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AVERTING THE FLOOD BY LESSENING THE FLOW*

Henry J. Friendly†

I am glad that an early act of your new dean, whom I have long admired, was to invite me to Ithaca. For me this is a return of the native. I was born and raised in Elmira, only a few miles from here, and most of my high school friends attended Cornell. Although I perversely decided to journey to the banks of the Charles River rather than join the parade to Cayuga's waters, I have retained an affection for this beautiful part of the country. May I add my assurance that, under Dean Cramton's leadership, this school will attain even greater heights.

The dean already has provided such a feast in the lectures of Chief Judge Haynsworth and Professors Rosenberg and Kurland as to make my role as the last speaker exceedingly difficult. It would be quite impossible in a paper of reasonable length both to develop my own solutions for the crisis in the federal courts and to comment in detail on what has been put before you by the preceding lecturers. Any of you who want an ampler exposition of my views will find it in a book, *Federal Jurisdiction: A General View*,¹ an expansion of the Carpentier lectures I delivered at the Columbia University Law School a year ago. I shall be obliged to refer to this rather frequently in order to put flesh on proposals that I must put forward here in rather barebones form.

I

PROPOSALS OF THE FREUND COMMITTEE AND OF CHIEF JUDGE HAYNSWORTH

The title I have chosen affords a good clue to my approach to the problems of the federal courts of appeals and the Supreme Court, which I believe are shared by the district courts although in somewhat lesser degree. If a stream is in mounting flood, common sense would dictate consideration of measures to divert a portion

* This Article is an expansion of a lecture delivered as part of the fifty-sixth Frank Irvine Lecture Series at the Cornell Law School on November 2, 1973.

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¹ H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* (1973) [hereinafter cited as FRIENDLY].

of the flow. I believe that solutions lie in that direction, rather than by placing primary reliance on what—and I mean no disrespect by this—seems to me in considerable measure a reshuffling at the appellate level.

I shall not spend much time on the National Court of Appeals proposed by the committee chaired by Professor Freund²—more accurately a National Court for the Screening of Appeals, since it evidently was not expected to do much else. For one thing, the proposal would not—indeed, was not intended to—alleviate the problems of the courts of appeals with which I am deeply concerned. Beyond that, the proposal has been talked to death and, if I may say so with deference, I hope literally as well as figuratively. The mortal blows would seem to have been administered by former Chief Justice Warren's address to the Association of the Bar of the City of New York³ and Mr. Justice Brennan's statement to the First Circuit Judicial Conference.⁴ The salient points in both these statements, which had been made earlier by knowledgeable but less authoritative sources,⁵ are that the screening function can be properly performed only by the Justices themselves, with whatever staff assistance they wish, since they alone have the required knowledge and "feel" of what is going on within the Court, and also that performance of this function is desirable to keep them fully informed about movements and developments in the courts below. The Warren and Brennan papers add a convincing demonstration that the Freund Committee gave too much weight to raw data and that performance of the screening function in seasoned hands has not compromised the Court's discharge of its duty to decide cases wisely and write opinions that are persuasive and lucid. To be sure, we have not yet heard from all members of the Court. But, particularly in view of what the former Chief Justice and Mr. Justice Brennan have recounted about their own experience, one would have to discount cries of distress concerning the certiorari burden from recent arrivals, if such there should be.

² STUDY GROUP ON THE CASE LOAD OF THE SUPREME COURT, FEDERAL JUDICIAL CENTER, REPORT (1972).

³ Burger & Warren, *Retired Chief Justice Warren Attacks, Chief Justice Burger Defends Freund Study Group's Composition and Proposal*, 59 A.B.A.J. 724 (1973).

⁴ Brennan, *Justice Brennan Calls National Court of Appeals Proposal "Fundamentally Unnecessary and Ill Advised"*, 59 A.B.A.J. 835 (1973). For a fuller version, see Brennan, *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473 (1973). I am pleased to note that Chief Judge Haynsworth shares my views on the moribund state of the proposal for a National Court of Appeals.

⁵ See Lewin, *Helping the Court with Its Work*, THE NEW REPUBLIC, March 3, 1973, at 15-19. See also Gressman, *The National Court of Appeals: A Dissent*, 59 A.B.A.J. 253 (1973).

With the regret stemming from my respect and affection for several members of this distinguished committee, I think the time has come to agree that their highly motivated proposal was ill-conceived and to stop devoting to it any part of the finite amount of time available for discussion of reform of the federal judicial system.

Chief Judge Haynsworth has put forward a thoughtful proposal for a National Court of Criminal Appeals⁶ having certiorari jurisdiction over all federal criminal appeals⁷ and all state criminal appeals raising a federal question. The principal way in which this would relieve the courts of appeals would be by decreasing the volume of applications to the district courts for postconviction relief by federal prisoners under 28 U.S.C. § 2255 and by state prisoners under 28 U.S.C. § 2254, and consequently of appeals from decisions rendered thereon, through foreclosing all claims that were or could have been presented to the National Court on direct review. Judge Haynsworth has now added the review of all decisions on claims of state and federal prisoners attacking prison conditions. The details of this added proposal are not altogether clear to me. In any event it is plain that Judge Haynsworth's chief concern is to develop a better solution for the problem of collateral attack. Agreeing that the present situation is unacceptable, I think there are more direct and less complicated means for dealing with this problem.

A minor step, aimed solely at the appeals problem, would be to provide that appeals in such cases can be taken only when a certificate of probable cause has been issued by the court of appeals.⁸ However, a more fundamental change is demanded and has been proposed. A bill, introduced by Senators Hruska and Scott in the second session of the last Congress and reintroduced in

⁶ Haynsworth, *A New Court To Improve the Administration of Justice*, 59 A.B.A.J. 841 (1973).

⁷ I realize that in his American Bar Association paper Judge Haynsworth spoke of federal question issues in convictions in the state and federal systems. *Id.* at 842. But almost every question in a federal criminal case is a federal question. If Judge Haynsworth was referring only to federal convictions raising a *constitutional* question, he did not say so. I had thought he did not mean to, since otherwise his framework would include no provision for review of other decisions of federal courts of appeals in criminal cases, although this is surely necessary, notably in cases involving the interpretation of federal criminal statutes or the Federal Rules of Criminal Procedure. His lecture seems somewhat less clear on this point.

⁸ There is now no requirement for such a certificate with respect to federal prisoners. In the case of state prisoners, the certificate can be granted by the judge who rendered the decision or by any circuit judge or justice. 28 U.S.C. § 2253 (1970). The change recommended in the text is proposed in the bill cited in the succeeding footnote.

this one,⁹ would limit collateral attack to cases where the claimed constitutional violation was not and could not have been previously raised and where the violation "is of a right which has as its primary purpose the protection of the reliability of either the factfinding process at the trial or the appellate process on appeal from the judgment of conviction,"¹⁰ and "the petitioner shows that a different result would probably have obtained if such constitutional violation had not occurred."¹¹

In view of the interest which had been taken in this proposal by Senator Ervin, Chairman of the Subcommittee of the Judiciary on Constitutional Rights, I have no doubt that it would have already been the subject of hearings in the present Congress but for the fact that Senator Ervin has had other preoccupations. The delay may well result in Congress having an even better bill to consider. At its September 1973 meeting, the Judicial Conference of the United States received a report of its Special Committee on Habeas Corpus which criticized the Hruska-Scott bill on various grounds and set out a number of alternatives. Some of the criticism seems to me to be valid; I now think the Hruska-Scott bill may have gone a bit too far in foreclosure, particularly when account is taken of the unhappily low level of the assistance of counsel in many cases. The Conference directed the Committee, which has the valuable assistance of Professor Frank Remington, to prepare a bill for consideration at the Conference's spring meeting, and I am confident it will be a good one. There is thus every reason to think that, at long last, collateral attack on criminal convictions is on the way to solution by well-considered legislation addressed directly to the problem,¹² and there will be no need to create a new court for that purpose.

⁹ S. 567, 93d Cong., 1st Sess. (1973); S. 3833, 92d Cong., 2d Sess. (1972). The bill represents months of work by the Department of Justice and the staff of the Senate Judiciary Committee; it should not be confused with much too drastic bills earlier introduced.

¹⁰ S. 567, 93d Cong., 1st Sess. (1973). This would enact the dissenting opinions in *Kaufman v. United States*, 394 U.S. 217 (1969), of Mr. Justice Black (*id.* at 231) and of Mr. Justice Harlan, joined by Mr. Justice Stewart (*id.* at 242), as well as the concurring opinion in *Schneckoeth v. Bustamonte*, 412 U.S. 218, 250 (1973), of Mr. Justice Powell, joined by the Chief Justice and Mr. Justice Rehnquist, and in spirit by Mr. Justice Blackmun (*id.* at 249), all to the effect that collateral attack should not ordinarily be available for claims of illegal search and seizure.

¹¹ S. 567, 93d Cong., 1st Sess. (1973).

¹² In a lecture at the University of Chicago Law School, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments* (38 U. CHI. L. REV. 142 (1970)), I noted the possibility of routing "appeals from state criminal decisions, whether on direct or on collateral attack, to a federal appellate tribunal—either the appropriate court of appeals or a newly created court" and

Once the problem of collateral attack is thus solved, the main benefit in Judge Haynsworth's proposal—apart from the recent addition of complaints concerning prison treatment, most of which do not seem to merit review by such an august tribunal—would be in relieving the case load of the Supreme Court, whose criminal jurisdiction would be limited to cases where the new court had granted certiorari and rendered a decision on the merits or where one or more of its judges had voted for certiorari. If, in fact, the Supreme Court is not now overburdened, as several Justices maintain,¹³ no sufficient justification exists. Indeed, even if the Court's burden is excessive or should become so, I would object to creation of the new court on two principal grounds.

The first is that it would interpose a new layer in the hierarchy, with consequent delay in the final disposition of those cases which the court took on for decision, or where at least one judge voted to do so. Presumably the new court would review many more criminal cases than the Supreme Court now does¹⁴ and would take almost as long in deciding them. Yet all these cases would be candidates for certiorari to the Supreme Court and, since the new court had evidenced its view of their importance by its own grant of certiorari, it could hardly refuse a stay to an unsuccessful defendant pending an application for Supreme Court review. This could mean another four to six months, depending on the season, in cases where the Supreme Court denied certiorari, and a year or more in cases where it granted this. There would also be added, although less, delay in the many cases where the new court had denied certiorari over the votes of one or more judges. Regrettable as delay is in any area, it is most serious in the enforcement of the criminal law.

My second objection is that while I am not at all opposed to specialized courts in principle, criminal law seems to me the last

precluding "federal habeas corpus as to issues for which that remedy is available" (*id.* at 166), but inclined in favor of a more direct approach to the problem.

Although Judge Haynsworth may object to the approach of continued insistence on exhaustion of state remedies, which I anticipate the Habeas Corpus Committee will follow since the defendant remains in prison during the process, I think that, in view of the exceedingly small percentage of success, this is vastly preferable to letting him stay out of prison pending review by the National Court of Criminal Appeals. Moreover, the exhaustion requirement has great independent value from the standpoint of federalism, as Judge Haynsworth recognizes in his proposal to require this for complaints by state prisoners in regard to treatment.

¹³ Justices Brennan and Douglas and former Chief Justice Warren. See A. BICKEL, *THE CASELOAD OF THE SUPREME COURT* 15-16 (Domestic Affairs Study No. 21, 1973).

¹⁴ This would surely be true if the new court were to serve the function with respect to collateral attack that Judge Haynsworth envisioned.

place for them.¹⁵ The main arguments for specialized courts are the need for expertise and for prompt and authoritative determination of the law so that people can formulate their conduct accordingly. As will later appear, I find these arguments persuasive in two fields of federal law—patents and federal taxation. Neither argument applies to criminal law. Its concepts are readily within reach of any competent lawyer, even though, as has been the case with many federal judges, he has had little or no criminal practice. Furthermore, criminals do not plan their activity with an eye fixed on the Bill of Rights, the Federal Penal Code, or the rules of evidence applicable in criminal trials. While conflicts on such matters should ultimately be resolved, as they now are, the earliest possible resolution is not a matter of urgency. Moreover, I see actual detriments in a specialized court of criminal appeals. It is too likely to become dominated by hard-liners or soft-liners, more likely the former.¹⁶ Bad as this would be in any event, it would be worse if the predominant mood of the new court differed from that of the Supreme Court. We would then see the frequent reversals that proved the undoing of the Commerce Court,¹⁷ in a field of law which is of far greater interest to citizens and carries a heavy emotional charge. Such confrontations could have an unhappy effect on the Supreme Court as well. When the Supreme Court reversed the National Court of Criminal Appeals, doubtless by a sharply divided vote and with vigorous dissents, there would be no general agreement that the Supreme Court was right and the National Court was wrong. It is one thing for the Supreme Court to reverse the highest court of Arizona, although that produced storm enough, and quite another for it to be frequently reversing a National Court of Criminal Appeals. When we reflect on the waves of protest that nearly engulfed the Court after some of its constitutional decisions in the criminal field in the late 1960's, we should

¹⁵ Perhaps anticipating this criticism, Judge Haynsworth proposed in his lecture that the new court should have the added job of hearing and determining, although without finality, civil cases referred by the Supreme Court. Reserving my general observations on this procedure for later discussion, I do not think the proposal meets the objection to a specialized criminal court. For one thing, with all the work Judge Haynsworth would give it, now including complaints on prison conditions, I do not see how the new court could accept additional burdens. On the other side, a court that might spend 90% of its time on criminal matters is scarcely the ideal tribunal to settle conflicts between circuits on, for example, the interpretation of the Federal Power Act or the scope of the class action.

¹⁶ While the English Court of Criminal Appeals is a separate court, it does not have separate judges.

¹⁷ See F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 153-74 (1928).

impose a heavy burden of proof on a proposal that would entail the likelihood of confrontations with a prestigious National Court of Criminal Appeals. With the problem of collateral attack curable by direct means, Judge Haynsworth's proposal does not meet that test.

II

THE WRITER'S PROPOSALS

Before considering the proposals of Professors Rosenberg and Carrington, I shall outline my own. The essentials are as follows:

- A. *Repeal of the FELA and the Jones Act (insofar as it relates to American vessels) and their replacement by the modern workmen's compensation act*

In his shotgun review of my lectures Mr. John P. Frank thought it sufficient for condemnation to call this a proposal to "[s]end the seamen's, railroad workers', and longshoremen's personal injury business somewhere else."¹⁸ The characterization is true enough, but Mr. Frank did not stop to explain why railroad workers, longshoremen, and, so far as practicable, seamen should not be "sent" where all other American workers, including those in the related occupations of driving trucks and buses and flying airplanes, have been for years, namely, under workmen's compensation. Longshoremen have also been there since 1927 so far as concerns suits against their employers,¹⁹ and the last Congress expanded this to include actions for unseaworthiness against the ship, while at the same time increasing the benefits.²⁰ To urge the retention of personal injury and wrongful death actions based on fault for railroad workers and seamen alone is sheer anti-quarianism.

- B. *Elimination of diversity of citizenship jurisdiction or, if that is not politically feasible, adoption of the proposals of the American Law Institute to end the anomaly whereby a jurisdiction intended to protect out-of-staters from local prejudice can be invoked by a resident of the state*

As shown in my lectures, however the case with respect to diversity jurisdiction may have stood when Professor Frankfurter,

¹⁸ Frank, Book Review, 59 A.B.A.J. 466 (1973).

¹⁹ Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-50 (1970).

²⁰ Longshoremen's and Harbor Workers' Compensation Act of 1972, 33 U.S.C.A. §§ 901-95 (Supp. 1972).

as he then was, advocated its abolition while speaking at this law school in 1928,²¹ the arguments for retaining it will not hold water when the federal courts are overburdened with distinctively federal business.²² While the *Erie* decision eliminated the evil of forum shopping, it also stripped the federal courts of the power to "make law" in diversity actions. And there are simply *no* respectable arguments for permitting the jurisdiction to be invoked today by a resident of the state where the federal court is held. Here again Mr. Frank's contrary position²³ reflects Alexander Pope's "Whatever is, is right." At the very least, while awaiting the congressional verdict on the larger issue, let us relieve the federal courts of personal injury litigation and, I would now add, actions on insurance policies, here and now.

C. *A harder look at the ever increasing use of the federal criminal process*²⁴

At every sitting of our court, we hear appeals in cases where a crime has been committed both against a state and against the United States but the federal interest is far too small to warrant taking the time of federal judges from more urgent tasks.²⁵ Such concurrent jurisdiction also affords grave possibilities of injustice due to the disparity between state and federal sentences, a problem acutely posed in this state by the stiff narcotics law recently enacted in New York.²⁶ The hard look that these matters deserve should further include the question whether we rely too much on criminal sanctions rather than civil penalties to enforce federal regulatory statutes.²⁷ Apart from the issue of the propriety of criminal sanc-

²¹ Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499 (1928).

²² See FRIENDLY 139-52. The Chief Justice has recently said that "[d]iversity jurisdiction had some validity for the first hundred years of our history but has had none for at least a generation." Burger, *Report on the Federal Judicial Branch—1973*, 59 A.B.A.J. 1125, 1126 (1973).

²³ See Frank, *For Maintaining Diversity Jurisdiction*, 73 YALE L.J. 7 (1963); Frank, Book Review, 59 A.B.A.J. 466 (1973).

²⁴ See FRIENDLY 55-61. As there noted (*id.* at 61-62 n.25), I do not mean to slight the larger question of decreasing both federal and state judicial business by eliminating various "victimless" crimes from the penal code. That subject was simply too large for consideration in lectures devoted to the special problems of the federal courts.

²⁵ We now have the new problem of the government's manufacturing the federal elements. *United States v. Archer*, 486 F.2d 670 (2d Cir.), *on rehearing*, 486 F.2d 683 (2d Cir. 1973).

²⁶ N.Y. PENAL LAW §§ 60, 220 (McKinney Supp. 1973).

²⁷ See Goldschmid, *An Evaluation of the Present and Potential Use of Civil Money Penalties as a Sanction by Federal Administrative Agencies*, in 2 RECOMMENDATIONS AND REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 896, 916-19 (1973), and authorities there cited.

tions in many such cases, Congress can provide that civil penalties may be administratively imposed, with the function of the courts limited to judicial review; in fact, because of the usually small amount of each such penalty, there would be little inclination to incur the expense required for review. The revision of the Federal Penal Code, now pending before the Senate, affords a splendid opportunity for reconsideration of the scope of federal criminal jurisdiction. Meanwhile, the Attorney General could make a useful contribution by promulgating guidelines for restraint in the exercise of concurrent jurisdiction and requiring United States attorneys to observe them.

- D. *Reversal of the recent legislative trend whereby the executive branch can seek immediate enforcement of regulatory statutes by the courts without prior executive or administrative fact-finding*²⁸

This would not decrease the number of actions but would substantially diminish the judicial burden. I realize this is not a popular position, since the executive and administrative agencies have declined in favor while the courts have risen. But it is a necessary one, and we now have an excellent but insufficiently known agency, the Administrative Conference of the United States, which your dean did much to strengthen, that should be consulted far more often in the drafting of new regulatory statutes and the revision of old ones. Indeed, Congress ought to make it a standard practice to obtain the views of the Conference on procedural matters before enacting any new regulatory legislation. Failing action along the lines indicated, the district courts should make fuller use of federal magistrates to hear and report on factual issues in enforcement actions; since these are generally equitable in nature, there seems to be no constitutional bar to doing this.

- E. *Provide the Equal Employment Opportunity Commission, the Department of Housing and Urban Development, and the Department of Health, Education, and Welfare with funds, staff, presidential support, and statutory power adequate to enable them to discharge their responsibilities to enforce the provision of equal treatment without the necessity of resorting to the courts*²⁹

This is important not simply, or even primarily, to relieve the courts but because the judicial process is too slow and expensive for litigants. The courts should be reserved for the cases where all else has failed.

²⁸ See FRIENDLY 62-68.

²⁹ See *id.* at 76-87.

F. *Limit collateral attack on judgments of conviction*

Here I need only refer to my previous discussion.³⁰

G. *Require state prisoners complaining under the Civil Rights Act with respect to the conditions of their confinement to exhaust state administrative and judicial remedies, if these are adequate and effective, before bringing suit in the federal courts*³¹

The Chief Justice has recently remarked on the absurdity of invoking the full panoply of the federal judicial system in a dispute regarding a prisoner's right to seven packages of cigarettes.³² Exhaustion of speedy and effective state administrative remedies is, I believe, required by existing law, but I must confess that language in recent Supreme Court decisions, mostly summary per curiam reversals, has placed the issue in some doubt. Exhaustion of state judicial remedies is now required when but only when the prisoner seeks restoration of good time credits.³³ Going all the way—and here I am delighted to have Judge Haynsworth's support—would effect a substantial reduction in the fastest growing head of federal jurisdiction. This would not happen overnight since the states are regrettably slow, as they were in the case of postconviction remedies, in doing what they should do, both administratively and judicially, for the prompt and fair disposition of prisoner complaints. But, as in that instance, they will come to realize the preferability of handling their own problems if federal law gives them an appropriate incentive.³⁴

H. *Remove all patent litigation from the general federal courts and place it, along with the patent jurisdiction now vested in the Court of Customs and Patent Appeals, in a Patent Court*³⁵

The case for this is two-fold. One reason is the varying attitudes of the circuits and, indeed, of judges within a circuit, toward the basic issue of invention, a difference now more important than ever in view of the Supreme Court's holding that, broadly speaking, invalidation of a patent by one circuit invalidates it in

³⁰ See notes 8-12 and accompanying text *supra*.

³¹ See FRIENDLY 104-07.

³² See Burger, *supra* note 22, at 1128.

³³ See Preiser v. Rodriguez, 411 U.S. 475 (1973).

³⁴ The subject of the handling of all suits under the Civil Rights Act is now under study by a committee of the Federal Judicial Center, which will work, so far as concerns prisoner complaints, in close collaboration with the Habeas Corpus Committee of the Judicial Conference.

³⁵ See FRIENDLY 154-61.

all.³⁶ The other is the increased complexity of the subject-matter, which unduly taxes the ordinary or even the extraordinary judge. Learned Hand, while still a district judge, referred in the simpler days of sixty years ago "to the extraordinary condition of the law which makes it possible for a man without any knowledge of even the rudiments of chemistry to pass upon such questions as these."³⁷ The proposed Patent Court would meet the latter problem by having a number of commissioners, who would try the cases as the commissioners of the Court of Claims do today, and a consulting scientific staff available both to the commissioners and to the judges.

I. *Place all appellate jurisdiction in federal tax cases in a Court of Tax Appeals, subject to Supreme Court review only in the exceedingly rare case where a substantial constitutional issue is raised*³⁸

The most compelling argument for this long advocated reform is to reduce the great lapse of time now required to procure a final resolution of disputed issues of tax law. Here, as with most of my proposals, the change would be needed even if the courts of appeals were lolling in indolence; its effect of lessening burdens upon them and on the Supreme Court is a valuable by-product.

J. *Make orders of the National Labor Relations Board self-enforcing*³⁹

Significant relief would be given the courts of appeals by making orders of the National Labor Relations Board self-

³⁶ See *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971) (determination of patent invalidity entitled to collateral estoppel effect in inter-patent infringement suit in another circuit).

³⁷ See *Parke-Davis & Co. v. H. K. Mulford Co.*, 189 F. 95, 115 (C.C.S.D.N.Y. 1911), *aff'd with modifications*, 196 F. 496 (2d Cir. 1912) (patent for adrenalin). I could have echoed that sentiment in *Carter-Wallace, Inc. v. Otte*, 474 F.2d 529 (2d Cir. 1972), *cert. denied*, 412 U.S. 929 (1973) (patent for meprobamate); losing counsel almost certainly did.

³⁸ See FRIENDLY 161-68. I also favor removing federal tax litigation from the Court of Claims and the district courts and placing all of it in a Tax Court having article III status (*id.* at 168-71), but this is more controversial and less urgent.

³⁹ Currently, the National Labor Relations Act § 10(e), 29 U.S.C. § 160(e) (1970), requires the NLRB to petition a court of appeals to enforce an NLRB order.

Another reform which I would advocate but would not have significant numerical consequences is repeal of the 1961 statute (75 Stat. 651, now 8 U.S.C. § 1105a (1970)) providing for review of final orders of deportation by the courts of appeals, and return of initial review of such orders to the district courts. There is always a question whether to place initial review of administrative action in the district courts or to provide direct access to the courts of appeals. When review is likely to hinge upon a question of statutory construction, review by the courts of appeals is obviously preferable. Immigration appeals rarely present such questions. The issues are rather of fact or of "abuse of discretion," when, indeed, there are any issues at all and the petition is filed for some purpose other than the usual one of

enforcing unless the aggrieved party promptly initiates a review proceeding, a reform that has been recommended on the merits by the Administrative Conference.⁴⁰ While no one can make a truly reliable estimate, my judgment is that half of the present seven hundred cases a year would disappear if the aggrieved party had to initiate a proceeding instead of simply awaiting action by the Labor Board. This is no small matter since Labor Board cases normally comprise nearly half the cases reaching the courts of appeals from tribunals other than the district courts.⁴¹

In a paper submitted to the Advisory Council on Appellate Justice, Professors Carrington and Rosenberg have estimated that the combined effect of these proposals would be to reduce the filings in the courts of appeals by one-third,⁴² bringing us back to the figures of 1969.⁴³ Although I did not attempt to quantify the effect of my proposals, I would have thought that, at least in terms of burden, the reduction would be somewhat higher.⁴⁴ Taking the professors' estimate and allowing for improved techniques in the handling of appellate business on the one hand and inevitable growth on the other, I believe this should see the courts of appeals through the present century—which is long enough for me. To the criticism that this is only buying time, I would respond that I cannot think of anything better to buy, especially when these reforms are justified on their own merits—provided, and the proviso is important, that in the time thus purchased we do not

putting off the evil day known to be inevitable. The 1961 statute reflected a belief of the late Representative Walter of Pennsylvania that direct review by the courts of appeals would reduce delay. It has not worked out that way, and the statute has created such troublesome jurisdictional problems (*see* FRIENDLY 175-76 & n.14) that, as I understand it, consideration is being given to increasing the burden of the courts of appeals by diverting to them the immigration cases now handled in the district courts. That would be just the wrong course.

⁴⁰ *See* FRIENDLY 174-75.

⁴¹ DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT, Table B-3 (1973) [hereinafter cited as A.O. REP.].

⁴² The professors say the proposals "would reduce slightly the number of certiorari petitions filed in the Supreme Court." Since every court of appeals decision is a candidate for certiorari and petitions for certiorari to the courts of appeals and other federal courts comprise more than two-thirds of the Supreme Court's certiorari docket, the reduction should be more than slight.

⁴³ A.O. REP. Table B-33.

⁴⁴ Elimination of FELA cases, motor vehicle cases, and half of the marine personal injury cases would reduce the civil docket of the district courts by 13%. FRIENDLY 137. Other proposals having a large numerical impact are those relating to diversity in general, federal criminal jurisdiction, collateral attack, and prisoner petitions. While the numerical effect of the proposals for patent and tax cases would be small, the reduction in burden would be very significant; a single patent appeal may involve more work than a dozen criminal appeals.

simply sit on our haunches but devise new approaches to the problems that are besetting us.

The professors say that the possibility of adoption of all these suggestions, even if desirable, is dubious. To this I make two responses. The first is that the program does not depend on immediate, or even eventual, adoption of everything. The second is that we should not too readily despair. If the longshoremen's unions could be persuaded by improved workmen's compensation benefits to give up the action against the ship for unseaworthiness, the railroad and seamen's unions may likewise see that substantial and quickly obtainable compensation payments are better than the chance of a larger damage award after many years of delay and with much of it going to lawyers. No-fault insurance, after some discouraging jolts, has taken on new life. The obfuscations of the proponents of diversity jurisdiction cannot forever prevail. At least the ALI proposal should have a fair chance of enactment if Congress ever gets the time to consider it, and, with this done, Congress might well be persuaded to do away with the remnant of diversity jurisdiction a decade hence. Some ill-advised and widely publicized federal prosecutions, budgetary considerations, and a general belief that the federal government has become too big and intrusive will provide a more favorable climate for reexamining federal criminal jurisdiction. Limitation of collateral attack on convictions by legislation specifically directed to that end is clearly in sight. The states should be acutely interested in this and in requiring exhaustion of state remedies by prisoners complaining of the conditions of their confinement, and they are not without influence in the halls of Congress. There is no longer monolithic opposition by the patent and tax bars to the creation of specialized courts.⁴⁵ The need is for two things—leadership and congressional time. With them much can be accomplished; without them nothing can be. Perhaps I should add a third need—avoiding the distraction of proposals which, however ingenious, do not tackle the problem at its root.

III

THE PROPOSAL FOR A NATIONAL COURT OF APPEALS

It is with that background that I come to Professor Rosenberg's proposal.⁴⁶ While, as would be expected in light of the

⁴⁵ See Gausewitz, *Toward Patent-Experienced Judges*, 58 A.B.A.J. 1087 (1972); *A Report on Complexity and the Income Tax*, 27 TAX L. REV. 327, 354-58 (1972).

⁴⁶ In light of Professor Rosenberg's generous acknowledgment of the extent of Profes-

ability of the authors, this contains many sound observations, the only definite proposal, as I read it, is to consolidate all the existing federal appellate courts, namely, the eleven circuits, the Court of Customs and Patent Appeals, and the Court of Claims,⁴⁷ which, with some augmentation in numbers, would continue to perform their present duties and be authorized to take on some others that might be delegated to them. The most novel feature of the consolidated court—indeed the only real reason for its creation—is to be a Central Division, manned by regular circuit judges on a rotating basis, and having several sections. One would be a Section for Criminal Appeals “with the duty to grant a searching review in appeals from the highest court of a state or a federal circuit court of appeals affirming a criminal judgment,”⁴⁸ with appropriate accompanying res judicata effects. A Section for National Law Specialties would hear cases within specified categories “drawn from a Chinese-menu style list”⁴⁹ which Congress prepares but from which the Supreme Court orders particular categories for the banquet. Within the selected categories, a decision will start its life as only a recommended one, but unless the Supreme Court takes the case within sixty days, the decision will become final and have the same nationwide authority as Supreme Court decisions now possess. Another section would examine all petitions for certiorari and recommend whether the Court should grant or deny them. Still another section would hear cases, already decided by a federal circuit court, as to which the Supreme Court “prefers a preliminary decision to be made by the Central Division and transmitted to the Supreme Court with a recommendation.”⁵⁰ Along with this Central Division and a Claims Division and a Customs and Patent Division, which are the Court of Claims and the Court of Customs and Patent Appeals under new names, the circuit judges would continue as a “Circuit Division” much as they are now, except that “they do not perform any functions assigned to the Central Division.”⁵¹

A principal objection to this proposal is the very one the professors correctly made, in their initial paper, concerning the

professors' proposal. I shall generally refer to this as “the professors’ proposal.” Somewhat differing versions have been put forward by former Solicitor General Griswold and a committee of the American Bar Association.

⁴⁷ Although the Court of Claims is technically a court of first instance, the judges themselves, as distinguished from the commissioners, function as an appellate court.

⁴⁸ Rosenberg, *Planned Flexibility To Meet Changing Needs of the Federal Appellate System*, 59 CORNELL L. REV. 576, 592 (1974).

⁴⁹ *Id.* at 593.

⁵⁰ *Id.* at 594.

⁵¹ *Id.* at 592.

great pother about circuit realignment—namely, that such action “may persuade some people that the problem has been met and mastered when in fact it has not.”⁵² The proposal does nothing to curtail the flow of cases into the district courts, with the single exception of collateral attacks on state, and possibly federal, criminal convictions. Professor Rosenberg agrees with Justice Frankfurter’s observation that “inflation of the number of district judges . . . will result, by its own Gresham’s law, in a depreciation of the judicial currency and the consequent impairment of the prestige and of the efficacy of the federal courts,”⁵³ but, doubtless because of their limited frame of reference, the professors do nothing about problems that might require a doubling of the present number of district judges by the end of the decade or, in any event, within a decade.

It is high time for a more realistic look at the solution of “more federal judges.” The facile assumption that more judgeships are procurable for the asking has just been proven false. A subcommittee of the Senate Judiciary Committee has proposed that the carefully considered recommendation of the Judicial Conference for fifty-one new district judgeships—itsself a considerable reduction of the figures proposed by the circuit councils which, in turn, were lower than those urged by the district courts—should be cut to twenty-seven. The basis for this, as I understand it, is that although these adjustments are made only quadrennially, additional judgeships should be provided solely when a district has already reached the point of crisis rather than in anticipation of clearly foreseeable increases in load.⁵⁴ Beyond this there has not been sufficient realization that, at least in the metropolitan centers, a federal judgeship, on the district court or even on a court of appeals, is no longer the glittering prize generally conceived. This is due to the combination of a number of factors: a galloping and

⁵² The Commission on Revision of the Federal Court Appellate System appointed to study this has now soundly recommended that the only things that can usefully be done are what were obvious all along, namely, splitting the Fifth and Ninth Circuits, although it has proposed a novel and, in my view, rather unwise method of dividing the Ninth which entails a division of California. COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, THE GEOGRAPHICAL BOUNDARIES OF THE SEVERAL JUDICIAL CIRCUITS: RECOMMENDATIONS FOR CHANGE (1973).

⁵³ *Lumbermen’s Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 59 (1954) (Frankfurter, J., concurring).

⁵⁴ See FRIENDLY 15-27. Although the pending case load in the district courts in 1973 showed the first decline since 1960 (but still to a level higher than 1971), this was due to the combination of a number of nonrecurring factors, such as the transfer of petty immigration offenses to federal magistrates and of many criminal and civil cases to the Superior Court of the District of Columbia. See A.O. REP. II-14-16. Realistically, save for the District of Columbia, the burden on the district courts increased. See *id.* at II-73.

seemingly uncontrollable inflation; the failure of the 1967 salary legislation⁵⁵ to cope with this problem as was intended; the increased interest and financial rewards of practice⁵⁶ and law teaching, which, indeed, can often be combined; and, most important of all, the changed consist of federal judicial work, with criminal matters (including collateral attacks and prisoner petitions) now accounting for half the filings in the courts of appeals⁵⁷ and, very likely, requiring a still higher proportion of the time of district judges. There are, of course, some excellent lawyers whose special interests make them willing to accept a commitment of that size to criminal business. But they are not likely to have had the experience that will make them expert in corporate, securities, antitrust, tax, or labor matters, and lawyers with more general interests are rarely willing to devote half their judicial lives to the affairs of those charged with or convicted of crime. If the response to what I have just said should be a question whether good lawyers have declined nominations to the federal bench, the answer is "yes"; moreover, many fine federal judges have told me, as I am sure they have told their younger friends at the bar, that they would not have accepted appointment if they had known what has now become apparent. One notable resignation for financial reasons has already occurred; others are understood to be in the offing. Recruitment is thus already a real problem in the large cities, and a lessening of prestige by major increases in the number of federal judgeships would still further decrease the number of highly qualified lawyers willing to accept appointment to the federal bench.

Beyond this, an increase in the number of filings in the district courts would be bound to mean a more than corresponding increase in appeals. Figures that have been recently produced are throwing more light on what has caused an increase in appeals from 3,889 in fiscal 1960 to 11,662 in fiscal 1970.⁵⁸ This has not been so much an increase in the appeal rate, which, though more than doubling in criminal cases, remained relatively static for civil cases taken as a whole (although with dramatic contrasts for particular categories), as a doubling of the ratio of appealable civil

⁵⁵ 81 Stat. 642, 2 U.S.C. §§ 351-61 (1970).

⁵⁶ While no one expects governmental salaries to equal those in the private sector, there is something wrong when a federal judge in New York and other metropolitan centers receives lower compensation than the most junior partner in the firm whence he came and little more than twice that paid to beginning lawyers—and less than a clerk of the New York Court of Appeals.

⁵⁷ A.O. REP. Table 5. These reached a new high in 1973. *See id.*

⁵⁸ *See* DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT 96 (Table 3) (1971).

judgments to total terminations.⁵⁹ Even if we should assume that both these ratios may be leveling off at the present high plateaus, an assumption that may well be too optimistic, continued increases in district court filings, not to speak of appeals from the independent agencies and the executive branch,⁶⁰ will confront the courts of appeals with ever mounting case loads.

It is true that the professors' proposal, made to an Advisory Council on Appellate Justice, is not inconsistent with proposals designed to limit intake. Indeed, I know from talks with Professor Rosenberg that he would like to proceed on both fronts. But, as I said in connection with the Freund Committee report and as the professors have noted with respect to circuit realignment, we must avoid diversion of energy. Experience has shown that years are required to effect reforms in the federal judicial system—often not so much because they are highly controversial as because Congress has only a limited amount of time available for such matters and no high sense of urgency about them. We should therefore look askance at a proposal which is mainly a reshuffling of appellate jurisdiction, even if it were more promising than I consider this one to be, and does not tackle the problem at its source.

Let me begin my criticisms with a few of the less important. I am not altogether clear how the professors expect the members of the consolidated court to be appointed, except that they are not to be appointed to fill specialized roles. This would mean that the court might not, indeed in the long run very likely would not, include the specialists who I think are needed to deal with patent and federal tax cases. Also, while the professors seem not to have focused on the geographical factor, a hundred important men on Capitol Hill certainly will. There are established traditions as to state representation on the courts of appeals other than that for the District of Columbia Circuit. Presumably, Senators will insist that state quotas should continue and, indeed, that these should apply to the full membership of the consolidated court. This could lead to large-scale bickering on a nationwide level, which would be repeated each time the membership of the court had to be increased. Also the country would lose the possibility now afforded by the three national appellate courts for the appointment of distinguished lawyers or judges who, for one reason or another, could not become judges in their own circuits.

⁵⁹ These figures are from an unpublished paper prepared by Jerry Goldman for the Federal Judicial Center.

⁶⁰ As to the latter, see *FRIENDLY* 34-35, and *Associated Indus. of New York v. Department of Labor*, 487 F.2d 342 (2d Cir. 1973).

Second, Professor Rosenberg does not tell us how the rotating judges of the Central Division are to be selected. This is a matter of considerable moment—indeed, Professor Rosenberg candidly calls it “crucial”—since some of its sections will be empowered to render decisions of nationwide effect unless the Supreme Court interposes. But we are told only that it is too early to worry about this and that the problem “is soluble.”⁶¹ Confronted with a similar problem the Freund Committee could do no better by way of solution than to devise an automatic plan which would insure that the judges would represent the average among federal appellate judges. Bad as that seemed for the task conceived by the Committee, at least its proposed National Court of Appeals, in contrast to the professors’ Central Division, could not decide very much. Yet any attempt to get the best rather than the average inevitably entails the question of who makes the selection. I can think of only two possibilities—the President or the Supreme Court; I don’t care much for either solution.

The professors also shrug off two other problems about rotation of a judge into the Central Division. One is the effect of his loss on the circuit whence he came. Although this problem is also said to be “soluble,” the only solution that has occurred to me is the creation of an additional temporary judgeship. A good part of the term of the departing member on the Central Division might have passed before the successor was confirmed and had become thoroughly familiar with the job. Soon the departing brother would return, with an added member on the court until the temporary judge died or retired and with the balance of the states thrown off kilter. Congress should take a very hard look at this.

More serious are the personal and logistical problems created by a short membership on the Central Division. If the Division sits in Washington, must the judges move there for the brief period of their incumbency or are they to come only for arguments and conferences? Only the former would be efficient. In a review of my Carpentier lectures Judge Gibbons has noted that

[a] recently completed time study by the judges of the Third Circuit Court of Appeals has brought to light that travel time, for the judges whose duty stations are remote from Philadelphia, is a very significant part of the real time devoted to the business of the court.⁶²

Yet the duty station in the Third Circuit most “remote” from Philadelphia is Pittsburgh; the Central Division would surely in-

⁶¹ See Rosenberg, *supra* note 48, at 595.

⁶² Gibbons, Book Review, 48 N.Y.U.L. REV. 564, 571 (1973).

clude judges from places much further from Washington—California, Texas, Florida, perhaps even Alaska and Hawaii. Yet, as Judge Gibbons also asks, “who would want to relocate his home and family for a three-year term?”⁶³ To be sure, this is done by cabinet and sub-cabinet members and other political appointees, but there are countervailing factors of prestige or of prospective advancement in public or private life that would not apply to the twenty or more judges of the Central Division. Moreover, Professor Rosenberg seems to contemplate that at least some sections of the Central Division will ride circuit—a prospect which, although less horrendous than in the early days of the Republic, is not attractive as a steady diet even in the jet age. Proposals for central units with rotating judges must take account of the fact that judges are not readily movable robots but middle-aged or older men and women, with spouses, children, friends, and homes.

Taking one more step, I cannot but wonder at the preservation of the Court of Claims and the Court of Customs and Patent Appeals apparently without change. The professors must perceive some unifying factor in customs and patent appeals that has been veiled from me. They fail to explain why other anomalies with respect to the patent appeals now heard by the Court of Customs and Patent Appeals⁶⁴ should not be corrected and say nothing about having all patent appeals heard by a single court.⁶⁵ Similarly, the Court of Claims, now named the Claims Division, is left with its present mixed bag, including a wholly unnecessary and sometimes harmful tax jurisdiction,⁶⁶ and the professors say nothing with respect to the long-felt need for a Court of Tax Appeals.⁶⁷ Although, of course, this could be one of the subjects chosen from the “Chinese menu” of the Section for National Law Specialties, the handling of federal tax appeals is a sufficiently important subject to be faced here and now.

Serious as I think these criticisms to be, they are not the most important. Let us look at the various sections of the Central Division, obviously the most significant part of the project.

As already indicated, the Section for Criminal Appeals would be “charged with the duty to grant a searching review in appeals from the highest court of a state or a federal circuit court of

⁶³ *Id.*

⁶⁴ *See* FRIENDLY 154.

⁶⁵ *Id.* at 154-61 (proposing that court hear all patent cases both initially, through commissioners, and on review).

⁶⁶ *Id.* at 163, 170-71.

⁶⁷ *Id.* at 161-68.

appeals affirming a criminal judgment.”⁶⁸ The phrase “searching review” stems from a paper constituting chapter 6 of the Courts Section, authored by Professor Meador of the University of Virginia Law School, in the working papers for the National Conference on Criminal Justice held in January 1973, in Washington, which in turn derived from his study of the British Court of Criminal Appeals. The stated purpose is “to assure that the defendant’s federally secured rights to counsel, freedom from illegal search, arrest, line-up, etc., have been protected,”⁶⁹ whether previously asserted or not, so that the judgment can have a *res judicata* effect not now possessed by affirmances of convictions.

“Searching review” has such a fine ring that questioning it seems like attacking motherhood. However, the English experience is not readily transposed to a court whose jurisdiction would include eleven (probably soon thirteen) circuits and fifty states, and we had better know what we are doing. In the first place, such a court would require a large staff to supplement or supplant possibly ineffective defense trial counsel in ferreting out all possible grounds of attack. One would wish to consider for a long time whether this is desirable and, if so, attainable. The proposal also seems to run counter to Professor Rosenberg’s sound goal of not elongating the appellate process, since, as I read him, the Section for Criminal Appeals is interposed between the state courts or the federal circuit divisions and the Supreme Court. Further, I do not understand what happens when a federal court of appeals *reverses* a conviction. Apparently, the Government must go directly to the Supreme Court. If the Supreme Court in turn reverses, does the case go back to the Section for Criminal Appeals for it to investigate possible constitutional infirmities? I do not see the need for all of this if, as I suggested in discussing Judge Haynsworth’s proposal for a National Court of Criminal Appeals, we are going to achieve a satisfactory method for dealing with collateral attack as a result of the work of the Habeas Corpus Committee of the Judicial Conference.

Unlike the Section for Criminal Appeals, the Section for National Law Specialties seemingly does not interpose a new appellate layer. But it has problems of its own. One is the burden on the Supreme Court of having to decide within sixty days whether to allow a decision of the section to stand, with nationwide effect, or to take the case itself. This is a burden quite different from that

⁶⁸ Rosenberg, *supra* note 48, at 592.

⁶⁹ *Id.*

incident to certiorari. An ill-advised denial of certiorari to a federal court of appeals has no serious consequences except to the litigants. Save in the rare case where the decision was en banc, it does not even preclude rather ready correction by the particular circuit. Refusal to take on a decision of the Section for National Law Specialties has the graver consequences of an affirmance; it sets the law for the country in the same way as a decision by the Court itself. One of two consequences would follow: either the Court would have to take a larger proportion of these decisions than it now does of decisions of courts of appeals in the same area of law, or the "national law" would be established by a rotating group of judges without the prestige and, particularly if selected on an automatic basis, of distinctly less ability than the Justices of the Supreme Court.

The thrust behind this proposal must be a belief that the present system involves unacceptable delay in the interpretation of federal statutes. I believe this to be true with respect to federal taxation and have proposed a remedy for it. Taxation is the paradigm of a field where "it is more important that the applicable rule of law be settled than that it be settled right,"⁷⁰ and the permanent Court of Tax Appeals I have suggested would be likely to decide cases in this technical area not only as well as but better than the Supreme Court. But the need in other areas has not been demonstrated; and the unwillingness of proponents to indulge in the modest research that would cast light on the problem arouses the usual suspicion when no attempt is made to present available evidence. Doubtless there have been instances where definitive resolution of an important issue of construction of a regulatory statute has been delayed for a while; one example was the dispute among the circuits over the use of union organization cards that was ultimately decided in *NLRB v. Gissel Packing Co.*⁷¹ My own impression was that the Supreme Court failed to resolve that conflict earlier not because it could not spare the time but because it wanted the dust to settle; sometimes this may be as wise with respect to issues of statutory construction as the professors' initial paper conceded it to be in constitutional matters. The Court has found no difficulty in resolving other conflicts under the National Labor Relations Act⁷² and other statutes⁷³ as soon as they arose.

⁷⁰ *Burnet v. Colorado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting); see FRIENDLY 166-68.

⁷¹ 395 U.S. 575 (1969).

⁷² See, e.g., *NLRB v. Savair Mfg. Co.*, 94 S. Ct. 495 (1973); *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964); *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964).

⁷³ See, e.g., *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726 (1973)

The number of cases each term where the Court has reviewed questions of federal law which have not yet resulted in conflicts and, in the views of many, were not of great importance suggests that lack of time is not the reason for delay in conflict resolution.

Moreover, we must not overlook the *usefulness* of inter-circuit conflicts in focusing the Supreme Court's interest on important problems of statutory construction. Presumably there would be relatively little chance to obtain Supreme Court review of a unanimous decision of a specialized court construing a regulatory statute, and even a dissent does not have the same impetus for review as a conflict. What the Supreme Court cannot resolve is differences in attitudes by the circuits, and by judges within a circuit, as to the judgments of administrative agencies acting within their statutory authority. Although all judges profess deference to the principles of such review stated in *Universal Camera Corp. v. NLRB*,⁷⁴ in fact they range from the judge who will "find a way" to upset any administrative decision he does not approve of to the judge who will never fault any agency for substantive misuse of conceded power, with the vast majority at various points between these polar positions. So long as there are many reviewing panels, no permanent social harm is done, however frustrated a losing litigant may feel. The situation would be different if there were a single reviewing court which was either overly zealous or too lax in applying such vague standards as "substantial evidence" and "arbitrary or capricious."

Then there is a section of judges supposedly acting as super law clerks who will write memoranda of recommendations to the Supreme Court with respect to certiorari petitions. I join Judge Gibbons who, in speaking of the Freund Committee's proposal, asked, "Who will want the job?"⁷⁵ Presumably the carrot here is the prospect of being rotated into one of the other sections, but I cannot imagine that would suffice, except for the lazy. Both the Freund Committee and the professors fail to recognize that, whatever the setup, a large proportion of the work on petitions for certiorari is going to be done by law clerks, either Supreme Court clerks or other judges' clerks. Indeed, this would be even more the case with the professors' proposal since I cannot visualize judges really agonizing over thousands of memoranda of *recommendation* to

(Shipping Act of 1916); *Brennan v. Arnheim & Neely, Inc.*, 410 U.S. 512 (1973) (Fair Labor Standards Act); *Snyder v. Harris*, 394 U.S. 332 (1969) (FED. R. CIV. P. 23); *Nicholas v. United States*, 384 U.S. 678 (1966) (Bankruptcy Act).

⁷⁴ 390 U.S. 474 (1951).

⁷⁵ *Gibbons*, *supra* note 62, at 571.

the Supreme Court. The Supreme Court clerks will do the work better both because they will usually have had a year's apprenticeship with a good circuit judge and will be the very best of such clerks, and, more important, because of their close contacts with the Justices and the Court's decisional work. A high degree of reliance on Supreme Court law clerks for screening certiorari petitions is not at all the evil the description might suggest. I should suppose a Justice would instruct his clerks to recommend a grant in several times the number of cases where this can feasibly be done and would devote the bulk of his "certiorari time" to such cases; the chance that a worthy case would be missed by nine Supreme Court clerks must be exceedingly small. In fifteen years as a federal appellate judge I cannot recall more than a half dozen decisions in which I participated—if that many—where I thought the Court had been wrong in denying certiorari; as to those, I am willing to recognize the Court may have had reasons of which I was not aware—or even, although this, of course, comes harder, that it was right and I was wrong! If present means are inadequate, a better solution would be to create a small senior staff in the Court⁷⁶ which would come to have a "feel" and a knowledge that rotating circuit judges and their clerks cannot possibly attain; the best solution of all might be to persuade three or four Supreme Court law clerks, already familiar with current problems, to stay on for an additional year. It is baffling why such splendid minds as the members of the Freund Committee and Professors Carrington and Rosenberg resist trying simple solutions—even providing Supreme Court law clerks with secretaries—in favor of complicated ones, except, of course, that the latter are more fun.⁷⁷

Finally, we have a section which has been dubbed a "court of exit" to hear cases the Supreme Court refers to it on an individual basis as requiring "decision at the highest level, but as to which it prefers a preliminary decision to be made by the Central Division

⁷⁶ See FRIENDLY 50-51.

⁷⁷ I am not attracted by Professor Kurland's proposal to divide the certiorari-granting power among all nine Justices, subject to later veto by a vote of five. Apparently denial by a single Justice would be final. If fractionating is demanded, a better course would be, as Professor Herbert Wechsler once suggested to me, to have petitions handled in the first instance by shifting panels of three Justices. One vote should be enough to bring the petition before the full Court for consideration and three sufficient to grant. Even if an occasional worthy case fell by the wayside for want of a single vote, the issue would almost certainly recur. On the other hand, this would not truly be substituting a "rule of three" for the long-standing "rule of four"; if three out of three Justices favored a grant, the chance that not one of the other six would be in accord must be exceedingly small.

and transmitted to the Supreme Court with a recommendation.”⁷⁸ Even Professor Rosenberg cannot manage to work up much enthusiasm over this proposal, which he regards as having “only marginal utility.”⁷⁹ Like the Section on Criminal Appeals, it violates his goal of not elongating the appellate process. I fail to understand why the judges of this section, particularly if the Central Division is recruited on a random basis, are better able to make sound “recommendations” than the judges of the circuit division who decided the case in the first place. If the professors are again worried about conflicts, I would think the last place where the Supreme Court would want another set of recommendations from circuit judges would be where it already had two.⁸⁰

In my view, therefore, the professors’ proposal is not a fruitful line of approach. Flexibility is a desirable quality but not so important as to warrant disruption of long established institutions, elongation of the appellate process in many cases, and distraction of attention from the true problem. As indicated in my title, there is only one way to avert the flood, namely, to lessen the flow of cases into the general federal courts by eliminating those that should not be there. What we need is not complex institutional change but legislation that will concentrate all levels of the federal judiciary on their proper tasks.

⁷⁸ Rosenberg, *supra* note 48, at 594.

⁷⁹ *Id.*

⁸⁰ Perhaps the idea behind this proposal is to divert decision about conflicts on subjects that are not very important. While I do not deny that such cases exist, my impression is that there are not more than three or four of these each term.