which are very different than certain kinds of broad policy questions on institutional issues and so on.

The second thing which I think sharply divides proponents and opponents is the significance to them. Maybe, as Judge Tyler said this morning, it is a philosophical diversity of holdings. Under that I would subsume whether it is important that a social security claimant in Georgia had a different rule apply, sometimes a rule of law, or a procedure, or a right to appeal; or a taxpayer and under this I would subsume the significance of the delay in decisions whether it be 5 years or 6 years or how many people are affected.

I readily concede that much as the Commission grappled a marvelous philosophical debate one particular time whether under our system of federalism and our diversity, encourage the State holdings, there is a different point of view with respect to the application of Federal law to citizens and their obligations to the Federal remedy.

It seems to me that lurking behind much of the differences and emphasis are differences along these two issues. I don't know whether you perceive it that way or whether you would want to comment on something so very broad.

Judge FRIENDLY. Well, you have asked quite a number of questions. Let me try to say a little something. I don't believe I will be able to cover the whole ground. As to the importance of nationwide uniformity, I think you have to differentiate between different types of questions. Obviously the paradigm of the kind of question where it is desirable to have uniformity is where the matter enters into planning as is true in some of the cases in the tax area. A good example to me of an instance where it does not make any difference at all—oh, that is a little oversaid, where it does not make any significant difference—

would be a question that I have been concerned with almost ever since I went on the bench; namely, whether rule 52(a) of civil procedure, the "unless a clearly erroneous rule" applies to a judge's application of a legal standard to facts or only to the raw facts. There has been a split among the circuits on that for 20 years, maybe more. I don't really see anybody suffering from it very much.

If you start out to commit a tort, or you are not going to commit one, you are really not thinking of whether the decision of a Federal district judge, if it should end up in the Federal court, is going to be tried to a jury or is going to be subject to that rule or is not subject to that rule. It does not shock me. The second circuit and the sixth circuit and probably several others apply one rule and the ninth circuit applies another. The Supreme Court does not seem to be worried about it so we go on our merry way which was started by Judge Learned Hand and Judge Swan and I don't see any harm in it.

Sure it would be nice if we had a nationwide uniformity, especially the way we think it ought to be but I don't think that is a problem of any significance.

Now, you asked another question about our different perceptions of the kinds of cases that are going to be decided by the national court. There are illustrations in the Commission's report. I don't think anybody is going to get terribly excited even if they think the national court has decided wrongly. Yet one says that and then the next minute you see the Supreme Court locked in mortal conflict as they were last week over the question whether a tax loss when carried back applies only to ordinary income or also to a capital gains. Rarely have I seen more bitter opinions on both sides than on that. So evidently the Supreme Court thought there was some big issue here and perhaps would not have been content to let a national court's decision stand.

However, my worry is not really about that type of case. My worry is about the fact that I just don't think you have enough of the conflicts on rather technical points of law which I would not suppose would arouse so much emotion and which if the national court does seriously wrong Congress can always fix for the future. My worry is about these other 100 cases that are going to be sent to them which I think will involve very important questions and very emotionally laden questions. That is where I see the trouble and necessity of further Supreme Court review and a high reversal rate which the public will not understand.

Senator HRUSKA. Thank you very much.

Judge FRIENDLY. Thank you, Senator.

Mr. LEVIN. I wish there were another hour and a half.

Judge FRIENDLY. Well, we could have it in Philadelphia.

Mr. LEVIN. All right. That is fine.

Senator HRUSKA. The subcommittee welcomes the Honorable Chesterfield Smith, one time president of the American Bar Association and a member also of a very prestigious and important Commission that is currently conducting its neogitations. The witness comes from the sessions of the Executive, Legislative, and Judicial Pay Commission to be with us here this afternoon.

We welcome you here and await your testimony.

## STATEMENT OF CHESTERFIELD SMITH, ESQ., ATTORNEY AT LAW, LAKELAND, FLA.

Mr. SMITH. Thank you very much, Senator Hruska.

I want to say on a personal note before I start testifying that I am delighted that I had the opportunity to appear one more time before you in the waning days of our Senate career. I consider you one of the great Senators of my lifetime; that opinion of mine is buttressed by my own observations but was inculcated in me by your colleague, Spessard Holland, who was my law partner and who told me that he thought that you were about the No. 1 Senator up here. I am glad that I get to appear before you one more time.

I remind you, and the members of the subcommittee, that I, while serving as president of the American Bar Association, appeared before the Commission on Revision of the Federal Court Appellate System on April 1, 1974. In my short statement there, recorded on pages 4, 5, and 6, I advanced the views of the association but as I went along, I also interlaced some of my own thoughts and personal positions. At that time, it was necessary that I draw a distinction between my own position and the position of the association. Today I have no such problem. I speak only for Chesterfield Smith, trial lawyer from central Florida. My standing, if any, before the subcommittee is simply as a citizen and taxpayer.

I have an outline of a statement which I will leave with the subcommittee. However, I want briefly to make several other points. Indeed, I hope to be helpful to the subcommittee by what I will call the generality of my approach, based upon my own background and capacities as a trial lawyer, in contradistinction to the specificities of those great legal scholars and judges who have or will testify. I notice in fact that one great judge testified right before me, and I see Professor Freund sitting in the audience and I assume that he also is to testify. I want to stay out of their areas, but in the things that I will talk about, I hope that I am a greater expert than they are. Perhaps I do know more about the problems of a practicing lawyer in central Florida than they do.

I have always believed that when the justice system does not function as well as it should, something should be done to improve it. As demands upon the Federal judicial system change, it is imperative that we in the bar who live by the justice system consider how to accommodate those new demands. The Federal justice system, as is well known, is not immune from change. We all are aware of its history. The system simply is nothing now like it was when our constitutional forefathers envisioned it. Wise change in the system which serves to preserve those basic values inherent to all citizens serves best both justice and the country.

My own judgment, perhaps based upon a life in the law, is that of all the institutions of Government devised under our American Federal system, the Federal judicial system, and particularly the Supreme Court of the United States, has been the most successful. Certainly it has contributed in innumerable ways to developing and preserving our democratic way of life. Understandably then, it is of crucial importance to all Americans that the Supreme Court, and the entire

Federal justice system, continue to play the role that it has played so well. We would like both to play it even better, but if they cannot play it better, we very much want to see that they are able to continue to do so as good as they have done.

Over the course of our country's history, the preservation of our justice system has not meant that we do not ever change it. Its success has not been because there has been no change in the structure or in the procedures of the Federal courts; on the contrary, new courts, such as the U.S. courts of appeals, have been created. Again, the procedures in my own lifetime for certiorari to the Supreme Court, a device which enables the system to function in the face of the caseload explosion in that court were developed. Today, as the number of docketed cases within the Federal system reaches new highs as revealed by the numerous studies addressed to this subject, and as the U.S. Supreme Court continues to have an ever-increasing docket, I think it is very important that the people, the lawyers, and particularly the Congress as the ultimate body which has to resolve conflicting views, stand willing to consider structural changes in the Federal court system which can make it possible for the system efficiently to function and effectively to continue to vindicate human rights and to develop and preserve our federalism.

To say that things are wrong in the Federal justice system and then not be willing to address the problem seems to me to be a bad thing. I, like others, want always to find the perfect solution to a particular problem, but I have come to know that I will not always find it. I have noted also that quite often those who for their own reasons really prefer the status quo fight the solution by attacking it without proposing any other way to solve the problem.

People can legitimately take issue with an activist approach, but when I see a problem I continue to think it very essential also to identify the best solution which occurs to me; because somebody takes issue with some particular solution of mine does not make me run away.

For reasons that shall develop, I thus personally endorse the basic proposal of the Commission on Revision of the Federal Court Appellate System that the Congress establish a national court of appeals.

I would be happy with both of the bills that have been introduced, that is, S. 2762 and S. 3423. The second bill, of course because of objections, takes away part of the jurisdiction granted in the first. Admittedly, the first proposal was complex, and it well might have created some problems in administration, but I believe that those problems could have been worked out. There was also objection to the fact that under the first bill one President would appoint all the members of the court. I understand that President George Washington or President Gerald Ford today, or President Jimmy Carter next January, would not make appointments to the court acceptable to all, but personally I would let one President appoint all the members of the court and be quite happy with it. In fact, as a trial lawyer, I have a great deal of trouble in deciding which President appointed the judge before whom I am trying a case. They all seem to me to become just impartial judges once they are sitting on the Federal bench. I can't tell then who appointed them; so that particular object didn't bother me. But I also don't take issue with other people who felt very strongly

about who is to make the appointments. So, this second proposal, which is a compromise proposal or at least an alternative proposal, I also endorse that.

While there are other variations in the two bills, the point that I am trying to make is that these differences fall in the area of unessential things that should be decided by a majority once we decide that there is a problem and that we are going to try to correct it. The details, the specifics, I am willing to let somebody else decide. I am willing to accept their viewpoint on how it best can be done; but I am not willing to ignore the problem

Briefly, the Federal judicial system must provide adequate appellate capacity for resolution of all important issues of national law. It is a truism that only in the Federal judicial system can we provide adequate appellate capacity for the resolution on a national basis of important issues of national law.

Litigation is very expensive, and one of the reasons that it is expensive, it seems to me, is that there is a lack of certainty to national law. Admittedly, the establishment of a national court of appeals will not give certainty to the national law in all respects, but those of us in the trenches as advocates representing clients desire that the number of conflicting decisions on complex issues of national law now never resolved by the Supreme Court of the United States be reduced as much as possible.

I have not tried to anlyze what happened years ago when the Supreme Court seemed to have more judicial time than it now does, but it is my distinct impression that the Supreme Court then quite often rendered significant decisions during a term in areas of great interest to the national commercial, financial, or business community. Nowadays, it seems to me that very few of the decisions by the Supreme Court are of tremendous significance to the national, financial, industrial and commercial community. Instead, and properly so, the Supreme Court devotes its attention primarily to the area of human and individual rights and to the impacts of Federal laws and regulations upon our individual citizens.

Believing that the Supreme Court should devote its primary attention to those matters, it seems to me then that we must have some way other than the Supreme Court to resolve on a national level those types of conflicts that were at one time resolved by the Supreme Court.

There is a great desire on the part of most lawyers to make the appellate process terminal as close to the trial court as possible. But perhaps of even more importance to lawyers counseling on litigation is to know what the law is in a particular situation. I practiced in what used to be only a farming community. It is pretty big now because a lot of people moved down there. We still are not in the hub of the nation, and yet my law firm now represents clients who have law problems, litigation, legal issues, legal opinions, arising all over the United States. We, as lawyers faced with the problem of trying to ascertain the national body of law in many fields of the law, are plagued with conflicting Federal appellate opinions.

For example, my own fifth circuit very well may not have addressed a particular issue. I find that long ago the sixth circuit and the eighth circuit addressed that issue and reached conflicting positions. Yet that conflict has never been resolved by the Supreme Court; we in the

fifth circuit don't know how to advise our client. We don't know how to approve their desired course of conduct. So more litigation ensues. In that instance, I do know that my national client, operating in multiple circuits, feels that it is not going to be resolved in a satisfactory way in the fifth circuit either. If a get a favorable opinion in the fifth circuit, that will be just one more opinion to those already existing in the sixth and eighth. The issue is not being resolved nationally in that way for anybody who is interested in national law. Such inconclusive procedures just makes the practice of law a little more expensive, a little more difficult, a little less efficient in rendering the type of justice that our people are entitled to receive.

Another point I would like to make is that clarity in the Federal law is important to the citizens of the country. It is very important. I think, that people not feel that they are threatened by Government or the private sector in different ways in different parts of the country. One welfare recipient, a social security claimant, should not be denied relief in Florida and another granted the same kind of relief under the same circumstances in California. A taxpayer in one part of the country should not have different tax obligations imposed upon him or her because of where that person lives. Yet we know that some people now pay Federal taxes because they live in one circuit. When they live in another circuit, they would not have to pay that Federal tax. There is something wrong with such a system.

Personally, I don't like a law that does not apply uniformly throughout our country. While I am a Floridian, I am first an American, and as an American I am entitled to have a body of American law that is the same for me as it is for people in Arizona or the people in Wyoming. I think it is very important that we have every possible judicial device to resolve and clarify that type of abiguity, conflict or void in the national law.

Now, admittedly a national court of appeals of course will not resolve all of those issues. Those who oppose it properly can point out that there will still be those kinds of things but a national court of appeals would whittle away at the problem. We have a problem and we should work toward a solution. We do not have to completely eliminate it, but we ought to try to go as far as we can. Every time we eliminate at least part of those types of problem situations, we have gained in a very substantial way.

In closing I state that both of these present proposals, S. 2762 and S. 3423, insofar as one who loves the law and wants it to do well by everybody, are feasible and certainly preserve what I consider to be the basic values of the Supreme Court. I might also add that in my personal judgment both of those proposals preserve and meet the basic principles adopted by the House of Delegates of the American Bar Association as minimum criteria that any such legislation should meet.

I am satisfied that the situation would be substantially improved even if this national court of appeals would hear only cases referred to it by the U.S. Supreme Court. I understand that those justices of the Supreme Court who have commented on the proposed court have said that it is feasible. Moreover, the proposals, as reflected in both of those bills, preserves intact the important role of the Supreme Court in our system.

Other proposals, before the report of the Hruska Commission, in my opinion made a mistake by chilling the right of access by all people to the Supreme Court. These present two proposals do not do that. The new national court would not in any way control the Supreme Court's docket.

Finally, of course, I am very pleased that in both bills, the judgment of the national court of appeals would be subject to review by the Supreme Court. We must ultimately have only one single Supreme Court—not a bifurcated one.

Those are generally my views. I sum up in one sentence by saying it is very apparent to me that most lawyers believe that there presently is a problem in the Federal appellate system, that something ought to be done about it, that these two proposals are a reasonable and feasible way to attack that problem, that in them the basic values essential to the Supreme Court are preserved, and that the only way that we will ever improve on the present proposals is to put something into operation. If it then appears that corrections are needed, corrections can be made at that time.

Thank you.

Senator HRUSKA. Thank you very much, Mr. Smith. We appreciate your coming here.

You opened and you closed on the theme that when a problem is perceived that there naturally arises a desire to find a solution. We have had some testimony here to the direction that after all, there is no great problem. In fact, one of the highly placed Justices of this Nation said not too long ago, "There is no problem, things are all right just as they are." But let me remind you of figures that have come again and again to the fore. I know that in your conclusions on this subject you have considered them at one time or another—in fact, I believe your testimony in 1974 embraced most of these statistics. In recent years the findings in the district court have risen to the astounding total of 170,000 per year. Eighteen thousand filings in the circuit courts of appeal and in the Supreme Court there were 4,204 appeals.

Supreme Court filings in those 15 years rose from 1,200 in 1961 to 4,000 and in the meantime we noted this phenomenon that in 1971, just 5 years ago, nonconstitutional holdings of the Supreme Court constituted in the range of 65 percent of its product. Now, that has been completely turned around as you know so that constitutional holdings amount to about 65 percent. That means a corresponding reduction in those areas that are not constitutional but highly important. This occurred in a period of time in the last 10 years when congressional enactment has imposed Federal standards in areas such as occupational health and safety, protection of the environment, product safety, economic stabilization, new class actinos, and a host of other things. In other words, the occasion for the many official appellate determinations, final appellate determination, has risen and yet the response thereto has shrunk.

Do not recitals of this kind, Mr. Smith, establish without much doubt whatsoever that a real problem does exist? Isn't that a sufficient case that the burden is not so much on those who submit a solution, the burden is on those who attack a given solution which has some framework of credibility, being the product of many minds and being subject to further processing by the Congress of the United States?

Mr. Smith. That was said exactly like I wish I had said it, Senator. That is exactly the point that I would have liked to have so clearly and precisely made.

Senator Hruska. It seems plain that we are here faced with the necessity of doing something. The process of trying to get something that is acceptable and workable as a pretty good headstart on the finding of the solution was the responsibility of the Commission. Yet we constantly are confronted with the bugaboo of a fourth tier. We are confronted with the fact that only 1 percent of the product of the circuit courts is reviewed by the Supreme Court. We are questioned on how this reference jurisdiction of the Supreme Court is going to be exercised. We don't know how it is going to be exercised.

The Commission and the bill authors didn't have the nerve to prescribe for the Supreme Court what the Supreme Court should do by way of exercising that reference jurisdiction and, frankly, the authors of the bills and the Commission both felt the Supreme Court knows how to run the Supreme Court better than second-guessers in the legislative branch of the Government. So it just seems to me that your remarks do make a lot of sense and, personally, I am grateful. As one-time Chairman of the Commission I am grateful for your appearing here again and emphasizing those points.

Mr. Westphal, have you any questions?

Mr. Westphal. Just one brief one.

Mr. Smith, you and Mr. Sears, the two of you today, are the first practicing lawyers that this subcommittee has heard on this question. I am wondering if you would just care to comment briefly upon an argument that has been advanced in various quarters in opposition to this proposal and that is this so-called fourth tier argument and the suggestion that this would increase the cost of litigation and would cause some additional delay. Now, as a practicing lawyer and in consideration of views that you previously have given us, what is your reaction to that kind of criticism?

Mr. Smith. In a particular case, the establishment of the national court very well may create one more avenue for litigants to run down, but in the end, it seems to me that such court will reduce overall litigation, and ultimately reduce the number of appeals, by creating with more certainty a national body of law. If in the end it does build that national body of law and eliminates at least some conflicts, it will by making the law certain cut down on litigation and thus make law less expensive.

The trial lawyers in my area, at least the trial lawyers in my firm, always want to litigate undecided issues if their clients will permit, but if a particular matter has already been resolved, for example, in our particular circuit, those same trial lawyers are not as gungho about going up for multiple appeals. But if a matter has not been resolved in our own circuit, right off those lawyers usually can honestly decide that it is a close question which, in the best interest of the client, requires resolution at the appellate level.

To illustrate, if the sixth and eighth circuits have taken conflicting positions on an issue, but the fifth circuit has not, well, the lawyers here will want to appeal to the fifth circuit; but if the fifth circuit had already taken a position contrary to our own, quite often we do not recommend appeal because we know that having to go on up to the

Supreme Court is too expensive and legally hazardous. With a national court of appeals, there would be less appellate conflicts, more certainty, and thus less litigation expense. I suggest that a national court of appeals might even result in the long run in less appeals. But perhaps more attractive to me in support of the court is the fact that trial lawyers, as officers of the court, do very much want to resolve disputes their clients have with others in the least expensive way. They do want certainty in the law for their clients, and when voids exist in national appellate law, they want to litigate only if they can reasonably advise their national clients that it is worthwhile throughout the nation in which they operate. How a case is going to come out and how a particular case should come out is often not as important to a client as having the dispute settled promptly, finally, and inexpensively. Most clients want to avoid litigation; they don't usually appeal to more than one court unless the matter has implications beyond the existing dispute.

Mr. WESTPHAL. Thank you.

Senator HRUSKA. Professor Levin.

Mr. LEVIN. I have no questions, Mr. Chairman, but if I may I would like to note for the record that I had the privilege of being present when Mr. Smith was on a program of the Young Lawyers Association of the American Bar Association at their last meeting and their vote for him as the hero of the section. I think that is a tremendous compliment. We are grateful for his coming here today.

Mr. SMITH. I am glad to come up. I don't suppose I will ever go before Senator Hruska again but I may be practicing law against you.

Senator HRUSKA. Mr. Smith, did you want to leave any of the material that you had?

Mr. SMITH. Yes.

Senator HRUSKA. If you desire to supplement it at a later time with a more formal presentation, that would be welcome also.

Mr. SMITH. All right.

[The material referred to follows:]

STATEMENT BY CHESTERFIELD SMITH

I. *As demands upon the Federal Judicial System change, it is appropriate to consider how to accommodate these new demands. The Federal Judicial System is not immune from change. On the contrary, wise change which serves to preserve basic values, serves both the system and the country best.*

The Federal judicial system, and particularly the United States Supreme Court, has been one of the most important ingredients in developing and preserving our democratic way of life. It is of crucial importance to insure that the Supreme Court, and the entire federal judicial system, be enabled to continue to play that beneficent role. Over the course of our country's history, this has not meant that there could be no change in the structure, or in the procedures of the Federal Courts. On the contrary, new courts were created—the United States Courts of Appeals, for example—and new procedures were developed—the petition for certiorari—which enabled the system to function in the face of new conditions: almost always mounting caseloads.

Today, too, as the number of cases within the Federal system reaches new highs every year and as the United States Supreme Court continues to have a heavy docket which invites recurring comments by the Justices, I think it important that the Congress stand willing to consider structural change which can make it possible for the system to function efficiently and effectively to vindicate human rights and to develop and preserve our federalism.

Specifically, I endorse the basic proposal of the Commission on Revision of the Federal Court Appellate System that the Congress establish a National Court of Appeals, for the reasons which I shall develop.

II. *The Federal Judicial System must provide adequate appellate capacity for resolution of important issues of National law.*

It is a truism that the federal judicial system must provide adequate appellate capacity for the resolution, on a national basis, of important issues of national law. Today, there are many who perceive the United States Supreme Court as a Court desiring to reduce federal litigation and to cut off access for the vindication of federal rights, at least partially in response to the pressures of docket congestion and workload. That is unfortunate. The system should be so designed that it provides adequate capacity.

It is disturbing when a Solicitor General of the United States, Honorable Erwin N. Griswold, writes that there were at least 20 cases a year which he considered worthy of Supreme Court consideration in which he did not request that certiorari be granted because of the Court's workload.

I note, too, that there has been substantial comment to the effect that the Supreme Court is resorting increasingly to summary disposition in important cases,—decisions without opinions—as a result of the pressures of its docket. The "homosexual case" last Term may be one example. It is unfortunate that the Court is perceived as handing down decisions without adequate explanation because of docket pressures. It is even more unfortunate if this is true to any substantial degree.

There will, of course, be many cases involving statutory intepretation and other types of inter-circuit conflicts which could be resolved by a National Court of Appeals. The present proposal is designed to provide this added measure of appellate capacity.

III. *Clarity and harmony in the Federal law are important to the citizens of this country.*

In my view a social security claimant should not be denied relief because he or she resides in one circuit rather than another. Similarly, a taxpayer in one part of the country, should not have different obligations imposed upon him because of where he lives.

Even where the United States Supreme Court ultimately resolves a conflict, it is not unusual for a decade or more to pass before the issue is determined. This is neither fair to the individuals involved nor efficient in terms of the system.

Closely related to the difficulty of obtaining relatively rapid resolution of questions of national law is the unhappy fact that there is a vast amount of relitigation of the issues in differing circuits for the purpose of obtaining favorable judgments. Much of such relitigation is by individual taxpayers. Even where no conflict between circuits ever results, doubt concerning what the law will be invites wasteful relitigation.

Of even greater concern, as the Commission's report has documented, is the fact that the government frequently relitigates in different circuits in order to create a conflict so that the United States Supreme Court will hear the case.

A National Court of Appeals would, at the least, double the capacity of the system for definitive interpretation of statutes and resolution of other national issues promptly and, thus, efficiently.

In many situations, it is desirable to have definitive resolution of questions, particularly procedural questions—even before a conflict has developed. This is true in environmental litigation which is difficult and complex. It would be highly desirable to provide a forum for the rapid resolution of questions arising under those statutes without waiting to see whether different circuits agree or disagree on their interpretation of the law.

IV. *The present proposal, as embodied in S. 3423, is feasible and preserves basic values.*

The provisions of S. 3423, under which the National Court of Appeals would only hear cases referred to it by the United States Supreme Court, is feasible, as attested to by the responses of the Justices of the Supreme Court, including those who would not now create a new court.

Moreover, the proposal of the Commission on Revision of the Federal Court Appellate System, as reflected in both these bills, preserves very important values concerning the role of the Supreme Court in our system. Access to the Supreme Court is not off; the new court would not control the Supreme Court's docket.

Finally, every judgment of the National Court of Appeal would be subject to review by the Supreme Court. We would continue to have "one Supreme Court."

Senator HRUSKA. The final witness is Prof. Paul Freund of the Harvard Law School. He comes all the way from Cambridge, Mass. and has been waiting patiently for his turn to come before us.

You have submitted a statement, Professor, and it will be printed in the record in full. You may proceed in your own fashion.

## STATEMENT OF PROF. PAUL FREUND, HARVARD LAW SCHOOL, CAMBRIDGE, MASS.

Mr. FREUND. Thank you, Mr. Chairman.

It is a privilege to appear before you at any time but particularly at this time when I won't say you are on the eve of one career but, rather, on the threshold of what I am sure is going to be a very active and interesting new career.

I should say at the outset that although I served as chairman of the study group on the caseload of the Supreme Court appointed under the auspices of the Federal Judicial Center, I appear here in a purely individual capacity. I have not consulted any members of the study group regarding the testimony that I will give.

Although the study group and the Hruska Commission had different terms of reference, since our group was to focus on the Supreme Court and the Commission on the courts of appeals, nevertheless in the end both groups recommended a national court of appeals. This is hardly surprising when it is remembered that with only minor exceptions the only Federal court with nationwide jurisdiction and authority today is the one established for 13 States and less than 4 million people in 1789.

The first issue I presume is whether there is a caseload problem. My own interest has centered on the Supreme Court and of course that problem, if it exists, is intimately bound up with that of the courts of appeals. It seems to me that the problem exists, as indicated by actions taken by the Supreme Court itself in recent years. The court has reduced the tim for oral argument from 1 to ½ hour for each side in the general run of cases. The number of law clerks per Justice was increased to two in 1947 and at the request of the court to three in 1969, and now I understand that four clerks per Justice are authorized as well as several clerks at large.

The filing of case records with petitions for certiorari has been dispenced with, thus reducing the formidable quantity of printed matter accompanying 75 petitions per week every week in the year, but at the same time at a cost of less informed actions by the court at the certiorari stage.

The number of petitions granted has remained fairly constant over the years: around 150 to 175 per term with a consequent decline in the percentage of grants. These figures are perfectly familiar but let me underscore them.

The grants declined from 17.5 percent in 1941 to 11.1 percent in 1951 to 7.4 percent in 1961 to 5.8 percent in 1971. I think the current figures are not very different.

Those to be sure include the in forma pauperis petitions where the percentage of grants is very low, one or two percent perhaps. If, how-

ever, we exclude the in forma pauperis petitions the figures still show a very marked decline—19.4 percent in 1941, 15.4 percent in 1951, 13.4 percent in 1961, 8.9 percent in 1971 and approximately the same today.

The study group concluded not merely on the basis of such statistical record as this but also on the basis of interviews with each member of the court that the business of the court had reached the saturation point. When I say this, I do not mean to ascribe to individual members of the court that judgment. Our judgment was formed not merely from their conclusions but from the implications of what tey confided in us. The neer members of the court were quite outspoken in describing the really alarming burden of the work. One of them said he worked 6½ days a week. Another said that he only wished he had time to put his feet on the desk and look out the window. We all know how much useful thought comes from looking out the window.

But the more senior members of the court also made what seemed to us significant statements. One said, "With us the decisionmaking function has become an event rather than a process." That seemed to me the single most telling observation that we heard.

Another member of the court who has since opposed relief—and I don't mean that he has changed his view because we didn't go into the question of remedies—said that he had given up all outside activities, all summer lecturing and the like, that he did his petitions for certiorari in the evenings and was now able to do the petitions at twice as fast a rate as he had when he came on the court. Thus, he said, he was able to cope with the burden. We did not ask him what was an obvious question, whether he would be able to cope with the burden if he were newly appointed to the court today. If he was at the saturation point when he could work twice as fast as he had been able to, how could a newly appointed member of the court cope with the load? I suspect in all realism that the answer would be the newly appointed member of the court would rely substantially more on his law clerks.

Another member of the Court who had come from a court of appeals said that when he went to the Supreme Court he looked forward to an opportunity to plumb cases to their depth as, he said, we had not been able to do in the court of appeals, but he said it turned out that we were even more pressured on the Supreme Court than we had been on the court of appeals. But he said you learn to numb yourself to it.

Now, he has expressed doubt whether there is a need at this moment for a remedial measure because the load is not, as I think he has put it more recently, impossible or intolerable. We on the study group, however, felt that to numb yourself to it was not a satisfying answer.

We felt that the Court should set its sights higher. The idea, for example, of devoting several conferences to a single subject would, I suppose, appear quite outlandish to the Court today. After all, at a single conference they will deal with, say, 30 percent of the 75 petitions filed in a week, 20-odd petitions, various motions, arguments of argued cases, 10 or 12 cases to be discussed, as well as discussion of drafts of opinions that are close to completion and distribution. That being the case, how could hours or days of conference be spent discussing a single topic?

I thought of a remark that Justice Brandeis made to me when I clerked for him; namely, that at a prior term he had persuaded the Court to set aside a whole conference to discuss the subject of depre-

ciation accounting, that being of course a very significant issue in utility ratemaking at that period. He added that the session was not all he had expected because the brethren had not all done their homework, but then his standards were very high.

The point I am making is that I think that would be considered quite out of the question today and yet it ought not to be. It seems to me that the model for the Supreme Court ought to be not the bureaucratic mode, that is to say, an agency of high volume and high pressure, but rather a small group of thinkers concentrating, discussing, self-criticizing, on a limited number of the most significant legal issues of the day. The fact that the Court is not in arrears seems to me not a very telling argument that the Court has not reached the saturation point.

Now, our study group made a number of proposals. One was the abolition of three-judge courts, which has been discussed here, a proposal which now, of course, has been accomplished as a result of similar recommendations by a good many others.

Also we recommended that review by the Supreme Court be wholly by certiorari, eliminating obligatory review on appeal.

Finally, we recommended a national court of appeals. Our submission was a court that would receive appeals and petitions from all the Federal courts of appeals and from State courts, as the Supreme Court does now, screening these and sending 400 or 500 of them per term to the Supreme Court. These cases would constitute the Supreme Court's docket from which the Supreme Court would choose those cases, as it does now, which it would grant a plenary review.

The principal objection to our proposal of a national court of appeals and an objection which was very widely voiced was that it would deprive the Supreme Court of control of its docket or, stated from another point of view, that it would deprive the ordinary citizen of the right of access to the Supreme Court on any Federal constitutional or statutory claim. I don't want to reargue our proposal but I thought it might be useful to compare it with the present proposal.

The Commission's proposal embodied in S. 3423 avoids that objection to the study group's recommendation. At the same time as a consequence I think it has to be said that it does not reduce the burden on the Supreme Court of its screening function and indeed may increase that burden.

Let me briefly summarize what to me are the questionable aspects of the proposal and then the meritorious aspects.

First, the screening and switchboard functions of the Supreme Court would become of greater relative importance, calling for separate decisions in that Court, on whether to grant review and whether to send the case to the court of appeals. The division on those two questions could be quite separate and distinct.

To cope with the burden of this screening and switchboard function as enhanced under the present proposal, the Supreme Court might be tempted to the use of panels as indeed has been suggested by some observers, or more likely to the greater use of a nonjudicial professional staff. In my judgment either course would be a move in the wrong direction for reasons that I elaborated a few moments ago concerning the model it seems ought to prevail for the Supreme Court.

Second, the appellate process, it can be said, would become overelaborate. A case could pass through five tiers: in the district court, the court of appeals, the Supreme Court, the national court of appeals and again the Supreme Court. This may smack of what Chief Justice Hughes once called, in another context, undue process of law.

Third, the proposal may be too modest in that it does not afford direct relief to the present courts of appeals.

Now, the merits of the proposal which to some degree mitigate against these objections and answer the objections seem to me to be these.

The bill provides a greater decisional capacity for the appellate system particularly in cases of conflicting decisions and in cases of statutory construction or Federal procedure that ought to be resolved authoritatively for the Nation, but not necessarily by an already saturated Supreme Court.

Second, the greater decisional capacity would have a reflexive effect on the caseload of the courts of appeals by settling more surely or more promptly issues that breed multiple litigation in the circuits.

I would agree heartily that the earliest possible resolution is not always advisable since some issues are likely to benefit from simmering and receiving the attention of additional judges on the circuits. What is called for is flexibility and this, it seems to me, is a final virtue of the proposal.

My third merit then is the flexibility of the measure which is provided by leaving a large degree of discretion to the Supreme Court both in the number of cases remanded and in their subject matter. It is fair to say, I think, that in the end the effectiveness and wisdom of the system will depend on the Supreme Court. As the new court gains the confidence of the Supreme Court and the country, as of course it is to be hoped that it will if it adopted, the Supreme Court may be moved to utilize the new court for supplementary screening of cases, for example, by remanding a batch of tax cases for the new court to decide on the grant or denial of review in the context of the larger tax picture.

The Supreme Court may forestall either the use of panels or the increased employment of a professional staff through the utilization of the national court of appeals.

At this stage or in this view the national court of appeals comes to resemble more closely the study group's proposal with the important difference that the new proposal avoids the objection of lack of control by the Supreme Court of its docket and lack of right of access to the Supreme Court.

Obviously, one cannot have every virtue. There has to be some sacrifice, some cost for the benefits. This Commission has chosen the cost of an extra tier and elaborate appellate processing. Our group chose the alternative of withdrawing certain matters from the Supreme Court which we thought had the least claim on the Supreme Court's attention. Politically I think the proposal of the Commission is likely to be more palatable than the alternative which our study group chose.

Let me say finally that as has been pointed out repeatedly at these hearings the problems of the Federal judiciary are intertwined at the various levels and I would hope that the Judiciary Committee, whatever its action on this proposal, would continue its examination of the

system as a whole and more specifically would look favorably on the following.

One, reduction in the volume of district court business through eliminating diversity of citizenship jurisdiction. I think the basis for the jurisdiction in principle no longer exists and consequently whatever relief can be obtained by eliminating it ought to be gained.

Second, as our study group recommended, the creation of a kind of ombudsman to whom a district judge could refer petitioners' claims whether for collateral review or for complaints about prisoner conditions in order that these complaints might be investigated and reports made and where possible settlement reached without coming to trial.

As you well know, Mr. Chairman, the review collaterally of criminal cases and prisoners' complaints under section 1983 have been a major source of the inflow of business in the Federal courts.

Third, a point I mentioned earlier, the use of certiorari throughout the appellate stage for the Supreme Court thereby eliminating appeals. In this connection let me say that the abolition of three judge courts while helpful is not likely to have a dramatic effect on the Supreme Court's business.

I say this for two reasons.

First, if the constitutional questions involved are substantial, the Supreme Court would presumably grant certiorari in any event.

Second, under the system that we now have and which I think is objectionable, there would be a right of appeal from the Federal courts of appeals in all cases where the courts held a State statute unconstitutional or a Federal statute constitutional.

In the opposite decisions the review would be by certiorari. The only basis for this cleavage is a presumed bias on the part of the court in favor of Federal statutes and against State statutes. This presumed bias seems to me quite unreal. If there is any bias unconsciously it would presumably be rather with respect to a particular subject matter of statutes and not whether the statute was a State statute or a Federal statute.

What I am saying is that there is still under our bifurcated system of appeals and certiorari a group of cases that will require appeal from the courts of appeals, a growing number now that the three judge court business is being funneled through the ordinary appellate process and therefore the need to do something about obligatory appeals becomes more pressing.

This leads to the subject of per curiams which I think are the response of the Supreme Court to an impossible problem of deciding on the merits the great number of cases that happen to come to it by appeal but which on certiorari would be denied.

Now, whether it is right to decide these cases per curiam on the basis of the rather meager jurisdictional statements without oral argument and supplementary briefs is very problematic and yet one can understand that the court wants to avoid the alternative of setting these down for plenary argument. I think the root of the problem is the needless persistence of the distinction between appeal and certiorari.

Now, finally let me say a few more general words. We have had suggestions for specialized courts. I, myself, still believe that a court of ultimate appeal ought to be a court of generalists particularly in a field like taxation where lawyers and, consequently, judges are likely to be

polarized in their views; that is to say, we have Department of Justice lawyers and we have private tax lawyers. Were it possible for the leopard to change its spots, one ought not to count on it. The polarization adversely affects the appointing process.

Now, the national court of appeals as proposed might very well decide a substantial number of tax cases per term. This would be all to the good. It would acquire expert expertise but it would not be solely composed of so-called tax experts or perhaps not composed at all of judges who had previously distinguished themselves as tax experts.

To me the relevant comparison is with the medical field where you have those valuable practitioners, the internists who have a subspecialty, an internist who is also a specialist in cardiology or gastroenterology. I think the national court of appeals would come to be composed of that kind of judge, a generalist with a subspecialty. It might be tax law, it might be welfare law, it might be labor law.

Now, you may say the subspecialist in medicine has received training in that specialty, and that to be sure is true. I would hope that if we have a national court of appeals that is likely to have to decide a substantial number of specialized class of cases there would be some opportunity by way of refresher education or judges institute, summer institute, to give the members of that court more sophistication in a field like taxation.

The subcommittee has heard a number of arguments to the effect that we ought to wait for more comprehensive reform. I would quote the old addage that the best is often the enemy of the good the best which may be a remote best. Also the aphorism that problems ought not to have to become rotten before they are ripe, like the fruit of the medlar tree. The question is not whether the situation is rotten but rather whether it is ripe and whether we ought to wait for it to become rotten.

In my judgment, the need for comprehensive reform of the jurisdiction of the Federal court is not but mutually exclusive with the proposal for a national court of appeals. It seems to me that the need for a national court of appeals stands on its own bottom and will continue regardless of reforms that are made at other levels of the system.

Thank you.

Senator HRUSKA. Professor Freund, we are deeply grateful to you. You have made a tremendous contribution in this area of study. You entered it at a time with your Commission which made it the pioneer and therefore took some lumps that were not deserved. It sometimes was deprived of some of the credit which was fully coming to it. So from that standpoint we are grateful.

We appreciate the approach of your analysis and the attitude that you have expressed in your testimony here today. It is judicious in its approach, if you don't mind my saying so, and very, very helpful.

I am going to ask Mr. Westphal if he has any questions or comments of you.

Mr. WESTPHAL. Mr. Chairman, I share with you your views on Professor Frend's presentation. However, I will forgo any privilege to ask him a question or two in order to have an opportunity to state this.

In view of the fact that this very likely will be the last hearing at which you may preside or participate in as a Member of the U.S. Senate, I would like to take this opportunity on behalf of the

staff of this particular subcommittee—and I don't think it would be presumptuous of me to ask on behalf of the staff of the entire Senate Judiciary Committee—and express our thanks to you for your untiring efforts on behalf of improving the Federal judicial system. Your efforts in that regard have been very great and they have been nonpartisan, as indeed the cause of judicial reform should be and, I believe, is nonpartisan.

Let me just simply say that we are going to miss your presence and we are going to miss your efforts, and we do thank you. It has been our pleasure.

Senator HRUSKA. Your gracious comments are very highly appreciated.

Professor Levin, with one of your compatriots in the witness chair, have you anything to respond?

Mr. LEVIN. I would like to follow in the footsteps of Mr. Westphal. I have no staff for which I can speak, but I think I can say one thing for the record and it goes without saying. For me it has been a great educational experience working under the chairman these few years on the Commission and on this measure. But the thing that I think has struck me most was the fact that totally nonpartisan judges of great number, and particularly the Supreme Court Justices, have respect and admiration for the man that is chairing this subcommittee here today. That respect was reflected on more than one occasion and by each and every one of them. That is a source of great delight to me but is something which I think you have accumulated with a lifetime of dedication by you to the Federal judicial system. It is something that may not be well known. It is the kind of thing that has more significance because it is expressed in most private situations with two, three, or four people present, but that is a very real thing and a tremendous tribute to you, Senator Hruska. I am pleased to be privileged to note it in the record.

Senator HRUSKA. Thank both of you for your generosity.

Thank you again for coming, Professor. With that we will conclude the hearings and adjourn the 2-day series of hearings on these bills.

Mr. FREUND. Thank you very much.

[Statement of Mr. Freund follows:]

STATEMENT OF PAUL A. FREUND

I appreciate the invitation to testify on the proposal to establish a National Court of Appeals. I am now professor emeritus at the Harvard Law School, where I have taught constitutional law, and I served as chairman of the Study Group on the Caseload of the Supreme Court, appointed under the auspices of the Federal Judicial Center. I appear solely in an individual capacity, and have not consulted other members of the Study Group in preparing my testimony. My special interest in the functioning of the Supreme Court derives from the experience of a clerkship with Justice Brandeis and service of seven years in the Solicitor General's office.

Although the Study Group and the Commission that recommended S. 3423 had different terms of reference (the former focusing on the Supreme Court, the latter on the courts of appeals), both groups in the end sponsored a National Court of Appeals. This is hardly surprising when it is borne in mind that, with minor qualifications, the only federal court with nation-wide jurisdiction and authority today is the one established for thirteen states and four million people in 1789.

With the growth in population, the rise of business and commercial interests, the proliferation of federal legislation, and the statutory expansion of the juris-

diction of the lower federal courts, the burgeoning caseload of the Supreme Court became a pressing problem in the period following the Civil War. In 1891, with the adoption of the Circuit Courts of Appeals Act, Congress provided an effective remedy, whereby these intermediate regional courts would serve as final courts of review except on important issues of law. But of course in time the solution became a problem, because of the fostering of conflicting decisions among the circuits, and the increasing pressure on the Supreme Court owing to the growing volume of appeals. The latter problem was addressed in the Judiciary Act of 1925, which made discretionary review by certiorari the preponderant mode of access to the Supreme Court. But this solution, too, came in time to become a problem, as the mounting burden of petitions for certiorari has threatened to take a disproportionate share of the Court's time for the screening function. The volume of filings per term has grown to roughly 4,000, or more than 75 applications for certiorari or appeal every week in the year.

In 1959, when the certiorari docket had reached 1500 cases, Justice Harlan voiced serious concern:

"At the time the Act of 1925 was passed the rapid growth of the Court's certiorari business could hardly have been foreseen. During the past eight terms the number of petitions dealt with by the Court has grown from about 1,000 to approximately 1,500. Increasingly, the time required to handle the certiorari work and that needed for adjudication of cases, and more particularly for the writing of opinions, are coming into competition. This is something that gives food for thought. On of one hand, the willingness of Congress to relinquish to the Court what in practical effect amounts to control of its appellate docket naturally presupposed that the Court would exercise this responsibility with a proper degree of deliberation. . . . On the other hand, certiorari would be self-defeating if its demands upon the Court's time were allowed to impinge upon the processes involved in the adjudication of cases. For after all the Court exists to decide cases, and certiorari is but an ancillary process designed to promote the appropriate discharge of that duty. It would be most unfortunate were the demands of certiorari permitted to lessen the number of cases on its calendar which the Court had time to decide, to consider on a plenary basis, or to dispose of with full-scale opinions. It would be still more serious if the demands of certiorari should ever reach the point of making significant inroads in the time which individual members of the Court can afford to devote to reflecton upon the decision of important issues. I think it can fairly be said that none of these things has come about so far. . . . While it can . . . be said that the certiorari work, despite its continuing growth, is still within manageable proportions, it would be shortsighted not to recognize that preserving the system in good health, and keeping it in proper balance with the other work of the Court, are matters that will increasingly demand throughful and imaginative attention." (33 Australian L. J. 108, 113–14).

The Court itself has taken a number of measures that implicitly reflect the problem of the caseload. The normal time for oral argument has been reduced from one hour to one half hour for each side. The number of law clerks per Justice was increased by law to two in 1947, and at the request of the Court to three in 1969; now four clerks per Justice are authorized, as well as several law clerks at-large. Case records have been dispensed with on petitions for certiorari, thus reducing the formidable quantity of printed matter comprised in 75 petitions per week, but at a cost of less-informed actions by the Court. The number of petitions granted has remained fairly constant, around 175 per term, with a consequent decline in the percentage of grants. These have declined from 17.5 percent in 1941 to 11.1 percent in 1951 to 7.4 percent in 1961 to 5.8 percent in 1971, where it stands approximately today. Excluding the *in forma pauperis* petitions, the figures still show a marked decline: 19.4 percent in 1941, 15.4 percent in 1951, 13.4 percent in 1961, 8.9 percent in 1971. At the 1975 term the figure was 9.1 percent, less than half of what it was thirty-five years ago.

The Study Group concluded, on the basis of the statistical record and interviews with each member of the Court, that the business of the Court had reached the saturation point. Even though the Court was abreast of its docket, and although, as one member of the Court put it in lamenting the lack of time to plumb the depths of cases, "you learn to numb yourself to it," the Study Group concluded that relief was needed if the Court was to have the time for reflection, discussion, self-criticism, and accommodation that the magnitude of the issues under submission deserved. The Study Group recommend (a) that three-judge courts, with a right of appeal to the Supreme Court, be eliminated (as has been substantially accomplished); (b) that appeal to the Supreme Court as of right be abolished,

and all review be by certiorari; (c) that a National Court of Appeals be established. This Court would screen all appeals from federal courts of appeals and from state courts, sending to the Supreme Court about 400 or 500 cases a term, from which the Supreme Court would select those to be granted review. The National Court of Appeals would decide on the merits cases involving a conflict of decisions but not presenting issues of sufficient importance to warrant Supreme Court decision, and cases remanded to it by the Supreme Court. The principal criticism of this proposal centered on the loss of control by the Supreme Court over its docket, or, from another point of view, the obstacle to a right of access to the Supreme Court by anyone having a federal statutory or constitutional claim.

The National Court of Appeals embodied in S. 3423 avoids the foregoing objection to the Study Group's proposal. At the same time, in consequence, it does not reduce the burden on the Supreme Court of its screening function and indeed may increase that burden. It will be convenient to state briefly the questionable features of S. 3423 and then to describe its meritorious features.

The questionable aspects of the proposal, in my judgment, are these:

1. The screening and switchboard functions of the Supreme Court would become of greater relative importance, calling for separate decisions in that Court on whether to grant review and whether to send the case to the Court of Appeals. To cope with the burden of this function the Supreme Court might resort to the use of panels, or with more likelihood to the greater use of a professional staff. Either course would, in my view, be highly regrettable. There ought to be one institution, namely the Supreme Court, which can resist the bureaucratic model, which leads to a separation of nominal responsibility for a function from its actual performance. The model should be that of a small group of thinkers, engaged in a collaborative process of reflecting on, and deciding, a limited number of the most significant legal issues of the time.

2. The appellate process becomes over-elaborate. A case could pass through a district court, a court of appeals, the Supreme Court, the National Court of Appeals, and again the Supreme Court. This may smack of what Chief Justice Hughes called "undue" process of law.

3. The proposal may be too modest, in that it does not afford direct relief to the present courts of appeals.

The merits of the proposal seem to me to be the following:

1. It provides a greater decisional capacity for the appellate system, particularly in cases of conflicting decisions and in cases of statutory construction or federal procedure that ought to be resolved authoritatively but not necessarily by an already saturated Supreme Court.

2. The greater decisional capacity would have a reflexive effect on the caseload of the courts of appeal, by settling more surely or more promptly issues that breed multiple litigation in the circuits. To be sure, the earliest possible resolution is not always advisable; some issues may benefit from simmering and receiving the attention of more than one circuit. This factor calls for flexibility, which is a final virtue of the proposal.

3. Flexibility is provided by leaving a large measure of discretion to the Supreme Court, both in the number of cases remanded and in their subject matter. In the end, the effectiveness and prudential success of this system will depend on the Supreme Court. As the new court gains the confidence of the Supreme Court and the country, as it is to be hoped it will, the Supreme Court may be moved to utilize the new court for supplementary screening of cases, as an alternative to either the use of panels in the Supreme Court or the increased employment of a professional non-judicial staff.

The problems of the federal judiciary are intertwined at every level, and hence the limited terms of reference of the several groups that have studied these problems have tended toward a partial or fragmented approach. It is fortunate that this Subcommittee has no such limited terms of reference, and it is to be hoped that continuing attention will be given to additional measures that are sensible in themselves and that would contribute to the greater effectiveness of the system. Among these measures are the following:

1. Reduction in the volume of district-court business by elimination of diversity-of-citizenship jurisdiction.

2. Creation of a kind of ombudsman in the federal correctional system, to whom a district judge could refer prisoners' habeas corpus or other petitions for investigation and possible settlement without trial.

3. Elimination of appeals, and substitution of certiorari, in applications for Supreme Court review. This would remove a needless complexity for counsel in

drawing the frequently fine distinctions between the two modes of review. It would, more importantly, remove the anomaly of per curiam decisions "on the merits" in dismissing appeals without argument and without briefs beyond those on the jurisdictional statements. The substantial resort to this device by the Court has been a response to its overcrowded docket, but the response is neither faithful to the original conception of appeals as of right nor a satisfactory method of rendering decisions that have the force of precedents.

Senator HRUSKA. In these hearings yesterday and today, as well as those in May, reference has been made to "land mark" legislation resulting in changes of large degree in the Supreme Court's structure, procedures and jurisdiction.

Notable among such occasions were the Court of Appeals Act of 1891 and the judges bill of 1925.

Earlier this year Mr. Justice White compiled a history and development of such enactments together with observations as to their impact. These remarks included a discussion of the activities and recommendations of the Commission on Revision of the Federal Court Appellate System.

These points were contained in a speech which the Justice delivered to the Capitol Hill Chapter of the Federal Bar Association in Washington, D.C., on March 10, 1976 in the Capitol Hill Club.

Without objection there will be inserted in the material of today's hearing and at a point immediately preceding the announcement of adjournment, the text of Mr. Justice White's speech on that occasion.

It should be noted that S. 3423 was introduced by this Senator on May 12, 1976, well after the time of the speech by the Justice. Hence, his remarks contain no reference to S. 3423.

[The speech of Mr. Justice White follows:]

SPEECH BEFORE THE CAPITOL HILL CHAPTER OF THE FEDERAL BAR ASSOCIATION BY MR. JUSTICE BYRON R. WHITE

Ladies and gentlemen, since I serve on the Supreme Court and since that fact very likely explains my being asked to be here, I suppose it would be appropriate to talk with you about an aspect of the Court's work. Of course, many lawyers do not litigate, at least very much, and only a tiny percentage of them has any direct participation in appellate litigation that reaches the Supreme Court. But all lawyers, especially a group like this, have a stake in the proper development of the federal law, whether constitutional or statutory; and it seems agreed that the proper functioning of the Supreme Court is of critical importance in this respect.

In any event, ladies and gentlemen, I shall address myself to a most significant event of the last year insofar as the future work of the Supreme Court is concerned.

I have in mind the recent report of the Commission on Revision of the Federal Court Appelate System. This group, a statutory body with the mission of studying the appellate system and making recommendations to Congress, has concluded that the decision-making potential of the Supreme Court is no longer adequate to fulfill the needs of the federal system. It recommends augmenting the appellate capacity of the federal court system by creating a national court of appeals with the primary function of deciding cases referred to it by the Supreme Court itself. This is the second study group to arrive at the conclusion that the Supreme Court is no longer able to cope with the stream of litigation coming to it and that the creation of a new court is essential. The Commission's recommendation, however, is much different from the prior proposal made by an unofficial group.

The conclusion by two different committees, both composed of experienced and highly qualified men, that the Supreme Court is no longer up to the appellate task that must be done is a matter of great moment. The issue has provoked much discussion. There are major disagreements, and the dialogue is continuing. You are invited into the fray.

It should be noted at the outset that having problems with our appellate structure is nothing new. If it is true that litigation has overrun the Court's capacities, it will not be the first time in our history that this has occurred, nor if a new court is created will it be the first time that far-reaching revisions in the system have been made to cope with the problem. Such events have come to pass at least twice before. The first inundation took the better part of 80 years and another 10–20 years to provoke legislative response.

The Constitution vested the federal judicial power in one supreme court and in such inferior courts as Congress would establish. The First Judiciary Act provided a Supreme Court made up of a Chief Justice and five Associate Justices. Thirteen district courts were created with jurisdiction over minor crimes, exclusive jurisdiction over admiralty and maritime cases and the power to decide other limited categories of cases. These courts were organized into three circuits, each with a circuit court of three judges composed of one district judge and two Supreme Court Justices, although one Justice was sufficient after a 1793 amendment to the Act. The circuit courts had original jurisdiction over all serious federal crimes, as well as civil cases where the United States was a plaintiff, an alien was a party, or the parties in the case were citizens of different states. There was no general federal question jurisdiction granted to either the district or circuit courts.

The circuit courts also had a substantial range of appellate jurisdiction over the district courts. The Supreme Court had appellate jurisdiction over all cases decided by the lower federal courts except criminal cases and civil cases involving less than $2,000. It also had appellate jurisdiction over state-court judgments where federal claims had been presented and rejected.

In 1806, the size of the Court was increased to seven and in 1837 to nine, where it remained except for several changes, up and down, made during and immediately after the Civil War. Meanwhile, the number of circuits increased to nine, and the appellate jurisdiction of the Court expanded, but always excepting some cases in which no access to the Court was provided. As the country grew so did litigation and the Court's workload. General federal question jurisdiction was extended to the federal courts in 1875. Soon thereafter the Court was in serious trouble. The number of cases in the Court almost doubled between 1870 and 1880—636 to 1,212. In the October Term 1890, there were 1,816 undecided cases on the docket. All of these cases were there, on writ of error or by appeal, and each of them called for resolution on the merits. No one court could perform this appellate task. As one account puts it, "the chronically-deepening crisis reached the point of universal acknowledgment. But action was paralyzed by seemingly irreconcilable differences about remedies."

New legislation was eventually forthcoming. The Court of Appeals Act of 1891 divided the country into nine circuits (now eleven counting the District of Columbia), and provided a court of appeals in each circuit with jurisdiction to review judgments of the federal trial courts. The Act also introduced the idea of discretionary review by certiorari. In important classes of cases, decisions of the new courts of appeals were to be final unless the Supreme Court, within its informed discretion, chose to issue a writ of certiorari and to undertake further review. Aside from the cases in these categories, appeal judgments of the courts of appeals lay as of right; and direct appeal to the Supreme Court from trial court judgments was retained in a variety of circumstances. There was also appeal as of right from state court judgments rejecting federal claims.

For a time, the remedy was adequate. The new regional courts did provide a substantial shield, and discretionary review proved useful in screening out unfounded appeals. 482 new cases had been filed in the 1887 Term, 623 in 1890. With the new Act, the figure dropped to 275 in 1892.

But litigation continued to grow with the country. Beginning in 1903, Congress provided for three-judge courts, with direct appeal to the Supreme Court, and in 1910 and 1913 substantially expanded the jurisdiction of these courts. In 1915 and 1916, the reach of the Court's discretionary jurisdiction was extended, and the provision for obligatory appeals correspondingly narrowed. Nevertheless, docket pressures were inexorable, and in the early 1920's the Court again fell behind in its work. There were too many obligatory appeals and too many cases that warranted review on the certiorari list. The interval between filing an appeal, or the grant of certiorari, and decision on the merits came to exceed twelve months. It was clear that delay would surely increase absent effective steps to make the appellate system work.

The solution was the Judges Bill of 1925, approved and much of it drafted in the Court and supported before Congressional Committees by a delegation made up of the Chief Justice and three Justices. The testimony was that the appellate system was not only intolerably confusing but that too many cases not deserving further review were being forced on the Court. Congress was presented with the proposition that after decision in a trial court and after at least one review in federal or state appellate court, further appeal to the Supreme Court should be permitted only where issues of federal law important to the country were involved or where further review was essential to resolve conflicts between lower courts on questions of federal constitutional or statutory law, which, by definition, was to be equally and uniformly applicable in all parts of the country. Absent these qualifictaions, one trial and one appellate review were enough; and the Court should be given broad powers itself to determine which cases merited review. Congress, embracing this approach, passed the Judges Bill and made review of all but rather narrow categories of cases discretionary with the Court. There were still appeals as of right from three-judge courts and from certain decisions of state courts; but obligatory appeals were so confined that by the simple device of denying certiorari in an increasingly large percentage of cases presented to it, the Court became current in its work and has remained so today. Except in unusual circumstances having little or no relation to docket pressures, there is little delay in deciding any case granted plenary review by the Court. There is no question in anyone's mind, as far as I know, that the Court is reasonably current in deciding which cases to take and in resolving those cases it has chosen to decide. But this observation leaves unanswered the question which is the focus of the two study committees, namely, whether the Court can or does hear all the cases that should be reviewd and authoritatively decided if the federal law is to survive in the form contemplated by the Constitution.

From the very outset of the government, and particularly since 1891 when the Courts of Appeals were created, the accumulated wisdom of the country was that it was not essential that the Supreme Court review every federal question presented to it by a disappointed litigant. And in 1925, the decision was that Supreme Court review be reserved for matters of law of substantial significance to the nation or to maintaining the supremacy and equality of the federal law throughout the union. It is also clear that the extension of discretionary review in 1916 and 1925 did not then threaten the existence of a coherent body of federal law. Hindsight indicates that four Justices would vote to give plenary review to enough cases to ensure a credible, and creditable, body of federal law. The question we now have is whether this is still the case. Discretionary review may be essential to the survival of the Supreme Court, but it plainly does not answer the issue now posed: can and does the Supreme Court grant and decide sufficient cases to maintain the federal law as a rational and coherent system?

The dockets of all of our courts, state and federal, trial and appellate, have grown rapidly over the last few decades. The increase in Supreme Court filings was not particularly impressive until the 1950's—983 new filings in 1935 and 1,234 in 1951. But new cases have trebled since 1951—2,185 in 1961, and 3,643, 3,741, 4,186 and 3,659 in 1971, 1972, 1973 and 1974, respectively. For present purposes, however, the interesting and crucial fact is that the number of issues in which the Court has granted and heard oral argument and written full appellate opinions has not nearly kept pace with the growth in the docket.

In the ten-year period of 1937 through 1946, there was an average of 142 signed opinions for the Court each term. That average was down to 101 during the 24 years from 1947 through 1970. During the last four terms the Court has issued an average of 133 signed opinions each year. However the figures are looked at, the number of cases taken and decided has not risen in proportion to the Court's docket. The Court is hearing and deciding a constantly decreasing proportion of the cases presented to it. Just as clearly, there are finite limits to the volume of cases the Court can decide, and, as is very likely, that limit has now been reached. I doubt seriously that the Court should attempt to give plenary consideration to and decide the merits of more than 150–200 cases each term. Our present argument docket is within that range.

Insulating cases or categories of cases from appellate review in the Court has always been a bone of contention. The major issue in the 1890's was whether appellate capacity should be increased or Supreme Court review effectively restricted. The country followed both courses at that time, creating new appellate courts but also in effect restricting review by providing the Court with a wide measure of discretion.

In the 1930's, one of the complaints leveled at the Court by Franklin D. Roosevelt was that under the system created by the 1925 legislation, the Court was unable to review a sufficient number of cases. In a 1937 message to Congress, the President complained about the Court and among other things inquired whether "full justice is achieved when a court is forced by the sheer necessity of keeping up with its business to decline, without even an explanation, to hear 87 percent of the cases presented to it by private litigants."

The Court's response, in a letter to Senator Wheeler, said that the Court was fully abreast of its work and went on to address directly the issue of the adequacy of the appellate system to perform its task:

"Under our Federal system, when litigants have had their cases heard in the courts of first instance, and the trier of the facts, jury or judge, as the case may require, has spoken and the case on the facts and law has been decided, and when the dissatisfied party has been accorded an appeal to the circuit court of appeals, the litigants, so far as mere private interests are concerned, have had their day in court. If further review is to be had by the Supreme Court it must be because of the public interest in the questions involved. That review, for example, should be for the purpose of resolving conflicts in judicial decisions between different circuit courts of appeals or between circuit courts of appeals and State courts where the question is one of State law; or for the purpose of determining constitutional questions or settling the interpretation of statutes; or because of the importance of the questions of law that are involved. Review by the Supreme Court is thus in the interest of the law, its appropriate exposition and enforcement, not in the mere interest of the litigants."

The Court said that no single court could or should decide all cases that litigants might want to bring to it. The Court went on to say, and I quote:

"I think that it is safe to say that about 60 percent of the applications for certiorari are wholly without merit and ought never to have been made. There are probably about 20 percent or so in addition which have a fair degree of plausibility but which fail to survive critical examination. The remainder, falling short, *I believe, of 20 percent, show substantial grounds and are granted.* I think it is the view of the members of the Court that if any error is made in dealing with these applications it is on the side of liberality . . . ." (Emphasis added.)

The Court no longer can or does review 20 percent of the cases presented to it. My own observation is that in the last three terms we gave plenary review to approximately 8 percent of all cases on the regular appellate docket that were acted upon at the initial stage of granting or denying review, but only 1 percent or less of the cases on the miscellaneous or unpaid docket. Overall, plenary consideration was given to only 4½ percent of all cases. Another 6 or 7 percent on the paid docket, however, and another 1 or 2 percent on the unpaid docket were summarily reversed, affirmed or vacated without argument and without opinion.

The issue emerging from these figures is whether, as initial filings grow but the Court's intake cannot be expected to exceed 150–175 cases, the appellate function anticipated by the Constitution and controlling statutes is being adequately performed.

Short of amendment or revision by competent authority, the Court is the final expositor of the Constitution and of the federal statutes when they are presented to it for interpretation. The assumption is that the Constitution is a national document binding and having a uniform impact on all public officials. It is also apparent that the acts of Congress should have an even-handed nationwide effect. The Supreme Court is now the only court whose decisions on issues of federal law are expected to be followed countrywide, and it is thus upon this Court that the legal profession, lawyers and clients, as well as the public, are to a great extent dependent to assure an internally consistent and rational body of federal statutory and constitutional law. This is the Court ultimately responsible for maintaining the boundaries between the various organis of the federal government, as well as between state and federal power. It must also accept responsibility for interpreting and enforcing the Bill of Rights and other constitutional limits on the exercise of the various powers of state and federal governments.

It must be remembered, however, that all courts in the land are bound by the federal law and that with the vast expansion of the federal law in our lifetime, all courts are busily engaged in construing the federal Constitution and federal statutes. With the explosion in federal question litigation, but with the Supreme Court's docket necessarily limited, the opportunities for disparate views among

courts have multiplied, as has the number of unsettled questions under far-reaching regulatory statutes.

As I have said, two study groups have now concluded that the Supreme Court no longer has the capacity to perform the task of harmonizing and overseeing enforcement of the federal law. The Freund Committee, chaired by Paul Freund of the Harvard Law School, included two other very prominent educators and three equally qualified practitioners. Its stark conclusion was this:

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

The congressionally created Commission on Federal Appellate Court Revision was made up of four senators, four representatives, three federal judges, a former chairman of the House Judiciary Committee, two very experienced practitioners and two educators, including Herbert Wechsler, who, if not the most knowledgeable scholar about the federal court system, is certainly one of a tiny group with such unusual experience and insight. The Commission arrived at a very similar conclusion—that present appellate arrangements leave unresolved too many conflicting decisions and too many unsettled questions of federal law—"that at some point the percentage of cases accorded review will have dipped below the minimum necessary for effective monitoring of the nation's courts on issues of federal statutory and constitutional law" and that this point has now been reached.

The Commission's recommended solution is a new Article III court of seven judges, who will sit *en banc* and decide cases coming to them from two sources. First is the so-called reference jurisdiction over cases referred by the Supreme Court itself. Appeal or certiorari from all judgments of the courts of appeals and state courts would continue to lie directly to the Supreme Court as is presently the case; and it is anticipated that the Court would immediately select and decide an appropriate number of important cases as it now does. All cases which it does not itself choose to decide and which would otherwise have been denied or dismissed, however, the Court would be authorized to refer to the new court; and the new court would be permitted to choose its docket from among that large number of cases. At the same time, it would be provided that the Supreme Court could direct that specified cases actually be decided by the new court and that the Supreme Court could itself finally deny review of any case without referring it to the new court.

The Commission also recommends that the present Courts of Appeals be authorized to withhold judgment in any case and to transfer the case to the new national court of appeals. Transfer would be upon motion or upon the court's own initiative. The new court would not be required to accept a case but could return it to the transferring circuit which would then be required to decide it in the usual way.

The Commission thus recommends the creation of a new court with a national jurisdiction and with the capacity authoritatively to decide 150 to 200 cases that are not now being decided in the federal system, cases that would be selected by the Supreme Court or by the new court itself, or to a more limited extent by courts of appeals.

Under this proposal, litigants would face no more barriers or delay to Supreme Court review than they face at the present time. Presumably, all cases which the Court has the time and energy to decide would be taken and immediately decided in the usual way. The Court's control over its own docket would not be disturbed, nor would its authority to prevent certain cases from being decided. In addition to its present powers, however, it could select for decision another 150 or 200 cases for the national court of appeals to decide; or if that task proved too burdensome, it could permit the new court itself to select all or part of its own workload. As to these cases, there would be no more delay than if the Supreme Court itself were to take and decide these issues.

According to the Commission, and others, there would be two principal benefits from the new court. First, it is asserted that a substantial number of conflicts between the courts of appeals, between courts of appeals and state courts or between state courts themselves are not now being resolved and that the proposed court would provide an authoritative mechanism for resolving these conflicts. Second, wholly aside from actual or impending conflicts, the new court could

provide authoritative answers to many emerging questions under new federal regulatory statutes which should be decided at an early date but which, because of docket pressures, wouldn't soon be resolved by the Supreme Court.

Plainly enough, the suggested new court is designed to improve the federal law rather than to ease the burdens on the Supreme Court. Concern for the new court's docket might indeed be a substantial additional burden for every Justice. The reality nevertheless is he Supreme Court can take care of itself through its discretionary jurisdiction, and need not assume burdens that it cannot discharge. The Commission, it seems to me, has correctly identified the real issue as the state of the federal law rather than whether or not the Supreme Court is overworked.

The case for the national court of appeals thus comes down to a sophisticated, but realistic, judgment as to whether additional appellate capacity is needed in the federal system. Surely, change should not be made merely for the sake of change; and revisions in the system should occur only in response to demonstrated shortcomings in present arrangements. There are also various other proposals that warrant some consideration. This is a decision which Congress must make; but it is one in which the bar and those who use the system, as well as the public generally, should also actively participate.

Ladies and gentlemen, let there be no mistake about it. This is serious business; and it would be our great good fortune if it turned out there is no problem at all or, if the problem really exists, it suddenly disappeared. Major surgery such as the Commission recommends should be undertaken only after the most careful consideration and only then if the informed judgment is that the state of the federal law requires substantial change.

Fortunately, the issue is now on the table for all to consider. Legislation has been proposed and the formal machinery of Congress will now be utilized to focus the country's best thinking on the situation. This process is the best our system permits; and we shall live with the outcome, whatever it may be. The problem is yours, perhaps more than mine and I leave it with you.

[Whereupon, at 3:50 p.m., the subcommittee adjourned.]