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A PROPOSED NEW FEDERAL INTERMEDIATE APPELLATE COURT*

Charles R. Haworth**
Daniel J. Meador***

The growing inability of the federal appellate courts to produce authoritative resolutions to certain important questions of national law is one of the most critical problems facing the American legal system today. This article addresses this condition. To expand the capacity of the federal judicial system for definitive adjudication of issues of national law, this article recommends the creation of a new intermediate appellate court that would contribute to the uniformity and predictability of legal doctrine in important areas of litigation. In the long run, the new court would also have the effect of reducing the volume of cases that comes before the federal appellate courts.

The proposed new court would be formed by merging the Court of Claims and the Court of Customs and Patent Appeals into a single appellate court at the same level as the courts of appeals. The court's jurisdiction would include that of the two existing courts, and in addition, exclusive jurisdiction of all appeals in patent, civil tax, and environmental cases from the United States District Courts and the United States Tax Court. Further review would be in the Supreme Court by writ of certiorari. The court would be headquartered in Washington, D. C.

This article begins with an analysis of the recent history of federal appellate court reform efforts. It then focuses on three areas of federal litigation — tax law, patent law, and environmental law — in which there are exceptional needs for uniformity in the law but in which uncertainty in legal doctrine is especially pronounced. To

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*This article is based on a proposal that was circulated in July 1978 by the Office for Improvements in the Administration of Justice of the Department of Justice. The ideas expressed here vary somewhat from the original proposal. The authors express their appreciation to Paul Nejelski, Denis Hauptly, James McMullin, and Scott Taylor of that Office for their efforts in the development of the original proposal. Appreciation is expressed to Joan Barton, an attorney in the Office for Improvements in the Administration of Justice, for editorial assistance in the preparation of this article for publication. The views expressed are the authors' and not necessarily those of the Office or the Department of Justice.

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make the law more uniform and predictable in these areas, the article proposes the new intermediate appellate court and sets forth in detail the jurisdiction and structure of this court. The article concludes by pointing out aspects of this proposal that should make it especially advantageous and also more acceptable than previous recommendations for appellate court reorganization.

I. RECENT FEDERAL APPELLATE COURT REFORM EFFORTS

Those who observe the administration of justice have long recognized a basic problem of the federal appellate court system—too many appeals for too few judges. Although the number of cases has grown steadily in the past, since 1960 the federal courts have experienced what one commentator has called "'exploding dockets.'" In addition to delay and increased expense for individual parties, this court congestion has exacerbated the federal appellate system's lack of adequate capacity for authoritative declaration of national law. In response to these conditions, additional judgeships have been created and several modifications of the structure of the federal appellate courts have been proposed in recent years.

A. The Study Group on the Caseload of the Supreme Court

The earliest court reform efforts of the 1970's focused on the Supreme Court. Filings in the Court increased from 1,234 cases in the 1951 Term to 3,643 cases in the 1971 Term. During the 1971 Term, however, only 143 cases were decided, 129 by full opinions and 14 by per curiam opinions. The stark disparity between 143 cases disposed of by full opinion and 3,643 cases in which review was sought but was either denied or was afforded only through
summary procedures fostered attempts to remedy this shortfall in the declaration of national law.

In 1971, Chief Justice Burger expressed his concern about docket conditions in the Supreme Court when, under the auspices of the Federal Judicial Center, he appointed a Study Group chaired by Professor Paul Freund to investigate docket congestion in the Court. The Study Group reported in December 1972 that the Court was overburdened, principally because of the need to screen a greatly increased volume of petitions for certiorari to determine which cases were worthy of consideration. This burden, the Study Group concluded, had led to failure to review issues that would have been decided in previous years, thereby preventing the Court from discharging its historic function of resolving conflicting decisions among the circuits and otherwise authoritatively settling important questions of federal law.

To alleviate the problem, the Study Group recommended the creation of a National Court of Appeals. This court would be composed of seven judges of the existing courts of appeals, who would be designated to sit on a rotating basis. The court could decide some cases on the merits, but the major responsibility of the proposed court would be to screen certiorari petitions that would have previously been filed in the Supreme Court. From the National Court of Appeals, about 400 cases a year would be passed to the Supreme Court for further screening and possible review.

This recommendation provoked substantial controversy and a large volume of literature. Several major objections to the proposal were expressed: the National Court of Appeals violated the "one supreme court" requirement of Article III; the new court would deprive the Supreme Court of a large measure of control over its own docket and would thereby decrease the Court's ability to control the development of the law and to take the pulse of the nation's legal system; the appearance of universal accessibility to the Supreme Court—echoed in the folk sayings of America as "taking it all the way to the Supreme Court"—would be sacrificed; screening was a relatively small part of the Court's workload; and the Court in fact was not overworked. In addition, the

5 Id. at ix.
6 Id. at 5, 7.
7 Id. at 1, 4, 6.
8 Id. at 18-24.
9 Some of the most recent collections of authorities are G. Casper & R. Posner, supra note 1, at xi n.2; Haworth, Circuit Splitting and the "New" National Court of Appeals: Can the Mouse Roar?, 30 Sw. L.J. 839, 856 n.155 (1976); Leventhal, A Modest Proposal for a Multi-Circuit Court of Appeals, 24 Am. U.L. Rev. 881, 889 n.25 (1975).
composition of the Study Group was strongly criticized. Moreover, the proposal was disapproved because it was directed only toward the Supreme Court, while many observers perceived that it was the regional courts of appeals that were truly inundated.

Although the proposal of the Freund Committee was the product of an able group of lawyers and academics, it gained little acceptance and was dead within a year. The report did, however, serve to focus attention on weaknesses in the federal appellate system, and it led to further serious efforts to deal with those problems.

B. The Commission on Revision of the Federal Court Appellate System

Limitations on the capacity of the Supreme Court and its possible overload are not the only difficulties that beset the federal appellate system. Serious fighting and dying is also done in the trenches of the regional courts of appeals. The ballooning caseloads of these eleven geographically-organized courts, combined with the fact that only one reviewing court—the Supreme Court—can render decisions that are binding nationwide, have caused serious problems in the functioning of the federal appellate system at this intermediate level.

The present framework of the courts of appeals, created by Congress in 1891, served its function well until the courts were beset by their current difficulties. The jurisdiction of the appellate courts is almost completely a matter of the litigant’s right rather than an exercise of the court’s discretion. Ostensibly, all appeals to these courts must be decided on the merits rather than simply be screened for review, as is the case in the Supreme Court. Consequently, it is this level of courts that has carried the brunt of the

12 Leventhal, supra note 9, at 889-90 (1975) (reduced to a “residue of embers in legal journals”).
15 We say “ostensibly” because wide-spread screening procedures involving the denial of oral argument and the decision of cases without opinion have the earmarks of discretionary review. See D. Meador, Appellate Courts: Staff and Process in the Crisis of Volume 168-70 (1974); Haworth, supra note 11.
legal explosion. Since the 1960's, the intermediate appellate courts have experienced exponential docket growth. For example, in 1962 only 4,823 cases were filed in the eleven regional courts of appeals.\(^\text{16}\) By 1977, however, the number of filings in these courts had risen to 19,188.\(^\text{17}\) During that same 15 year period, the number of circuit court judges rose from seventy-eight to ninety-seven.\(^\text{18}\) Thus the growth in filings outpaced the number of additional appellate judgeships by a 12-to-1 ratio.\(^\text{19}\)

Under our federal judicial system, no court other than the Supreme Court is capable of rendering judgments that constitute binding precedents nationwide in all courts.\(^\text{20}\) In earlier decades of this century, the Supreme Court annually reviewed a sufficient number of cases from the lower courts so that significant intercircuit conflicts were eliminated and a satisfactory level of uniformity in federal law was maintained.\(^\text{21}\)

Today, however, the Supreme Court is giving plenary consideration on the merits to less than one percent of the cases decided by the courts of appeals.\(^\text{22}\) The lack of supervision that results from

\(^{16}\) 1971 ANNUAL REPORT, supra note 1, at 99, Table 2.

\(^{17}\) 1977 ANNUAL REPORT, supra note 1, at 300, Table B1.

\(^{18}\) Id. at 300, Table 1.

\(^{19}\) Increased filings in the last decade in these courts have caused alterations in the appellate system that are difficult to explain or justify on any basis other than extreme overload. Every court of appeals except the Second Circuit has a rule authorizing denial of oral argument in cases, and most circuits use their rule extensively. Haworth, supra note 11, at 265-66. Five circuits have local rules providing for affirmance without written opinion. Id. at 271. The mass production of justice through overse of clerks and staff, to the extent that this condition exists, threatens both the correcting and institutional functions of an appeal by substituting the decision of a nameless, faceless, staff attorney for that of an Article III judge. See generally D. MEADOR, supra note 15. These procedures are hard to reconcile with the characteristics of the system most essential to preserve if the appearance and realities of appellate justice are to be maintained. See P. CARRINGTON, D. MEADOR, & M. ROSENBERG, JUSTICE ON APPEAL 7-9 (1976) [hereinafter cited as JUSTICE ON APPEAL]. The imperatives detailed by these authors are missing today to some extent in the federal courts of appeals.

\(^{20}\) JUSTICE ON APPEAL, supra note 19, points to two results of this lack of authority:

One is that there is a significant volume of repetitive litigation which is a needless cost to litigants and a burden on the courts. The other is that there is an unsettling effect on legal planning. This effect can be especially mischiefous in areas of the national law which are the most intricate, and the most intensively litigated: taxation, utility regulation, environmental protection, patents and perhaps antitrust.

\(^{21}\) In the early years following the Judiciary Act of 1925, 43 Stat. 936 (codified in scattered sections of 28 U.S.C.), the Supreme Court granted approximately one-sixth of the petitions for certiorari. See Frankfurter & Landis, The Supreme Court Under the Judiciary Act of 1925, 42 HARV. L. REV. 1, 14 (1928).

\(^{22}\) Hufstedler, Courtship and Other Legal Arts, 60 A.B.A.J. 545, 546-47 (1974); see Griswold, Rationing Justice - The Supreme Court's Caseload and What the Court Does Not Do, 60 CORNELL L. REV. 335, 341 (1975). Between 1974 and 1976, the Supreme Court gave plenary consideration to between 175 and 179 cases each term. See Hellman, The Business of the Supreme Court Under the Judiciary Act of 1925: The Plenary Docket in the 1970's, 91 HARV. L. REV. 1711, 1727 n.74 (1978). This compared with approximately 15,500 and 18,400 cases filed annually in the courts of appeals during the same period. 1977 ANNUAL REPORT, supra note 1, at 305, Table B3.
this limited review reduces the institutional responsibility of the appellate courts. Judges know that the likelihood that any decision they make will become the subject of a full hearing before the Supreme Court is very slight.\(^\text{23}\) On many issues, there is no definitive legal ruling that must be followed. As a result, it is not unusual for the appellate courts to reach different decisions on the same issue. Moreover, even where there is no actual conflict among the circuits, uncertainties exist in federal law that cannot be readily resolved authoritatively. In addition, the likelihood of uneven adjudication within each circuit has grown as the number of judges has increased; in the larger circuits, the *en banc* procedure has decreased in effectiveness as a means of definitively establishing the law of the circuit.\(^\text{24}\)

Congress responded to this problem in October 1972 by creating the Commission on Revision of the Federal Court Appellate System, chaired by then-Senator Roman Hruska. The Commission was directed to suggest changes in boundaries for the courts of appeals and in the structure and internal procedures of those courts.\(^\text{25}\)

The Commission’s first report recommended splitting the Fifth and Ninth Circuits, thereby creating two new regional courts of appeals.\(^\text{26}\) This proposal has yet to be enacted by Congress.\(^\text{27}\)

The second report of the Hruska Commission dealt with court structure. As with the Study Group, the recommendation was for a


*Sec. 6. Any court of appeals having more than 15 active judges may constitute itself into administrative units complete with such facilities and staff as may be prescribed by the Administrative Office of the United States Courts, and may perform its en banc function by such number of members of its en banc courts as may be prescribed by rule of the court of appeals.*

*Id.* at § 6 (To be codified at 28 U.S.C. § 41 note).
new court to be called a National Court of Appeals. But little about the Hruska Commission’s National Court resembled the Study Group’s court, other than the name and the fact that each would have been a new tribunal inserted between the courts of appeals and the Supreme Court. The Hruska Commission benefitted from reactions to the earlier proposal, as well as from the contemporaneous work of the Advisory Council on Appellate Justice chaired by Professor Maurice Rosenberg. As a result, the Hruska Commission came to perceive the problems differently, and the Commission’s proposal avoided most of the criticisms of the Study Group’s recommendation.

The National Court of Appeals devised by the Hruska Commission would have had the power to decide a substantial number of cases on the merits, but its jurisdiction would have consisted solely of cases referred by the Supreme Court or transferred from the courts of appeals. It would have been composed of permanent Article III judges.

The Hruska Commission proposal was premised on the need to "increase the capacity of the federal judicial system for definitive adjudication of issues of national law" to remedy what the Commission characterized as the problem of "unnecessary and undesirable uncertainty." The Commission pointed to four major consequences of the appellate court system’s lack of adequate capacity for the declaration of national law: (1) the Supreme Court’s failure adequately to resolve conflicts among the circuits; (2) delay; (3) the burden upon the Supreme Court of hearing cases not clearly worthy of its attention; and (4) uncertainty in the law caused by potential intercircuit conflict, even though actual conflict might never develop. An additional problem, identified as particularly true of patent law, was said to be the Supreme Court’s inability to monitor...
a complex field of law in which problems were caused not so much by actual unresolved conflicts between the circuits as by perceived disparities in results, a condition that encouraged unbridled forum-shopping.\textsuperscript{36}

A number of objections were raised to the Hruska Commission proposal: it could create a significant additional burden on the Supreme Court to act as a “switching station”; it would establish a fourth tier within the federal judicial system; and it would be unlikely to ease substantially the pressures on the regional courts of appeals because, although these courts could avoid decisions on the merits of some cases by transferring them to the new court, the transfer decision itself would take time and could prove troubling and divisive.\textsuperscript{37}

As the preceding summary indicates, the Hruska Commission proposal and other structural reform efforts have shared a common weakness: either the Supreme Court would be helped and the courts of appeals would be left unaided, or vice versa.\textsuperscript{38} Most critics of these proposals have agreed, however, that the evidence has shown a system that was not working well, even though the problem might not justify a National Court of Appeals in the mold suggested by the Study Group or the Commission.\textsuperscript{39}

Whatever the merits or lack of merits of earlier proposals, as a practical matter it does not appear likely that any of the suggestions for appellate court reorganization that have been previously circulated will be adopted by Congress within the next several years. But the problems remain.\textsuperscript{40} It would be irresponsible to ignore them.


\textsuperscript{38} See, e.g., Wiener, Federal Regional Courts: Solution for the Certiorari Dilemma, 49 A.B.A.J. 1169 (1963) (proposing a fourth tier above the existing courts of appeals); Hufstader, New Blocks for Old Pyramids: Reshaping the Judicial System, 44 S.Cal. L.Rev. 901, 910-11 (1971) (suggesting the creation of an appellate division for the federal district courts).

\textsuperscript{39} Alsup, Reservations on the Proposal of the Hruska Commission to Establish a National Court of Appeals, 7 U. Toledo L. Rev. 431, 435 (1976); Feinberg, A National Court of Appeals, 42 Brooklyn L. Rev. 611, 624-27 (1976); Owens, supra note 31, at 598.

\textsuperscript{40} The nature of the unsolved problems is addressed by Justice White and Chief Justice Burger in recent dissents to denial of certiorari in Brown Transp. Corp. v. Atcon, Inc., ___ U.S. ___, 99 S. Ct. 626 (1978). Both justices seem to call upon Congress to create in some form a National Court of Appeals.
C. Omnibus Judgeship Act of 1978

These problems will not be solved by enactment of the Omnibus Judgeship Act. This Act is unlikely to alleviate docket congestion permanently, and it will not increase the capacity of the federal judicial system for definitive adjudication of issues of national law. Continued growth in district court caseloads is predictable. As newly-appointed district judges generate increased outputs at the trial level, the courts of appeals will be placed back in the position in which they now find themselves. At least as problematic is the fact that the bill will create 35 new appellate judges who must be integrated into the system, a task that becomes more difficult as the courts increase to near-convention size. Dispositions by the new appellate judges will likewise increase the burden on the Supreme Court.

Furthermore, creating additional judgeships without enacting more fundamental changes in the appellate system will make it more difficult to maintain coherent legal doctrine nationwide. Increasing the number of decision-making entities makes it more likely that inconsistent legal doctrine will be pronounced. Since the Supreme Court's capacity cannot be enlarged significantly, the result will be an even greater difficulty in achieving authoritative decisions that are nationally binding.

D. Imperatives of Federal Court Restructuring

The discussions provoked by the Study Group, the Hruska Commission, the American Bar Association, and the Advisory Council for Appellate Justice produced agreement on imperatives, stated in various ways, that must be considered in any future court reform effort. By "imperatives" we mean those principles that, for reasons of public opinion or sound policy, may not be ignored. In relation to the appellate system these imperatives are:

1. No fourth tier should be added to the federal judicial system.
2. Any new appellate tribunal must consist of permanent Article

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43 Justice on Appeal, supra note 19, at 141.
III judges who have important adjudicative tasks.
3. If a new court is created, its jurisdiction and position in the system should be such as not to diminish the status of existing courts and judges.
4. Undue specialization of courts and judges should be avoided.
5. Any new tribunal should provide flexibility in the federal court system to meet changing docket conditions.
6. Access to and review by the Supreme Court should remain available.
7. The number of judges or courts within the federal judiciary should not be unduly expanded.
8. A new court should operate free of jurisdictional disputes.46

Can some rearrangement be made within the federal appellate structure to increase the capacity of that appellate system to render authoritative decisions on national matters while observing these imperatives of appellate court reform? The evidence suggests that a modest yet significant step in that direction can be taken by implementing the proposal described here.

II. AREAS OF FEDERAL LITIGATION IN WHICH SPECIAL NEEDS EXIST

Although none of the previous recommendations for restructuring the federal appellate system has proven acceptable thus far, the problems that gave rise to those proposals continue. Knowledgeable lawyers and judges have long recognized three fields of federal litigation in which nonuniformity and uncertainty of legal doctrine are especially pronounced. These are tax law, patent law, and environmental law. Although many areas of general federal law might benefit from special attention, this proposal is designed to take care of the fields of law in which the problems of inconsistent adjudication are most grave. For that reason, it focuses on civil tax, patent, and environmental cases.

A. AREAS PARTICULARLY AFFECTED BY LACK OF BINDING PRECEDENT

Based on the evidence that it had compiled, the Hruska Commission singled out tax and patent appeals as being most appropriate for special treatment.47 On a list of eight critical issues "on which serious uncertainty exists," the Commission included one

46 This list synthesizes the suggestions of Griswold, supra note 22, at 335-37; Hufstedler, supra note 22, at 547-48; Rosenberg, supra note 30, at 587; Rosenberg, Enlarging the Federal Courts' Capacity to Settle the National Law, 10 Gonz. L. Rev. 709, 715-16 (1975).
patent dispute and three tax questions. Furthermore, in a Commission survey of practitioners, both the tax and patent bars indicated that uncertainty created by the lack of national precedent was a significant problem, and the Commission singled out patent law as an area in which widespread forum-shopping is particularly acute. On this evidence, even critics of the Commission’s National Court of Appeals have conceded that a good argument could be made for concentrating tax and patent appeals in national forums with exclusive appellate jurisdiction of those cases.

Environmental cases are another category in which special need may exist. Although the environmental statutes are of fairly recent origin, significant conflicts have already arisen. The language of those statutes is ambiguous in certain crucial respects. The National Environmental Policy Act has been described as “a statute whose meaning is more uncertain than most, not merely because it is relatively new, but also because of the generality of its phrasing,” and as a statute that is “fashioned in a manner calculated to breed litigation.” As a result of these problems, one

48 Id. at 22-25, 67 F.R.D. at 227-31.
49 Id. at 144-57, 67 F.R.D. at 361-76.
50 Id. at 152, 67 F.R.D. at 370; see Feinberg, supra note 39, at 622.
51 Feinberg, supra note 39, at 622. See also 1975 Commission Hearings, supra note 37, at 1314-15 (letter from Friendly, J.):

One is immediately struck by the high proportion of issues deemed suitable for the National Court that consists of tax cases. In my own thinking I must eliminate these for I remain convinced of the validity of the solution . . . which would take these cases away from the court of appeals, thereby giving these courts significant relief . . .

The report also has a good deal to say about intercircuit conflicts in patent cases. With relatively few exceptions these conflicts are not over true questions of law but rather reflect varying intuitions of judges on the application of the test . . . [of non-obviousness]. 35 U.S.C. Section 103. These varying intuitions . . . can be ended only by placing all patent litigation in a single court.


commentator has concluded that "agency action is being seriously impeded for lack of consistent judicial interpretation having prece­dential value."56

**B. Proposals for Special Treatment of These Areas**

In the recognition that special concerns exist in these areas of the law, Congress has established multiple avenues of review for tax, patent, and environmental cases, including several specialized tribunals. Unfortunately, this system has often proven dysfunctional and counterproductive. As an alternative approach, some commentators have advocated the establishment of special appellate courts with exclusive national jurisdiction over one of these areas of litigation.57 Despite the urgency of the problems, and despite attractive arguments in favor of each of these recommendations, there has been considerable opposition to the concept of creating narrowly specialized courts with jurisdiction of only a single area of litigation.58 An examination of present review procedures and previous suggestions for special treatment of these areas is useful to an understanding of the present proposal to create a new appellate court with jurisdiction of all three types of cases.

1. Tax Law — Today a taxpayer has three possible forums for tax litigation: the Tax Court, a federal district court, or the Court of Claims. The choice of court depends on whether the taxpayer is willing or able to pay the demanded taxes.

   If the taxpayer refuses or is unable to pay, he must litigate his contention in the Tax Court of the United States.59 The Tax Court considers itself to be a national court bound only by a Supreme Court decision or a circuit opinion "squarely in point where appeal lies to that Court of Appeals and to that court alone."60 Soon after the Tax Court stated this rule, it was presented with identical issues in separate litigations, one of which would have been appealable to the Eighth Circuit and one to the Fifth Circuit. The Eighth Circuit had not ruled on the issue, and there was no precedent to follow; the Tax Court in that case ruled in favor of the government.61 The Fifth Circuit, however, had previously decided the issue in favor of the taxpayer; the Tax Court felt bound to follow

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56 Id. at 501.
57 See, e.g., Whitney, supra note 55; Griswold, The Need for a Court of Tax Appeals, 57 Harv. L. Rev. 1153 (1944).
59 I.R.C. § 7442.
that rule and therefore ruled in favor of the taxpayer. These cases illustrate the potentially inconsistent results that taxpayers must consider if they decide to litigate before the taxes are paid.

Appellate review of decisions of the Tax Court takes the form of an inverted pyramid, with the cases fanning out over the entire country to the eleven regional courts of appeals. Review in each case is in the circuit in which the taxpayer is located. Review of Tax Court decisions by the regional appellate courts is not, however, an effective means of producing uniformity of treatment for taxpayers. For example, in another set of cases, two brothers who lived in different circuits were co-owners of the same exclusive right to open Dairy Queen franchises in the State of Washington. When they appealed a decision of the Tax Court to their respective circuit courts of appeals, one brother obtained the benefit of capital gains treatment for money received from sales of individual franchise outlets, while the other brother was required to treat the payments as ordinary income in the nature of royalties. Thus, these taxpayers received disparate treatment of the most blatant kind simply because of the absence of a controlling national tax forum.

A taxpayer with the financial ability and willingness to pay the tax under protest has some choice as to the forum in which to sue for a refund. One alternative is to file suit in federal district court. Under most circumstances, the taxpayer may file suit in the federal district court in which he resides or, in the case of a corporation, in the federal district court in which the principal place of business is located. Alternatively, suits may be filed in the United States Court of Claims, which is located in Washington, D. C. District court decisions are reviewable by the regional courts of appeals and the Supreme Court, while Court of Claims decisions are reviewable by the Supreme Court.

For at least the past forty years, distinguished legal com-

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64 Compare Theodore E. Moberg v. Commissioner, 310 F. 2d 782 (9th Cir. 1962) with Vern H. Moberg v. Commissioner, 305 F. 2d 800 (5th Cir. 1962).  
65 For additional criticism see 1975 Commission Hearings, supra note 37, at 1178 (statement of Caplin); Leventhal, supra note 9, at 896 n.55.  
66 28 U.S.C. §§ 1346, 1391(b), 1402(a) (1976). Under a circumstance in which a corporation has no principal place of business, a tax refund suit should be filed in the district in which the tax return was made or, if no return was made, in the District Court for the District of Columbia. 28 U.S.C. § 1402(a)(2) (1976).  
Scholarly writings supporting a specialized tax court are replete with examples of direct conflicts among the courts that review tax cases.73 As many as ten years may elapse before a final decision is reached on some tax issues.74 Because of these conflicts and delay, critical areas of the law remain open until the Supreme Court or Congress resolves them. This failure to define the national law adequately and quickly leads to uncertainty in legal doctrine and severe consequences for the appellate system. Lack of uniformity breeds forum-shopping as the attorneys for taxpayers scramble to find a court with a decision directly in point with the special facts of their case, or at least a court whose general approach to problems leans toward the taxpayer's position.75 This cynical approach to appellate law can only breed disrespect for the judicial system.76

The creation of an appellate tax court with jurisdiction to render decisions that are binding nationwide would have material benefits for the system. Such a court would introduce certainty into tax litigation. As a result, taxpayers would know more quickly whether to settle or to press an issue — a development that could reduce court congestion as taxpayers come to recognize areas of tax law in which appeal would be frivolous. Predictability within the system would contribute to equality of treatment for all taxpayers. Tax planning might lose some of its excitement for the practitioner,77 but citizens would know more clearly the tax consequences of their actions. The Internal Revenue Service also would benefit from this


71 Cathcart, Unifying Federal Civil Tax Appeals (unpublished, on file in National Archives).


73 See, e.g., Miller, A Court of Tax Appeals Revisited, 85 YALE L. J. 228, 234-35 (1975).

74 1975 Commission Hearings, supra note 37, at 1350 (statement of New York State Bar Association, Tax Section).

75 See 1975 Commission Hearings, supra note 37, at 1179 (statement of Caplin).

76 See Del Cotto, supra note 70, at 8.

77 See COMMISSION: STRUCTURE, supra note 28, at 151 (letter from Cleveland, Ohio, practitioner).
certainty of legal doctrine since it would reinforce our tax system, which depends upon self-assessment and administrative resolution of controversies. In addition, channelling tax litigation to a single forum would encourage expertise in the resolution of tax cases, and thereby reduce the time necessary to decide those cases.

2. Patent Law—There are also three possible forums for patent litigation. Adjudication of patent issues is in the Court of Customs and Patent Appeals (CCPA), a federal district court, or the Court of Claims. The choice of forum depends partially on the nature of the action.

If the Patent and Trademark Office denies a patent, the disappointed applicant may choose between review of the decision in the CCPA or suit against the Commissioner of Patents and Trademarks in the United States District Court for the District of Columbia. A loser in a patent interference proceeding may appeal to the CCPA or may file a civil action in federal district court, where the issues will be considered de novo. This suit will be subject to the general rules of venue and in personam jurisdiction. The winner in an interference proceeding, as appellee, may exercise the option to "remove" the case from the CCPA to federal district court. Review of CCPA decisions is in the Supreme Court, while review of decisions of the District of Columbia District Court is in the Court of Appeals for the District of Columbia Circuit and the Supreme Court.

Jurisdiction of suits for infringement of patents or for declaratory judgments of non-infringement is in the federal district courts. Thus, because district courts throughout the United States handle

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78 1975 Commission Hearings, supra note 37, at 1179 (statement of Caplin).
80 See H. FRIENDLY, supra note 36, at 162-63; 1975 Commission Hearings, supra note 37, at 1350. See also Heckerling, The Quest for Tax Certainty: A Court of Tax Appeals, 40 TAXES 37 (1962). Judge Learned Hand described the difficulty for the uninitiated:

In my own case the words of such an act as the Income Tax . . . merely dance before my eyes in a meaningless procession: cross-reference to cross-reference, exception upon exception — couched in abstract terms that offer no handle to seize hold of — leave in my mind only a confused sense of some vitally important, but successfully concealed, purport, which it is my duty to extract, but which is within my power if at all, only after the most inordinate expenditure of time.

85 Id.
patent cases, each of the eleven circuit courts of appeals renders decisions on patent questions.\textsuperscript{89} Further review is by writ of certiorari in the Supreme Court.\textsuperscript{90}

The Court of Claims decides patent cases in which the United States is an alleged infringer.\textsuperscript{91} The decisions of the court are reviewable by the Supreme Court.\textsuperscript{92}

Although there are some actual unresolved conflicts in patent law, the primary problem in this area is uncertainty which results from inconsistent application of the law. Because of this situation, the argument for centralized review of patent cases may be more subtle than the rationale for national review of tax cases, but it is equally compelling.

Even in circumstances in which there is no conflict as to the actual rule of law, the courts take such a great variety of approaches and attitudes toward the patent system that the application of the law to the facts of an individual case can produce different results in different courtrooms. Perceived disparities between the circuits cannot be explained away by vague references to happenstance.\textsuperscript{93} This condition has led to "mad and undignified races" between alleged infringers and patent holders to be the first to institute proceedings in the forum they consider most favorable.\textsuperscript{94}

The almost non-existent attention that the Supreme Court gives this area is of little help. One would hardly expect consistency of legal doctrine when the frequency of review of certain patent issues by the Court may be no greater than once every sixteen years.\textsuperscript{95}

As long as the effect of an adverse adjudication was limited to a particular circuit, perhaps no great harm was done. Until recently, the doctrine of mutuality of estoppel required that for the patentee to be bound by a prior decision, the alleged infringer must also be bound.\textsuperscript{96} Since the litigating parties were rarely identical, multiple litigations occurred, \textit{stare decisis} being the only deterrent. In \textit{Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation},\textsuperscript{97} however, the Supreme Court announced the demise of the requirement of mutuality of estoppel. The stakes in an individual patent litigation have thereby grown because a loss by the patentee

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\textsuperscript{93} \textit{See} H. \textsc{Friendly}, \textit{supra} note 36, at 155 n.11.
\textsuperscript{94} \textit{Id.} at 155.
\textsuperscript{96} \textit{Triplett v. Lowell}, 297 U.S. 638 (1936).
\textsuperscript{97} 402 U.S. 313 (1971).
on the issue of validity may bind him in all subsequent litigation. While this is a salutary development in that it reduces multiple litigations over the same patent, the effect is to settle the validity of the patent under one circuit’s view of the law and its approach in applying the law, which may differ sharply from that of other circuits. In other words, although the Blonder-Tongue rule may settle certain issues as to a particular patent, it does little to establish nationally uniform administration of patent law. Moreover, because the first court to decide a case will settle the validity of the patent, this new estoppel effect may even intensify forum-shopping.

Another argument used to support a separate court for patent appeals is that in this area judges with little technical expertise must try to decide, for example, whether a chemical patent is valid and infringed. A stroll through the Smithsonian Institution reveals a display of patented devices used for hanging wearing apparel from a taut cord to aerate them — clothes-pins. A stroll through the Federal Reporter, Second Series, will reveal cases such as Application of Edwards, dealing with the patentability of Water Insoluble Nitrogen-Containing Polyols. Therein lies the difference in the nature of patent cases facing the courts today from those of earlier, less complex times. Almost all judges make at least the perfunctory boast that they are able eventually to master the factual material, but often it is not without the expenditure of an unusual amount of time and energy. Thus many observers favor bringing a greater degree of expertise to the patent area by creating a special court for these cases.

3. Environmental Law—Among the first problems to arise in litigation under the Clean Air Act and the Federal Water Pollution Control Act was whether cases should be filed in the district court or the court of appeals. These statutes have been

100 In one case Judge Friendly of the Second Circuit wrote:

This patent appeal is another illustration of the absurdity of requiring the decision of such cases to be made by judges whose knowledge of the relevant technology derives primarily, or even solely, from explanations by counsel and who, unlike the judges of the Court of Customs and Patent Appeals, do not have access to a scientifically knowledgeable staff.

101 H. FRIENDLY, supra note 36, at 156-59; Marovitz, supra note 100, at 379; 1975 Commission Hearings, supra note 37 (statements of Prof. Gambrell and Lay, J.).
described as containing judicial review provisions that are "in some respects inconsistent, incomplete, ambiguous and unsound." Merely "[s]orting out who may take which cases to what courts and when they may do so under these provisions has already yielded a bumper crop of litigation." For example, Section 307 of the Clean Air Act gave jurisdiction to the courts of appeals to review approval and promulgation of state implementation plans. Some district courts, however, construed challenges to the Administrator's inclusion or exclusion of clauses from such plans to be within their own jurisdiction to review ministerial actions as provided by Section 304 of the Act. This ambiguity has prompted the introduction in Congress of a bill, not yet enacted, that would allow corrective transfer between the courts of appeals and the district courts when the court of filing lacked jurisdiction.

Under the Clean Air Act, review of national standards was placed in the United States Court of Appeals for the District of Columbia, while jurisdiction to review local standards was in the United States Court of Appeals for the circuit in which the affected air quality control region was located. In contrast, the Federal Water Pollution Control Act provided only for local review. This bifurcation left the courts of appeals in a state of confusion as to the proper reviewing forum.

In addition, the technical and special nature of the environmental statutes presents special problems. The courts are keenly aware of the complexities of this legislation and the pertinent regula-

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102 Recommendations of the Administrative Conference at the United States, 1 C.F.R. § 305.76-4(a) (1978).
108 See generally Currie, supra note 103, at 1262-71.
109 The environmental statutes are listed in note 52 supra.
The Supreme Court in a related context has characterized these cases as "complex" and filled with "novel scientific issues." Because of the unique nature of this field of law, Congress in 1972 directed the President through the Attorney General to study whether a special system of courts should be established to handle environmental matters. Congress manifested concern that increased environmental litigation, combined with the complex nature of the statutes, the sophisticated technology involved in pollution control, and increased judicial activism in the area might make the creation of a specialized court system appropriate.

The investigation, conducted by the Land and Natural Resources Division of the Department of Justice, focused on a specialized court system with original and possibly appellate jurisdiction of environmental cases. The Report did not evaluate a court that would have only appellate jurisdiction of environmental cases and no trial jurisdiction. Although the Attorney General's Report indicated that "there is confusion as to what the law is on certain environmental matters," it concluded that a specialized court system solely for environmental cases was not warranted at that time. It raised certain specific objections to such a specialized court: the total number of environmental cases was not sufficient to justify the creation of a separate court system; jurisdictional problems could arise; the judges on a court handling only a single category of cases could develop prejudices on the issues and an

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115 Report of the President, Acting Through the Attorney General, on the Feasibility of Establishing an Environmental Court System (October 11, 1973). The Report was based in part on three hypothetical models of environmental court systems. One model was based on the structure of the Court of Claims. The court would have had both original and appellate jurisdiction and would have considered environmental cases generally. A second model posited a court to review orders of federal agencies that could affect the environment. A third model would have established an environmental court to review order of designated federal agencies. Under any of these systems, the court would have been created under Article III, and its decisions would have been subjected to review only in the Supreme Court by certiorari.

overly narrow view of the law; and, the Supreme Court might ben-

efit from seeing various approaches by the lower courts to the same

issue in a relatively new area of the law.117

Although the Attorney General's Report recommended against a

specialized court with exclusive jurisdiction of environmental
cases, Congress has recognized that environmental litigation pre-
sents special and serious problems for the appellate courts. Con-
sequently, Congress has established, at least under the Clean Air
Act, centralized review of some issues in the United States Court
of Appeals for the District of Columbia Circuit.118

C. Existing National Courts With Tax, Patent, and

Government Claims Jurisdiction

Already in place in the federal judicial system are two national
courts that are, or at least operate as, appellate tribunals: the Court
of Claims and the Court of Customs and Patent Appeals. A familiar-
liarity with the nature of those courts is essential to an understand-

ing of the proposal described below.

1. The Court of Claims—The Court of Claims was created in 1855

primarily to relieve the pressure on Congress of the volume of pri-

vate bills.119 It was declared by Congress in 1953 to be an Article III
court,120 an assessment confirmed by the Supreme Court.121 The
court is composed of seven judges.122 It sits both en banc and in
three-judge panels.123 The court's headquarters are in Washington,
D.C., but it can and does sit elsewhere, usually in San Francisco,
to hear cases from the West.124

The jurisdiction of the Court of Claims is quite general, for it is
limited only by the requirement that the United States must be the

117 Id. at VII-1.
119 Act of February 24, 1855, Pub. L. No. 55-122, 10 Stat. 612. For a history of the Court of
Claims see Bennett, The United States Court of Claims, A 50-Year Perspective, 29 FED.
B.J. 284 (1970); Wiecek, The Origin of the United States Court of Claims, 20 Ad. L. REV.
387 (1968); A Symposium — Part II: The United States Court of Claims, 55 GEO. L. J. 573
(1967).
124 Interview with Frank T. Peartree, Clerk, United States Court of Claims, in Washing-
defendant. The court has no injunctive power and no criminal jurisdiction. Most of the court's general docket is made up of government contract and tax cases, with Indian claims cases, military and civilian pay cases, and inverse condemnation cases making up the bulk of the remainder. Patent cases are heard whenever the United States is the ultimate user or beneficiary of a product or process allegedly infringing the rights of a patent owner.

By statute the Court of Claims is a court of first instance, but in reality its functions resemble those of an appellate court. With the exception of major motions in cases commenced in the Court of Claims (e.g., motions for summary judgment or motions to dismiss) and appeals from decisions originally filed before government contract boards under the Wunderlich Act, initial determinations in the cases before this court are ordinarily made by one of sixteen Court of Claims trial judges. These trial judges issue all interlocutory orders and preside over pretrial proceedings and the trial itself in much the same manner as a district court judge con-

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129 41 U.S.C. §§ 321, 322 (1976). The Wunderlich Act provides that an administrative decision in a government contract dispute shall be binding unless it is not supported by substantial evidence. Id. See Gantt & Roberts, Wunderlich Act Review in the Court of Claims under Bianchi, Utah, and Grace, 3 Pub. Cont. L.J. 7 (1970). Because appeals from government contract boards therefore require no fact-finding by the Court of Claims, they go directly to the Article III judges.

130 Referred to as trial commissioners in Title 28, these people in practice have been called trial judges for several years. For a discussion of the treatment of cases commenced in the Court of Claims, see Jacoby, Recent Legislation Affecting the Court of Claims, 55 Geo. L.J. 397, 399 (1966).
ducting a nonjury trial. Their functions are also analogous to those performed by federal magistrates and special masters. Two of the trial judges specialize in patent litigation. The trial judges cover the country hearing cases, but only the Article III judges may enter dispositive orders. After the conclusion of a trial, the trial judge prepares a report containing his findings of facts and his recommended conclusions of law. Definitive action in the case is then taken by the Article III judges, sitting either in a panel of three judges or en banc. Review of Court of Claims decisions is available by writ of certiorari in the Supreme Court. The trial judges, but not the Article III judges, also adjudicate congressional reference cases.

Thus, the Article III judges decide major motions and appeals from findings of the trial judges on cases commenced in the Court of Claims as well as appeals from decisions of government contract boards. The docket of the Article III judges is current and does not appear heavy when compared with that of the regional courts of appeals, but the generally lengthy nature of government contract cases and numerous dispositions of cases by order appear adequately to occupy the court. Although the docket of the trial judges is perhaps not as current as the docket of the court itself, representatives of the court contend that anyone who wants a trial

132 This information is taken from interviews by the authors with the Honorable Daniel Friedman, Chief Judge, United States Court of Claims, in Washington, D.C. (June 9, 1978); the Honorable Oscar H. Davis, United States Court of Claims, in Washington, D.C. (June 16, 1978); and with Frank Peartree, Clerk, United States Court of Claims, in Washington, D.C. (June 9, 1978).
135 Decisions on cases heard originally by the trial judges are often made by a panel of Article III judges acting in chambers. On Wunderlich Act cases, on cases in which exceptions have been taken by the parties to the trial judge’s report, and on some major motions, the Article III judges — sitting either in panels of three or en banc — decide cases after having heard one hour oral argument. Interview with Frank Peartree, Clerk, United States Court of Claims, in Washington, D.C. (October 11, 1978).
136 In 1977, the Article III judges of the Court of Claims wrote 122 majority opinions involving 139 cases. 1977 ANNUAL REPORT, supra note 1, at 474. At the close of the year, the Court had only 17 cases awaiting decision, of which 7 were being held “pending action in other courts.” 1977 CLERK’S REPORT, supra note 126.
137 All cases commenced in the Court of Claims are placed on the trial judge’s docket, where they remain until the case is refined to an issue of law and the trial judge files a report with the Article III judges. Thus, if a major motion is filed in a case, it may appear on the dockets of both the trial judges and the Article III judges. The 1977 Clerk’s Report, supra note 126, shows 685 filings on the trial judges’ dockets and 470 dispositions, with 1,158 petitions pending at the end of the court year. However, because there is much interplay between the dockets of the Article III judges and the trial judges, with cases “bouncing back and forth” between the dockets, not all of these petitions will require the attention of a trial judge. Interview with Frank Peartree, Clerk, United States Court of Claims, in Washington, D.C. (October 11, 1978). In Court of Claims terminology, a case is commenced by filing a “petition,” which is a pleading analogous to a complaint in district court.
can get one quickly.\(^{138}\)

2. *Court of Customs and Patent Appeals*—Created as the Court of Customs Appeals in 1909,\(^{139}\) the Court of Customs and Patent Appeals (CCPA) acquired patent jurisdiction in 1929.\(^{140}\) The court is composed of five judges.\(^{141}\) It was declared by Congress in 1958 to be an Article III court,\(^{142}\) a status sustained by the Supreme Court.\(^{143}\)

The jurisdiction of the CCPA is fairly narrow. It hears appeals from decisions of the U.S. Customs Court,\(^{144}\) the Patent and Trademark Office,\(^{145}\) the U.S. International Trade Commission,\(^{146}\) and from certain findings of the Secretaries of Commerce\(^{147}\) and Agriculture.\(^{148}\) The court has no jurisdiction of patent infringement cases and no copyright jurisdiction.

As with the Court of Claims, the docket of the CCPA is current.\(^{149}\) Even if allowance is made for the complicated nature of the CCPA’s caseload, the court appears to have capacity for a larger volume of business.\(^{150}\) The average time for disposition of a patent or trademark case in the CCPA has fallen from 31.5 months from

\(^{138}\) See interviews with the Honorable Daniel Friedman, the Honorable Oscar H. Davis and Frank Peartree, note 131 supra.


\(^{140}\) Act of March 2, 1929, Ch. 488, 45 Stat. 1475 (current version at 28 U.S.C. § 1542 (1976)).

\(^{141}\) 28 U.S.C. § 211 (1976). As in the Court of Claims, the judges of the Court of Customs and Patent Appeals also have varied backgrounds. Three were in the private practice of law, one in Illinois, one in New York, and one in Texas, with two specializing in patents; one was a United States Senator; and one was a commissioner on the Court of Claims. United States Government Printing Office, 1977 CONGRESSIONAL DIRECTORY, 95th Cong., 1st Sess. 750-52 (1977).


\(^{149}\) In 1977 the court had 193 filings and 198 dispositions. The *Clerk’s Report* for that year showed 30 customs, commerce, and international trade cases, and 163 patent and trademark cases. 1977 ANNUAL REPORT, supra note 1, at 473, Table G-2A.


\(^{150}\) Evidence of this ability to handle additional cases is revealed by the frequent sittings by two of the five CCPA judges in other courts. During the 12-month period ending June 30, 1977, one of the judges sat 6 days on the circuit courts of appeals, hearing 26 cases; another judge served 24 days in the courts of appeals, hearing 120 cases. 1977 ANNUAL REPORT, supra note 1, at 522-28, Table V-2. These sittings on other courts are cited simply to show that there is judge time available to be devoted to additional business, if there were such, in the CCPA.
filing to decision in 1973 to 10.2 months in 1977.  

Each judge on the CCPA has two technical advisors to assist him in resolving cases. These advisors are lawyers whose service is identical to that of a law clerk, except that they also have technical degrees and experience in a scientific or engineering field or in patent law. They serve for two years and confer with the judges on both legal and technical matters. In addition, the court has a permanent Chief Technical Advisor, who himself has a technical advisor/law clerk. Among other duties, the Chief Technical Advisor is available to all the judges for consultation on technical matters, and he reviews all opinions that issue from the CCPA for consistency.

III. A NEW FEDERAL INTERMEDIATE APPELLATE COURT

Unquestionably, it is desirable for federal law to mean the same thing everywhere. As the federal appellate court system is currently structured, however, it lacks the capacity to deliver within a reasonable time decisions that are binding precedents nationwide. This article has identified certain areas of the law as being particularly affected by a lack of authoritative decisions. The proposal described below is designed to eliminate uncertainties in these fields and, at the same time, to increase the stability, uniformity, and predictability of legal doctrine throughout the federal system.

A. The Proposal

The essence of the proposal is to create a new intermediate appellate court through the merger of the Court of Claims and the Court of Customs and Patent Appeals. The new court would not be interposed between the regional courts of appeals and the Supreme Court. It would have equal status with present courts of appeals. It might be called the "United States Court of Appeals for the Federal Circuit" or the "United States Court of Special Appeals." The new court would be staffed by the twelve judges of the two existing courts plus three additional judgeships to be filled by Presidential appointment, which would give the court fifteen authorized judgeships. These positions would be that of United States Circuit

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151 1977 ANNUAL REPORT, supra note 1, at 473, Table G-2B.
153 The present Article III judges of the Court of Claims and the CCPA could be converted by statute into circuit judges of the new court. Thus, those judges who continue in active service following creation of the new court would not need to be reappointed.
Judge. Review of decisions of the court would be in the Supreme Court by writ of certiorari.

The jurisdiction of the new court would be much the same as that of the two present courts. Existing appellate review jurisdiction would not be diminished in any way. In addition, however, the new court would handle patent, civil tax, and environmental appeals, both from the district courts and the Tax Court.\textsuperscript{154} All ancillary or pendent matters making up the case would also be included within the jurisdiction of the new court.\textsuperscript{155} Specifically, the new court would have jurisdiction of all appeals from final decisions in:

1. \textit{civil tax cases} decided in all United States District Courts and in the Tax Court arising under any Act of Congress relating to income, estate, gift, or excise taxation, including extraordinary proceedings and suits for refund, for impartial assessments, for judgments against delinquent taxpayers, and to enforce summonses;
2. \textit{patent cases} decided in all United States District Courts arising under any Act of Congress relating to these subjects, including suits for injunctions against infringement and declaratory judgments of invalidity or non-infringement of patents;\textsuperscript{156}
3. \textit{environmental cases} decided in all United States District Courts arising under any of the environmental statutes previously listed;\textsuperscript{157}
4. \textit{all claims under existing Court of Claims appellate jurisdiction}, which consists of claims against the government, primarily for money damages, in a wide variety of circumstances;
5. \textit{all claims under existing Court of Customs and Patent Appeals jurisdiction}, which consists of appeals from the Customs Court, the Office of Patent and Trademarks and other specified government agencies.

Currently the Court of Claims performs a substantial trial function which, as already mentioned, is carried out by the trial judges

\textsuperscript{154} Although the original proposal suggested inclusion of environmental cases within the jurisdiction of the new appellate court, after subsequent deliberation these cases have been omitted from its jurisdiction in the legislation that has been developed to implement this proposal. Nevertheless, public comment on this aspect of the original proposal revealed sufficient interest to warrant expanded discussion here. See S. 1477, 96th Cong., 1st Sess. (1979).

\textsuperscript{155} An additional statute to permit transfer between this new court and the existing courts of appeals on jurisdictional grounds would be enacted. The Court of Claims already has such a statute. 28 U.S.C. § 1506 (1976).

\textsuperscript{156} As to these cases, the jurisdiction of the new court of appeals could be defined as jurisdiction over appeals in all cases in which the jurisdiction of the district courts rests on 28 U.S.C. § 1338 (1976). This statute also includes plant variety protection cases. Occasionally patent and federal tax issues arise in state litigation. These cases would not be affected by the proposal.

\textsuperscript{157} See note 52 supra.
rather than by the Article III judges. Under the proposal, the trial judges of the old Court of Claims would be converted into a separate trial forum. This new trial forum could take one of three forms. One would be an Article I court resembling the Tax Court of the United States.\(^{158}\) Another possibility would be to create an Article III court resembling the Customs Court.\(^{159}\) A third possibility would be to convert the trial judges into a claims commission to hear and decide all cases presently entertained by the Court of Claims, with the exception of appeals from contract board decisions brought pursuant to the Wunderlich Act.\(^{160}\) Whatever the organizational form, these trial judges would be given the power to enter dispositive judgments, with appeals lying to the new court. They would continue to hear cases in all parts of the country. Their number could be increased, if necessary, to enable them to handle the volume of cases in the future.

The new court would have its headquarters in Washington, D.C., in the facilities of the two existing courts. It might sit in panels in specified cities throughout the country, with additional authority by rule of court to sit at other designated places. The regional courts of appeals now usually sit in panels of three judges. A convincing argument may be made, however, for panels in the new court of five judges each to increase doctrinal stability and authoritativeness of decision.\(^{161}\) A panel of five judges "is less responsive to the erratic instincts of individual judges, and is more likely to send up a warning signal of dissent if a decision is contrary to the pattern established by the highest court."\(^{162}\) Moreover, \textit{en banc} procedures are unwieldy and of limited effectiveness as a control device in a court of fifteen judges.\(^{163}\) These enlarged panels would make it feasible to dispense with any \textit{en


\(^{159}\) The Customs Court consists of nine judges, including a chief judge, who are appointed by the President with consent of the Senate, who hold office "during good behavior." 28 U.S.C. §§ 251, 252 (1976). Although the court is headquartered at the port of New York, it has statutory authority to sit any place within the jurisdiction of the United States. 28 U.S.C. §§ 251, 256 (1976). For a description of the functioning of the United States Customs Court, see Rao, \textit{A Primer on Customs Court Practice}, 40 BROOKLYN L. REV. 581 (1974).

\(^{160}\) This would in effect return the court to something close to its original status as an Article I forum with first instance jurisdiction over claims against the government. See Wiecek, \textit{supra} note 119.

\(^{161}\) See \textit{JUSTICE ON APPEAL, supra} note 19, at 159-60.

\(^{162}\) \textit{Id.} at 159.

banc procedure and provide for further review only in the Supreme Court. By gradual rotation of panel assignments by subject matter category, five-judge panels could achieve a measure of expertise while avoiding the pitfalls of undue specialization. No single judge would sit on a subject-matter panel longer than a specified period of time, perhaps three years. The system of assigning cases and judges to panels should be such as to assure that over a period of years each judge of the court sits on panels hearing all categories of cases within the court's jurisdiction.

The existing system of technical advisors in the CCPA could be enlarged to aid the judges of the new court. It has been suggested that judges would frequently benefit from having access to such advisors. 164 Although it may not be feasible to provide this system to all federal appellate judges nationwide, it would clearly be practical to provide this kind of assistance to a single appellate forum that handles a large concentration of technical and scientific issues. Since some of the fifteen judges of the new court would at times be sitting on cases not involving technical or scientific issues, it would not be necessary for each judge to have personal technical advisors as do the five judges of the CCPA. Instead, there could be a pool of such advisors, who would also have law degrees, to whom any judge could turn for assistance on a particular technical problem. The size of this pool, and whether these advisors would be permanent or short-term employees of the court, are matters that can be determined later. Each of the fifteen judges of the new court should also have two personal law clerks. The individual judges would, of course, be free to follow the practice of the CCPA, if they so desired, and to choose as clerks lawyers who also have scientific degrees and expertise.

B. Advantages of the Proposal

In several respects, this proposal should be more acceptable than previous recommendations for appellate court reorganization. It is designed to avoid the objections to prior proposals and to meet the imperatives that must be observed if any appellate court reform effort is to succeed. 165

1. A Nonspecialized Court—Specialization is a major pitfall to be avoided. Opposition to a court with jurisdiction limited to a single, narrow category of cases rests on twin concerns: the court could foster the development of "tunnel-visioned" judges who

165 See text accompanying note 46 supra.
take too limited and arcane a view toward the development and application of the law; and the court would be vulnerable to capture by a special interest.

The first of these concerns involves the apprehension that judges on a specialized court could lose sight of the basic values at stake in their decisions. Because the judicial process requires the unique capacity to see things in their context, the development of tunnel vision could lead to a branch of legal doctrine secluded from the mainstream of the law and immunized "against the refreshment of new ideas."  

In part, the fear that vested interests might capture a specialized court is a reaction to experiences with the Commerce Court. Established by Congress in 1910 after stormy debate, the court was abolished in 1913. The Commerce Court had been given jurisdiction over only a single category of cases that commanded extraordinary public attention in a populist era of our history. Although at that time it was asserted that the Commerce Court was dominated by the railroads, more recent research shows that the Commerce Court suffered bad press and in fact was not supported by the very interests by which it was alleged to have been captured.

Even if claims of railroad domination over the Commerce Court had been accurate, the proposed court would not be likely to suffer a similar fate. The current proposal for appellate court reform avoids undue specialization of courts and judges. The new court would handle civil tax, patent, and environmental matters, as well as all matters now considered by the two existing courts. The combined jurisdiction of the Court of Customs and Patent Appeals and the Court of Claims is quite broad. Court of Claims jurisdiction is limited only by the requirement that the United States be the defendant in the suit. Cases before the court involve contracts, trademarks, Indian claims, customs, commerce, international trade, inverse condemnation, military and civilian pay claims, and all related and pendent aspects of these cases. Moreover, tax, patent, and environmental cases contain a variety of issues.

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166 Rifkind, supra note 58, at 426.
168 Dix, supra note 167, at 247.
169 For example, it has been said that "[t]here is hardly ever such a thing as a pure 'patent case',", since often patent infringement suits also include allegations or defenses of "misuse, fraud, equitable conduct, violation of the antitrust laws, breach of trade secret agreements, unfair competition, and such common law counts as unjust enrichment." Kauper, Statement Submitted to Hruska Commission, May 20, 1974, at 14 (unpublished; on file in National Archives). Judge Miller of the CCPA has made a similar point. 1975 Commission Hearings, supra note 37, at 1251. Even experts in one of the most perplexing fields of law —
This rich docket assures that the work of the proposed new court would be broad and diverse and not narrowly specialized. The judges would have no lack of exposure to a wide variety of legal problems. Moreover, the subject matter of the new court would be sufficiently mixed to prevent any special interest from dominating it. All citizens are constituents of tax matters. Although constituencies may exist in environmental matters, the competing forces seem to have fairly equal strength. When patent cases and claims of all sorts against the government are added to tax and environmental cases, it is clear that no single interest could muster sufficient political influence to control a majority of the judges on the court.

2. Avoids Previous Objections — The proposal also observes other imperatives of appellate court reform that have emerged from the experiences of recent years. First, it does not add a fourth tier to the federal judicial system. The court would be part of the intermediate appellate level; the designated cases would go directly from the trial courts to this court for review instead of going to one of the regional courts of appeals.

Second, the proposed intermediate court would be composed of permanent Article III judges who have important adjudicative tasks. The new court would have basically the same mission as the two existing courts, but it would have additional important and varied legal questions to decide.

Third, the jurisdiction and position of the new court within the system would not diminish the status of existing courts and judges since its location in the federal hierarchy would be on a level with the regional courts of appeals.

The proposal also meets a fourth imperative of federal court reform — flexibility in the appellate system to meet changing docket conditions. Once such a court was created, with nationwide appellate jurisdiction, Congress would have available a forum to which it could add categories of business if it appeared in the future that a special need had emerged for definitive national adjudication. Congress could also withdraw jurisdiction in later years if the need for such a forum for the presently designated cases diminished in relation to other types of cases. 170

170 An alternative suggestion, which would bring a higher degree of flexibility to the system, is that Congress vest the Supreme Court with authority to fix the intermediate court's jurisdiction, within certain outer limits defined by statute. See Justice on Appeal, supra note 19, at 175-76; Rosenberg, supra note 30, at 589.
Fifth, access to and review by the Supreme Court would remain available. Under this proposal certiorari review in the Supreme Court would be preserved. However, the need for such review would be lessened because of the enhanced authoritativeness and uniformity of the decisions rendered by the new appellate court.

Furthermore, the proposal would not unduly expand the number of judges or courts within the federal judicial system. This proposal would require the creation of only three additional judgeships. Moreover, the consolidation of the Court of Claims and the CCPA would simplify the judicial structure and hence reduce problems of judicial administration.

Finally, the proposal would be free of jurisdictional uncertainties. The new court’s jurisdiction would be defined by statute, in such a way as to leave little room for debate over jurisdictional lines.

In addition to satisfying all the imperatives of appellate court reform, the proposal avoids criticisms raised in the Attorney General’s Report evaluating a specialized environmental court system.171 As it was explained above, the proposal would avoid problems of jurisdictional ambiguity and of over-specialized judges. In addition, although the total number of environmental cases may not have been sufficient to justify the creation of a separate court system to consider only those cases, the new court, with a combination of types of issues, would have an adequate docket of complex and varied cases. Moreover, although the proposition that environmental issues may benefit from successive considerations by several courts is one which may have superficial appeal, it does not withstand analysis. In the first place, as previous sections of this article have pointed out, it is illusory to consider Supreme Court review as a solution to the lack of uniformity in environmental law. Because of the limited proportion of cases that the Supreme Court reviews, and because of the expense involved in seeking such review, it is unlikely that the Court will ever consider certain environmental issues, even if conflict exists among the circuits. Furthermore, environmental cases present issues in which "the gain from maturation of thought from letting the matter simmer for a while is not nearly as great as the harm which comes from years of uncertainty [with respect to] questions which are essentially ones of statutory construction."172 Although the language of the environmental statutes may be unusually ambiguous, those statutes govern areas of the society in which large-scale business planning

171 See notes 115-17 and accompanying text supra.
172 COMMISSION: STRUCTURE, supra note 28, at 78 (quoting 1974 Commission Hearings, supra note 37, at 201 (statement of Erwin Griswold)).
occurs; certainty and predictability in the interpretation of the law are therefore vitally important to the national economy. Moreover, although centralized review of environmental appeals would reduce the variety of approaches the courts have taken to these issues, the Supreme Court would still have the benefit of the multiple viewpoints of the judges of the district courts throughout the United States.

3. Logistically Feasible—The proposal contains additional positive features. From a practical standpoint, a merger of the Court of Claims and the Court of Customs and Patent Appeals could be accomplished with virtually no disruption to the people involved. The existing courts already jointly occupy almost all of the Courts Building on Lafayette Square in Washington, D.C., where there appears to be room for additional judges’ chambers. The two courts share the same library, and court personnel share the same dining facilities. Furthermore, a standing order of the Judicial Conference allows the interchange of judges between the two courts.\footnote{JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 53 (September 23-24, 1976).}

Analysis of the workload of the proposed new court discloses that this merger also could be accomplished easily in terms of caseload. The dockets of both existing courts are current.\footnote{See notes 135 and 148 supra.}

Based on the 1977 volume of business, the new court would be handling 193 appeals that would otherwise have been heard by the former CCPA,\footnote{Caseload in the Court of Customs & Patent Appeals – FY 1977

<table>
<thead>
<tr>
<th>Type of Case</th>
<th>Filed</th>
<th>Terminated</th>
</tr>
</thead>
<tbody>
<tr>
<td>Customs, Commerce and International Trade</td>
<td>30</td>
<td>34</td>
</tr>
<tr>
<td>Patent and Trademarks</td>
<td>163</td>
<td>164</td>
</tr>
<tr>
<td>Total CCPA cases</td>
<td>193</td>
<td>198</td>
</tr>
</tbody>
</table>

1977 Annual Report, supra note 1, at 473, Table G-2A.}

\footnote{See notes 135 and 148 supra.} 384 cases that would have been heard by the former Court of Claims,\footnote{The docketing of cases in the Court of Claims presents a confusing statistical picture to the uninitiated. Some cases appear on the trial judges' docket and others appear on the docket of the Article III judges, while some cases are placed on both dockets. For purposes of projecting the new court's caseload, the relevant statistics are not those that reveal the total caseload of the Court of Claims but rather those that reflect the caseload of the Article III judges on the Court. The following table contains those figures:} and 651 cases coming directly from the
district courts that would have been heard by the regional courts of appeals.\textsuperscript{177} This would provide a total docket of 1,228 cases. This number of appeals would make an adequate but not unduly burdensome workload for a court of fifteen judges. Several years ago Professor Charles Alan Wright estimated that about eighty dispositions per year would be appropriate for a busy but not overworked federal appellate judge.\textsuperscript{178} The projected annual filings in the proposed court would break down to approximately eighty-two cases per judgeship, which is lower than the per judgeship filings in any of the regional circuit courts in 1977.\textsuperscript{179}

But filings per judgeship are not the only appropriate statistics. Because the new court may be handling unusually complex and technical cases, a more realistic picture of the workload can be gained by considering the number of cases disposed of by the regional courts of appeals after oral hearing or submission on briefs. These cases ran from a low of 336 in the First Circuit, for a total of

\begin{center}
\textit{Appellate Caseload in the Court of Claims – FY 1977}
\end{center}

\begin{tabular}{l|r}
\textbf{Total Disposition by Article III Judges} & \\
- In Chambers & 160 \\
- Calendared & 164 \\
- Requests for Review & 60 (est.) \\
\textit{Total Article III - Judge Workload} & 384 \\
\end{tabular}


Appeals To Be Rerouted To the New Intermediate Appellate Court (FY 1977 figures)

<table>
<thead>
<tr>
<th>Source of Appeals</th>
<th>Total Appeals</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Appeals from the Tax Court of the United States filed in Courts of Appeals</td>
<td>213</td>
</tr>
<tr>
<td>Total U.S. Plaintiff Tax Cases filed in Court of Appeals</td>
<td>50</td>
</tr>
<tr>
<td>Total U.S. Defendant Tax Cases filed in Courts of Appeals</td>
<td>193</td>
</tr>
<tr>
<td>Patent Appeals Rerouted</td>
<td>95</td>
</tr>
<tr>
<td>Environmental Appeals Rerouted</td>
<td>100</td>
</tr>
<tr>
<td>\textit{Total Tax, Patent, and Environmental Appeals to be Rerouted}</td>
<td>651</td>
</tr>
</tbody>
</table>

\textit{See 1977 Annual Report, supra note 1, at 305, Table B-3; 310-13 table B-7. The number of environmental appeals was obtained from the Administrative Office from computerized information regarding the number of appeals from the defined environmental cases in the district courts. Special thanks to Raymond L. Kamery of that office for his help.}\textsuperscript{178} Wright, \textit{The Overloaded Fifth Circuit: A Crisis in Judicial Administration}, 42 \textit{Tex. L. Rev.} 949, 957 (1964). If the court sat in five-judge panels, the calculations would be somewhat different since there are certain economies of scale from larger panels. Professor Carrington has estimated that 94 dispositions per judge for a court working in five-judge panels would keep a court busy but not inundated. See \textit{Federal Appellate Caseloads and Judgesthips: Planning Judicial Workloads for a New National Forum}, in \textit{IV Appellate Justice: 1975, supra note 30, at 169.} \textsuperscript{178} 1977 \textit{Annual Report, supra note 1, at 168, Table 3. Filings per judgeship in the eleven circuits ranged from a low of 131 in the District of Columbia Circuit to a high of 238 in the Fifth Circuit.}
122 per judgeship, to a high of 2,181 in the Fifth Circuit, for a total of 145 per judgeship.\textsuperscript{180}

Several other factors are relevant to an evaluation of the new court's docket. The volume of appeals from the Tax Court has remained steady over the last five years.\textsuperscript{181} No reason appears to anticipate dramatic increases in that caseload. The number of patent appeals on the other hand has declined in the past several years.\textsuperscript{182} Surprisingly, environmental cases dropped by 16 percent from 1976 to 1977.\textsuperscript{183} Moreover, as the new court brings uniformity and predictability to these areas of the law, the number of appeals resulting from attempts to obtain different rulings on disputed legal points can be expected to decrease. Another consideration is that currently the Article III judges of the Court of Claims spend a substantial portion of their time reviewing the work of the trial judges and handling some trials in the first instance. Since this proposal would establish a separate trial forum with the power to enter dispositive judgments, the Article III judges would be relieved of these responsibilities and would have the capacity to handle additional cases. Thus, the workload of the new court is likely to be adequate but manageable.

Furthermore, the judges of the new intermediate appellate court would possess the requisite abilities to handle the subject matter included in the proposed docket of the court. The bulk of the cases — tax and patent law — would not pose dramatically new issues for most of the judges of the existing courts. Court of Claims judges already decide tax and patent cases, and CCPA judges are of course well-versed in patent law. As noted above, these courts already consider myriad issues. Furthermore, the judges of the existing courts compare favorably with the bulk of courts of appeals judges.

In any event, because of the large number of appointments of new judges that can be made, concerns about whether the present judges of the two existing courts are well suited for the business of the proposed court is a short-run, transitional matter and provides no basis for objecting to the new appellate court. The proposal would create three new judgeships to be filled by the President. Of the twelve judgeships carried over from the existing courts, four judges will be eligible to retire by 1979. Thus, with three additional

\textsuperscript{180} Id. at 179, Table 8 and 300-02, Table B-1.
\textsuperscript{181} The number of appeals has ranged between 213 and 269 between 1973 and 1977. 1977 ANNUAL REPORT, supra note 1, at 305, Table B-3.
\textsuperscript{182} Patent appeals from all circuits totaled 95 in 1977. 1977 ANNUAL REPORT, supra note 1, at 311, Table B-7. The total number of patent appeals had been 127 in 1967. 1967 ANNUAL REPORT, supra note 1, at 192-93, Table B-7.
\textsuperscript{183} See note 177 supra.
judgeships and four retirements, seven new appointments could be made by the time the new court becomes operational.

IV. Conclusion

The consolidation of the Court of Claims and the Court of Customs and Patent Appeals would be logistically and technically uncomplicated. Furthermore, it would make maximum use of facilities and personnel already a part of the federal system. Not all details of the proposal are worked out. For example, it is not essential that jurisdiction over environmental cases be included in the scheme. While environmental cases exhibit special need for nationwide uniformity and perhaps a measure of expertise, other types of cases may be equally good candidates for inclusion in the new court's jurisdiction. The most important objective should be to create this new forum by merging the two existing courts. The precise jurisdictional contours can be worked out through congressional hearings.

Thus, the proposal makes only a modest change in federal appellate court structure. It would, however, bring desirable uniformity to three unusually difficult areas of the law. The forum-shopping common to these areas of litigation would be reduced. Business planning would be made easier as more stable law is introduced. Moreover, as the new court brings uniformity to these fields of law the number of appeals resulting from attempts to obtain different rulings on disputed legal points can be expected to decrease. In addition, consolidation of review of these cases would permit judges to develop a measure of expertise in these complex fields, reduce the amount of court time absorbed by these cases, and improve the quality of decision in these areas.

At the same time, adoption of the proposal would relieve docket pressures both on the regional appellate courts and on the Supreme Court. Although the number of appeals to be redirected is not great in proportion to the total caseload of these courts, the rerouted cases contain some of the most complex and time-consuming issues that the courts consider. The impact of the new court on the dockets of these courts therefore would be far greater than a first glance at the raw numbers might indicate. The proposed new intermediate federal appellate court therefore would increase the capacity of the judicial system for definitive adjudication of issues of national law, while at the same time it would avoid the pitfalls encountered by previous ideas for federal appellate court reform.