TAX COURT IMPROVEMENT ACT OF 1979

HEARING

BEFORE THE

SUBCOMMITTEE ON TAXATION AND DEBT MANAGEMENT GENERALLY

OF THE

COMMITTEE ON FINANCE

UNITED STATES SENATE

NINETY-SIXTH CONGRESS

FIRST SESSION

ON

S. 1691

A BILL TO PROVIDE FOR IMPROVEMENTS IN THE STRUCTURE AND ADMINISTRATION OF FEDERAL TAX COURTS, AND FOR OTHER PURPOSES

NOVEMBER 2, 1979

Printed for the use of the Committee on Finance

U.S. GOVERNMENT PRINTING OFFICE

54-877 O WASHINGTON : 1979 HG 96-51

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CONTENTS

TAX COURT IMPROVEMENT ACT OF 1979

FRIDAY, NOVEMBER 2, 1979

U.S. SENATE,
SUBCOMMITTEE ON TAXATION AND DEBT MANAGEMENT
GENERALLY, COMMITTEE ON FINANCE,
Washington, D.C.

The subcommittee met, pursuant to notice, at 2 p.m., in room 2221, Dirksen Senate Office Building, Hon. Harry F. Byrd, Jr. (chairman of the subcommittee) presiding.

Present: Senators Byrd and Baucus.

[The press release announcing this hearing and the bill S. 1691 and the Joint Committee on Taxation Description of S. 1691, follow:]

[Press Release, Oct. 19, 1979]

FINANCE SUBCOMMITTEE ON TAXATION AND DEBT MANAGEMENT TO HOLD HEARING ON S. 1691, THE TAX COURT IMPROVEMENT ACT OF 1979

The Honorable Harry F. Byrd, Jr. (I-Va.), Chairman of the Subcommittee on Taxation and Debt Management, today announced the Subcommittee will hold a hearing on S. 1691, a bill to create an appellate court with exclusive jurisdiction over all Federal civil tax appeals. This bill has been referred to the Committee on Finance for consideration until not later than December 31, 1979. Senator Max Baucus will chair this hearing.

The hearing will begin at 2:30 p.m., Friday, November 2, 1979, and will be held in Room 2221 Dirksen Senate Office Building.

Senator Baucus noted that this hearing is being convened to obtain the broadest range of opinions concerning the establishment of a single court of appeals for all civil tax cases. This measure, which has already been favorably reported by the Judiciary Committee, provides for significant restructuring of the Federal tax litigation system, Baucus added.

Requests to testfy.—Persons desiring to testify during this hearing must make their requests to testify to Michael Stern, Staff Director, Committee on Finance, Room 2227, Dirksen Senate Office Building, Washington, D.C. 20510, not later than the close of business on Thursday, October 25, 1979.

Witnesses will be notified as soon as possible after this date as to when they are scheduled to appear. If for some reason the witness is unable to appear at the time scheduled, he may file a written statement for the record in lieu of the personal appearance.

Consolidated testimony.—The Subcommittee strongly urges all witnesses who have a common position or the same general interest to consolidate their testimony and designate a single spokesman to present their common viewpoint orally to the Subcommittee. This procedure will enable the Subcommittee to receive a wider expression of views than it might otherwise obtain. Further, all witnesses should exert a maximum effort to coordinate their statements.

Legislative Reorganization Act.—The Legislative Reorganization Act of 1946 requires all witnesses appearing before the Committees of Congress to "file in advance written statements of their proposed testimony and to limit their oral presentations to brief summaries of their argument." In light of this statute, the number of witnesses who desire to appear before the Subcommittee, and the limited time available for the hearing, all witnesses who are scheduled to testify must comply with the following rules:

1. All witnesses must include with their written statements a summary of the principal points included in the statement.

2. The written statements must be typed on letter size paper (not legal size) and at least 100 copies must be delivered to Room 2227 Dirksen Senate Office Building not later than 5:00 p.m. on the day before the witness is scheduled to appear.

3. Witnesses are not to read their written statements to the Subcommittee, but are to confine their oral presentations to a summary of the points included in the statement.

4. No more than 10 minutes will be allowed for any oral summary.

Written statements. Persons not scheduled to make an oral presentation, and others who desire to present their views to the Subcommittee, are urged to prepare a written statement for submission and inclusion in the printed record of the hearing. These written statements should be submitted to Michael Stern, Staff Director, Senate Committee on Finance, Room 2227 Dirksen Senate Office Building, Washington, D.C. 20510, not later than Friday, November 16, 1979.

II

96TH CONGRESS
1ST SESSION

S. 1691

[Report No. 96-306]

To provide for improvements in the structure and administration of Federal tax courts, and for other purposes.

IN THE SENATE OF THE UNITED STATES

AUGUST 3 (legislative day, JUNE 21), 1979

Mr. KENNEDY, for the Committee on the Judiciary, reported the following original bill which was referred, by unanimous consent, to the Committee on Finance for a period not to extend beyond December 31, 1979

A BILL

To provide for improvements in the structure and administration of Federal tax courts, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Tax Court Improvement Act of 1979".

CREATION OF COURT OF TAX APPEALS; COMPOSITION AND PLACEMENT OF CIRCUIT

SEC. 101. (a) Section 41 of title 28, United States Code, is amended—

(1) by inserting "(a)" immediately before the introductory sentence; and

(2) by adding at the end of the section the following new subsection:

"(b) The United States Court of Tax Appeals is composed of all the Federal judicial circuits.".

(b) Section 44(a) of title 28, United States Code, is amended—

(1) by striking out "(a) The President" and inserting in lieu thereof "(a)(1) The President"; and

(2) by adding at the end thereof the following new paragraph:

"(2)(a) The United States Court of Tax Appeals shall be comprised of eleven judges of the United States circuit courts of appeals other than the Court of Appeals for the Federal Circuit. The Chief Justice shall designate one judge of each court of appeals to serve on the Court of Tax Appeals. In the event that the Chief Justice is unable to designate a judge of a circuit court to serve on the Court of Tax Appeals, a district judge of that circuit shall be designated to serve on the court.

"(b) The first eleven judges designated shall serve on the court as follows: four for a term of one year from the date of designation, four for a term of two years from the date of designation, and three for a term of three years from the date

of designation. Thereafter, whenever a vacancy occurs on such court, the Chief Justice shall designate an additional judge of the court of appeals no longer represented on the Court of Tax Appeals to serve on the court for a term of three years from the date of designation. A circuit judge who serves on the Court of Tax Appeals shall remain a judge of the circuit court from which he was designated.".

(c) Section 48 of title 28, United States Code, is amended by adding the following new subsection at the end thereof:

"(d) Sessions of the United States Court of Tax Appeals shall be held at least once per year in each of the circuits, and at such other times and places as the court may by order select, except that such appeals shall be heard in the judicial circuit where the taxpayer is domiciled, or, in the case of a corporation, in the judicial circuit where said corporation or association has its principal place of business, or, in the case of a cooperative or organization claiming a tax exemption, in the judicial circuit which constitutes its principal place of activity.".

APPOINTMENT OF CHIEF JUDGE AND ASSIGNMENT OF JUDGES

SEC. 102. (a) Notwithstanding the provisions of section 45 (a) and (b) of title 28, United States Code, the first chief judge of the United States Court of Tax Appeals shall be appointed by the Chief Justice of the United States from

those judges appointed under section 44(a)(2) of title 28, United States Code, as added by section 401(b) of this title. When the person who first serves as chief judge of the United States Court of Tax Appeals vacates that position, the position shall be filled in accordance with the provisions of section 45 of title 28, United States Code.

(b) Section 46(c) of title 28, United States Code, is amended by inserting the following after the second sentence: "The United States Court of Tax Appeals may sit in panels of more than three judges. Whenever six of the judges of the court determine that it is in the interest of justice no less than nine judges shall hear the case en banc. In deciding whether to hear a case en banc, the judges shall consider, but shall not limit their consideration to—

"(1) whether the question presented in the case was thought to be novel and unlikely to recur or was likely to apply to many taxpayers;

"(2) whether there was unanimity in the panel which decided the case;

"(3) whether any of the judges who composed the panel which heard the case suggested that it be reheard; and

"(4) whether the case presented issues of first impression.".

(c) Section 292 of title 28, United States Code, is amended by adding at the end thereof the following new subsections:

"(f) The Chief Justice of the United States may, whenever the need arises and in the interests of justice, designate and assign temporarily any district judge to serve as a judge of the United States Court of Tax Appeals for the consideration of any matter before such court.

"(g) On or about January 1, 1985, the Director of the Administrative Office of the United States Courts shall report to the President and the Committees of the Judiciary of the Senate and House of Representatives concerning the implementation and effectiveness of the United States Court of Tax Appeals. Such report shall include:

"(1) a description of the progress made in accomplishing the objectives of this Act; and

"(2) the extent to which litigants in each Federal circuit have had their cases resolved promptly and efficiently within their own circuits.".

CONFORMING AMENDMENTS RELATING TO APPEAL TO THE SUPREME COURT

SEC. 103. Section 1254 of title 28, United States Code, is amended—

(1) by striking out "Cases in the courts of appeals" and inserting in lieu thereof "(a) Except as pro-

vided in subsection (b), cases in the courts of appeals"; and

(2) by adding at the end thereof the following new subsection:

"(b) Cases in the Court of Tax Appeals may be reviewed by the Supreme Court by writ of certiorari.".

JURISDICTION OF THE UNITED STATES COURT OF TAX APPEALS

SEC. 104. (a) Chapter 83 of title 28, United States Code, is amended by adding at the end thereof the following new section:

"§ 1296. Jurisdiction of the United States Court of Tax Appeals

"The Court of Tax Appeals shall have exclusive jurisdiction—

"(1) in any appeal from a district court in which the jurisdiction of the district court was based, in whole or in part, on section 1340 of this title;

"(2) in any appeal from a district court in which the jurisdiction of the district court was based, in whole or in part, on section 1346(a)(1), or 1346(a)(2) in any claim founded upon an Act of Congress or a regulation of an executive department providing for internal revenue, or on 1346(e); and

"(3) in any appeal from the United States Tax Court.".

(b) The table of sections for chapter 83 of such title is amended by adding at the end thereof the following new item:

"1296. Jurisdiction of the United States Court of Tax Appeals.".

CONFORMING AMENDMENTS RELATING TO REVIEW OF ORDERS OF FEDERAL AGENCIES

SEC. 105. Section 2342 of title 28, United States Code, is amended by striking out "The court of appeals" and inserting in lieu thereof "Except for the Court of Tax Appeals, the courts of appeals".

OFFICERS AND EMPLOYEES OF THE COURT OF TAX APPEALS

SEC. 106. (a) Chapter 47 of title 28, United States Code, is amended by adding the following new section at the end thereof:

"§716. United States Court of Tax Appeals

"(a) Sections 711 through 715 of this chapter shall not apply to the United States Court of Tax Appeals and the judges thereof.

"(b) Notwithstanding subsection (a), each judge assigned to the United States Court of Tax Appeals shall be entitled to appoint the regular number of law clerks and secretaries in accordance with section 712 or section 752 as a consequence

of his appointment as a judge of a circuit court of appeals or a district court.".

(b) The table of sections of chapter 47 of title 28, United States Code, is amended by adding the following new item at the end thereof:

"716. United States Court of Tax Appeals.".

ACCOMMODATIONS FOR THE COURT OF TAX APPEALS

SEC. 107. Section 462 of title 28, United States Code, as added by section 314(k) of this Act, is amended by adding the following new subsection at the end thereof:

"(g) The Director of the Administrative Office of the United States Courts shall provide permanent accommodations for the United States Court of Tax Appeals only at the District of Columbia. However, the court may hold regular and special sessions at other places utilizing the accommodations which the District provides to other courts.".

TECHNICAL AND CONFORMING AMENDMENTS OUTSIDE OF TITLE 28 RELATING TO THE UNITED STATES COURT OF TAX APPEALS

TITLE 18

SEC. 108. Section 204 of title 18, United States Code, is amended by inserting ", or the United States Court of Tax Appeals" after "Court of Claims".

TITLE 26

SEC. 109. (a) Section 7481 of the Internal Revenue Code of 1954 (26 U.S.C. 7481) is amended by inserting "Tax" after "United States Court of" each time it appears.

(b) Section 7482 of the Internal Revenue Code of 1954 (26 U.S.C. 7482) is amended—

(1) in subsection (a) by striking out "Courts of Appeals" and inserting in lieu thereof "Court of Tax Appeals" and by striking out "any such court" and inserting in lieu thereof "the Court of Tax Appeals";

(2) by repealing subsection (b);

(3) in subsection (c)(1) by striking out "such courts" and inserting in lieu thereof "the United States Court of Tax Appeals"; and

(4) in subsection (c)(4) by inserting "Tax" after "United States Court of".

MISCELLANEOUS PROVISIONS

SEC. 110. The provisions of this Act shall take effect two years after the date of enactment of this Act.

SEC. 111. Any appeal which has been taken from a district court of the United States prior to the effective date shall be decided by the court of appeals in which it has been filed.

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DESCRIPTION OF S. 1691
(TAX COURT IMPROVEMENT ACT OF 1979)

INTRODUCTION

The bill described in this pamphlet, S. 1691, has been scheduled for a hearing on November 2, 1979, by the Subcommittee on Taxation and Debt Management Generally of the Senate Committee on Finance. S. 1691, the "Tax Court Improvement Act of 1979," was reported by the Senate Committee on the Judiciary on August 3, 1979 (S. Rep. 96-306) and referred. by unanimous consent, to the Committee on Finance.

The first part of the pamphlet is a brief summary of the bill. This is followed by a discussion of present law, issues involved the provisions of the bill, and the effective date.

I. SUMMARY

Under present law, a decision of a United States District Court in a tax case or a decision of the United States Tax Court generally is appealable to the United States Court of Appeals for the judicial circuit in which the taxpayer resides or has its principal place of business.

The bill would establish a national court of tax appeals with exclusive intermediate appellate jurisdiction over all decisions of the United States Tax Court and civil tax decisions of the United States District Courts, regardless of the taxpayer's residence or place of business. Decisions of the new national appellate tax court would be reviewable by the United States Supreme Court.

The national court of tax appeals would be staffed by 11 judges, one from each of the 11 Courts of Appeals, serving three-year terms. The new court would hear cases, in panels of three or more judges, in the judicial circuit in which the taxpayer is domiciled or has its principal place of business.

The provisions of the bill would become effective two years after the date of enactment.

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II. DESCRIPTION OF THE BILL

Present law

If the Internal Revenue Service determines a deficiency of income, estate, gift, or certain excise taxes, the taxpayer can challenge the asserted liability in the United States Tax Court without first paying the tax.[1] Alternatively, the taxpayer can first pay the deficiency and, after exhausting administrative remedies, sue for a refund in either a United States District Court or the United States Court of Claims. Also, a taxpayer can sue for a refund of an overpayment of tax not attributable to a deficiency, after exhausting administrative remedies, in a District Court or the Court of Claims. A trial by jury may be obtained in a District Court, but not in the Tax Court or the Court of Claims.

A decision of the Tax Court can be appealed to the United States Court of Appeals for the judicial circuit[2] in which the taxpayer's legal residence is located (sec. 7482(b)(1)(A) of the Internal Revenue Code). In the case of a corporation, the appeal lies to the Court of Appeals for the judicial circuit in which the principal place of business or principal office or agency of the corporation is located (sec. 7482(b)(1)(B)). If a taxpayer files suit in a District Court, the decision of the District Court usually will be appealable to the same Court of Appeals that would hear an appeal from a decision of the Tax Court had that taxpayer sued in the Tax Court.

A Court of Claims decision cannot be appealed to a Court of Appeals and can be reviewed only by the United States Supreme Court.

In deciding a question of tax law, the Tax Court or a United States District Court is required to follow only interpretations of the law made by the particular Court of Appeals to which the case being tried can be appealed. For example, a District Court within the Fourth Circuit is bound by the decisions of the Court of Appeals for the Fourth Circuit and is not bound by decisions of the ten other Courts of Appeals. Similarly, if a taxpayer residing in the Second Circuit files suit in the Tax Court, the Tax Court, in reaching its decision, is bound only by the decisions of the Court of Appeals for the Second Circuit.[3] If a second taxpayer with an identical claim but residing in

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[1] A taxpayer may also seek a declaratory judgment in the Tax Court in controversies involving tax-exempt organizations, retirement plans, certain transfers of property from the United States, and certain government obligations (secs. 7428, 7476, 7477, and 7478 of the Internal Revenue Code. A declaratory judgment may also be sought in the United States District Court for the District of Columbia and the United States Court of Claims in a controversy involving tax-exempt organizations (sec. 7428 of the Code).

[2] The Federal intermediate appeals courts are divided into 11 geographically defined judicial circuits. For example, the Fourth Circuit encompasses Maryland, North Carolina, South Carolina, Virginia, and West Virginia.

[3] *Golsen* v. *Commissioner*, 54 T.C. 742 (1970), *aff'd on other grounds*, 445 F.2d 985 (10th Cir.), *cert. denied*, 404 U.S. 940 (1971).

the Third Circuit files suit in the Tax Court, the Tax Court, in deciding the second taxpayer's claim, is bound only by the decisions of the Court of Appeals for the Third Circuit and is not bound by the decisions of any other Court of Appeals. The Court of Claims is not bound by any decision of a Court of Appeals.

All three trial courts—the Tax Court, District Courts, and Court of Claims—are bound by the decisions of the Supreme Court. Decisions of the Courts of Appeals are reviewable by the United States Supreme Court.

Issues

The first issue to be considered with respect to S. 1691 is whether there should be a national court of tax appeals.

If a national court of tax appeals were to be established, other issues include the following:

(1) Where should the court be located?
(2) Where should the court hear cases?
(3) How many judges should the court have?
(4) How should the judges be selected?
(5) Should the judges be permanently appointed to the court or should they serve on a temporary basis?
(6) How many judges should be required to decide a case?
(7) When should the court hear a case en banc?

Explanation of the bill

General

The bill would establish a United States Court of Tax Appeals which would decide (1) all appeals from decisions of the United States Tax Court and (2) appeals from decisions of United States District Courts in civil tax cases. Decisions of the Court of Tax Appeals would be reviewable by the United States Supreme Court by writ of certiorari.

The bill would not affect provisions of present law concerning the jurisdiction of the Court of Claims over tax refund litigation or review by the Supreme Court of tax decisions of the Court of Claims.[4]

Location

The Court of Tax Appeals would have permanent offices in the District of Columbia. Appeals would be heard, however, in the judicial circuit in which the taxpayer is domiciled. In the case of a corporation, an appeal would be heard in the judicial circuit in which the corporation has its principal place of business.[5] The Court of Tax Appeals would convene at least once a year in each judicial circuit and hold additional sessions at such locations and at such times as the Court determines.

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[4] S. 1477 (the "Federal Courts Improvement Act of 1979"), as passed by the Senate on October 30, 1979, provides that tax decisions of the Court of Claims would be reviewable by the Courts of Appeals in the same manner as decisions of the District Courts in nonjury civil tax cases. For example, if a taxpayer residing within the Fourth Circuit brought a refund suit in the Court of Claims, the case would be reviewable by the Court of Appeals for the Fourth Circuit. The provisions of S. 1477 generally would become effective two years after the date of enactment.

[5] The principal place of activity of a cooperative or organization claiming a tax exemption would determine the judicial circuit in which the cooperative's or organization's appeal would be heard.

Composition

The 11 members of the Court of Tax Appeals would be chosen by the Chief Justice of the Supreme Court from among the judges of the Courts of Appeals.[6] The Chief Justice would be required to designate one judge from each of the geographically defined judicial circuits. Whenever a vacancy occurs on the Court of Tax Appeals, the Chief Justice would be required to appoint a circuit judge from the judicial circuit no longer represented on the Court of Tax Appeals. If the Chief Justice is unable to designate a circuit judge, a district judge sitting in that judicial circuit could be desgnated.

Term of service

A Court of Tax Appeals judge would serve a three-year term [7] during which he or she would remain a judge of the Court of Appeals from which he or she was selected. The bill does not expressly provide whether a judge may serve consecutive terms.

Chief Judge

The first chief judge of the Court of Tax Appeals would be selected by the Chief Justice from among the first 11 judges. Thereafter, the chief judge would be selected on the basis of seniority and age in the same manner the chief judge of a Court of Appeals is selected.

Hearings

The Court of Tax Appeals would sit in panels of three or more judges. In addition, the bill requires that at least nine judges would hear a case en banc whenever six judges decide an en banc hearing is "in the interest of justice." The bill requires the judges to consider, but does not limit consideration to, the following factors in determining whether to hear a case en banc: (1) whether the issue presented is novel or applicable to many taxpayers; (2) whether the panel of judges that decided the case was unanimous; (3) whether any of the judges on the original panel recommend a rehearing; and (4) whether the case presents issues of first impression.

Report

The bill requires the Director of the Administrative Office of the United States Courts to report, on or about January 1, 1985, on the implementation of the bill and the extent to which taxpayers have had their cases resolved promptly and efficiently in their judicial circuits.

Effective date

The provisions of the bill would become effective two years after the date of enactment. All appeals taken before the effective date from a decision of a District Court would be decided by the Court of Appeals in which the appeal had been filed. The bill does not contain a similar rule for the disposition of pending appeals from Tax Court decisions.

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[6] The bill provides that judges of the proposed Court of Appeals of the Federal Circuit could not serve on the Court of Tax Appeals. The Court of Appeals for the Federal Circuit would be established under S. 1477 (the "Federal Courts Improvement Act of 1979"), as passed by the Senate on October 30, 1979.

[7] The terms of the first judges selected would vary from one to three years so that vacancies would be staggered.

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Senator BYRD. The hour of 2 p.m. having arrived, the committee will come to order.

The Subcommittee on Taxation and Debt Management will today consider legislation to establish a Tax Court of Appeals which will replace the current appeals process from the U.S. district and the Tax Court.

The measure, S. 1691, of which the distinguished Senator from Montana, Mr. Baucus, is the chief patron, should be given thoughtful and careful deliberation. It will have a significant impact on the resolution of the controversy of tax payments between the Federal Government and the taxpayers. Several questions to consider in evaluating these proposals are whether they will meet the needs of the taxpayer in deciding cases without undue delay; two, the extent to which the change will encourage uniformity of tax decisions; three, the extent to which the proposal will prolong decisions in tax cases by encouraging appeals either by the Government or the taxpayer; and four, the extent to which the specialized jurisdiction established by the measures necessary, are desirable.

Care should be taken to evaluate whether or not the current system is functioning adequately and whether the proposed change is necessary.

I look forward to the testimony of the witnesses today and I might say that it is a very distinguished and outstanding group of witnesses.

Senator Baucus will be here as quickly as possible. There are two measures on the floor of the Senate, one dealing with food for the starving people of Cambodia, and the other dealing with the Milwaukee Railroad, both of which issues Senator Baucus is vitally interested.

I will open the hearing when Senator Baucus arrives and will turn over the chair to him.

Now, I notice that there is a vote in the Senate so we will need to take a brief recess even before we get started. One of the two of us will be back very quickly.

[A brief recess was taken.]

Senator BYRD. The committee will come to order.

That vote was to provide $30 million of aid to relieve the starvation of the people of Cambodia.

The first witness will be Mr. Erwin N. Griswold, former Solicitor General of the United States. Dean Griswold, the committee is delighted to have you today. You may proceed as you wish.

Mr. GRISWOLD. Thank you, Senator.

I have prepared and filed a written statement and I will not read it. I would like to summarize it.

Senator BYRD. The text of your statement will be published in the record and you may summarize it as you think best.

Mr. GRISWOLD. Thank you, Senator.

STATEMENT OF ERWIN GRISWOLD, FORMER SOLICITOR GENERAL OF THE UNITED STATES

Mr. GRISWOLD. Over the past 6 or 8 years, a great deal of attention has been given to the workload of the Supreme Court of the United States. This is not a new problem. Way back in 1890,

Congress adopted the Court of Appeals Act primarily for the purpose of relieving the burden on the Supreme Court.

I think that we rightly focused on the Supreme Court, but that problem is now essentially solved, for the Congress has made further changes, with the result that the Supreme Court's jurisdiction is now almost exclusively discretionary. They are not overburdened, because they, themselves, hold the key to the door and cases can get in only with the consent of the Court.

That solves the Supreme Court's problem, but it highlights another problem which has been talked about over the years and which is now rising to be a very serious problem, which is that there are a great many cases clearly worthy of review which the Supreme Court is simply unable to take and one consequence is that we now have in this country a massive system of discretionary justice which I think we would not accept if we saw a way to get around it.

No one can tell why the Supreme Court denies certiorari or finds that there is not probable jurisdiction of an appeal. No consistent pattern can be found with respect to those actions.

Certiorari is frequently denied when there are conflicting decisions in the courts of appeals and I think that we are beginning to see more clearly than we have before—although we could have seen it before—that we have a very serious problem in the country because of courts of appeals are divided on a regional basis.

They take all kinds of cases in the region and that means that there is no consistency of decision over the country.

Theoretically, and for many years, practically, that was handled by the Supreme Court resolving conflicts, but to a very large extent, that no longer happens.

We also have an even more serious problem with respect to the courts of appeals. When they were first set up, each U.S. court of appeal consisted of three judges. You knew who the three judges were. You knew their outlook. You knew the approach they would take.

Now we have a court of appeals in this country with 26 judges. Three sit on a case, and I think it is not too much to say—and I honestly believe it—that the result, in many pieces of litigation is a pure lottery today in our U.S. courts of appeals. It depends entirely on who are the three judges who make up the panel.

I have a friend in a different part of the country who put this in strong words and I am going to adopt his language:

> Now that Circuit Judges are multiplying like rabbits and the litigation curve rises faster than the inflation rate, it becomes increasingly clear that the existing Federal judicial system has become unworkable.
>
> How to avoid intra-circuit conflicts when there are 26 judges in a single circuit? How to predict a result when every one of these 26 has a different outlook? I used to say that except in a truly open and shut case I could guarantee a win, provided only that I was allowed to select the panel.

And speaking for myself, I think, just being specific with respect to the U.S. Court of Appeals for the District of Columbia circuit for which I have great respect, that in many types of cases I can guarantee the result one way or the other, depending which of the 3 of the now 11 judges come through the curtain.

My friend continued with these words:

Something must give and I feel even more strongly now than I did some years ago that there must be a new tier between what we now have and the Supreme Court. These new courts will work only if they are composed of a fixed number of judges and if they are completely closed to visiting judges of every description, which is another one of our problems under our present system.

Else, they too will suffer from the panelitis that makes Las Vegas slot machines far more certain in their operation than the U.S. courts of appeals as presently constituted.

Senator BYRD. If you will yield there, he is a very colorful writer.

Mr. GRISWOLD. The unfortunate fact is that there is a very considerable measure of truth in it. We will, before too long, I am sure, come to recognize that we simply cannot operate in this country with the U.S. court of appeals of 26 judges.

Now, what can we do?

I am equally sure that the answer is not to be found in more circuits and more judges. That simply continues the chaos.

We ought to find a way to reduce the chaos and I think that we can do that by setting up U.S. courts of appeals on a functional rather than a regional basis.

One way, of course, to do it would be to allocate all cases according to subject. Have a court of appeals for antitrust cases and a court of appeals for tax cases and a court of appeals for patent cases. I have a feeling that, in the long run, that is likely to be what is going to happen.

In that way, you eliminate the conflict problem because the Tax Court will decide the tax cases on a national basis which will be binding on tax lawyers and upon Government lawyers. They will know where they stand. Those decisions will be subject to review by the Supreme Court of the United States, but very rarely will the court grant review, because in the absence of a conflict, and since in the tax field practically everything is a matter of statutory construction, the Tax Court can decide the question within 1½ or 2 years of when it first arises instead of the 10 years which is often needed now before we know what the tax law is.

I would like to make specific reference to a case which I argued when I was Solicitor General, *United States* v. *Cartwright*. It involved the question of valuing, under the Federal estate tax, the value of mutual fund shares which are customarily sold at a mark-up which, in essence, is the selling agent's commission.

If you buy a mutual share, you pay 100, although you only receive about $93 worth of shares.

When you come to redeem the share, you get only the $93 not the $100. The question was whether in the estate tax that should be valued at $100 or $93. It really makes no difference because if you take the lower value, there will be a higher capital gain when the share is eventually sold. If you take the higher value, there will be a lesser capital gain when the share is eventually sold.

That question took over 10 years. There were five published decisions in lower courts. I am sure there were thousands of conferences in revenue agents offices, because this question arose recurringly and often in relatively small estates.

After 10 years, the Supreme Court decided, and we now know, that they are to be valued at the lower value.

I suggest that that question never was worthy of the time of the Supreme Court. If we had had a U.S. Court of Tax Appeals that

question would have been decided in a year-and-a-half. That would be the final and ultimate decision. Tax lawyers would have known where they stood; Government lawyers would have known where they stood.

Many tax lawyers do not like the idea of definitive results in the construction of tax statutes which this bill would provide. I do not question at all their judgment and good faith.

Nevertheless, it does seem to me that it is a prolitigation stand. The longer you can keep the question open the more you can continue to litigate it. The more likely, they say, you will eventually get a good result.

I would like to suggest that on most of these questions, like the *Cartwright* case, a prompt result, carefully considered and thought out, is much more important than an ultimate, possibly better result after extensive litigation over a long period of years.

Thank you, Senator.

Senator BYRD. Thank you, Dean Griswold.

Let me ask you this. Why should tax litigation be treated any differently from other areas of litigation?

Mr. GRISWOLD. I suggested that I think that in the long run we are going to come to a functional allocation of appellate jurisdiction rather than a regional one. I would pick tax cases simply because they are the ones which present recurring technical, narrow issues, usually of statutory construction, and where it is highly desirable in the administration of the tax law to have a fairly prompt, definitive decision.

I think that happens more frequently in the tax law than in any other area of the law that I am familiar with.

Senator BYRD. You put considerable stress on certainty. Why will the Tax Court of Appeals provide certainty when there are 11 judges, one from each circuit?

Mr. GRISWOLD. Well, I assume the U.S. Court of Tax Appeals under this bill would apply stare decisis. Three judges of a court being part of a panel, having decided a question subject to possible consideration by the court en banc which would be fine—3 months, 4 months—that that would then decide the question. The Treasury would be bound by it. Taxpayers would be bound by it.

There would be no further litigation on that question.

Of course, if we are going to have a system when a question has been decided by the Court of Tax Appeals, people can keep on litigating and the court will continue to hear it and treat it as if it were a new question, it would not do any good, but I do not understand that that is the way the court of tax appeals would operate.

Senator BYRD. Would the judges of a national Court of Tax Appeals have a sufficient understanding of problems or practices peculiar to particular regions or areas of the country. Do you feel that that could present a problem?

Mr. GRISWOLD. Senator, I honestly do not. I have been concerned at two stages in my career, as a Government lawyer in Washington where I was dealing with questions from all parts of the country, community property, oil and gas, forest products, oil shale in Colorado, among other things that I think of. I think perhaps the

people there may say they got a bum rap because I worked on the question. But my feeling was that I understood them.

I do not think that these questions are so peculiar that a competent judge cannot grasp them and deal with them adequately.

Senator BYRD. Just one final question. Would rotating judgeships essentially destroy the underlying purpose of creating a national civil tax appellate court?

Mr. GRISWOLD. You will find, Senator, in my prepared statement, that in the last portion of it I have said that I would prefer to have a court with say, seven judges appointed to that court of whom perhaps five would sit at a time.

I recognize that that causes problems in the minds of many people. I do not think those problems are unreasonable, by any means.

I think that that is what we will come to eventually, but I think it is important to get the concept or idea of U.S. Court of Tax Appeals established and that it will help to get the court established to have this system of selecting judges. I think that that is much better than not having the court at all.

As I said, I prefer to have a permanent bench. I am not worried about the argument about specialization. I happen to think that the U.S. Tax Court, the trial court in the area, is one of the best tribunals in the country. It does not suffer from narrowness of outlook, and I do not think that would happen with the U.S. Court of Tax Appeals.

Senator BYRD. If the first case were to be poorly argued, could it set a bad precedent which would bind the courts later in acting on similar cases?

Mr. GRISWOLD. Well, that is a problem. I suppose that is true in the Supreme Court of the United States. That assumes that when a case is poorly argued that the Court will be misled into deciding the other way.

My experience has been when the lawyer on the other side is no good, then the court feels very sorry for that client and decides to think up the arguments for him that should have been made and having thought up those arguments, they think they are pretty good because they thought them up.

The net result is, you lose the case because the other lawyer did not do a competent job. I think that is highly speculative and I do not think that it would happen very often in such a way that it would affect the result.

One thing that the Court of Tax Appeals should do if they feel that a case has been badly presented, they can set it down for reargument. That might mean another argument by the same lawyer.

They could set it down for reargument en banc and that would bring together most of the panel of the court and they ought to be able to dig into the matter and handle it correctly.

Indeed I have sometimes said, I think accurately to a considerable extent, that the law clerks of the judges today are performing the function that attorneys used to perform and ought to perform, and if the judges feel that a case has been very badly handled before them, they can turn it over to their law clerks and say dig into this and see if you can find some things that he should have

said. By the various stages of the process I think that it is very unlikely that that will lead to a result which is damagingly unsound.

I put it that way because we are dealing primarily with matters of statutory construction. If the court makes a bad mistake, the Congress through this committee can amend the law, clarify it, straighten it out, as it has done at various times in the past.

Senator BYRD. Your observation today about the possibility in the future of having courts based on functions rather than geography is a rather intriguing one. I had not heard that expressed before.

Mr. GRISWOLD. I would like to point out, Senator, that we now have such a court. The Temporary Emergency Court of Appeals exists.

We also had another court by that name during the war which handled all price cases very satisfactorily.

Now, about 1972 or so, that court had expired. We set up a new court with the same name which has jurisdiction on energy questions and handles them no matter where they are tried throughout the country and handles them in a way that has attracted so little attention that most people do not know about it.

But if you were in the energy field, you would know it, and that is a court with nationwide jurisdiction on appeal from the district courts of the United States, occasionally from administrative agencies, to decide legal questions which arise in the energy field and that is an excellent analogy for a court such as that involved in this bill.

Senator BYRD. Thank you very much, Dean Griswold.

Mr. GRISWOLD. Thank you, Senator.

[The prepared statement of Mr. Griswold follows:]

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

The Constitution provides—in Article III, Section 1—that we shall have "one supreme Court"—and we have it. It is a remarkable tribunal, for which I have the greatest respect. It serves this nation well, to the extent of its human and physical capacity. It must retain the final voice in the exercise of the judicial power of the United States. It is the only court in this country which speaks with a national voice, whose decisions are binding throughout the land.

Yet, the Supreme Court cannot possibly decide all of the cases which merit a decision on a national basis. Congress has long recognized this fact, and the Court would have been overwhelmed without such aid from Congress. Nearly ninety years ago, Congress established the United States Courts of Appeals. More than fifty years ago, in 1925, Congress narrowed the obligatory jurisdiction of the Supreme Court, and provided that a considerable proportion of decisions in the courts of appeals and in State supreme courts should be reviewable only at the discretion of the Supreme Court, through what we call the certiorari jurisdiction. In recent years, Congress has carried this process close to a conclusion, by eliminating most of what remained of the Supreme Court's obligatory jurisdiction of appeal.

The result has been to provide well warranted protection for the Supreme Copurt. It is no longer overwhelmed, not is it in danger of being overwhelmed, for it holds itself the key to its front door. With very few exceptions, the jurisdiction of the Supreme Court is now wholly discretionary. The Court can take as many cases as it feels it has the time and resources to decide. It need not take any more. This was largely inevitable. It is good for the purpose of preserving and protecting the Supreme Court in order that it may soundly perform its basic function. No one wants the Supreme Court to decide any more cases than it does now, even though the number of cases seeking review in the Supreme Court has quadrupled over the past thirty of forty years.

But this protection of the Supreme Court, necessary and vital as it is, has been obtained at a great price. The time has come when we should give careful attention to the situation which has resulted from the inevitable restrictions on the jurisdiction of the Supreme Court. This is why I welcome the consideration which is being given by this Committee to S. 1691 and the problem with which it deals.

For the present jurisdictional arrangement, with one undoubted Supreme Court, acting on a discretionary basis, leads to a curious paradox. It is true that we have "one supreme Court" constitutionally and legally established. But, for practical purposes, we have, in tax cases, and in other fields, an indefinable number of supreme courts in this country in addition to the Supreme Court of the United States. These consist of the eleven United States Courts, of Appeals, and the Court of Claims. But all of these courts have many judges, and there is an unlimited number of panels which can make essentially final decisions in tax and other cases, reviewed by the Supreme Court only through its discretionary certiorari, which, out of necessity, can be exercised only rarely. It is a very striking fact, pointed out some time ago by Judge Hufstedler, that less than one percent of the cases decided by the United States Courts of Appeals are now reviewed by the Supreme Court.

There are two important consequences of this:

1. The first is that though we have one Supreme Court, the fact is that we have a system which provides, ultimately, only chance and discretionary justice. And, discretionary justice is by no means compatible with "Equal Justice Under Law." It has quite a bit in it which is reminiscent of Harun al Rashid sitting under a tree. There can be little consistency in decisions made by so many varied and changing panels of judges. No reasons are given for the denial of certiorari. It is impossible to state in any persuasive way the grounds on which certiorari is granted or withheld. Despite misapprehensions which are sometimes held, the denial of certiorari is not a decision of the legal questions involved in the case. Anyone who examines a number of the cases which come before the Supreme Court on petitions for certiorari will find that the Court frequently denies its discretionary review in cases which it would reverse if it had the time to hear them on the merits.

This system, though inevitable, and though it provides well warranted protection for the Supreme Court, is not wholly sound. It has in it a considerable element of what Dean Pound called "Justice without law." This is troubling. It probably cannot be entirely eliminated in a country as large and litigious as ours. But it can be reduced through developments such as those provided in the Bill now before the Committee.

2. The second defect of the present system is that we have inadequate appellate capacity on a national basis. No decision of any state supreme court, or of any federal court of appeals is binding throughout the land. Though the number of questions which has been decided is large, the only decisions which establish the law of the land are those of the Supreme Court of the United States, and they are very few.

The result is kind of chaos, so great that we would be startled by it, I am sure, if we had not grown up with it, and become accustomed to it. Under our present system, it is a striking fact that no one can rely on a decision of a court where a question with which he is concerned has been decided, since sometime in the future, the Supreme Court of the United States may review a case from that court, or from another court, and decide it the other way.

The situation is especially difficult with respect to federal tax cases, where there is every reason why we should have prompt and definitive resolution of the many technical legal questions which inevitably arise. Instead, we have a system now, with scattered review, where questions often remain unsettled for many years, until, somehow or other, the issue is able to crack the Supreme Court's certiorari barrier, which, ordinarily, and understandably, is hard to do.

In our well warranted concern for the courts, we tend to forget that most of the law in this country is administered in law offices, private and governmental. The judicial system would surely collapse if this were not so. Under our present system though, the process of administration is made extremely difficult. A careful lawyer cannot advise his client that the law is one way or another. About the most he can say is that there are three decisions in the courts of appeals which go this way, and two that go that way. In addition, there are decisions in two other circuits which are not wholly clear. It is true that one of the cases against us is in this circuit. However, I cannot advise you to proceed according to that decision, because this is an area where the Supreme Court may grant certiorari, perhaps years hence, and there is now way to make sure prediction that the Supreme Court will decide the case one way or the other.

The question is equally difficult for government lawyers. They cannot rely on the decisions of the several courts of appeals any more than the private lawyers can. The result is continuing uncertainty, encouragement to litigation, and a premium on continued litigation. I am sure that the burden on the courts in this country would be considerably reduced if we had a system which would enable lawyers, both private and public, and judges of the lower courts, to know somewhat more definitely than is now the case what the law is.

This is especially true in an area such as federal tax law where there are a large number of recurring questions, no one of which is of great importance by itself, and most of which are not really worthy of review by the Supreme Court of the United States.

I can illustrate the problem by referring to a case which I argued in the Supreme Court when I was a government officer. This is *Cartwright* v. *United States*, 411 U.S. 546, decided in 1973. The question involved there was the value to be put upon shares in mutual funds for the purpose of determining the federal estate tax. Should they be valued at the high, or retail price, including loading, at which they can be bought; or, should they be valued at the lower price, without loading, for which they can be redeemed? This is a constantly recurring question, particularly in relatively small estates, which must have arisen tens of thousands of times, and it must have been involved in many thousands of conferences between executors and revenue agents. Yet it took more than ten years to get this issue finally decided. The Treasury issued a regulation fixing the high value. And this was approved by several of the lower courts. Yet, eventually a conflict of decisions developed, and the Supreme Court ultimately decided that the lower value was the correct one. We should not have had to wait more than ten years for a decision establishing a rule in this matter which was binding on a nationwide basis. Yet, under our present system, only the Supreme Court could made a decision on this question which was binding on a national basis, even though it is hard to feel satisfied that the question was one which the Supreme Court should ever have had to concern itself with at all. The problem arises because our system provides no nationwide answer for any question until the Supreme Court has decided it—and the Supreme Court can, in the nature of things, decide very few cases.

The fact is that we badly need a better organized appellate capacity in this country. The dockets of the United States Courts of Appeals are nearly overwhelmed. But we will not solve the real problem, I feel sure, by merely providing more regional appellate courts and appellate judges.

The point I wish to make was well put in a letter which I received a few weeks ago from an old friend in a distant state. I want to adopt his words. This is what he wrote me:

"Now that Circuit Judges are multiplying like rabbits, and the litigation curve rises faster than the inflation rate, it becomes increasingly clear that the existing federal judicial system has become unworkable. How avoid intra-circuit conflicts when there are twenty-six judges in a single circuit? How predict a result when every one of these twenty-six has a different outlook? I used to say that, except in truly open-and-shut cases, I could guarantee a win provided only that I was allowed to select the panel."

At this point, I would repeat a thought I have tried to express before. Under the present system, there is no certainty—there can be no certainty—in appellate decisions. The way many cases will come out is a lottery, depending entirely on the make-up of the panel which hears the case. This is not only unsound as between the parties. Even more serious is the fact that it makes planning and predictability almost impossible.

My friend continued with these words:

"Something must give, and I feel even more strongly now than I did some years ago that there must be a new tier between what we now have and the Supreme Court . . .

"These new courts will work only if they are composed of a fixed number of judges, and if they are completely closed to visiting judges of every description, else they too will suffer from the 'panelities' that makes Las Vegas slot machines far more certain in their operation than the U.S. Courts of Appeals as presently constituted."

These are strong words, but I think that they are well warranted. At the very least, we should start the process of organizing our courts in such a way that the uncertainty may be reduced. This can be done by establishing one or more courts of appeals which handle cases on a topical rather than a regional basis. A good place to start this process is with tax cases, and this is the reason why I strongly support S. 1691.

By establishing a Court of Tax Appeals, we will provide a court, below the Supreme Court, which can make decisions which are nationally binding on federal tax cases, an area in which virtually all of the questions are matters of statutory construction, and often, or usually, of a rather technical nature. The decisions of these courts would be subject to review by the Supreme Court, but it seems clear in advance that the Supreme Court would rarely exercise its discretion to review these decisions, since there would be no conflicts, and most of the questions decided—like the questions involved in the *Cartwright* case—would not be worthy of Supreme Court review.

S. 1691 is an important step in the process of improving our appellate structure. I favor the proposal, because I think it is important to get this process started. There is no doubt that it will have to be developed and improved, but this can be done without too much difficulty once we have accepted the proposition that there should be one or more courts of appeals which should be established to provide review on a national basis in certain areas where such review is especially useful in the administration of the law.

Indeed, we have such a court already, in the Temporary Emergency Court of Appeals. A court with that name was established during World War II for the purpose of reviewing decisions in the area of price control. The name was used again in establishing the present court which reviews decisions in the field of energy. Those courts have worked very well. What we need is more of them.

There are some aspects of the Court of Tax Appeals provided by S. 1691 which give me concern. Under S. 1691, this court would not have the stability and continuity which I feel to be desirable. It would consist of eleven present circuit judges, or district judges, who would be designated by the Chief Justice for a relatively short term, and they would be succeeded by other circuit or district judges who would serve on the court for a period of three years. Normally, the United States Court of Tax Appeals would sit in panels of three judges. It is obvious, therefore, that there would be considerable diversity in the court, and little continuity. This, in my view, is undesirable if the Court of Tax Appeals is to be effective in producing decisions which would be binding on a national basis, and which would proceed with a consistency of doctrine which would enable the lower courts to decide cases in a way which would provide sound and efficient tax administration. I would rather have a court of say seven judges, permanently assigned, or appointed to the court, sitting perhaps in a panel of five. With such a court, I think that we would have much more consistency and stability in the tax field, and that we would soon have a tax system which is better administered, and involves less litigation, than is the case with our present system of divided review and long-delayed finality.

I recognize the problems involved at this time in providing new judges on a permanent basis for the new court. I am sure these problems can be worked out over time. The most important matter now is to get the new court established. When it is in operation, the problems which remain will be more clearly defined, and they can then be considered and dealt with more effectively than is possible now.

In the federal tax field, the Court of Tax Appeals will not add a new layer of appellate review. There will continue to be just one court between the trial court and the Supreme Court. We will continue to have "one supreme Court," as the Constitution provides. But we will have provided a tribunal which can announce decisions on tax questions which are controlling on a nationwide basis. The availability of prompt and definitive decisions will contribute substantially to the prompt and more efficient administration of the tax law.

Senator BYRD. The next witness will be Mr. John M. Samuels, Tax Legislative Counsel, Department of the Treasury. Welcome, Mr. Samuels.

Mr. SAMUELS. Thank you, Senator Byrd.

With me is Michael Melton of our office. I, too, have a prepared statement that I would like to have inserted in the record.

STATEMENT OF JOHN M. SAMUELS, TAX LEGISLATIVE COUNSEL, DEPARTMENT OF THE TREASURY, ACCOMPANIED BY MICHAEL MELTON

Mr. SAMUELS. We welcome the opportunity to present the views of the Treasury Department and the Revenue Service on the Tax Court Improvement Act of 1979.

This bill would, as you know, establish a U.S. Court of Tax Appeals that would have exclusive appellate jurisdiction over decisions of the Tax Court and district courts in civil tax controversies.

The establishment of a single court of tax appeals has been the subject of considerable debate in the legal and academic communities over the past 40 years, and the arguments both for and against the creation of such a court have been fully aired. I do not intend to spend time getting into those this afternoon.

On balance, the Treasury and the Internal Revenue Service believe the advantages of a single Court of Tax Appeals outweigh its disadvantages. We believe that such a court would provide for earlier resolution of tax issues, thereby mitigating the delay, uncertainty, and disparate treatment of similarly situated taxpayers that occurs under the present system.

We do not, however, support the creation of such a court unless its framework is designed to insure both a sound and capable court.

We have two fundamental objections to the structure of the court that would be established under S. 1691. First, we believe that the Chief Judge and the majority of the other judges on the new court should be permanently assigned to that court. Second, we believe that the decisions of the U.S. Court of Claims should be subject to review by the new appellate court.

We believe that at least some of the judges on the new court should be permanently assigned to that court, since consideration of a tax issue by the Court of Tax Appeals would be both the first, and undoubtedly the final, appellate consideration of that issue. Because of the importance and practical finality of its decisions, we believe that it is essential that the court be composed of judges of sufficient ability and expertise to develop a sound body of precedent that will be consistent with congressional intent and the overall scheme of the tax laws.

S. 1691 provides that the judges on the Court of Tax Appeals would serve only 3-year terms and would continue to sit on nontax cases in their original circuits. We believe that this short tenure, coupled with the continuing workload in the circuit courts, does not provide adequate assurance that the judges on the new court would have the required expertise in the tax law or the time in which to obtain it.

Perhaps more importantly, the rotation of judges required by the bill raises the very important question of how the Chief Justice would choose the appointees from among the circuit court judges. Would the judges selected be those most easily spared from their own circuits? If so, the responsibility of unifying the tax law may not fall on the shoulders of those best able to undertake that task.

We would expect that the opportunity to hear appellate tax cases would attract outstanding practitioners and academicians to serve on a Court of Tax Appeals, since it would, undoubtedly be one of the most influential and potentially strongest courts in the Nation. A major defect of S. 1691 in our view is that it does not take advantage of this opportunity. We do not agree with the argument that permanent judges assigned to a Court of Tax Appeals would deprive the tax law of the benefits of well-rounded judges and attorneys, and we do not think that these permanent judges would

encourage technical decisions that are out of touch with general principles of law.

The fact that tax lawyers are specialists by no means suggest that they are isolated from other areas of law. Indeed, perhaps more than any other discipline, the tax law cuts across the broad fabric of the law.

In any event, what we would propose is that a number of the new judges be permanent and a number be designated from among the existing circuit judges. The designation of some judges from the courts of appeal should provide adequate assurance that the quality of decisionmaking would not suffer as a result of undue specialization.

We are not alone in recommending that a national Court of Tax Appeals would be best served by a permanent body of judges. An informal poll of the Section on Taxation of the American Bar Association taken in May of this year, while opposing the establishment of a single court of tax appeals, favored the assignment of permanent judges to such a court if it were established by a vote of 105 to 37.

The bill also requires that one judge from each of the 11 geographically designated judicial circuits be designated to sit on the Court of Tax Appeals. We see no reason for this rigid geographical allocation of judgeships. It is important for us to have a diversity of background and viewpoint represented on the court. We believe, however, that the judicial selection process will assure that the bench is both diverse and of high quality.

In short, we think that the principal benefits to be gained by a centralized appellate court would be lost if the court did not have a permanent core of judges with substantial tax expertise.

We also recommend that the bill be amended to subject the decisions of the U.S. Court of Claims to be reviewed by the new Court of Tax Appeals.

Under present law, a taxpayer can choose to litigate his or her tax dispute in the U.S. Court of Claims. The decision of the Court of Claims is then subject to review only by the U.S. Supreme Court by writ of certiorari, an extremely rare occurrence.

This limited appellate review of the Court of Claims means that its decisions, in effect, constitute a separate body of tax law enabling taxpayers to avoid adverse precedents simply by litigating in the Court of Claims.

The Court of Tax Appeals that would be established by S. 1691 would have exclusive appellate jurisdiction over decisions of the other two trial forums for resolving disputed tax issues—the Tax Court and the district courts—but would not have any jurisdiction over the tax decisions of the Court of Claims.

The absence of this jurisdiction may be due to the fact that when the Judiciary Committee reported S. 1691 out, a companion bill would have divested the Court of Claims of tax jurisdiction, so that it was not then necessary to have Court of Claims tax decisions reviewed by the new Court of Tax Appeals. However, this companion bill has now passed the Senate and has been amended on the Senate floor to reinstate tax jurisdiction in the new claims court.

Thus, under S. 1691, as it is currently drafted, well advised taxpayers will be able to avoid the effect of decisions of the Court of Tax Appeals by litigating in the Court of Claims.

We believe that much of the benefit to be derived from centralizing the review of tax cases would be lost if no intermediate appeals were allowed from the tax decisions of the Court of Claims and strongly recommend that S. 1691 be amended to subject decisions of the Court of Claims to review by the Court of Tax Appeals. Otherwise, much of the delay, uncertainty, and disparate treatment that occurs under present law will not be remedied by the bill.

Indeed, we believe that the absence of effective review by Court of Claims decisions should not be allowed to continue, even if this bill is not enacted.

One solution to this problem is provided by S. 1477, the companion bill I referred to earlier which passed the Senate on October 30, 1979. S. 1477 would replace the Court of Claims with the new claims court and would provide for appellate review of tax decisions of this new claims court in the appropriate circuit courts of appeals.

In the event that S. 1691 is not enacted, we would urge the adoption of S. 1477 to subject Court of Claims decisions and tax controversies to appellate review.

Of course, if this bill should be enacted, we believe that the Court of Claims tax decisions should be reviewed by the national Court of Tax Appeals in the same manner that it reviews decisions of the tax court and district courts.

Thank you very much.

Senator BYRD. Thank you, Mr. Samuels.

What is the annual number of appeals from the tax court to the circuit court of appeals?

Mr. SAMUELS. I do not have those numbers with me, Senator Byrd. We can supply them for the record.

Perhaps Mr. Rosenberg from the Justice Department, who will testify after me, will have them.

Senator BYRD. I do not suppose you would have this. I will ask you just for the record—in what percentage of these appeals would you estimate that conflicts among the circuits are present?

Mr. SAMUELS. Again, I would like to supply that for the record.

Senator BYRD. Very good.

[The material to be furnished follows:]

OFFICE OF THE SECRETARY OF THE TREASURY
WASHINGTON, D.C. 20220

JAN 8 1980

Dear Senator Byrd:

At a November 2, 1979 hearing before the Subcommittee on Taxation and Debt Management of the Senate Finance Committee relating to S.1691, the Tax Court Improvement Act of 1979, you requested that the Treasury supply information for the record regarding the annual number of appeals from the Tax Court to the Circuit Courts of Appeal and, to the extent available, an estimate of the percentage of those appeals which result in conflicts among the Circuit Courts.

In connection with the first question, relating to the number of appeals of Tax Court decisions each year, I have attached two pages of tables which reflect not only the appeals from decisions of the Tax Court, but also appeals from judgments of the District Courts, and the petitions for a writ of certiorari from the Court of Claims to the United States Supreme Court for the period from approximately 1975 to the present. These tables were prepared by the United States Department of Justice and were presented by M. Carr Ferguson, Assistant Attorney General, Tax Division, at a hearing on May 7, 1979 concerning the Federal Court Improvements Act, S.678 before the Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary. I believe these tables graphically illustrate the paucity of effective appeals from Tax Court and District Court decisions.

In requesting information regarding the percentage of appeals which result in conflicts you indicated that you did not expect that we would be able to supply the information. Indeed, we have not been able to ascertain the percentage of the appeals which result in conflicts. However, it is important to note that there is a potential conflict any time a District Court or the Tax Court renders a decision which would be appealable to a Circuit Court which has not ruled on an issue that has been ruled on by other Circuit Courts. Further, our research has indicated that, as of the beginning of 1979, there were approximately 24 substantial issues in conflict among the Courts of Appeal and between the Courts of Appeal and the Court of Claims.

Sincerely yours,

/s/ John M. Samuels
John M. Samuels
Tax Legislative Counsel

The Honorable
Harry F. Byrd, Jr.
United States Senate
Washington, D.C. 20510

Attachments

54-877 O - 80 - 3

Attachment

APPEALS FROM A JUDGMENT OF A DISTRICT COURT

Fiscal Year*	Government Appeals	Taxpayer Appeals	Total	Adjusted Total**
1975	117	227	344	299
1976	106	220	326	283
Transitional Quarter	0	5	5	4
1977	111	242	353	307
1978	205	392	597	519
(Six Months) 1979	111	134	245	213

APPEALS FROM A DECISION OF THE TAX COURT

	Government Appeals	Taxpayer Appeals		
1975	25	262	287	250
1976	33	276	309	269
Transitional Quarter	0	9	9	8
1977	44	300	344	299
1978	23	227	250	217
1979 (Six Months)	19	137	156	136

*7/1-6/30 for 1975-76; 10/1-9/30 for 1977 and thereafter.

**The statistical source for the figures in this report reflects taxpayer-litigants rather than an actual case load. Since a court case may involve several such taxpayer-litigants, we have provided this adjusted total which converts taxpayers to cases, based on a conversion factor of 87 percent arrived at by a small sampling on an actual count. It is at best a rough adjustment and may well be wide of the mark but the result is probably a more accurate picture of actual caseload than the raw statistical figures.

Attachment

PETITIONS FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

Government Petitions	Government Granted	Taxpayer Petitions	Taxpayer Granted
	Supreme Court, October Term 1974		
0	0	1	0
	October Term, 1975		
0	0	4	0
	October Term, 1976		
2	2 (consolidated)	7	0
	October Term, 1977		
0	0	4	0
	October Term, 1978		
0	0	5	0

Senator BYRD. Would the existence of a Court of Tax Appeals significantly reduce administrative controversies and encourage taxpayer compliance?

Mr. SAMUELS. Yes, we believe it would. In fact, that is one of the principal reasons we support such a court. We think if the law is settled quickly, the number of controversies in the administrative process that exist now simply because there is no authoritative resolution of the particular issue will be far fewer.

Moreover, it may be and will be, more difficult for taxpayers to decide questionable issues in their favor on their tax returns once the law is settled one way or the other.

Senator BYRD. Thank you very much.

[The prepared statement of Mr. Samuels follows:]

STATEMENT OF JOHN M. SAMUELS, TAX LEGISLATIVE COUNSEL, U.S. DEPARTMENT OF THE TREASURY

Senator Baucus and members of this distinguished subcommittee, we welcome the opportunity to present the views of the Treasury Department and the Internal Revenue Service on S. 1691, the Tax Court Improvement Act of 1979. S. 1691 would significantly change the structure of the Federal court system by establishing a United States Court of Tax Appeals that would have exclusive appellate jurisdiction over decisions of the Tax Court and District Courts in civil tax controversies.

SUMMARY OF POSITION

While we support the concept of a single appellate forum for the resolution of civil tax controveries, we do not support the establishment of such a court without regard to its composition or jurisdiction. We have two fundamental objections to the structure of the court that would be established by S. 1691. First, we believe that, at a minimum, the chief judge and a majority of the other judges on the new court should be permanently assigned to the court. Second, we believe that the decisions of the United States Court of Claims should be subject to review by the new court. Becuase of these objections, we are unable to support S. 1691 at this time. However, if the bill were amended to satisfy our concerns, we would be pleased to give it our full support.

PRESENT LAW

Under present law, a taxpayer may choose to litigate a dispute over Federal taxes that cannot be resolved administratively in one of three forums—a United States District Court, the United States Tax Court, or the United States Court of Claims.

A taxpayer who is unwilling (or unable) to pay a disputed tax may file suit in the United States Tax Court to contest his or her liability for the disputed amount without first paying the tax. Alternatively, a taxpayer can first pay the tax and then file an action for a refund of the disputed amount in either a United States District Court or the United States Court of Claims. A trial by jury may be obtained in a District Court, but not in the Court of Claims or the Tax Court.

Appals from the decisions of these courts diverge. A District Court or Tax Court decision generally may be appealed to the United States Court of Appeals for the judicial circuit in which the taxpayer is domiciled. Thus, whether the taxpayer files suit in a District Court or the Tax Court, the taxpayer's case would generally be reviewed by the same Circuit Court of Appeals. On the other hand, a Court of Claims decision is subject to appellate review only by the United States Supreme Court by writ of certiorari—a rather remote possibility.

A decision of a particular Court of Appeals is binding only with respect to controversies within the jursidiction of that Circuit Court. For example, a District Court within the Fifth Circuit is bound by decisions of the Court of Appeals for the Fifth Circuit, and is not bound by decisions of the ten other Circuit Courts of Appeals. Similarly, if a taxpayer residing in the Second Circuit files suit in the Tax Court, in making its decision the Tax Court is bound by the decisions of the Court of Appeals for the Second Circuit, but not by the decisions of any of the other Circuit Courts of Appeals. Finally, the Court of Claims is not bound by decisions of any of the Circuit Courts of Appeals.

Decisions of all three trial courts—the Tax Court, District Courts and Court of Claims—and the Courts of Appeals are bound by the decisions of the United States Supreme Court.

DESCRIPTION OF THE BILL

S. 691 would establish a new United States Court of Tax Appeals that would have exclusive appellate jursidiction over all decisions of the Tax Court and the District Courts in civil tax cases (excluding bankruptcy cases). Decisions of the Court of Tax Appeals would be reviewed by the United States Supreme Court by writ of certiorari. The court would be an additional court under Article III of the Constitution at the same level as the existing Federal Circuit Courts of Appeals.

The Court of Tax Appeals would consist of eleven judges designated by the Chief Justice of the United States from among the judge of the Circuit Courts of Appeals. The Chief Justice would be required to designate one judge from each of the eleven geographically designated judicial circuits. Court of Tax Appeals judges would serve three-year terms, during which they would continue to serve on their respective circuits and continue to participate in non-tax cases, if their workload permitted.

The Court of Tax Appeals would have permanent offices in the District of Columbia, but appeals would be heard in the judicial circuit in which the taxpayer is domicile1. The court would normally sit in panels of three or more judges, and would hear a case en banc at the request of six judges.

DESIRABILITY OF A COURT OF TAX APPEALS

The establishment of a single court ot review all civil tax appeals has been the subject of considerable debate in the legal and academic communities over the past 40 years, and most of the arguments for and against the creation of such a court have been fully aired.

The proponents of a court of tax appeals contend that it would eliminate many problems engendered by the delay under the present system in getting a final decision on tax issues, and cite a number of good reasons why the sure and speedy resolution of disputed tax issues is desirable. First, a national court of tax appeals would save valuable resources for both the government and taxpayers by greatly reducing the number of judicial and administrative tax controverises. The number of cases appealed beyond the trial court level would decline, since having only on appellate court would end the current practice—by both the government and taxpayers—of appealing identical issues in numerous circuits in the hope of securing a conflict to serve as a basis for Supreme Court review. In turn, because decisions of the court would be binding on both the government and taxpayers, it would relieve a heavy burden on the administrative process (through which most tax disputes are settled) by eliminating many issues that are in controversy simply because there has not been an authoritative resolution of the controverted issue. Second, the earlier resolution of tax questions that would result from taking all appeals to the new court would reduce the likelihood that taxpayers whose circumstances are in all other respects identical would be treated differently for tax purposes simply because they are residents of different circuits, and therefore are controlled by different precedents. Similarly, prompter settling of the law would reduce the period in which taxpayers could resolve questions in their favor on their tax returns, or gamble on the chance of successfully litigating the matter or working out a settlement based upon the risks of litigation. Third, speedier resolution of the issues means that businesses will be confronted with uncertain tax liablity in far fewer situations, enabling business taxpayers to plan their financial affairs with a greater degree of certainty. Finally, appeals involving tax issues would be taken to the Supreme Court only if certiorari were granted, since there would no longer be conflicting decisions of courts of appeals. Relieved of the necessity of hearing and deciding tax issues over which the circuits disagree, the Supreme Court could devote itself to a more limited, but more consequential, review of tax cases.

On the other hand, those who favor the current system of appellate review of tax controversies argue that the benefits to be gained by centralizing tax appeals are more than offset by the virtues inherent in the present system that would have to be sacrificed if such a court were established. They argue that good jurisprudence is an evolutionary process of which reflection and reconsideration are integral parts. If tax appeals were centralized there would no longer be the opportunity for reconsideration of an issue already decided by the appellate court of one circuit by another appellate court free of the constraints of the doctrine of stare decisis. The review of the issue in the first court may have been distorted by the particular record, the admission of an argument, or simply may have been mistaken. Only after the initial decision may the importance of the matter become apparent—along with the feeling

that the decision did not take into account all relevant considerations. Recourse to Congress to correct such decisions would be far from certain, and in the cases it did occur would be an undesirable burden on the legislative process. They argue the existing practice, affording multiple appellate review of contested issues, provides such reflective consideration and can lead to more reasoned and thoughtful conclusions.

Opponents of a system for centralized tax appeals also stress the problems presented in dealing effectively with erroneous decisions of a single appellate court. They are concerned that the sparse opportunities for Supreme Court review and the uncertainty and delay involved in Congressional correction can result in extended application of an improper rule of taxation with its attendant unfairness.

On balance, the Treasury and the Internal Revenue Service believe that the advantages of a single court of tax appeals outweigh its disadvantages. We believe a single court of tax appeals would provide for earlier resolution of tax issues, thereby mitigating the delay, uncertainty and disparate treatment that occurs under the present system. We do not, however, support the creation of such a court unless its framework is designed to ensure a sound and capable court.

RECOMMENDED CHANGES

We believe the Court of Tax Appeals that would be established under S. 1691 would be such a court if the bill were changed in two respects. First, we recomend that S. 1691 be amended to provide that the chief judge and the number of other judges necessary to comprise a majority of the new court be permanently assigned to the court. Second, we believe a national court of tax appeals should be established only if it has appellate jurisdiction over decisions of the United States Court of Claims (or any successor to the Court of Claims).

Composition of the court.—The consideration of a particular tax issue by the Court of Tax Appeals will be both the first and most probably the final appellate consideration of that issue. Therefore, we believe it essential that such a court be composed of judges of sufficient ability and expertise to develop a sound body of precedent that will be consistent with Congressional intent and the overall scheme of the tax law.

S. 1691 provides that the judges on the Court of Tax Appeals would serve only three-year terms, and would continue to sit on non-tax cases in their original circuits. We believe that this short tenure, coupled with their continuing workload in the circuit courts, does not provide adequate assurance that the judges on the new court would have the required expertise in the tax law—or the time in which to obtain it. Indeed, the rotation of judges required by S. 1691 raises the important question of how the Chief Justice is to choose the appointees from among the circuit court judges. Will they tend to be the judges most easily spared from their own circuits? If so, the heavy responsibility of unifying the tax law may not fall on the shoulders best able to undertake the task.

We would expect that the opportunity to hear appellate tax cases could attract outstanding tax practitioners and academicians to serve on the Court of Tax Appeals. We believe that a major defect of S. 1691 is that it does not take advantage of this opportunity.

In our view, the absence of judges with substantial tax expertise would vitiate the principal benefits to be gained by a centralized appellate court. We do not agree with the argument that permanent judges assigned to a court of tax appeals would deprive the tax law of the benefits of wellrounded judges and attorneys, and would encourage technical decisions that are out of touch with general principales of law. The fact that tax lawyers are specialists by no means suggests they are isolated from other areas of law. Tax laws cut across so many fields of law that a tax lawyer inevitable must have considerable familiarity with the legal principles governing other fields of law. Perhaps Dean Griswold best expressed this point when he wrote:

". . . this argument represents a complete misconception of the tax field. It is high time the tax lawyers rise up to defend themselves against the charge that tax work is narrow and stifling. On the contrary, it seems difficult to find a field which leads practitioners more widely through the whole fabric of the law. . . . He must be broad in his background and broad in his outlook, if he is to deal effectively with the manifold problems which make up the field of modern tax laws." Griswold, "The Need for a Tax Court of Appeals", 57 Harvard Law Review 1153, at 1183-84 (1944).

In any event, designation of the remaining judges on the Court of Tax Appeals from among the judges of the Circuit Courts of Appeals should provide adequate assurance that the quality of decision making will not suffer as the result of undue specialization.

We are not alone in recommending that a national court of tax appeals would be best served by the assignment of a permanent body of judges. An informal poll of members of the Section of Taxation of the American Bar Association taken in May of 1979 favored the assignment of permanent judges to a national court of tax appeals by a vote of 105 to 37. Similarly, the Commission on Revision of the Federal Court Appellate System rejected a rotating panel of judges from the circuit courts in making its recommendations for a National Court of Appeals:

"Temporary service on a rotating basis by federal appellate judges sitting on assignment from their respective courts would, in the Commission's view, be even more undesirable. A court so composed would lack the stability and continuity that are essential to the development of national law . . . We note, too, the difficulty of devising a satisfactory process for selecting the judges to be assigned. Finally, should the rotation be relatively rapid, the circuits would be asked to bear the burden of vacancies and other deterrents to the smooth functioning of those courts." Proposed revision of Appellate System, Commission on Revision of the Federal Court Appellate System, 67 F.R.D. 195, at 237-238 (1975).

We also see no reason for the rigid geographical allocation of judgeships required by S. 1691. It is important, of course, to have a diversity of background and viewpoint represented on the court. We believe, however, that the judicial selection process will assure a bench that it is both diverse and of high quality.

Court of Claims.—The current system for judicial resolution of tax disputes allows taxpayers to choose among three trial forums—the United States District Courts, the United States Tax Court or the United States Court of Claims. Decisions by the District Courts and the Tax Court are subject to intermediate appellate review by the Circuit Courts of Appeals. On the other hand, cases decided by the Court of Claims are subject to review only by the United States Supreme Court by writ of certiorari—a rather rare occurrence. This limited appellate review of the Court of Claims means its decisions in effect constitute a separate body of tax law, enabling taxpayers to avoid adverse precedents in the Courts of Appeals by litigating in the Court of Claims.

The Court of Tax Appeals that would be established by S. 1691 would have exclusive appellate jurisdiction over decisions of the Tax Court and District Courts, but would not have any jurisdiction over the tax decisions of the Court of Claims.[1] Thus, under S. 1691 well-advised taxpayers will be able to avoid the effect of decisions of the Court of Tax Appeals by litigating in the Court of Claims.

We believe that much of the benefit to be derived from a centralized review of tax cases would be lost if no intermediate appeals were allowed from the tax decisions of the Court of Claims, and strongly recommend that S. 1691 be amended to subject the decisions of the Court of Claims to review by the Court of Tax Appeals. Otherwise, much of the delay, uncertainty and disparate treatment that occurs under present law will not be remedied by S. 1691.

Indeed, we believe that the absence of effective review of Court of Claims decisions should not be allowed to continue even if S. 1691 is not enacted.[2] One solution to this problem is provided by S. 1477, a companion bill to S. 1691, which was passed by the Senate on October 30, 1979. S. 1477 would replace the Court of Claims with a new United States Claims Court and would provide for appellate review of the tax decisions of that court by the appropriate Circuit Courts of Appeals. While S. 1477 responds to the need for appellate review of tax cases decided by the new Claims Court in the absence of a single court of appeals, its procedure for review of the decisions the new Claims Court would not be desirable if S. 1691 were enacted. If the Court of Tax Appeals were established under S. 1691, we believe it is essential that the decisions of the Court of Claims (or the new Claims Court) be reviewed by the new Court of Tax Appeals in the same manner it reviews decisions of the Tax Court and District Courts.

Senator BYRD. The next witness will be Maurice Rosenberg, Assistant Attorney General for Judicial Improvement, Department of Justice.

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[1] This may be explained by the fact that at the time S. 1691 was reported by the Senate Committee on the Judiciary a companion bill, S. 1477, replaced the Court of Claims with a new Claims Court that did not have any jurisdiction over tax matters. Thus, it was not necessary for S. 1691 to give the new Court of Tax Appeals jurisdiction over tax issues decided by the new Claims Court. However, S. 1477, as passed by the Senate, has been amended to reinstate jurisdiction over tax issues in the new Claims Court. Therefore, the question of appellate review of Claims Court decisions by the new Court of Tax Appeals must be addressed.

[2] We believe it is appropriate to defer consideration of whether Court of Claims trial jurisidiction over tax issues should be eliminated until there has been a comprehensive review of the present system for the trial of tax cases.

I must say, at this point, that we have run into a bit of a problem. I must preside over another meeting.

I was forced to cancel one this morning and reschedule it for this afternoon.

Senator Baucus is en route to this meeting at the present time so I would suggest that we take a 5-minute recess. I think that Senator Baucus will be here at that point.

Thank you, gentlemen.

[A brief recess was taken.]

Senator BAUCUS. The hearing will come to order.

Our next witness is Maurice Rosenberg, Assistant Attorney General for Judicial Improvements, Department of Justice.

Mr. Assistant Attorney General, I deeply apologize for the delay. Unfortunately, as you know, we do not control events here.

We look forward to your testimony.

STATEMENT OF MAURICE ROSENBERG ASSISTANT ATTORNEY GENERAL, OFFICE FOR IMPROVEMENTS IN THE ADMINISTRATION OF JUSTICE, DEPARTMENT OF JUSTICE, ACCOMPANIED BY FRANK P. CIHLAR

Mr. ROSENBERG. Thank you, Mr. Chairman.

I have with me Mr. Frank Cihlar of the Office for Improvements in the Administration of Justice.

Mr. Chairman, thank you for the opportunity to present the position of the Department of Justice on S. 1691. Before starting a very brief statement, I would like to say that a fuller statement in writing has been filed and I hope that it will be a part of the record of these hearings.

During the testimony of the preceding witness, Mr. Samuels of the Treasury Department, Senator Byrd asked a question with regard to the number of appeals from the Tax Court to the U.S. Courts of Appeals. I have here the figures for the last 3 fiscal years. In 1977, there were 213 appeals from the Tax Court to the U.S. Circuit Court of Appeals. For 1978, the figure was 211; for 1979, the figure was 272.

We support the goals of S. 1691. We think the need has been abundantly shown for a single forum of nationwide authority to resolve tax appeals effectively and to be the last word in deciding those appeals. As former Solicitor General Griswold testified earlier, the Supreme Court of the United States now pronounces the last word in tax cases very rarely. I believe that for the last 3 court years the average number of such pronouncements was four each year. The need has been shown for some forum that can provide a definitive resolution of tax appeals; one in which this can be done speedily, with certainty and unity and evenhandedness. Many of characteristics occur only sporadically in the present system.

In supporting these goals, we propose three modifications in various aspects of the proposal made in S. 1691.

First, as to the structure and composition of the court, we believe that, instead of 11 judges picked from the circuits, there should be 7 full-time judges. This will assure collegiality and continuity. It will also avoid the almost impossible administrative and logistical problems that would arise from utilizing busy court of appeals judges who would have to shuttle back and forth from their home

circuits and interrupt their home business. The prospect especially unpleasant when, as may often occur, the need arises for an en banc sitting of the 11 judges. The picture of those 11 judges scurrying together from their home circuits is one that is not pleasant to contemplate. It would create havoc back home; and it would be difficult to bring them all together at one time for the en banc hearing of the Court of Tax Appeals. So we urge strongly that the court be composed of seven full-time judges.

In the second place, as to the selection of these judges, we think that the best compromise between having an all-rotating part-time bench and an all-permanent bench that might be made up entirely of specialists in the tax practice would be to have a chief judge and three of the associate judges picked by the President to serve permanently after confirmation by the Senate and to have the other three judges assigned by the Judicial Conference of the United States to serve for staggered terms of 3 years.

This represents, we think, a slight tilt toward specialization. We say that because we think it is likely that the four permanent judges might come to that court with a heavy concentration of practice in the tax field. We think that would be desirable. It would give the Court, so to speak, the best of both worlds. It would have judges from the tax practice who are specialists and well-versed in the tax law, and it would have judges from the circuit courts who see a broad range of the problems that come before the Federal appellate courts. The net result ought to provide what is essential to this court—a sense of respect and confidence on the part of the public and the profession in what the court does.

Third, in regard to the procedure of the court, we think that the judges should sit en banc whenever they convene. That seems necessary if the court is to assure the certainty and the unity in the law which is one of the ends and objects of S. 1691.

In summary, then, we suggest a compromise that would make more functionally sound the acceptably constructive ideas contained in S. 1691. Thank you, Mr. Chairman.

Senator BAUCUS. Thank you very much, sir.

One question I have, Mr. Rosenberg, concerns your statement that you feel that the National Court of Tax Appeals would tend to have the last word; whereas now the various circuit courts of appeals tend to have the last word.

I believe that you stated that only four cases have gone from the Circuit Court of Appeals to the Supreme Court in 1 year's time. Is that correct?

Mr. ROSENBERG. The Supreme Court has granted certiorari in tax cases four times a year on average for each of the last several court years. Yes, Mr. Chairman.

Senator B. UCUS. If there were a National Court of Tax Appeals, do you think that there would be fewer instances when the U.S. Supreme Court would grant certiorari?

Would there be any review by the U.S. Supreme Court?

Mr. ROSENBERG. There certainly would be the opportunity to apply for review. There would be less need for review inasmuch as there would be fewer conflicts. There would not be conflicts among courts speaking to different effect on the same statute or regulation.

Senator BAUCUS. I am wondering whether that might be a potential problem. Very few, if any, cases decided by a National Court of Tax Appeals would be reviewed by the U.S. Supreme Court.

Mr. ROSENBERG. Dean Griswold testified a bit earlier this afternoon that the Supreme Court carries the key to its own door. It can open that door and let in any case which it thinks was either wrongly decided or which it should pronounce on for other reasons. So in my mind there is not an appreciable risk that cases the Supreme Court should take would not be taken.

Senator BAUCUS. If there were a National Court of Tax Appeals, in your judgment would the number of appeals to that court increase or decrease or remain about the same?

Mr. ROSENBERG. I think the number of appeals would probably decrease.

Senator BAUCUS. Why is that?

Mr. ROSENBERG. There would be less of a lottery. There would be less chance that a litigant could get a different result by going to a different circuit on appeal or by getting a different panel of judges from the circuit, and the net result would be to discourage appeals.

Today, I think, neither the taxpayer nor the Government believes that when one panel of three judges has pronounced on an issue that that is the last word. If there is another opportunity to raise that issue again in another circuit, or even in the same circuit, it will be taken, at least if a litigant could know that the panel was going to be different.

Senator BAUCUS. What about the number of cases tried in the district court? Would that number change in any way in your judgment if there were a National Court of Tax Appeals?

Mr. ROSENBERG. It is hard for me to believe that there would be any impact on the trials in the district court except to the extent that the trials now occurring are in some measure occurring because of uncertainty as to what the law is. If I knew the answer to the question how many cases are going forward in the district courts because of uncertainty as to what law is applicable to the case, I would be able to answer your question. I suppose that the logic of the premise that there will be greater certainty as a result of the creation of the new court suggests that there would be a reduction in the number of trials in the district court. How many, I would be loathe to try to venture a guess at.

Senator BAUCUS. How would you rate the problem of multiple choice appellate forums in the hierarchy of problems in tax administration, taxpayer compliance? How important is this, the presence of multiple appellate forum compared with any other problems that come to mind?

Mr. ROSENBERG. I would not rate it of great consequence in the enforcement of the criminal tax law. I would leave it to the IRS to say to what degree it may affect compliance. But it seems to me, in the area of judicial administration, it is a very, very costly piece of pathology because it gives the overworked U.S. Courts of Appeals, which are truly in a state of crisis these days, it gives them more work than they need. Further, it gives them a lot of gratuitous work to the extent that they are being asked to pass separate and distinct judgment on an issue that already has been heard and

decided in some other court. It is the nature of the system that they are entitled to pass their independent judgment, and they do.

What I am saying is that it is important in the administration of justice and in the administration of the tax laws, and for purposes of certainty in tax planning, that all of these problems be taken care of. I suppose that all of those good results at the end of the process have their backwash in terms of greater compliance and greater respect for the tax laws, but I see this mainly as an effort to improve the administration of justice and the administration of the tax laws and not so much an effort to improve the taxpayer's behavior.

Senator BAUCUS. What specific types of tax appeals cases or issues do you think should be within the jurisdiction of the Court of Tax Appeals, and what kinds should perhaps not be?

For example, bankruptcy cases?

Mr. ROSENBERG. With regard to bankruptcy cases, I think there is a question as to whether S. 1691 is as specific and thought-through as it ought to be. I would be very glad for the opportunity to meet with the staff of the subcommittee and with the Senators to discuss whether we could make better provision than is now made with regard to this problem of tax issues that arise in bankruptcy proceedings. I think that is a weakness in the present drafting, but one which could be overcome.

Senator BAUCUS. Are there any other cases, besides bankruptcy cases, where there might be a question?

Mr. ROSENBERG. I know of none myself. I would defer to people in the tax division and in the Treasury and IRS on that question.

Senator BAUCUS. Let me just ask a basic question here. There are other kinds of federal cases, taking labor law, OSHA cases for example, a wide realm of Federal law cases that come before different courts of appeals around the country because of their geographic location and where the district courts reside.

I wonder if you could, just in your own words, tell me what is it about tax law that requires a single court of appeals whereas those same reasons do not compel a national court to handle other kinds of Federal cases that our judicial system accommodates?

Mr. ROSENBERG. Well, this is not an area of my specialty so I approach your question with a degree of humility.

Senator BAUCUS. I ask it with a degree of humility, believe me.

Mr. ROSENBERG. In a country that depends on voluntary compliance with our tax laws to the extent that we do—and that is to a very great extent indeed—with tax revenues coming in at several hundreds of billion dollars a year, it is very important for people to have respect for the idea that the tax laws are not a sort of game. It seems to me that if people, in planning their business and personal affairs, can know in advance that the outcome is not going to be dependent upon the fortuity of which group of judges they draw by a lottery, or which circuit the case can be brought in, then their respect and confidence in the whole administration of the tax laws may be enhanced.

My view, as sort of an outsider to this whole problem, is that today a lot of that respect and confidence is undermined, just because we hear—the public does and the profession does—that there is a kind of game in which a lot of balls are rolling around

and the problem is to get clever lawyers to roll the balls into the right places so that you will get happy outcomes from the machine. That is not the way a voluntary tax compliance mechanism should work, in my view. Perhaps my view of the matter is mistaken, but that's what it is.

Senator BAUCUS. In what percentage of cases is forum/shopping available as compared to the percentage of cases that the taxpayers do not have that availability? It seems to me that a degree of what you have to say is true.

One has to ask, how much forum shopping is available?

I am wondering, because, obviously some large taxpayers have probably a greater ability to forum shop. Has anybody determined the degree to which, in terms of numbers of taxpayers on an absolute basis, or relative basis, taxpayers are able, in fact, to significantly forum shop?

Mr. ROSENBERG. We know that forum shopping is possible at the entry level. The taxpayer has three options—the Court of Claims, the district courts, or the Tax Court. We know that there is an option also with regard to whether to appeal. To the extent that there is an option with regard to venue, which circuit you go into, I cannot say that I can speak to that question. I suppose in some circumstances that there is an option.

Certainly, if you go into the Court of Claims, instead of into the district court or to the Tax Court, you get away from the circuit where you otherwise would be. I believe, therefore, at the entry level that there are options, and I would hazard the guess that there are some options concerning which appellate court you wind up in.

I would like to add something to my last answer with regard to what is different about the tax laws—why they require particularly a central, unitary, integrated, speedy, definitive court. OSHA transactions and a lot of the other transactions mentined, are not planned with the same degree of expectation that what is agreed to and put down now on paper is going to be the way it will come out years later, or when the deal is consummated. I think the tax law is particularly intended to give the people assurance what the future effect of the transaction will be in terms of their tax liabilities. They need to be able to rely on their legal predictions in transactions planned with taxes in mind much more than with unplanned transactions, and much more than in many nontax planned transactions, like labor negotiations. I just think that if we expect people to report their own tax liabilities, we have to be sure to tell them all we can about the tax consequences of what they are planning to do.

Senator BAUCUS. I understand what you are saying. I wonder if perhaps the greater uncertainty is just due to the complexity of the law regardless, independent of what forum one may have his case heard.

In any event, I want to thank you very much, Mr. Rosenberg, for your testimony. I appreciate it.

Mr. ROSENBERG. Thank you, Mr. Chairman.

[The prepared statement of Mr. Rosenberg follows:]

STATEMENT OF MAURICE ROSENBERG, ASSISTANT ATTORNEY GENERAL, OFFICE FOR IMPROVEMENTS IN THE ADMINISTRATION OF JUSTICE

Mr. Chairman and members of the subcommittee, it is an honor to appear before this Subcommittee today to present the views of the Department of Justice on S. 1691, the "Tax Court Improvement Act of 1979." The bill addresses a need of long standing in the administration of the nation's tax laws. President Carter characterized the nature of the problem on February 27, 1979, when, in proposing measures to improve the administration of justice in the federal courts, he declared that a "need exists for uniformity and predictability of the law in the tax area, where conflicting appellate decisions encourage litigation and uncertainty." S. 1691 responds to that need. It seeks, through a modest change in the structure of the federal judicial system, to provide a mechanism to settle civil tax disputes with more speed and certainty than the system achieves today. In this statement, we advance several suggestions that move in the same direction.

Thoughtful observers have long had under discussion the idea of creating a single court of tax appeals. In various formulations, this proposal has been the subject of testimony by other representatives of the Department of Justice as well as by officials of the Treasury Department and Internal Revenue Service, and by interested parties outside the Administration. The testimony to which I refer was given in connection with the consideration of S. 678 by the Senate Committee on the Judiciary. This Subcommittee and the Judiciary Committee have done the country a distinct service in giving devoted attention to this important problem. You deserve, and surely have, our warm appreciation.

THE PRESENT SYSTEM

An understanding of the choices currently available to taxpayers for litigating tax cases is helpful in evaluating S. 1691. A citizen who wants to go to court has a choice of three trial-level tribunals: a federal district court, the Court of Claims, or the United States Tax Court. Diverse procedural consequences turn upon the choice of forum.

The taxpayer who is prepared to pay the disputed tax and file for a refund can go either into the Court of Claims in Washington or into the geographically-proper United States district court. A jury trial is available in the district court only. From the district court, appeals go as a matter of right to the regional United States Court of Appeals. From the Court of Claims, appellate review is available only in the United States Supreme Court by petition for certiorari, with only a remote possibility that review will be granted.

The great majority of taxpayers do not use either the district court or the Court of Claims, but file suit instead in the U.S. Tax Court which is based in Washington, but holds hearings in various cities across the country. A person who seeks a redetermination of a tax deficiency in this Court is not obliged to pay the disputed tax in advance. This is a fact of considerable importance at a time of historically high interest rates and doubtless goes far to explain why the great majority of taxpayers use the Tax Court. The taxpayer must file in the Tax Court within 90 days after receiving a notice that tax is due. Cases in the Tax Court usually are decided by a single judge without a jury. Important cases are reviewed by the entire 15-judge court. An appeal from the Tax Court decision goes to the court of appeals for the circuit in which the taxpayer lives which means that a given taxpayer's case is reviewed in the same regional court of appeals whether it begins in the district court or the Tax Court.

Under the present system, a decision of the first court of appeals on a contested issue is not binding on either the government or taxpayers, except as to taxpayers located within the geographical jurisdiction of the court. Conflicting opinions of circuit courts, or of circuit courts and the Court of Claims, are subject to resolution only if the United States Supreme Court grants a petition for certiorari, and this rarely occurs. In this testimony last May, my predecessor, Daniel J. Meador, declared that this system generates uncertainty both in tax planning and in the administrative treatment of tax returns; creates delay and unpredictability in individual cases; and sometimes produces disparate treatment of citizens whose cases are basically indistinguishable.

RECOMMENDATION

S. 1691 seeks to provide for more consistent, more predictable and speedier resolution of tax appeals by creating a single forum whose decisions will be definitive and whose personnel will command widest public and professional confidence. Those are clearly commendable goals, worthy of the widest support. What is less

clear is whether the route adopted by the bill represents the optimal way of achieving the desired results. Obviously, there are many ways to do this, in point of the structure of the court, the selection of its complement of judges and the procedures which it utilizes.

Before turning to specific suggestions, I want say a few words about our perspective on the matter. In furtherance of President Carter's purpose to work cooperatively with the Congress to remedy problems created by disunity and unpredictability in the federal tax laws, we at the Department of Justice have agreed with representatives of the Treasury and the Internal Revenue Service upon a position that is consistent with the basic goals that underlie S. 1691. With a few modifications, the Administration regards this bill as an acceptably constructive solution to the problems currently faced by citizens in tax litigation.

Our first modification concerns the composition of the court. As proposed, the Court of Tax Appeals would be composed of eleven United States circuit judges, designated to sit for three years while continuing to function as judges in their home circuits. We are concerned that this division of the judges' responsibilities would create awkward administrative and logistical problems. There would be serious scheduling difficulties, since it would be necessary to fix times and places for tax appeals court sittings that would fit compatibly with the obligations of the judges, all of whom would have continuing, substantial involvements in their busy home courts. To settle the uncertainties that might often arise from conflicting decisions of three-judge panels, en banc hearings might often be needed. Arranging a time when all eleven judges would be available might be almost impossible. The logistical problems for the circuit courts could be equally complex. All the judges of the new court would, of course, face a constant problem of division of duties and the frequent distractions of travel throughout their three-year terms.

Many of these difficulties can be avoided or lessened by providing, as we recommend, that the court be composed of full time Articles III judges, and that they be seven in number. Making the judges full-time would not only avoid in large part the practical difficulties I have noted; it would also improve the prospects for developing a sense of collegiality and continuity within the new court. This is a particularly critical quality in a court with an unusually great need to provide stability and predictability in the decisional law. I should add that seven judges, serving full-time, would, in our opinion, be an adequate number to handle the court's expected caseload.

Our second recommendation goes to the question whether the judges of the new court should serve as permanent or temporary members. Our suggestion is that the chief judge and three of the associate judges be appointed by the President, with the advice and consent of the Senate, to be permanent members and that the three remaining judges be designated by the Judicial Conference of the United States from among the ranks of active circuit judges, to serve for set terms of three years. This approach would give the court the best of both worlds: it would enjoy the confident touch that can be provided by a group of judges with specialized knowledge of the tax law and at the same time have the wider perspectives lent by circuit judges who have been exposed to the broad range of problems that come before federal appellate courts. Four judges who very likely would be tax specialists would sit with three judges of more generalized experience. Together they would provide the strongest possible bench for the purpose. Eminent lawyers form the tax practice might well be attracted to service on the new court as permanent members. Permitting the Judicial Conference to select the judges who serve for three-year terms will assure that a balanced judgement by a broadly representative group of federal judges will be choosing nearly one-half the members of the court. Those chosen will probably be both well qualified and well respected.

This recommendation diverges in two respects from the design of S. 1691 as reported by the Judicial Committee. First, if, as expected, the tax bar becomes the primary pool for choosing all four permanent members of the court, the final complement of judges will resemble more closely the "tax specialty" court than S. 1691 intends. In our view, a slight tilt toward specialization is warranted. The taxpaying public and the profession would perceive that the court includes a majority or plurality of judges having a thorough familiarity with the intricacies of the federal tax laws. The result should be a considerable boost in public confidence in the court's capability.

Second, our proposal, differing from S. 1691, would result in increasing by four the total number of Article III judges serving in the federal courts. While we would prefer to avoid the increase, this modest increment in the federal judiciary seems warranted, for it will assure a measure of continuity in the court's membership.

That will enhance the likelihood of consistency and stability in the court's decisions. We believe the price is worth paying.

It should be clear that despite these variations the design of S. 1691 and the design we would prefer are in no sense in fundamental conflict. Our proposed modifications respect the desire to avoid undue specialization while holding to the minimum the increase in the number of Article III judgeships recommended.

A third point is that we favor having the judges of the new court hear all cases en banc. This will take maximum advantage of the combined strength of the tax specialists and the non-specialist circuit judges. This, too, should work to assure that the court's decisions will enjoy the widest professional respect and public confidence, for they will be known to represent the considered judgment of all of the judges who could in any case speak to the issues adjudicated. This is particularly important, since review by the United States Supreme Court will occur only rarely, and the decisions of the Court of Tax Appeals will stand as the final judicial words on the matters decided.

Details regarding the jurisdiction of the new court require further study. Quite possibly, some refinements may prove necessary. We will be pleased to work with the Subcommittee and its staff to effect any desirable revisions.

CONCLUSION

The recommendations that are set forth above represent a joint effort to reach common ground and make constructive suggestions regarding S. 1691. With the changes made, S. 1691 would have the support of the Department of Justice. Without them, we would stand on the reservations expressed by representatives of the Department in the course of their testimony before the Senate Judiciary Committee on S. 678.

Senator BAUCUS. Our next witnesses will be a panel of three persons, former Commissioner of the Internal Revenue Service: Mr. Mortimer M. Caplin, Mr. Randolph W. Thrower, Mr. Donald C. Alexander.

Gentlemen, I am very happy to have you here and I suggest that each of your proceed in any way you wish.

I might suggest that you each individually give a short statement.

Mr. CAPLIN. We would like to say a few words preliminarily and let you engage in questions.

Senator BAUCUS. Absolutely.

Mr. CAPLIN. We have statements and we would like to submit them for the record.

Senator BAUCUS. They will be included.

STATEMENT OF MORTIMER CAPLIN, FORMER COMMISSIONER OF INTERNAL REVENUE

Mr. CAPLIN. My position is, in essence, that I support the National Court of Tax Appeals. I will not go into some of the technical adjustments that might be appropriate. I think that the suggestions of the Treasury and the Department of Justice amply define a route.

I lean heavily in favor of some permanent court whether it is the entire court or a partial permanent court with some rotating panels. Either one would be satisfactory.

It is very important for the court's members to develop a sense of collegiality, and I think either of those suggestions, combined with giving the court some permanent locale, would accomplish that goal.

Also, a more flexible en banc review would be desirable. I think that if we had a smaller court, one of seven judges, you could have most of the judges sitting on the bulk of the appeals.

Essentially I support this court on two grounds. One, I think that we would have a fairer and more efficient revenue system. I say this from the standpoint of a former administrator; I am looking at the question from the broad view of what is needed to have a workable tax system rather than from the standpoint of protecting the special interests of any individual client.

Americans file 90 million individual tax returns a year; 2 million tax returns are audited, which is hardly enough. We have barely 20,000 revenue agents to audit those 2 million returns. In the face of these limited administrative resources the country has developed a tremendous underground economy. It should be clearly understood that "underground economy" is simply a polite term for tax evasion in many cases. It refers to people who receive income in cash or in kind and who are deliberately not reporting that income or paying their taxes.

Throughout the history of this country, we have leaned heavily on what we call self-assessment, relying upon the decency and the honesty of the people of this country to report their income accurately and pay their taxes fairly. We have an extraordinary record that way, better than any other country in the world, but to maintain this record, we need an effective mechanism of audit, machinery for fair administrative appeals and an efficient court system for resolving disputes that cannot be settled administratively.

The difficulty with the present system of multiple appellate forums is not so much the number of conflicts in the circuits. That point that gets emphasized a lot—that there are only a handful of direct conflicts. Nor is the main problem the number of tax appeals that burden the dockets of the cirucuit courts.

The big thing to me is the impact which the state of uncertainty inherent in the present system has at the lowest level of the tax system—the preparation of returns, 90 million returns, and then the 2 million examinations by revenue agents, and then administrative appeals, followed only at the tail end by the judicial system's role.

When you have an absence of controlling decisions, people throughout the country are in a position to decide complex tax issues as they see fit.

You tell me that there is a decision in the ninth circuit which is completely contrary to the interests of my clients sitting here in the District of Columbia. That is only the ninth circuit. I may properly advise that client to take a position on his return contrary to that decision and know that we have a good chance of prevailing.

The revenue agent is somewhat confused as to what route he is going to follow if that return is selected for audit. The appeals officers are somewhat confused as to what rule to follow. The national office may or may not want to follow the ninth circuit opinion. It may tell IRS personnel in the field, "Apply a contrary rule," or "Apply the ninth circuit rule."

This is the type of pattern that I think cries out for decisions, controlling on a nationwide basis

Perhaps not every decision reached by a National Court of Tax Appeals will be the perfect decision. There are arguments, if you

have a difficult case, try it in five different circuits, and each court will improve the result a bit, so eventually we are going to get the perfect decision.

I believe that there are very few cases that demand such a refined level of perfection. You need certainty. We are handling a mass tax system. We need definitive rules to go by. Errors will be made; there has to be some breakage to raise over $400 million a year and to get a decent level of compliance.

I think we need a much higher level of controlling decisions in this country.

Let me just make one further comment, concerning the idea of an overspecialized court, Senator, you raised the question, why should you have a specialized court in taxation when not in OSHA, when not in EPA, and the like.

I do not think there is any other body of law that affects the citizenry as much as the tax law. Every American is affected by it whether we are talking about the booklet of instructions that the IRS puts out, or an attorney advising a client how to file his return. We all need some guidance that we can respect and feel is controlling.

You have situations today where the IRS continuing viewpoint is contrary to some of the cases which have been decided in the courts. Their booklets are contrary to judicial decisions, and a person is left in a state of confusion.

Specialization, per se, is not the boogey man that it is sometimes made out to be. Dean Griswold many years ago had this little quote that I would like to leave with you. He says:

> This argument represents a complete misconception of the tax field. It is high time that tax lawyers rise up to defend themselves against the charge that tax work is narrowing and stifling. On the contrary, it seems difficult to find a field which leads practitioners more widely through the whole fabric of the law. . . . He must be broad in his background and broad in his outlook if he is to deal effectively with the manifold problems which make up the modern field of tax law.

You cannot just be a narrow technician to be a good tax lawyer, or a good tax judge. You have to have a familiarity with the underlying substantive issues, partnerships, trusts, estates, corporations—again, you name it. So I do not think that overspecialization is an evil you have to worry about. I think it is a problem of selecting capable men and women and I support this approach.

Senator BAUCUS. Thank you very much.

STATEMENT OF RANDOLPH W. THROWER, FORMER COMMISSIONER OF INTERNAL REVENUE

Mr. THROWER. I, as an opponent, Mr. Chairman, and by reason of chronology of service, am sandwiched here between two proponents of the proposal. I have been strongly opposed, for many years, to the proposal, as are many of the lawyers throughout the country.

I think that this wide objection arises primarily from the condition that Mr. Caplin was just describing—tax laws do not operate in a vacuum. They apply to the widest range of human affairs.

Often a tax case, before the law is applied, the taxpayer's personal or business affairs must be analyzed and characterized. Often there is a question as to what is the status of those matters under State law.

They deal with highly personal matters of marriage and divorce, alimony, community property, administration of estates of decedents and incompetents, trusts for minors, gifts to charity or to members of the family, as well as the widest range of business affairs, banking, and financial, and securities, which may be centered in one area of the country, primarily, or one circuit, as in the second circuit in the financial business, gas and oil, mining, manufacturing, problems of water interests, timber, ranching, orchards, and varied kinds of agricultural pursuits throughout the country.

Tax cases evaluate the legal significance of issues arising in these areas, and this is why, for 40 years, so many lawyers, particularly, I might say, those removed from the District of Columbia, have opposed removing the development of the decisional law in taxation from the mainstream of the law as reflected in the appellate courts of the United States.

The people of the United States and especially lawyers simply do not trust specialized courts, particularly where they are dealing with the widest range of human affairs.

Dean Griswold earlier said, that if he could the panel in our present appellate court of the District of Columbia, he could often predict the result. If one could pick the entire court of seven appellate court judges who would be deciding all tax cases in the United States, it would follow that one could affect the result of all tax decisions within the country.

I think the proponents of this proposition have failed to mention the value that has been obtained for our tax law from the honing and turning and polishing of the law that has been derived from the positions and principles frequently developed by the various circuits approaching an issue from their different propositions and with different factual situations.

I agree that the element of conflict has been overemphasized, viewing the whole spectrum. I think the conflicts are relatively minor. What does happen is that it takes years to develop a broad lasting principle of the law, in any area, which then often becomes reflected in legislation, regulations and IRS rulings.

As the proponents have recognized—and I think it is healthy to have their recognition, the Court of Tax Appeals would become, for all practical purposes, a court of last resort. There would be no further significant participation, it is contemplated, by the Supreme Court. This error would be perpetuated.

I think that court, since it is appointed to get certainty, in order to have that certainty, would tend to move toward rules of thumb. This would tend to make the law more complicated, not simplified. There is much value, in my judgment, in the present system which requires that the exposition and application of tax law being made understandable to able generalists, judges, on our courts of appeal. If they cannot understand it, then how can taxpayers and their representatives throughout the country understand it?

Now, with regard to the particular provisions of S. 1691, the entire testimony this afternoon seems to indicate that the idea of revolving judges coming out of the circuits, remaining in their circuits, serving for 3 years and thus having a body of generalists acting on tax decisions, would simply not work. It is inoperable,

impractical, and unrealistic. I think that it is mere gimmickry to undertake to satisfy longstanding objections to the proposal.

Senator BAUCUS. Could you expand on that point? Why do you think it would be impractical and would not work?

Mr. THROWER. If I could, and I would hope that I could have time to finish, but with respect to that, I think that it would be a very unpopular assignment within a circuit to remain with responsibilities in the circuit but, at the same time, sit in panels all over the United States for a term that may not be more than 3 years.

Such a court could not develop the kind of kinship among judges that is really necessary to make it effective. It would not be a cohesive court, in any sense. I do not think it could contribute significantly as a court. I think it would not appeal at all to the judges on the courts of appeals and, as indicated in the bill, if the Chief Justice cannot get a circuit court judge, he can designate a district court judge, which I think is realistic.

Certainly our great jurists on the courts of appeal now, and in the future, would not be attracted to this, and this was reflected by the earlier proponents from the Government. Consequently, I think this would shortly be changed but in the meantime it would result in weaker judges, maybe those less needed. I think it would quickly move to a court of permanent appointment, and practically every proponent who has testified in and out of Government has indicated that he would think that this should be done.

I would like to add that it should not be assumed that tax cases are creating an inordinate burden on our appellate courts, and I would like to refer you, Senator, now or at a later time, to the appendix of my written statement which has been submitted. It shows that the number of tax decisions of the sort that would go to the court of tax appeals, in absolute terms and in proportion to the total volume of business, has gone down significantly and gradually over the years. Where in the midfifties and early sixties the volume of tax decisions of the sort I am referring to, relative to the total number of tax cases disposed of in the courts of appeals might have been 8 or 10 percent, 7, 8, 10 percent a year, now in the last couple of years, 1977 to 1978, it averaged about 1 percent.

I think this indicates that harmony and a balance is being achieved where, despite the increased volume of taxpayers and judges and total cases, the tax cases going to the courts of appeals, by reasons of this harmony and balance has not been increasing but, in fact, declining.

I would like to join with Mr. Caplin in noting the importance of our revenue system consistently consuming in the support of Government more than 20 percent of our gross national product. Our tax system reaches much farther, in breadth and depth, than any in the world. Our tax system rests upon compliance very heavily, and upon mutual respect. To maintain this spirit of confidence and mutual respect, I think it is much more important that a taxpayer be assured that his affairs subject to taxation, will be subjected to consideration in our present courts and in the mainstream of the law, where they now are rather than to the quick, perhaps erroneous, decisions from a court of tax specialists.

The resolution of tax cases is worthy of all the time and attention of our courts that is now required. Some of our great princi-

ples of tax law have developed over a period of years through the contribution of the several circuits. The system is working, in my judgment, very well.

Of course, it is subject to improvements, but I would hope that it not be radically disturbed as this proposal, I think, would do.

Senator BAUCUS. Thank you very much, Mr. Thrower.

Mr. Alexander?

STATEMENT OF DONALD C. ALEXANDER, FORMER COMMISSIONER OF INTERNAL REVENUE

Mr. ALEXANDER. I am the most recently retired, or resigned, Commissioner of Internal Revenue and the one of longest service on this panel as Commissioner 3 years 9 months and 2 days under three Presidents. That may account for the fact that I surely do not look like a junior member of any panel.

I am as deeply concerned as former Commissioners Caplin and Thrower about our tax system.

I might point out that our Federal taxes, I think, take about 21 percent of our gross national product, not 30 percent, and our Federal tax system does not raise as much money as it would if the tax laws were enforced effectively and abided by completely by all our taxpayers.

Senator Baucus, then we would not have a Federal deficit, without any additions to our present tax laws. Our budget would be more than balanced.

But our tax laws do not work very well. Part of the problem stems from defects in the way our laws are administered and in the way disputes under the tax laws are resolved. Part results from the fact that our tax laws are too complicated, much too complicated. Too many preferences, too many exceptions, too many mysterious sentences that are very hard to decipher by judges, whether specialist or generalist, and equally hard to decipher by tax specialists like those that you see in the room. Ordinary taxpayers simply can't cope with all this.

This very complicated Internal Revenue Code is administered by too few people in the Internal Revenue Service. Former Commissioner Caplin made it clear that the percentage of audits, the percentage of examinations, is too low. There are only 2 million or slightly more audits in an individual taxpayer population of almost 90 million and a corporate taxpayer population of about 2 million.

With all this, we have a cumbersome, complex, slow and uncertain system of resolving tax disputes, and that system has an adverse effect, as former Commissioner Caplin has pointed out in answer to your and Senator Byrd's question on tax administration and compliance. It is very easy for an aggressive taxpayer or tax practitioner to take the position in our present system that there is no definitive court decision blocking the precarious route that the taxpayer or the tax practitioner proposes to follow.

Gamesplaying is encouraged by a system that encourages forum shopping. I do not mean to say in any way that we do not have a fine group of tax practitioners in this country. We do, but Graham's law is at work.

I do not mean to say in any way that most of our taxpayers do not try to abide by the tax laws. I think they do, but many do not

and the underground economy that Commissioner Caplin referred to is simply one facet of the problem.

Compliance has dropped somewhat. I was aware of this when I was in office. It has been demonstrated, by I think, recent issuances by the Internal Revenue Service and recent studies by the GAO.

One of the reasons it is dropping is a growing lack of respect for a system which, by its very complexity built into the system itself, the way it operates and the way that judicial disputes are resolved encourages disrespect for the law.

Let's examine the argument that our present system produces a better final product. This is the counterweight argument to the arguments for certainty and for uniformity of taxpayer treatment across this country and for prompt, rather than delayed, resolution of issues.

Let's take an actual case when we talk about "honing and toning and polishing." Let's take a case of what was honed and toned and polished, the *Kowalski* case, decided by the Supreme Court in 1977, involved the taxability of cash meal allowances for New Jersey State troopers.

That case resolved about 23 years of dispute over the taxability of meal allowances of State troopers beginning in 1954 when similar meal allowances were held to be taxable.

There were at least 10 court decisions going one way or the other way while this issue was being honed, and toned, and polished.

Finally, the Supreme Court was willing to hear the case. The Supreme Court decided the State troopers' meal allowances were taxable. Of course, Congress promptly overruled this decision.

If the first decision had stuck back in 1954, holding that meal allowances were not taxable, we would not have had 20 years of uncertainty, 20 years of wasted time and money by taxpayers and government alike, with some of that money going to the benefit of counsel who argued these cases. And the result would have been the same as that ultimately reached by Congress.

That case may illustrate the proposition that the final decision is not necessarily the best decision and waiting many years is a very high price to pay, if indeed the best decision were ultimately produced.

Another argument we have heard is that a single court cannot deal with veiled issues arising in different States and different parts of the country. The Tax Court of the United States is a specialized court headquartered in Washington, sitting throughout the Nation. It manages, as former Commissioner Thrower points out on pages 14 and 15 of his statement, to deal rather effectively with all these varigated issues that are produced by the application of the tax laws to various circumstances to people living in different States and having different property rights.

The Supreme Court of the United States, of course, sitting here in Washington, decides very few—far too few—tax cases but decides them with a degree of finality.

The Supreme Court takes an average of four tax cases a year now. Probably it would take probably fewer cases if we had a court of tax appeals, but substituting finality at the level of a court of tax appeals, rather than finality at the level of the Supreme Court

would, in my judgment as former tax administrator and as a tax practitioner for more than 30 years, have great benefits for our system. a system that all of us here agree is in need of improvement.

The cost would, in my judgment, be minor. Debates about whether the service on the Court should be 3 years or permanent, debates about whether there should be 11 or fewer judges, are matters of minor consequence compared to the need for this court.

The Court described in the bill could work and would work. Judges in various circuits now sit in other circuits, willingly, by designation, and I am not sure that those judges are necessarily the weaker judges on the particular circuits to which they are regularly assigned.

I hope that S. 1691 will be enacted by this Congress. It is long overdue.

Senator BAUCUS. Thank you. I think you are right, that noncompliance has gone up. All figures show it. It is a very big problem in the administration of tax law.

But I am still not convinced that this is going to be changed, the problem of lack of compliance—that if there were a Court of Tax Appeals, that suddenly everybody would comply with the tax law. We would not have to worry about a deficit.

Mr. ALEXANDER. I am not going to say that this is going to solve the problems of the world. I am going to say that it is an improvement over our present system and would, in my judgment, lead to increased compliance simply because of removing the delays and uncertainties which encourage gamesplaying and noncompliance at this time.

Senator BAUCUS. Candidly, objectively, to what degree would it eliminate the problem of noncompliance?

Mr. ALEXANDER. I cannot put a number on that.

Senator BAUCUS. One percent, 80 percent? You have very direct practical experience in this area.

Mr. CAPLIN. All you can talk about is your own experience. I know that it would limit the type of advice that lawyers could give, limit it severely in terms of options and it would limit return preparers significantly. I cannot help believe but that this would be a significant contribution towards improved compliance.

Now, on the other hand, Mr. Thrower's point is that you are going to get more rules, but they are not going to be refined rules.

As a tax practitioner, I think I, along with many of my colleagues, like to have the option of selecting the best possible forum for a client.

You raised the question of how often does this come up. I think it comes up every time I see a client who has an audit problem. From the very beginning we ask, what would be the best forum to litigate this? How do we want to cast our administrative procedure? Do we want a refund? Do we want a deficiency? What circuit can we get into? These considerations are right up front. They are not just remote thoughts. When you are facing litigation, you think of these questions at the very beginning.

Senator BAUCUS. Maybe you do, but I was just thinking, when I attempt to do my income tax returns—I used to do it myself until a few years ago where it got so complicated—my accountant will just

say,"Max, there are a few things, a few questions here." I just let him use his best judgment and go ahead. I really do not worry about it. He does not say to me, "Well, we have this Circuit Court problem."

Mr. CAPLIN. He is making certain judgments, particularly under the new statute which imposes obligations upon him and subjects him to potential liabilities. He has certain problems in terms of complying with the rules of law.

It may be that those rules are black and white in your situation. If so, your accountant does not have much manuveurability. He is going to be very limited in certain discretions that he can exercise.

Senator BAUCUS. Another question that I have, if it is true—and I think it is—that tax law is so pervasive throughout the economy and it is so involved in people's lives—and we all know that it is—and, if the National Court of Tax Appeals would, by and large, be a court of last resort, is there not a good argument that the Supreme Court should hear some cases because, after all, since the tax law is so pervasive and involves people's lives, the judges, whomever they may be, should bring to bear their experience in other areas of human nature to the law on tax cases that are before them?

It just seems to me that, to the degree that tax law is more pervasive, there is more an argument that there should be a little more cross-fertilization here.

Mr. CAPLIN. The Supreme Court tries to avoid hearing cases in the tax field. The famous case of *Dobson* v. *Commissioner,* and the legislative background involved in that case explain why. The Court was trying to get out of the tax field because it felt it was not equipped to deal with these cases properly. They leaned very heavily on the expertise of the Tax Court and indicated that because of its expertise, the Tax Court should be the main tax tribunal of this country.

Mr. Justice Jackson, who was one of the few people on the Court who had extensive experience as chief counsel to the Internal Revenue Service wrote the controlling opinion in that case and he said the Supreme Court should not be hearing these cases.

Mr. THROWER. I might add, Senator, that the Supreme Court promptly reversed the results of that, which reflected at that time its desire to maintain the general law, the developmental tax law, within the general stream of the law and not direct it primarily into a special court.

I think that the Tax Court has added greatly to the law over the years. The circuit courts have shown great respect for its decisions and for the decisions of each other, but it has grown in stature and effectiveness operating, in effect, under the guidance of the circuit courts of appeals.

Senator BAUCUS. Let me ask the two Commissioners who are in favor of the bill here, you too, Mr. Thrower, for that matter, what other major actions can the Congress take to encourage better compliance?

Mr. CAPLIN. I would say one thing. I think you ought to give the Revenue Service additional appropriations to hire additional revenue agents. I think they are significantly and rather shockingly undermanned.

To be auditing 2 million returns out of 90 million individual tax returns is a desperate situation.

Senator BAUCUS. Is that directly related to noncompliance?

Mr. CAPLIN. I think so, like a policeman on the street.

Senator BAUCUS. That is what I am asking. In America, we have lived under a voluntary tax compliance system. By and large, are you saying that the ratio between revenue agents and audits have declined? If that is not the case, that does not seem to be a problem.

Mr. CAPLIN. The ratio has declined from the early 1960's to today. We were auditing as much as 4 percent of the returns in the early sixties.

Senator BAUCUS. In addition to more personnel what is the next best thing we could do?

Mr. CAPLIN. The next thing to do is stop putting in the myriad credits—depending on which direction I build my house, how much the sun comes in the ceiling—which try to achieve all these social and economic results through the tax law.

If the tax law was a disgrace to the human race before the last Presidential election, it is a double disgrace today.

Mr. THROWER. Senator, may I make a comment in connection with this subject. I feel strongly about this. I do not agree that tax compliance has been declining. I do not know of anything that would contribute more directly to a decline in tax compliance than to have it indicated to the people of the United States that everyone is cheating and you are a fool if you do not get your part.

It is my judgment that what is being disclosed to an increasing degree is noncompliance in the areas where there has been noncompliance right along, for many years, in areas in which many other industrial countries do not even bother to touch.

We are undertaking—and I think very properly so—as I mentioned earlier, to enforce our tax laws with greater breadth and depth than any other Nation in the world, and are doing it more effectively.

I do agree that steps can be taken to improve our compliance, but it is my judgment that our compliance, perhaps at all levels, is higher than it has been in any past years, beginning at the level of the largest corporations where more shortcomings are being ascertained, but because those audits, or examinations, are being conducted in much greater depth, we were all shocked about the slush funds and political contributions and overseas bribes. That is not a new development. We have undertaken to increase compliance in those areas.

There is a complaint about independent contractors, truck drivers, taxi cab operators, loggers in the woods, beauty parlor operators who are not complying fully with their tax obligations. They have never complied.

There should be an effort to bring out that compliance, I agree, but to say, as it is being said, too widely, that compliance is declining, I think first it is not supportable, but it feeds on itself and, I am afraid, is counterproductive in stimulating greater noncompliance.

I have heard this on the radio and in television talk shows. I have heard it in conversations, a feeling of disrespect for the legal

obligation to comply arising from disclosure of areas of noncompliance that have existed for years.

Mr. ALEXANDER. Having left my rose-colored glasses at home, I think I had better respond.

First, I think that many in the taxpayer and practitioner area are fully aware of the deficiencies of our present audit and criminal investigation practices. I think that the Internal Revenue Service has a duty to tell the truth, and I suggest that if this is indeed an issue before the committee at this time, I will be delighted to give you information which has been made public, and I think completely properly so, by the Service, by the General Accounting Office and others, in connection with budget requests and otherwise, which will demonstrate the validity of the point I make.

Compliance, I am sorry to say, is dropping. It is provable by the Internal Revenue Service's own studies which have now been released, and I think it is idle to pretend that this is not so.

The Internal Revenue Service did have, at one time, a position that if the public were told the truth then the public would not comply with its responsibilities. I suggest that withholding the truth from the public was an abdication of Internal Revenue's responsibilities, its responsibility to the Congress, its responsibility to the public it serves, and its responsibility to itself.

Unfortunately our system is not working as well as it should. Our system still works surprisingly well. The problem is that the Internal Revenue Service is saddled with HEW's programs, HUD's programs, and the Department of Energy's programs, et cetera. The Internal Revenue Service can carry out administration and enforcement of a tax law reasonably well, but it cannot carry out the programs of all the other departments, save perhaps one or two.

Senator BAUCUS. Let me ask another question.

Our country, to some degree, you know, espouses the John Locke idea of a marketplace of ideas. I wonder to the degree to which different opinions in the various forums in some way help hone or refine what seems to be a wiser, hopefully, answer to a question.

Is there any merit to that argument at all, to have different courts of appeals, the Court of Claims, address somewhat the same question with somewhat different answers?

Mr. ALEXANDER. We would have a host of differing answers depending on where the taxpayer lives and what forum the taxpayer litigates.

Senator BAUCUS. Is there any value at all to that argument? In your judgment is there none, or is there some value?

Mr. ALEXANDER. There is some value to having varied answers because sometimes having those answers and having them reviewed, considered, and thought out, may indeed produce a better result.

The question is whether the price to the system is too great, and I think it is.

Senator BAUCUS. Gentlemen, I want to thank you very much. We have more witnesses here this afternoon. In the interests of time, we are going to have to move along.

[The prepared statements of the preceding panel follow. Oral testimony continues on p. 107.]

SUMMARY OF STATEMENT ON S. 1691

MORTIMER CAPLIN
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Washington, D. C.

UNITED STATES SENATE
COMMITTEE ON FINANCE
SUBCOMMITTEE ON TAXATION AND DEBT MANAGEMENT

Room 2221
Dirksen Senate Office Building
2:30 p.m., November 2, 1979

I strongly support the proposal to create a national Court of Tax Appeals with exclusive jurisdiction to review all trial court decisions in civil federal tax cases. Creation of such a court would make our tax system fairer and more efficient.

A single Court of Tax Appeals would make our system fairer by eliminating situations in which different federal tax costs are imposed on taxpayers in substantially the same economic circumstances who live in different parts of the country. This unfairness is highlighted most spectacularly when the Tax Court (because of its Golsen rule) reaches opposite results in cases involving taxpayers with identical interests in a single transaction, but who live in different circuits. These examples of apparent irrationality have a significant impact on taxpayers' perceptions of the overall logic and fairness of our tax system. They undercut confidence in the system and lead to erosion in compliance -- which is so essential to the self-assessment process.

The court will be even more important because of its impact on the administration of our tax laws. Its controlling decisions will reduce uncertainty, inconsistency, and delay both in the IRS administrative process and in the judicial system. I think those who belittle the number and significance of conflicting decisions by the various courts which now hear tax cases overlook the administrative aspect of the problem.

In this regard, it is important to emphasize that much of the cost of the present system is effectively hidden. A great many controversies arise on audit of tax returns, and persist through the administrative appeals process, solely because there has not been an authoritative judicial resolution of a basic legal question. It is difficult to quantify the precise number, duration, and cost of these controversies. But it is clear that the costs are extensive -- and their burden on the system is often ignored.

It seems to me that the costs resulting from the inefficiency of the present system are being ignored by those who suggest we continue to rely on appellate review by a succession of different courts because it is the best way to reach theoretically perfect answers to difficult tax questions. My response to this position rests principally on practical considerations -- I believe the inevitable costs of uncertainty far outweigh the speculative benefits of perfection. To put it bluntly, multiple appeals are a luxury that our tax system -- which depends on fewer than 20,000 IRS agents to audit more than 2 million returns -- cannot afford.

Although I support S. 1691 even as it stands now, I believe it can be improved. I would prefer to see the Court of Tax Appeals composed of judges assigned to serve there on a permanent basis. A court made up of permanent judges who serve there exclusively would more readily develop the collegial atmosphere so essential to maintaining a consistent body of precedent. Moreover, the court could probably function with less than 11 judges if they devote their full time to its work and are not distracted by the business of their home circuits.

If the Committee decides to retain the composition of the Court now reflected in S. 1691, I believe that the bill can still be improved in one important respect. The Court's procedures should be designed to encourage consistency of decision between different panels of judges, and over time as the make-up of the court changes. To this end, consideration of cases by the full court should be made more readily available; the bill's present requirement that 6 of 11 judges approve an en banc hearing is unnecessarily restrictive. To facilitate this goal the Court might adopt procedures comparable to those now used by the Tax Court, whereby important cases are considered and voted upon by all the judges in conference even though they are heard by only one panel.

In conclusion, my position may be summarized as follows:

1. We need a national Court of Tax Appeals; Congress should definitely enact legislation to create such a court, in one form or another.

2. My first choice would be to have a court with a relatively small number of judges who would serve there permanently on a full-time basis.

3. A court structured along the lines envisioned in S. 1691 is an acceptable alternative. However, I strongly recommend that the Court's procedures provide for relatively easy and frequent consideration of cases by the full Court.

Let me close by noting that I wholeheartedly reject any suggestions that a court composed of tax specialists would be narrow-minded, insensitive, or would lack that broader understanding of human conduct which provides the proper perspective for interpreting the revenue laws. Rather, I share Mr. Justice Jackson's view that a degree of specialization is both appropriate and desirable -- as he put it -- in a "field beset with invisible boomerangs."

Statement on S. 1691 by

MORTIMER CAPLIN
Caplin & Drysdale
Washington, D. C.

UNITED STATES SENATE
COMMITTEE ON FINANCE
SUBCOMMITTEE ON TAXATION AND DEBT MANAGEMENT

Room 2221
Dirksen Senate Office Building
2:30 p.m., November 2, 1979

INTRODUCTION

I appreciate your invitation to testify about S. 1691 which would establish a national Court of Tax Appeals. For some 25 years I have been a lawyer engaged in federal tax practice, and I served as U.S. Commissioner of Internal Revenue from February 1961 to July 1964.

I strongly support the basic objective of S. 1691, because I believe that the creation of a national Court of Tax Appeals with exclusive jurisdiction to review all trial court decisions in civil federal tax cases would significantly strengthen the administration of our tax system.

My one major concern relates to the bill's proposal to staff the court with 11 circuit court judges serving three year terms. I would recommend, instead, that judges be assigned to serve on the court on a permanent

basis. I suggest this change because it seems to me that having judges who serve for such short terms will make it more difficult for the court to develop a reputation for consistency that is so crucial to its basic goal of reducing uncertainty.

SUMMARY OF CONCLUSIONS

My views on the proposal are in summary:

1. Creation of a new national Court of Tax Appeals would represent an important step in reinforcing our self-assessment tax system.

2. Authoritative pronouncements by such a Court would provide illumination for all involved in the tax process, and would tend to eliminate uncertainty, inconsistency and delay.

3. The present administrative and judicial system does not provide sufficiently prompt and authoritative resolutions of important federal tax issues.

4. Over the next 10 years, greater strains will be imposed on our tax administration and judicial system by significant growth in both annual tax return filings and audit activities, and by the declaratory judgment jurisdiction recently assigned to the Tax Court, and U. S. District Courts.

5. It would be preferable for the Court to be composed of judges appointed to serve there on a permanent basis. These judges could be selected from the district courts as well as the circuit courts. Having a relatively fixed group of judges would help the court reach decisions which are consistent over time and between different panels of judges.

6. It is essential that taxpayers not be able to avoid the jurisdiction of the Court of Tax Appeals by bringing their case to the Court of Claims. This goal can be achieved in either of two equally acceptable ways -- (i) by eliminating tax cases from the trial level jurisdiction of the Court of Claims, or (ii) by retaining that trial level jurisdiction (in the new U. S. Claims Court, whose creation is the subject of separate legislation) but providing that appeals of tax cases tried there be heard by the Court of Tax Appeals.

7. On balance, the various arguments propounded by opponents of the Court of Tax Appeals concept, are unpersuasive.

DETAILED ANALYSIS

For the convenience of the Committee, I have divided my written testimony into three major sections.

Part I contains a detailed statement of the reasons why I strongly support the general concept of a national court of tax appeals with exclusive appellate jurisdiction over civil federal tax cases. It is in large measure a restatement of the position I presented in my May 10, 1979 testimony on S. 678 before the Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary.

Part II reflects my comments on the specific proposal embodied in S. 1691 to set up such a court. While I fully recognize that the bill now before this Committee reflects a balance of many competing factors, I think that S. 1691 could be improved in several respects -- most notably by providing for a court with a fixed group of judges.

Finally, in Part III, I explain why I find the principal arguments advanced by opponents of the court of tax appeals concept unpersuasive.

PART I: GENERAL CONSIDERATIONS SUPPORTING CREATION OF A NATIONAL COURT OF TAX APPEALS

A. THE NEED FOR GREATER CERTAINTY

Our federal tax system demands more direct participation by citizens than any other aspect of American law. It is a self-assessment system which rests predominantly on voluntary compliance by taxpayers and which needs a high degree of certainty and predictability for its sound operation. An expanded flow of definitive court decisions on important tax issues would make a major improvement in the administration of our tax laws.

Year after year, over 97 percent of Internal Revenue Service collections come from self-reporting and withholding. For fiscal 1978, for example, the Service collected nearly $400 billion from all sources, while direct enforcement activities of the IRS resulted in proposed additional assessments (including interest and penalties) of only $6.7 billion and actual collections of delinquent taxes totalled only $3 billion. With filings in 1978 of 87.4 million individual returns and 2.3 million corporation returns, 19,000 revenue agents and tax auditors of the IRS were able to audit only two million returns. Obviously, to fulfill its vast mission, the IRS needs the help and cooperation not only of taxpayers and businesses, but also of their lawyers, accountants and other advisers.

To achieve timely and accurate reporting of income, deductions and credits as well as self-computation of tax liabilities, there must be as many specific answers as is reasonably possible to the numerous questions that continue to arise under our complex tax laws. If there are conflicts or uncertainties over the correct interpretation, how is the taxpayer to comply? How are lawyers and accountants to advise?

A broad range of definitive answers are needed not only to permit accurate compliance by taxpayers, but also to educate and inform the IRS and its employees. Voluntary compliance is given a decided boost when clearcut, definitive information is set forth in instructions to tax returns, IRS booklets for taxpayers, revenue rulings, regulations and IRS manuals for the guidance of all field office employees.

By the same token, unsettled areas of the law often provide unwarranted havens for taxpayers who intentionally strain against the boundary line between legal tax avoidance and illegal tax evasion. These taxpayers and the Service recognize that uncertainty in the interpretation of the Code may provide substantial protection against the imposition of civil and criminal tax penalties. In the end, honest taxpayers who are doing their best to pay their taxes according to the law must make up the lost revenues.

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B. THE NEED FOR GREATER JUDICIAL CAPACITY

Resolving tax disputes places an enormous burden on our limited administrative and judicial resources. While the precise magnitude of this burden is difficult to quantify, statistics for fiscal 1978 illustrate the problem:*/

-- During 1978, the Appeals Office of the IRS disposed of nearly 55,000 disputed cases by reaching agreements with the taxpayers involved.

-- Nevertheless, during this same period more than 13,000 petitions contesting liability were filed in the Tax Court; slightly more than 800 refund suits were filed in the U. S. District Courts; and more than 200 were filed in the Court of Claims.

-- The Tax Court decided approximately 1,100 cases by written opinion, however, nearly 500 of these were small tax cases which generally involve very simple issues. In addition the Tax Court disposed of 1,500 cases by summary dismissal, and nearly 9,000 by stipulation of the parties. Nevertheless, at the end of fiscal 1978 there were over 23,000 cases pending before the Tax Court -- an increase of more than 2,000 from the previous year's figure.

-- The District Courts disposed of about the same number of cases as they received (800), leaving a year-

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*/ These statistics are drawn from the 1978 Annual Report of the Commissioner of Internal Revenue (IRS Publication No. 55) and the Annual Report FY 1978 of the Chief Counsel of the Internal Revenue Service (IRS Publication No. 1076).

end backlog of about 2,800 cases. At the same time the Court of Claims disposed of 120 cases (60% as many as it received), resulting in an increase in its backlog from 660 to 750.

-- The Courts of Appeals rendered opinions in slightly less than 200 civil cases (186); and the Supreme Court decided 6 while denying 35 petitions for certiorari.

As can be seen, our mass tax system places great pressures on our trial and appellate courts. Any weakening of the administrative settlement process -- at either the revenue agent or Appeals Office level -- could result in flooding our courts with additional tax litigation. The IRS policy to dispose of cases at the lowest possible level is not only an important aspect of tax administration, but is also critical in limiting the burden tax litigation imposes on our judicial system. To function effectively, this policy requires that there be well-defined rules of law which can be readily understood and applied by IRS employees at all levels.

In addition to a predictable increase in the traditional types of civil tax cases, Congress has recently increased the judicial burden by authorizing declaratory judgment actions in certain areas. This was done first in the 1974 pension reform law (E.R.I.S.A.) which authorized the Tax Court to render declaratory judgments concerning the

qualification of pension plans.*/ This jurisdiction was expanded by the Tax Reform Act of 1976 to include (1) determinations of the tax exempt status of organizations under Code section 501(c)(3);**/ (2) determinations concerning the presence of a tax avoidance purpose in connection with transfers of property to foreign countries under Code section 367(a)(1);***/ and (3) "disclosure actions" under Code section 6110.****/ Most recently, the Revenue Act of 1978 added yet another category of declaratory judgments to the growing list -- I.R.C. §7478 gives the Tax Court authority to determine the tax exempt status of municipal bonds under Code section 103.

Additional judicial capacity will clearly be needed in future years to handle the increasing volume of tax litigation. Moreover, we cannot look to the Congress to keep providing the answers. Anyone who has competed for legislative time and attention knows full well that it is unrealistic to expect Congress to fill in the innumerable interpretative gaps that keep reappearing over the years as the Internal Revenue Code is applied to new and changing circumstances. A new national Court of Tax Appeals would

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*/ I.R.C. §7476.

**/ I.R.C. §7428.

***/ I.R.C. §7477.

****/ I.R.C. §6110(d) and (e).

help to meet this challenge both by providing decisions in more cases and by reducing the need for litigation by resolving -- once and for all -- questions which provoke repetitive legal disputes.

C. THE PRESENT SYSTEM: MULTIPLE APPELLATE FORUMS

At present, tax litigation is complicated by the variety of forums available to a taxpayer. Uniformity of decisions is difficult to achieve -- in part, because most civil tax cases can be brought to any one of three independent trial forums; but more importantly, because each forum has different controlling precedents which are not effectively coordinated at the appellate level. Over 30 years ago, the Supreme Court noted:

> "This diversification of appellate authority inevitably produces conflict of decision, even if review is limited to questions of law. But conflicts are multiplied by treating as questions of law what really are disputes over proper accounting. The mere number of such questions and the mass of decisions they call forth become a menace to the certainty and good administration of the law." */

After receipt of a statutory 90-day notice of deficiency, a taxpayer may file a petition in the U. S. Tax Court and litigate the issue before paying any additional tax.

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*/ Dobson v. Commissioner, 320 U.S. 489, 499 (1943) (emphasis added).

Alternatively, he may pay the full amount of the deficiency, file a claim for refund with the Internal Revenue Service, and then commence a refund suit either in the U. S. Court of Claims or a District Court.

Appeals from Tax Court decisions, as well as from those of the District Courts, are taken to the U. S. Courts of Appeals generally for the circuit where the taxpayer resides or has his principal place of business. Appeals from the Courts of Appeals and from the Court of Claims to the United States Supreme Court may be requested through a petition for a writ of certiorari. However, as a practical matter, these petitions are rarely granted unless there is a direct conflict among the circuits. In effect, therefore, 12 separate courts of essentially coordinate rank now preside over the judicial development of federal tax law.

Further confusion arises from the unique role of the Tax Court as a specialized, nationwide forum with recognized expertise in tax matters. Prior to 1970, the Tax Court held that it was bound only by decisions of the Supreme Court -- not by those of the Courts of Appeals.*/ Its position was based on the fact that Congress had given it nationwide jurisdiction; and it regarded this jurisdictional grant as a legislative mandate to foster uniformity in interpreting the internal revenue laws, without hindrance from conflicts among geographically limited Courts of Appeals.

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*/ Lawrence v. Commissioner, 21 T.C. 713 (1957), rev'd 258 F.2d 562 (9th Cir. 1958).

In 1970, however, this practice was changed when the Tax Court recognized in the Golsen case*/ that "better judicial administration" requires it to follow a controlling decision of the circuit court to which the case before it will be appealed. At the same time, in any appeal to a circuit where there is no controlling precedent, the Tax Court applies its own best view of the law regardless of conflicts with the position of other circuits.**/ Moreover, even when the Golsen principle is applied, the Tax Court's opinion will explain why it disagrees with the result it feels compelled to reach. As a result, while it is technically only a trial court, the Tax Court provides yet a thirteenth significant and relatively independent source of judicial interpretation of the tax code.

D. THE PRESENT SYSTEM IS INADEQUATE

The fundamental criticism of the present system is that, absent a controlling Supreme Court decision, it

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*/ Golsen v. Commissioner, 54 T.C. 742 (1970), aff'd, 445 F.2d 985 (10th Cir. 1971), cert. denied 404 U.S. 940 (1971).

**/ See, e.g., Mitchell v. Commissioner, 428 F.2d 259 (6th Cir. 1970), rev'g, 52 T.C. 170 (1969); Anderson v. Commissioner, 480 F.2d 1304 (7th Cir. 1973), rev'g 56 T.C. 1370 (1971); Cummings v. Commissioner, 506 F.2d 449 (2d Cir. 1974), rev'g, 61 T.C. 1 (1973); and Brown v. Commissioner, 529 F.2d 609 (10th Cir. 1976), rev'g, 32 T.C.M. 1300 (1973). In these cases the Tax Court and several circuit courts have maintained varying positions concerning the characterization of payments resulting from violation of the insider profits provision of section 16(b) of the Securities Exchange Act of 1934.

lacks a practical and reliable method for authoritatively resolving tax questions. Or, as Professor Magill pointed out many years ago: "If we were seeking to secure a state of complete uncertainty in tax jurisprudence, we could hardly do better than"*/ the system now in place. This uncertainty has substantial costs in terms of both equity and efficiency.

The basic potential for unfairness is obvious: Taxpayers whose circumstances are in all other respects identical may lawfully pay different amounts of tax solely because they are residents of different circuits. This unfairness is highlighted most spectacularly when the Tax Court (because of the Golsen rule) reaches opposite results in cases involving taxpayers with identical interests in a single transaction, but who reside in different localities.**/ Even though such blatant examples occur only infrequently, they have a significant impact on taxpayers' perceptions of the overall logic and fairness of the tax system.

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*/ Magill, The Impact Of Federal Income Taxes, 209 (1943).

**/ See, e.g., Doehring v. Commissioner, TC Memo 1974-234, 33 T.C.M. 1035 (1974) and Puckett v. Commissioner, TC Memo 1974-235, 33 T.C.M. 1038 (1974) two related cases involving the identical issue and the same corporation. The first held for the government, adopting the rationale favored by the Tax Court, as there was no controlling contrary precedent in the Eighth Circuit where the case would normally be appealed. In the second, however, the court felt obliged to rule for the taxpayer because an appeal from the case would be made to the Fifth Circuit, which had previously established a controlling precedent. In reluctantly deciding for the taxpayer in Puckett, Judge Fay, who wrote both opinions stated: "We hasten to add that this decision does not reflect the thinking of this Court on the issue resolved hereby."

Multiplicity of appellate authorities not only can be unfair, but also plainly inefficient. This inefficiency takes several forms. First, it is almost inevitable that the same issue will be litigated a number of times before it is finally resolved. As a result, there is frequently an inordinate time lag from the first occasion that a tax issue surfaces at the administrative level until it is finally resolved by a definitive court decision. What emerges is a highly refined pattern of forum shopping.

The IRS carefully selects prime cases for appeal in order to achieve the ultimate appellate result that it desires. When deciding not to appeal a given case, it may nevertheless announce that it is not acquiescing in the principles enunciated by the lower court decision. At the same time, taxpayers may go to considerable lengths to insure that their cases will be heard by courts which have established favorable precedents, or at least to prevent them from being ruled upon by courts whose authorities are unfavorable. Both taxpayers and the IRS thus find themselves litigating the same issues again and again, moving from circuit to circuit or to the Court of Claims, in an effort to achieve a favorable outcome.

Repetitious tax litigation is especially burdensome to the judicial system since tax cases often present intricate and difficult issues which require an inordinate expenditure of judicial resources. Moreover, while some conflicts may be resolved by the U.S. Supreme Court, its

other responsibilities are far too great to permit it to resolve by decision the many tax issues that are in serious controversy. As Mr. Justice Jackson stated in Dobson v. Commissioner, 320 U.S. 489, at 500 (1943): "To achieve uniformity by resolving such conflicts in the Supreme Court is at best slow, expensive, and unsatisfactory."

In addition, the absence of controlling judicial decisions places a heavy burden on the administrative process through which the vast majority of tax disputes are settled. It is difficult to quantify, and therefore easy to overlook, the amount of time and effort -- both in audits and administrative appeals -- devoted to issues which are in controversy simply because there has been no authoritative resolution of basic legal questions. It is certain that these costs are extensive.

In my view, the foregoing analysis provides compelling support for the proposal to establish a national Court of Tax Appeals. Additional authoritative decisions enunciated by such a court would provide illumination for all involved in the tax process, and would tend to eliminate uncertainty, inconsistency and discrimination among taxpayers. Delays would be reduced, confidence in the fairness of the tax system would be enhanced and taxpayer compliance improved.

PART II: SPECIFIC COMMENTS ON S. 1691

For the reasons discussed above, I believe the costs of the present system are unacceptably high, and that some reform along the general lines proposed in this bill is not only desirable but is, in fact, long overdue.*/

This second part of my statement is devoted to an analysis of certain specific features of S. 1691.

A. COMPOSITION OF THE COURT OF TAX APPEALS

On the assumption that a single Court of Tax Appeals ought to be created, the most important questions relate to the selection and tenure of the judges who will serve on it. As envisioned by S. 1691, the Court of Tax Appeals is to be established under Article III of the Constitution and composed of 11 judges chosen from among those already sitting on the existing courts of appeals. The selection is to be made by the Chief Justice who is required to name one judge from each circuit; however, if no circuit judge is available from a particular court, the

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*/ The proposal to establish a national Court of Tax Appeals has been discussed extensively over the past 35 years. See, e.g., Griswold, The Need For A Tax Court of Appeals, 57 Harv. L. Rev. 1153 (1944); Del Cotto, The Need For a Court of Tax Appeals: An Argument And a Study, 12 Buffalo L. Rev. 5 (1962); N. Y. State Bar Ass'n., Tax Section, "Report To The Commission On Revision Of The Federal Court Appellate System Regarding The Need For A Court of Tax Appeals," (1975); Miller, A Court of Tax Appeals Revisited, 85 Yale L. J. 228 (1975); Caplin and Brown, A New United States Court of Tax Appeals: S. 678, 57 Taxes 360 (1979).

Chief Justice may name a district court judge from that circuit instead. After a transitional period designed to stagger vacancies, all judges are to serve for three-year terms, although any judge may presumably be reappointed for subsequent terms. In addition, the Chief Justice is empowered to ddsignate federal district judges to serve temporarily on the new court.

This proposed structure raises two main issues: First, is it preferable for the judges who sit on the Court to be generalists rather than tax specialists? And, second, is it desirable to have the Court composed of judges who will serve there only temporarily during their judicial careers?

1. Generalists vs. Specialists

The staffing of the Court with generalist judges is apparently done to meet an oft-repeated objection to the basic concept of a single Court of Tax Appeals, namely that judges who serve exclusively on such a court would be mere technicians, well-versed in the intricacies of the Internal Revenue Code, but out of touch with other areas of law. They would thus lack, the argument goes, that broader understanding of human conduct which provides the proper perspective for interpreting the revenue laws.

Careful analysis strongly indicates that the dangers of over-specialization have been exaggerated and that, on balance, the Court of Tax Appeals would best be served by judges who are to some degree specialists in tax matters.

First, the fact that tax lawyers are specialists in their field by no means suggests that they are isolated from other areas of law. Indeed, the incidence of taxation depends largely on transactions or relationships governed by a wide range of underlying substantive law (e.g., property, domestic relations, contracts, partnership, trusts, etc.); and tax lawyers are necessarily involved in a broad variety of these non-tax legal issues. Dean Griswold expressed this thought most eloquently when he wrote:

> . . . this argument represents a complete misconception of the tax field. It is high time that tax lawyers rise up to defend themselves against the charge that tax work is narrowing and stifling. On the contrary, it seems difficult to find a field which leads practitioners more widely through the whole fabric of the law. . . . He must be broad in his background and broad in his outlook, if he is to deal effectively with the manifold problems which make up the modern field of tax law. */

Secondly, it is difficult to believe that there are many tax controversies in which generalist judges rather than specialists would be more likely to reach a proper result consistent with the intent of Congress and the overall scheme of the revenue laws.

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*/ Griswold, supra, 57 Harv. L. Rev. at 1183-1184.

In tax cases, the number of situations in which equitable considerations are so compelling that they should control the decision is very small; and, should the equities be so stunning, it is quite likely that even a group of tax specialists will somehow manage to perceive and act upon them.

On the other hand, a far greater number of cases will surely demand a thorough understanding of the underlying purposes of a particular statutory provision and its relationship to the entire structure of the Internal Revenue Code. Here it would seem clearly preferable for experts to decide the issues. As Justice Jackson noted, in urging that the Supreme Court itself should defer to the "specialist" judges of the Tax Court:

> . . . the Tax Court is a more competent and steady influence toward a systematic body of tax law than our sporadic omnipotence in a field beset with invisible boomerangs. */

Finally, in choosing between the two types of panels, one must remember the unique position of the proposed Court of Tax Appeals. As the sole appellate tribunal hearing tax cases, its decisions will establish the law. There will be no possibility of another coordinate court reexamining the question -- only the Supreme Court or Congress will have the power to change its rulings. In this setting, it

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*/ Arrowsmith v. Commissioner, 374 U.S. 6, 12 (1952) (Jackson, dissenting).

would seem preferable to have a court which is more likely to resolve technical issues correctly, even at the risk that it might, on rare occasions, be insufficiently sensitive to other considerations.

2. Permanent vs. Rotating Judges

Even more important than the issue of where the judges of the new Court will come from, is the issue of how long they will serve on the Court. I would strongly recommend that the judges assigned to the new Court serve on a permanent -- rather than rotating -- basis. It is interesting to note in this connection that an informal poll of approximately 150 members of the ABA Tax Section suggests that many who actually oppose the creation of a national court of tax appeals nevertheless would agree that any such court should be staffed with judges who are assigned to serve there permanently.*/

My recommendation on this point is based in part on the considerations discussed above under the heading "Generalist vs. Specialist Judges," and on the following additional factor. It is vitally important that the new Court develop an adequate sense of itself as an independent

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*/ Statement of the Section of Taxation of the American Bar Association, submitted to the Senate Judiciary Committee, Subcommittee on Improvements in Judicial Machinery, June 18, 1979.

entity devoted to creating and maintaining its own coherent body of precedents. To the extent that the Court feels free to reverse its position after a period of time simply because the former minority has become the majority, it will undercut its very reason for being -- the special need for final and certain resolution of tax questions. This same problem may arise if different panels of judges feel they may reach different results in similar cases.

The rotation plan will certainly not serve as well to generate cohesiveness as would a permanent collegial body.

B. OTHER ISSUES RAISED BY S. 1691

1. Procedure for En Banc Hearings

The Judiciary Committee Report on S. 1691, */ emphasizes the availability of en banc hearings as a means of assuring consistency. However, I question whether this is a realistic assessment of the efficacy of this procedure considering (i) the practical difficulties of arranging for such hearings with 11 judges from the different circuits, and (ii) the requirement that six judges approve a case for a hearing by the full court. Under the bill the main factor tending to promote consistency is the procedure which permits cases to be heard by panels of more than three judges.

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*/ S. Rep. No. 96-306, 96th Cong., 1st Sess. (1979).

As indicated in the previous section, it seems to me that the best way to insure uniformity is to provide for a court with fewer judges who would serve there full-time on a permanent basis. However if such a drastic revision of S. 1691 is unacceptable, I believe the following, relatively simple changes, would improve the bill in this respect:

(1) In addition to providing for en banc hearings, the bill should make it clear that the Court is empowered to consider cases in conference, with the full court voting on the decision, even in the absence of a rehearing. This procedure is now employed successfully by the Tax Court.

(2) Cases should be considered by the full court, whether in conference or in an en banc hearing under any of the following circumstances: (i) when the chief judge so directs; (ii) when any member of the panel which originally heard the case so requests; or (iii) when five of the other judges of the Court so decide.

2. Elimination of Court of Claims Trial Jurisdiction In Tax Cases.

The Judiciary Committee report on S. 1691 indicates that the bill intends to achieve its goal of centralizing judicial review of all civil tax cases in part by eliminating Court of Claims trial jurisdiction in these cases. Impetus for this change apparently derives from two sources -- first, from the basic desire to assure uniformity by reducing

the number of tax litigation forums, and second from a belief in some quarters that the quality of tax jurisprudence in the Court of Claims is at best uneven.

In response to these points, it is argued that there is a class of tax-refund cases -- lengthy in duration and involving complex factual issues -- that are best heard by this particular trial tribunal.*/ So long as appeals from these trials are directed to the Court of Tax Appeals, there seems to be no pressing need to bar tax jurisdiction from the trial division of the Court of Claims. However, if this were not feasible -- as might be the case if current proposals to divide the Court of Claims into separate trial and appellate courts were not adopted -- then I think it is essential that tax cases be removed from its jurisdiction.

3. Rules for Appointment of Judges

The bill now contains two rules concerning the appointment of judges to the Court which I think are unnecessary. There seems to be little logic in permitting the appointment of a district judge from a particular circuit to a full term on the Court only if no appeals court judge from that circuit is available. Similarly, I see no reason to restrict temporary designations to district court judges. I would commit the matter of both temporary and full-term appointments to the sound discretion of the Chief Justice,

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*/ Statement of M. Carr Ferguson, Assistant Attorney General Tax Division, submitted to Senate Judiciary Committee, Subcommittee on Improvements in Judicial Machinery, May 7, 1979, pp. 12-13.

and let him select in both instances judges from either the district courts or the courts of appeal.

4. Transitional Rules

Although the bill provides a specific transition rule concerning the disposition of cases still pending on appeal from the district courts at the time the Court of Tax Appeals comes into existence, it provides no such rule for comparable cases on appeal from the Tax Court. This point should be clarified.

PART III: ARGUMENTS AGAINST A NATIONAL COURT OF TAX APPEALS ARE UNPERSUASIVE

A. THE ARGUMENT IN FAVOR OF INTERIM UNCERTAINTY

The most forceful argument against the concept of a national court of tax appeals rests on the assertion that the benefits which flow from successive consideration of the same legal issue by different circuits are greater than the costs of interim uncertainty. As M. Carr Ferguson, now Assistant Attorney General - Tax Division, wrote in 1963:

> . . . the interstitial case law of income taxation will grow sturdily only where first appellate impressions are subject to re-analysis in other courts and other controversies free of the numbing effect of stare decisis. */

Such a viewpoint assumes that a "right" answer to each question will be found if only the question is asked often enough.

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*/ Ferguson, Jurisdictional Problems In Tax Controversies, 48 Iowa L. Rev. 312, 381 (1963).

This assumption necessarily presupposes that clear standards exist for judging a tax issue. To be sure, there are certain well-recognized and generally accepted principles which animate the Internal Revenue Code and make it something more than a random collection of statutory provisions arranged in numerical sequence. However, while these principles provide useful guidance in deciding certain cases, it is clear that they are not invariably determinative. Quite often any one of a number of answers is equally sustainable. As Professor Surrey has said:

> Many a tax question is no nearer a "right" decision after four or five circuit courts of appeals have battled over it than when the first court pronounced its judgment. All that has happened is that each of the several reasonable but contradictory positions has been given the stamp of judicial approval. Meanwhile a confused Bureau and bewildered taxpayers, who would be quite content to adjust themselves to the first decision if it were left unchallenged, are forced to struggle along as best they can until the Supreme Court selects one of the available alternatives and it becomes the "right" answer, at least until Congress acts . . . . */

Particularly in a field as pragmatic and morally neutral as taxation, certainty and predictability are themselves fundamental values. Judge Wilbur made this point in a recent dissent where he sharply criticized the Tax

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*/ Surrey, Some Suggested Topics in the Field of Tax Administration, 25 Wash. U. L. Q. 399, 419 (1940).

Court's abandonment of a long-standing principle in the field of corporate reorganizations:

> The statute we interpret was enacted nearly one-half century ago. During the interim the Courts have squarely decided the specific issue before us. The issue was a close one, but it was fairly raised and carefully decided. If there is to be an end to litigation at some point consistent with judicial economics; if some certainty and stability are to be provided the lenders, investors, and businessmen who adapt business organizations to current requirements; if predictability is a tool to be made available to legal advisors in complex business transactions; if the Courts, striving for at least a minimum level of doctrinal continuity must be aware of what their colleagues elsewhere have done and are doing; and if Congress, in amending the statute, is to have any working understanding of the state of the law being amended, then we must adhere to a substantial and undeviating body of precedent developed over nearly half a century of experience when it is directly dispositive of the issue. */

Suffice it to say that the Judiciary Committee fully considered both sides of this argument and then unanimously concluded that the speculative benefits of perfection are far outweighed by the proven costs of uncertainty. I concur fully with that con clusion. As a practical matter, multiple appeals are a luxury the U. S. tax system - which depends on fewer than 20,000 revenue agents to audit 2,000,000 returns to insure "voluntary" compliance by 90,000,000 taxpayers -- cannot afford.

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*/ Reeves v. Commissioner, 71 T.C. ____ (No. 69, 2/6/79). ("B reorganization treatment sustained even though some stock of the Target company was acquired for cash).

B. ARGUMENT THAT THE NEW COURT WOULD NOT END UNCERTAINTY

The concept of a national court of tax appeals has also been criticized by those who believe it will not have the desired effects of providing certainty, finality, and an end to repetitious litigation. While this view has been expressed as the official position of the ABA Tax Section, */ it is a point of doubtful impact. For even if the reduction in uncertainty would be less than that hoped for, that in itself would not be a negative factor. At most it suggests that if there are other disadvantages to the proposal, they might tip the balance against it more easily. Moreover, the thrust of this point is particularly questionable when it is considered together with the first opposing argument -- that is, that some degree of uncertainty and opportunity for repetitive litigation is desirable.

C. ARGUMENT THAT TECHNICAL PROBLEMS MAKE IT IMPOSSIBLE TO ESTABLISH A NATIONAL COURT OF TAX APPEALS

Finally, some critics have suggested that certain technical problems inherent in the concept make it impossible to establish a national court of tax appeals on a satisfactory basis. Upon examination none of these problems seems insurmountable.

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*/ Statement of the ABA Tax Section, supra.

They first stress the difficulties of the transition period during which there would supposedly be major uncertainty with respect to issues which have been settled under the present system by circuit court decisions. I find the factual premise of this argument unacceptable. I simply cannot imagine that the judges of the new court -- fully aware of the principal reasons for its creation -- would be any more likely to overturn established precedent than are the existing courts of appeal.

Secondly, these critics focus on the difficulty in defining those "civil federal tax cases" over which the Court will have jurisdiction.*/ While there is some force to this point, it does not seem to be a major factor since similar concerns must be faced in setting up any new judicial structure, and every court in existence must continually wrestle with problems in defining its jurisdiction.

CONCLUSION

Creation of a Court of Tax Appeals with exclusive appellate jurisdiction over all civil federal tax cases would make our tax system fairer and more efficient.

It would eliminate situations in which different federal tax obligations are imposed on taxpayers located in different parts of the country.

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*/ At present, the bill defines the new Court's jurisdiction by reference to 28 U.S.C. §§ 1340 and 1346 and to Tax Court jurisdiction. It would not have jurisdiction over criminal tax appeals, collection cases or tax issues arising in bankruptcy proceedings.

It would facilitate the resolution of disputes at the administrative level by providing definitive answers to basic legal questions.

It would do away with the present necessity for repeated litigation in the various Courts of Appeals.

Because the Court of Tax Appeals would, for all practical purposes, be the final authority in interpreting the revenue laws, it should be structured so that cases will be heard by judges with some expertise in taxation. It would be preferable to have a court composed of judges who were assigned to it on a permanent basis. However, the present proposal -- calling for judges from the other circuit courts to be assigned to the Court of Tax Appeals for multi-year terms -- is a solid first step in the right direction.

Statement by
Randolph W. Thrower
Sutherland, Asbill & Brennan
Atlanta, Georgia and Washington, D.C.

before the

United States Senate
Committee on Finance
Subcommittee on Taxation and Debt Management

Concerning

The Proposed Single Court of Tax Appeals--S. 1691

on

November 2, 1979

I appreciate this opportunity to testify on S. 1691 which would transfer appellate jurisdiction in cases involving proposed Federal tax deficiencies and suits to recover overpayments of tax from the several United States Courts of Appeals to a newly created single United States Court of Tax Appeals. I speak on this subject out of a background of more than thirty-five years of private practice, much of which has related to Federal taxation, and service as Commissioner of Internal Revenue from early 1969 to mid-1971. I have worked closely for many years with tax lawyers throughout the country and served for two years as Chairman of the Section of Taxation of the American Bar Association.

Based upon these experiences I strongly oppose the adoption of S. 1691. The proposal is not a new or innovative suggestion. As I shall explain later, S. 1691 merely clothes

in impractical and inoperable provisions a proposition that has failed to win support of the Bar or adoption by the Congress for almost 40 years.*/ What can be called the "dressing" given by this bill to the long standing proposal is apparently intended to meet well founded objections to a single court of tax appeals but, upon scrutiny, it can be seen that the basic proposal is not changed but only adorned temporarily with camouflage. In this statement I will comment on general propositions associated with this issue and review some of the particularized provisions of S. 1691.

The Federal tax laws, although extremely complex, deal with the personal and business affairs of individuals and with the corporations, partnerships and other business, and the charitable and social associations which they create. Such highly personal matters as marriage, divorce, separation, gifts to one's family or to charity, the administration of estates of decedents or incompetents, have tax significance and fall within the scope of our tax laws. Likewise, every business undertaking and almost any transaction involving substantial money or property have an impact of consequence under the tax laws. The point emphasized here is that the tax laws do not operate as in a vacuum but apply to the

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*/ See, e.g., Griswold, "The Need for a Court of Tax Appeals," 57 Harv. L. Rev. 1153 (1944).

widest possible range of personal and business affairs. Litigated tax problems often involve both an analysis of the factual matters with which the taxpayer was involved, which frequently requires determination of the status of those matters under state law, and the application of the tax laws to them. The state law questions may involve such matters as rights of descent and distribution, claim of a spouse under community property laws, the validity of contracts, the nature of recoveries of damages, and an endless number of other state law questions. These are questions with which the present trial and appellate courts are familiar and, based upon their wide experience in the law, can resolve with more perception and understanding than a highly specialized court of tax appeals.

It is because tax cases deal with a very wide range of personal and business affairs that many lawyers of the country have opposed removing the appeal of tax cases from the mainstream of the law and placing them in a specialized appellate court. Lawyers generally have a distrust of specialized courts. This distrust is heightened in the present instance by the fact that the removal of the possibility of seeking Supreme Court review through establishing a conflict between courts of appeals, which is virtually the only ground on which petitions for certiorari in tax cases are granted in the Supreme Court, would for practical purposes make the specialized Court of Tax Appeals the court of last resort.

A single court of tax appeals, with no possibility of conflict with a court of equal rank and with few if any grounds for review by the Supreme Court, would tend simply to perpetuate error. The tendency for a court operating with such few constraints would be to drift into the practice of substituting "rules of thumb" for reason and judgment. These tendencies could contribute to increasing resentment on the part of taxpayers and their representatives. With a growing feeling that fairness and equity were being "capped" through removal of tax litigation from the main channels of the Federal courts and assigning it to a narrowly specialized court with no opportunity for reversal of error, Congress would most likely be called upon more frequently for corrective legislation, and the tax burdens of that already overloaded body would be increased.

The proponents of a single court of tax appeals attribute little value to the honing, turning and polishing of the decisional tax law which comes from the several courts now having jurisdiction. Yet this process has developed many of the great and lasting principles of tax law. Some of these have been subsequently incorporated into specific provisions of the Code and others, such as the oft applied principle of honoring substance over form laid down by the Supreme Court in Gregory v. Helvering, 292 U.S. 465 (1935), touch many of its provisions. The courts of appeals, along with the Supreme Court,

have contributed greatly to this process of honing, turning, and polishing the tax law. They may tend to reflect points of view affected by different approaches, backgrounds or locations. For example, the Courts of Appeals for my circuit, the Fifth, and the Second Circuit have both made very substantial and lasting contributions to the tax law, each with its own distinctiveness and flavor but with few conflicts between them.

By reason of their background and experience, the judges of the Second Circuit have dealt very authoritatively with tax questions involved in complex transactions concerning banking, securities, and the like, while those of the Fifth Circuit have made special contributions in tax cases involving oil and gas, agricultural operations, and other such pursuits heavily reflected in taxpayer activities in the region. The same is true of other circuits having large numbers of taxpayers engaged in such activities as mining, ranching, use of water rights, operating orchards, growing timber, various types of manufacturing, and many other activities best understood by those having some background of experience with them. It is my impression over the years that support for a single court of tax appeals located in the District of Columbia has come primarily from a few of the lawyers in the District, supported by others in the Northeast, while the lawyers throughout the

remainder of the country, as might be expected, have generally been opposed to it.

The significance of the conflicts among circuits in tax cases has, in my opinion, been overstated. It is my experience that the Courts of Appeals show great respect for the decisions of the other circuits, as well as for those of the Court of Claims and the Tax Court. Those seeking to magnify conflict often overlook the fact that the difference in results in cases involving similar issues is frequently produced by variations in critical facts justifying different approaches and applications of the law. It is this process through which on so many occasions important concepts of tax law grow and develop. Often this kind of healthy growth in the interpretation of a portion of the Internal Revenue Code may continue for years without conflict developing. And in this atmosphere, where conflict does arise, the persuasive reasoning of another court may lead a court to modify its position without the necessity of review by the Supreme Court. */

It is sometimes implied by proponents of a single court of tax appeals that the judges of our present courts of

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*/ The very fact that the Government has been filing so few petitions for certiorari to the Supreme Court in tax cases would tend to indicate that it is currently finding very few conflicts of consequence among the lower courts. That this appraisal is shared by the Supreme Court is demonstrated by its actions on petitions for certiorari in tax cases, reflected in the following:

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appeals, being generalists, are unable to cope with the complexities of the Internal Revenue Code. On the other hand, there is much that obviously would be bad about a court of appeals, effectively the court of last resort, where only the specialists could talk to each other. Much to be preferred is our present system where the parties must make their positions understandable to appellate court judges who, though of recognized ability and widely experienced in the law, are not specialists.

If the tax propositions to be urged before the appellate courts cannot be understood by able and experienced appellate court judges, how can they possibly be made comprehensible to taxpayers and their representatives throughout the country! We should not turn over to specialists the ultimate review of important issues of tax liability affecting millions of taxpayers under our revenue system.

Petitions for Certiorari in Tax Cases

Year	Gov't Granted	Gov't Denied	Taxpayer Granted	Taxpayer Denied
1978	1	0	3	35
1977	1	0	4	39
1976	1	0	2	44
1973-1975	not available			
1972	1 granted			10 denied

Source: Annual Reports, Commissioner of Internal Revenue.

It may be thought by some that the burden of hearing tax cases imposes too heavily on our Federal courts. I would suggest, however, that the operation of the revenue system of the United States justifies all the time and attention given to it by our Federal courts. Consistently, year after year, more than 20% of our Gross National Product is consumed by Federal taxes. No other nation in the world can match the United States in the breadth and depth of its coverage of national income through a progressive income tax. The United States stands alone in the extent to which it pursues the income of its citizens around the world. It seeks to apply its income tax provisions uniformly in areas which many other countries largely ignore, such as among very small businessmen and low income independent contractors or among those engaged in criminal pursuits. No other nation is comparable to the United States in emphasis upon enforcement through civil and criminal penalties. Our reliance upon substance over form is looked to as a model by many other nations. The mutual confidence in the United States between taxpayers and tax administrators, though battered and in need of support from time to time, sustains our remarkable system of self-assessment. The Congress should not listen to the suggestion that any of our courts, including the Supreme Court, are too busy to give a small portion of their time to the consideration of cases arising from the operation of our revenue system.

There may be some "living in the past" on the part of those who, to support S. 1691, emphasize the heavy burden that tax cases are imposing on our appellate courts. My hurried review of relevant statistics in preparation for this testimony would indicate that this may not be a justifiable ground for support of the bill. Information available from the reports of the Commissioner of Internal Revenue and the Administrative Office of the United States Courts indicates that over the past twenty-seven years the number of decisions by courts of appeals in cases involving tax refunds and determinations of deficiencies has dropped both in absolute numbers and in relationship to the total volume of cases handled by the appellate courts. These figures are set forth year-to-year in Appendix I attached to my written statement. For example, in the fiscal years 1977 and 1978 this category of tax decisions numbered, respectively, 172 and 186, while in the fiscal years 1952 and 1953 the numbers were, respectively, 267 and 328. The level of these decisions in 1977 and 1978 was lower than in any other years in the past twenty-seven and was less than half the average for the decade of the 1960's. This decline over a twenty-seven period in the number of tax appeals contrasts with the fact that during this same period the number of all cases "terminated" in the courts of appeals increased more than five-fold. While the proportion of tax decisions to total cases disposed of in the courts of appeals

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may have been alarmingly high in early years (e.g.: 1962-9.4%, 1953-10.12%, 1952-8.76%), the average of 1977 and 1978 approximated only 1%. The reductions of the burden of these cases on the courts of appeals over the past twenty-seven years, as shown by Appendix I, would be even more impressive if account were taken of the substantial increase in the number of judges on the courts of appeals during this period (from 68 in 1955 to 132 in 1979). Similarly, the case load contributed to the docket of the United States Supreme Court by tax refund and deficiency decisions had been relatively light and appears to be declining. In the past eight years (1971-1978), there has been an average of four such decisions each year, less than half the average for the ten years 1961-1970. (Most of these were won by the Government.) Additional time of the Justices and staffs of the Supreme Court is required for the review of petitions for certiorari in cases involving tax refunds and asserted deficiencies but, here again, the burden is relatively not large and appears to be declining. */ These quickly gathered statistics, which certainly would bear further examination, tend to indicate that the burden on our appellate courts of reviewing appeals in tax refund and deficiency cases is not inordinate and seems to have achieved a balance at a relatively low level.

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*/ See footnote on pages 6 and 7, supra.

In my comments to this point I have largely ignored the effort in S. 1691 to make the Court of Tax Appeals a "generalist" court by providing for appointments ultimately of three years from each of eleven courts of appeals. The appointments would be made by the Chief Justice of the United States. A district court judge could be designated by the Chief Justice if he were "unable to designate" a court of appeals judge. The court would have its central offices in the District of Columbia and a panel of the court would be required to hold sessions in each of the eleven circuits at least once each year.

Although the Court of Tax Appeals would have its permanent accomodations in the District of Columbia, the several members would presumably remain at their offices in the Circuits, and would sit on panels of the court throughout the country and occasionally on panels of the regular courts of appeals. A term of only three years (one or two years for most of the initial appointees), with judges remaining at their present residences and hearing cases throughout the country, would not permit a judge to develop a feeling of close kinship with the court and understanding with the other judges. It would seem impossible for the court to have any sense of cohesiveness. It seems clear that most judges on the courts of appeals would look upon "designation" to serve a term on the Court of Tax Appeals as being a very unattractive assign-

ment. Certainly the best minds and the great jurists of the appellate courts would not be attracted to the Court of Tax Appeals and their talents and contributions would be lost to the revenue system. Thus, weaker judges would fill these places.

The concept of rotating membership on the court among the judges in each circuit seems wholly inoperable as a practical matter and appears to be mere gimmicry designed to meet the demand for appellate court decisions by generalist judges on the several courts of appeals rather than by narrow specialists. The plan for a court of rotating judges under S. 1691 seems so thoroughly impractical and unsatisfactory that it would soon have to be replaced by a plan for permanent appointments to the court. Indeed, several of the strong supporters of the proposal before the Subcommittee on Improvements in Judicial Machinery, Committee on the Judiciary of the United States Senate, supported S. 1691 in principle but urged that the appointments be made permanent. */ One can be assured

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*/ See, e.g., statements of former Solicitor General Erwin Griswold and former Commissioner Mortimer Caplin.

Some proponents of the present bill would favor further fragmentation of the present authority of the Courts of Appeals, suggesting consideration of such specialized fields as the review of Federal statutory and constitutional questions which arise in state court decisions, particularly in the criminal field, environmental law, energy law, and antitrust law. See Statement of Erwin N. Griswold, of Washington, D.C., before

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that, if S. 1691 were adopted, this insistence would increase. The Court of Tax Appeals within a few years would become, I believe, a court of specialists with either permanent or long term appointments.

A further deficiency of S. 1691 is that it would bifurcate appellate court consideration of revenue issues, sending most cases to the Court of Tax Appeals but leaving important segments of tax litigation in the regular channels of appeals. For example, review of decisions in refund suits and determinations of deficiencies would go to the new Tax Court of Appeals, while criminal cases, cases involving the use by the Commissioner of his power to summons taxpayers, and tax issues in bankruptcy cases would remain with the regular courts of appeals. The difficult process of developing harmony and consistency in principles applicable to criminal and civil tax fraud will not be improved by sending criminal fraud cases through one appellate process and civil fraud cases through another. Yet, the Committee would certainly not wish to have criminal tax cases sent to a specialist court. Similarly, the important function of reviewing the Commissioner's use of the summons powers, often touching on important rights

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the Subcommittee on Improvements in Judicial Machinery, May 7, 1979. The creation of the specialized Court of Tax Appeals would be seen by some as merely the first step in the fragmentation of Federal appellate court jurisdiction and the centralization of judicial power in the District of Columbia.

under the First, Fourth and Fifth amendments, would remain in the general courts. The proper resolution in bankruptcies of tax claims which often have priority over claims of other creditors is of critical concern to many. These important issues would be reviewed with less understanding if the regular courts of appeals were denied the background of experience which is presently available in cases which would be removed under S. 1691.

A further objection which I would raise against S. 1691 arises from my concern that it would undercut the status and prestige of the Tax Court of the United States. The Tax Court has steadily grown in stature and effectiveness over the years. The tax bar has had some small part in this, by (1) pressing for the appointment of a balanced court of competent judges, (2) serving along with government counsel on advisory committees of the court, (3) supporting the upgrading of the status of the court from that of an independent agency in the Executive branch to that of an Article I court, which was finally accomplished in 1969, and (4) assisting the court in getting authorization for securing its own court building in Washington, so that it could move out of the national headquarters of the Internal Revenue Service, accomplished only in 1975. The Tax Court is truly a court of great expertise and is respected in all other jurisdictions. Over the years, an excellent balance has been achieved between the contribu-

tions of the Tax Court with judges who by reason of their backgrounds and experience on the court become tax experts, and other courts with judges generally of broader backgrounds and wider experiences on the bench. To overlay the Tax Court with a specialized court of appeals would lessen the significance of the Tax Court and tend to make it into a specialized tax court, "second class". The Tax Court would suffer from loss of the pressure now provided by the Courts of Appeals to keep its decisions on issues of general law and state law in harmony with the mainstream of the law found in the Federal and state courts. The Tax Court handles effectively a great volume of cases. There is no present justification for upsetting a system of judicial administration of tax litigation that on the whole is now working very well.

I appreciate the opportunity of presenting these views to the Committee.

APPENDIX I

United States Courts of Appeals
Ratio of Total Cases to Tax Decisions

Year	Total Cases Terminated [1]	No. of Tax Decisions [2]	%
1978	17,714	186	1.05
1977	17,784	172	.97
1976	16,426	299	1.82
1975	16,000	365	2.82
1974	15,422	256	1.72
1973	15,112	278	1.84
1972	13,828	463	3.35
1971	12,368	355	2.87
1970	10,699	331	3.09
1969	9,014	349	3.88
1968	8,264	243	2.94
1967	7,527	413	5.49
1966	6,571	373	5.68
1965	5,771	381	6.60
1964	5,700	520	9.12
1963	5,011	349	6.97
1962	4,167	414	9.94
1961	4,049	261	6.45
1960	3,713	348	9.38
1959	3,753	n/av.	n/av.
1958	3,704	365	9.85
1957	3,687	190	5.15
1956	3,734	264	7.07
1955	3,654	258	7.06
1954	3,192	278	8.70
1953	3,240	328	10.12
1952	3,048	267	8.76

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1 From Administrative Office, United States Courts Annual Court Management Statistics. These comparative statistics were gathered from annual reports prepared by the Administrative Office of the United States Courts (Court Management Statistics) and the Commissioner of Internal Revenue (Commissioner of Internal Revenue Annual Report). "Terminated" cases includes cases settled and dismissed. The number of tax "decisions" does not include settlements or dismissals.

2 From Annual Reports, Commissioner of Internal Revenue, on cases involving asserted deficiencies and suits for refund.

STATEMENT OF

DONALD C. ALEXANDER

BEFORE SUBCOMMITTEE ON TAXATION AND DEBT MANAGEMENT

COMMITTEE ON FINANCE

UNITED STATES SENATE

NOVEMBER 2, 1979

My name is Donald C. Alexander and I am a partner in the Washington office of Morgan, Lewis & Bockius. I am appearing at the invitation of the Subcommittee to discuss S. 1691 which would reform our present system of litigating civil tax disputes by creating a new U. S. Court of Tax Appeals. I am here solely in my personal capacity, not on behalf of any client, any Government agency, or my law firm.

I strongly favor the creation of a Court of Tax Appeals. On May 10, 1979 I so testified before the Senate Judiciary Committee's Subcommittee on Improvements in Judicial Machinery about Title IV of S. 678, the predecessor of S. 1691. Significant and positive changes have been made to Title IV of S. 678 in its conversion to S. 1691. While I believe that S. 1691 could be improved further, the bill as reported is sound. I hope that Congress will not be diverted from achievement of the objective sought in S. 1691 by being overly concerned about details of implementation.

Few tax professionals and few taxpayers would disagree with the proposition that our tax law has become so complicated as almost to defy human comprehension. This need not be so, but we have made it so. The fact that we live in a complex society does not require our tax law to be so complex. As our law becomes more lengthy and complex and more difficult to understand and administer, compliance drops. We can ill afford further reductions in the rate of compliance that we have had in the past and that we must have in the future for the survival of a system based on voluntary compliance by millions of taxpayers.

We need to overhaul the Internal Revenue Code and to remove some of the subsidies, preferences, incentives, and disincentives which clutter our tax system and can best be handled through direct grants and penalties administered by the agencies responsible for the particular activity which Congress wishes to encourage or discourage. Wherever possible, we should also eliminate the exceptions, limitations on exceptions, and exceptions to the limitations on the exceptions that add hundreds of statutory pages. Then we can reduce the Internal Revenue Code to a volume of manageable size, capable of being understood by those who must comply, those who must advise and those who must administer and enforce.

Our complex tax law is matched by a cumbersome and complex system of resolving civil disputes under the law. A

taxpayer can choose to take his or her case to the Tax Court, the Court of Claims or the local Federal District Court. To utilize the Court of Claims or the District Court, one must first pay the disputed tax, but this may not be a burden to many taxpayers. Appeals from decisions of Trial Judges (formerly Trial Commissioners) in the Court of Claims generally go to a three-judge panel of such court, and the decision of such panel is final in the absence of Supreme Court review.

On the other hand, appeals from the decisions of Federal District Courts and of the Tax Court, which has national jurisdiction, go to one of the eleven regional Courts of Appeals depending on the taxpayer's residence. This puts the Tax Court in an awkward spot; should it apply uniform rules at the risk of reversal by a particular Circuit, or should it sacrifice uniformity for practicality? After initially choosing to be uniform, the Tax Court finally opted in favor of following the views of the particular Circuit to which an appeal would lie. Jack E. Golsen, 54 T.C. 742 (1970), aff'd, 445 F.2d 985 (10th Cir.), cert. denied, 404 U.S. 940 (1971). Review of Circuit Court of Appeals decisions is made only if the Supreme Court grants certiorari, as it rarely does. Thus we have eleven Courts of Appeals and the Court of Claims engaged in deciding tax appeals.

As one would expect, such a system has created substantial problems for the Government and taxpayers alike. Many of these

result from the inability of the Supreme Court, the only Court whose decisions are final in the tax field, to resolve tax issues. There are competing demands upon the Supreme Court's time, and constitutional and civil rights issues have first claim.

Our system of multiple choice in the areas of both primary jurisdiction and appellate jurisdiction encourages forum-shopping by taxpayers and by the Government. A single appellate decision (or decision by the Court of Claims in its appellate capacity) resolves very little other than the particular case, for another taxpayer in another Circuit can raise the same or a similar issue to the appellate level with a colorable chance of success, and the Government has the same opportunity or, perhaps, duty. Moreover, anyone living anywhere in the country can take his case to the Court of Claims if his Circuit has spoken adversely but the Court of Claims is silent. Of course, the converse is equally true; a Court of Claims decision may well settle the issue in such Court but only there.

It is idle to suggest that the Government can introduce finality into this process by conceding the issue, say, when the first appellate decision has been rendered against it; in very many situations, taxpayers are on both sides of the matter, however unlikely this might appear to be. For example,

compare Malat v. Riddell, 383 U.S. 569 (1966), with Parkside, Inc. v. Commissioner, 571 F.2d 1092 (9th Cir. 1977). The adoption of two-Circuit or three-Circuit rules by the Government is an awkward and incomplete means of solution; binding one side does not bind the other.

Delay and uncertainty in the resolution of disputed tax issues, in definitive judicial interpretation of ambiguous statutory terms, and in the application of the law, exacerbate difficulties faced by taxpayers who wish to meet their responsibilities and by the Internal Revenue Service which must tell taxpayers their rights and duties and must call upon them to comply. By encouraging the venturesome to cut corners and take chances, delay and uncertainty compound the problems caused by the "tax lottery" -- inadequate audit coverage.

It has been suggested that the present system results in a better final product -- an ideal set of ultimate tax decisions -- than a system in which a single court would resolve issues at an earlier stage and without extended debate and ferment. I think this suggestion has more validity in theory than in reality. If it were correct, then one would think the Government should reject any two-Circuit or three-Circuit rule and litigate to the bitter end. Moreover, this theory apparently assumes

that the final decision must be better than and different in material respects from the first decision, and I do not believe that this is so. And even if the final product of ten years or more judicial consideration of a tax issue of broad application were different and were better, is such benefit worth the cost? As a former tax administrator and as a long-time tax practitioner, I think not.

S. 1691, therefore, is a long step forward. It would create a single Court of Tax Appeals for the purpose of hearing civil appeals from all trial courts having tax jurisdiction. Therefore, if the Court of Claims retains trial tax jurisdiction - as it should - presumably its tax appeals would lie to the Court of Tax Appeals. Decisions by the Court of Tax Appeals would almost always be final, and in the rare cases in which this is not true, Supreme Court review would follow promptly. This would reduce the gamesmanship in our present variegated system in which taxpayers are tempted to disregard adverse appellate decisions. The Supreme Court would presumably hear only tax cases of transcendent importance or those where the Court of Tax Appeals clearly erred or was badly split.

As previously stated, S. 1691 represents a substantial improvement of Title IV of S. 678. The bill might be improved, however, if selection of judges to serve on the Court were made

by the Circuit of which the particular judge is a member. Moreover, a term of five or six years on the Court would, I think, be preferable to a three-year term. Also, it should be made clear that appeals from the Court of Claims (if, as I hope, it will continue to have trial jurisdiction in tax cases) will lie to the Court of Tax Appeals.

We have long needed a Federal Court of Tax Appeals, and I hope this Congress gives us one.

Senator BAUCUS. At this point, unfortunately, I will have to call a 2-minute recess.

[A brief recess was taken.]

Senator BAUCUS. The hearing will come to order.

Now we have Charles M. Walker, on behalf of the tax section of the American Bar Association.

Mr. Walker, we are glad to have you. Please proceed in any manner that you wish.

Mr. WALKER. Thank you very much.

I have with me Andrew Singer, vice chairman of one of the sections in the tax section working with me on this and I have submitted a statement for the record, and I would like now to just comment briefly on some of the points that were made.

STATEMENT OF CHARLES M. WALKER, ON BEHALF OF THE TAX SECTION OF THE AMERICAN BAR ASSOCIATION, ACCOMPANIED BY ANDREW SINGER

Mr. WALKER. We certainly do appreciate the opportunity to present the views of the tax section on this proposal. I am speaking incidentally only for the tax section of the American Bar Association, not for the association itself. I hasten to say that neither the board of governors nor the house of delegates of the association has established a position on this matter.

But the tax section has and, in due time, I will recommend that the association adopt the same position that we are now presenting.

If I say the words "I" or "we" I am speaking only for the tax section in this respect.

Senator, we oppose the establishment of the proposed Court of Tax Appeals with its exclusive appellate jurisdiction over civil tax cases, depriving the present 11 circuits of appeals in those cases. We feel it is not in the best interests of the Nation's tax jurisprudence.

We are aware of the reasons given for proposing the new court and of its objectives, at least the reasons as we read them in the report of the Judiciary Committee. Certainly we share the desire for quick decisions and a removal of uncertainty and, as tax practitioners, we would much prefer to give unequivocal advice to clients rather than to say we are not sure of an answer because of conflict

in the circuits, or because the Government threatens to resist in our circuit a decision favoring us in another.

We would rather not have to try a case or appeal a case instead of settling it on the basis of a definitive court decision.

We support all the reasonable efforts that can be made to reduce the case load of the circuit courts and of the Supreme Court, but despite these desires, we are firm in our conclusion that we, as tax practitioners—and indeed the tax system and the public—are far better off with the present circuit system than we would be with the proposed exclusive court of tax appeals.

Preliminarily, we know this is not the first proposal for a Tax Court of Appeals. Prior Congresses have rejected similar proposals. The reasons for their rejections are still there, and still valid, and support rejection again.

Here are our specific reasons for opposing the new court. First, tax cases arise in particular factual settings to which specific provisions of the Internal Revenue Code apply. Seldom does a tax case turn on a pure question of law. Rather, there is a fact question to decide, such as what is the value of an asset? How is a purchase price allocated between assets or between parties to an agreement, or what is the useful life of an asset?

If it is not a fact question, then the issue would be a question of the interrelation between tax law and local law. A case of community property versus separate property in a community property State is an example. Another example is the definition of "interests" involved in oil and gas transactions.

Given the nature and predominance of those kinds of tax cases, they will continue to arise whether the circuit system stays as it is, or whether we have a new appellate court established to handle the cases. We believe it is clearly better to adjudicate these matters in circuit courts with generalist skills and expertise in local law than to route all appeals to a single court.

Second, nothing in the Judiciary Committee report says how serious the circuit conflict is by reference to the number or character of tax issues that have been slow to be resolved. Only four issues were mentioned there. The testimony there also showed that there are some 700 tax appeals per year. Surely before trying to rearrange or to adjust the system to remedy this so-called evil in the circuit conflicts, we should try to find out if the system is really not working properly.

It would seem to us appropriate to try to develop some data. I was glad to hear they will be offered for the record, when the Government witnesses show what the nature and character of these conflicts are in the volume of tax appeals generally.

Another reason we object is illustrated by the circuit conflict cases that were cited in the testimony before the Judiciary Committee. They have a very interesting point in common. The first circuit court decision on each of those issues happen to have been wrong. It is only a question of how long to wait for a right answer.

In those four situations, two of those right decisions that were rendered by later circuits were, themselves adopted by the first two circuits that had the reached the wrong decision. In other words, the original circuits reversed themselves after having seen the

maturing process and exposure of the issues by the other courts in their analysis.

We have heard numerous times and have seen in the testimony that has been presented or in statements presented a couple of tax court memorandum decisions that are cited as examples of the circuit court confusion.

Those cases happen to involve a conflict, not between the circuits but between one circuit decision and a decision of the Tax Court and the Tax Court held its view, knowing that the circuit would not support it in a companion case, and so it reached a contrary decision.

The fact is, is that case went on up into the circuit that had not yet decided the issue. That circuit joined the first one and there was never any conflict between the circuits.

The only conflict had been between the circuit and the Tax Court.

The conclusion, really, to be reached from this, is that it is not necessarily better to be fast than it is to be right. With our complex tax system, we really do need to be right as often as we can.

Another reason for objecting is that this single court of tax appeals has a practical problem which can cast a doubt upon the soundness of its decisions. By hypothesis, we assume that when our appeal reaches the court it can be on an issue which, more often than not, certainly very frequently, will be an issue of first impression.

When you have a single case that is going to make the law on a new issue, we have very grave importance placed on that first case. We run a risk, it seems to me, when that first case does get to the court of appeals, that the law may be improperly construed, or the arguments improperly developed. Maybe this particular issue was one of several issues that may not have been adequately briefed. There may have been poor arguments made with respect to it. The court might not have adequately analyzed the issue.

On top of this, sometimes these tax appeals come up on what you might call a hard set of facts, or poor set of facts. I think it is true that many times hard cases make bad law. The court would tend to react, to the hard set of facts.

With only one court of appeals, there is also, I think, an undue advantage that the Government has in selecting and helping decide which cases in their portfolio will be brought for the first time to the new appellate court.

Another reason we object is that access to the appellate process will be impaired, we do believe. Under the present circuit system a taxpayer is assured of year-round access to the court in his own circuit. It sits in several cities in the circuit and has access to it all year round.

This new proposed court assures him of access in his circuit only once a year and that is in one city in his circuit. It is evident he does not have the same access that the present circuit system gives him.

Finally, this rotating assignment of judges is a poor idea. We have already heard much about that today. I will not belabor the point. I think it is much better that there be a permanent staff of judges. There will be a tendency for litigants—taxpayers or the

Government—to urge that an earlier case is distinguishable, when appealing to a new set of judges who have been rotated onto the court, and to urge that the other case should be distinguished on the facts, or that it should even be reversed. You would have a new panel to go before.

As noted in our statement, Senator, there has been a poll taken indeed of the members in attendance af a recent meeting of the tax section that strongly favored a permanent court.

I wonder if I might take up a moment, Senator, to comment on what some of the other panelists have said. As I mentioned earlier, I am glad to see—I think it was Mr. Samuels who has offered to bring some data for the record concerning the number of appeals that reflected the circuit conflict. I also would like to put in a nickel's worth, if I might, on this compliance discussion that was taking place with the various Commissioners.

It seems to me compliance, as that phrase is used, relates to the broad spectrum of taxpayers like you and me, not like the individuals who more often than not become involved in the circuit court system.

That really is not a question of compliance. That is a question of being able to interpret the tax law in light of the given facts of that particular case. These are not really—I just fail to see how this gets to be a compliance question.

There is a legitimate opportunity always for a tax adviser or a tax counsel to endeavor to distinguish an earlier decision somewhere if it really affects a significant issue or his situation. I just did not relate that to compliance. I am sorry. I just wanted to say that.

I might also say that many of these cases that go up are criminal type cases which this new court would not handle anyway, so that would still remain in the circuit system and present conflicts there.

Thank you very much, Senator. I do appreciate the opportunity to present this statement.

Senator BAUCUS. Thank you, Mr. Walker.

Are there any circumstances under which you would agree that there should be a Court of Tax Appeals?

Mr. WALKER. Certainly I favor certainty and speed. I think a correct decision is by far a better result than to try to get a speedy decision in a single court. I would not say there is no circumstance under which I would like to see it. I just happen to see, in the spectrum of the tax cases I have seen go by. I prefer the present system, with its frailties, and potential delays. I think the record will show, in looking at these cases, that the cases themselves do not reflect delayed decision—incidentally, a taxpayer can always bring his own case even though there might be a dispute in the circuits. He can always bring his own case.

This may bring more litigation about than otherwise would be the case. But if there is a legitimate reason to bring a case that you do not agree with the decision elsewhere reached, all aimed at arriving at a correct answer, I think we should pursue that route.

Senator BAUCUS. What is your reaction to the statement, sure, all tax attorneys, Bar Association, prefer the present system because they forum shop. It just helps them to pursue the result they want more easily.

Mr. WALKER. I am not sure it comes more easily. Speaking for myself, now, I think, the forum shopping business, I think is really not as large a problem, at least under the current bill, that not has passed the Senate, as otherwise it would have been, for the capacity now to get to the Court of Claims is one of the forums that would be different from the circuit system.

As I understand the bill that has passed the Senate forum shopping would no longer be possible because appeals from the new U.S. Claims Court would lie to the home circuit. There would be way to avoid a circuit, your home circuit, if you happen not to like its decision.

That area of forum shopping would have vanished.

The only other area of forum shopping has to do with the district court, or the Tax Court. In either case, you are in your home circuit on appeal.

I am not sure I see a forum shopping question in that respect at least at the appellate level.

Senator BAUCUS. I think I heard you say—you implied it, anyway—that you disagree with the contention made earlier this afternoon that the present system prevents tax attorneys from helping taxpayers plan with reasonable certainty, that there is an inability under the present system for tax attorneys to provide reasonably sound advice.

You, I take it, disagree with that contention?

Mr. WALKER. I do not think it makes giving the advice easier. I have never had much difficulty giving advice, even though there is an uncertainty because of a certain posture of a decision.

In fact, you make many tax decisions—I am now speaking for myself, you understand. I have found, in making tax decisions, it is only one of many kinds of issues that you put really to the client for a business call on how he wants to handle the transaction. If there is a degree of uncertainty, you express it.

It would be nice, obviously, if there was not a degree of uncertainty. As careful counsel, you have to point out where the uncertainty lies and give an opinion with respect to how you think it would emerge, but if this will end up by perhaps forecasting or predicting that there may be need to litigate the issue in that particular circuit, if that is where the circuit comes down.

Senator BAUCUS. Do you agree with Commissioner Alexander that there is a greater problem of noncompliance?

Mr. WALKER. I do not see the relationship between compliance.

Senator BAUCUS. I am not asking about the relationship. Just as a general proposition, what do you think?

Mr. WALKER. I do not have any data on which to respond to that, either.

Senator BAUCUS. I was going to ask you, to the degree that there might be, what one suggestion you might have to encourage greater compliance.

Mr. WALKER. I am glad always to answer these questions. It was my enthusiasm to the area, because I think one of the greatest areas that leads to this question is the complexity of the law. It cannot help but breed difficulties and uncertainties and a potential—I will not say avoidance—that, and high rates.

It is the pressure that leads that way.

Senator BAUCUS. Your judgment is probably that the Finance Committee and the Ways and Means Committee should enact fewer credits and deductions and go the other direction, rather than enacting more?

Mr. WALKER. I would hope that somehow we could get to a much more simplified system, one that would broaden the base instead of narrowing it. That is what noncompliance is doing. It is narrowing the tax base.

Many of these special provisions are narrowing the tax base. When the revenue needs are there, with the narrower base, the rates have to stay high.

If one could broaden the base and reduce the rates, the pressure on noncompliance would be much reduced, I think.

Senator BAUCUS. Thank you very much, Mr. Walker. I appreciate your testimony.

Mr. WALKER. Thank you, very much.

[The prepared statement of Mr. Walker follows. Oral testimony continues on p. 132.]

SECTION OF TAXATION
OF THE AMERICAN BAR ASSOCIATION

SUMMARY OF THE
STATEMENT OF CHARLES
M. WALKER, CHAIRMAN,
BEFORE THE SUBCOMMITTEE
ON TAXATION AND DEBT
MANAGEMENT OF THE
COMMITTEE ON FINANCE
OF THE UNITED STATES SENATE

NOVEMBER 2, 1979

I.

The Section of Taxation of the American Bar Association opposes S. 1691, the Tax Court Improvement Act of 1979.

II.

The grounds for the Section of Taxation's opposition are:

(a) The Tax Section fully supports the judgment of prior Congresses in rejecting the drastic separation of tax litigation from the other civil litigation of the country.

(b) The vast majority of litigated tax cases turns on factual disputes or questions of the interaction between federal and local law. Such cases will be litigated regardless of the nature of the appellate tribunal, and the Tax Section submits that the local law expertise of the existing circuit court system makes it more likely that the cases will be properly decided.

(c) Empirical study supports the conclusion that the first appellate decision is not necessarily the appropriate or correct resolution of the issue.

(d) Testimony presented does not support the conclusion that a substantial number of circuit conflicts develop under the existing appellate court system.

(e) To the extent that circuit conflicts have developed they have provided the opportunity for more mature consideration of the issue. In a number of such situations circuit courts have reversed their earlier decisions in the light of subsequent decisions.

(f) The proposed Court of Tax Appeals will substantially reduce taxpayer's accessibility to appellate review, and provide the Government with an undue advantage in selecting cases to be presented to the appellate court.

(g) The assignment of judges to the Court of Tax Appeals on a rotating basis may adversely affect the quality of decisions, and will clearly not result in the certainty which the proponents of the bill assert is the goal sought. If the Congress concludes that a Court of Tax Appeals should be created, judges should, for the reasons set forth in the Tax Section's full statement, be appointed on a permanent basis.

SECTION OF TAXATION

OF THE AMERICAN BAR ASSOCIATION

STATEMENT BEFORE THE SUBCOMMITTEE ON

TAXATION AND DEBT MANAGEMENT

OF THE COMMITTEE ON FINANCE OF

THE UNITED STATES SENATE

November 2, 1979

Tax Court Improvement Act of 1979
S. 1691

As Chairman of the Section of Taxation of the American Bar Association, I am pleased to have this opportunity to appear as a spokesman for the Section of Taxation to express the opposition of the Section to S. 1691, the Tax Court Improvement Act of 1979.[1/]

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[1] When interest in the subject of a national court of tax appeals was renewed last fall, the Section of Taxation's Committee on Court Procedure reopened its own consideration of the subject. With the benefit of the development of arguments and issues by that Committee, the Section held a 90 minute discussion of the tax portions on S.678, the precursor of S.1691, at its annual Spring meeting on May 19, 1979. The members of the discussion panel were Jerome Kurtz, Commissioner of Internal Revenue; M. Carr Ferguson, Assistant Attorney General, Tax Division, Department of Justice; Kenneth Feinberg, Staff Counsel, Senate Judiciary Committee; and Marvin J. Garbis, then Chairman of the Section's Committee on Court Procedure. The panel was moderated by Lipman Redman, then Chairman of the Tax Section.

Following the discussion, an informal poll of the Section members present was taken, and at a special meeting on May 20, 1979 the Council of the Section expressed its judgment.

S.1691 would create a new federal appellate court, the United States Court of Tax Appeals, which would have exclusive appellate jurisdiction over all civil tax cases arising in the lower federal courts. The bill provides that the new court would be staffed by eleven judges now sitting in the existing circuit courts of appeals. The tax appeals judges would serve rotating terms of three years and would be designated by the Chief Justice of the United States.

As was noted in the testimony before the Judiciary Committee on S.677 and S.678, the precursors of S.1691, the idea of a national court of tax appeals is not a new one, and we believe that the problems inherent in S.1691 amply support the judgment of prior Congresses in rejecting such a drastic separation of tax litigation from the other civil litigation of the country.

We oppose the concept of a national court of tax appeals; however our opposition to S.1691 is not confined merely to the concept of the court proposed to be created by that bill. We are also opposed to the specific mechanism outlined in the bill for staffing such a court with judges temporarily assigned to the court for three-year terms. Such temporary appointments, in our view, significantly undercut the prospects for achieving the "certainty" which is

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[1] Footnote cont'd - The results are shown in Exhibit A attached to this statement. Thereafter, the Section complied with the applicable procedures of the American Bar Association, with the result that, while neither the Board of Governors nor the House of Delegates has taken a position on the matter, the Section of Taxation has done so, and I appear today to present that position.

the major argument advanced in favor of the bill. Furthermore, we believe that such a court will not significantly speed the resolution of most litigated tax cases, and that, except for the relatively small number of cases involving conflicts between the circuits on interpretation of the Internal Revenue Code, it will not achieve significant gains in certainty.

The vast majority of litigated tax cases turn on factual disputes or questions of the interaction between federal and local law, such as, for examples, valuation of assets, allocation of purchase price, or characterization of property as "separate" or "community" in community property states. Because of their nature, such cases will continue to be litigated regardless of the nature of the appellate tribunal, and, indeed, we believe that the local law expertise of the existing circuit courts of appeal makes it more likely that federal tax issues in this category of cases will be decided on a proper understanding of local law.

Relatively few tax cases involve conflicting decisions by the circuit courts of appeal interpreting provisions of the Internal Revenue Code. Indeed, the entire list of circuit conflicts in tax cases identified by witnesses before the Senate Judiciary Committee consists of but four conflicts over a considerable span of years.[2/] While a more complete list might be assembled, the fact that only

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[2] See Exhibit B attached.

these have been cited is an indication that such conflict cases are relatively rare. It is reasonable to conclude, therefore, that a new centralized national court of tax appeals cannot be justified on the ground of reducing the number of tax appeals by removing potential circuit conflicts. Presence of the new court would not reduce the much larger number of tax appeals which do not involve circuit conflicts.

Review of the specific cases cited before the Senate Judiciary Committee confirms our view that a major dislocation of the judicial process is being proposed to deal with a fairly minor problem. Several witnesses cited Doehring v. Commissioner, T.C. Memo. 1974-234, and Puckett v. Commissioner, T.C. Memo. 1974-235, which cases involved the inconsistent resolution by the Tax Court on the same day of a Subchapter S question. Yet these cases did not involve a conflict between the circuits, but rather the Tax Court's refusal to follow an existing Fifth Circuit precedent on the issue outside the Fifth Circuit. The Eighth Circuit, on appeal, reversed the Tax Court's decision in Doehring v. Commissioner, 527 F.2d 945 (8th Cir. 1975) and followed the Fifth Circuit position. Thus, in roughly one year, the circuit courts arrived at a harmonious position without the need for Supreme Court review.

Indeed, the cases cited in Assistant Attorney General M. Carr Ferguson's testimony before the Judiciary Committee are instructive. In two of the three conflict situations he cites, the courts of appeal achieved harmony

in their decisions without intervention by the Supreme Court.[3] Moreover, as noted in Exhibit B recent experience has shown that such conflicts as do arise between the circuits are generally resolved expeditiously by the Supreme Court.

In short, we believe that the record demonstrates that circuit conflict is simply not a significant problem. Relatively few instances of circuit conflict arising over a number of years have been cited although the system processes well in excess of 700 tax appeals each year.[4]

Recognizing that a case for such a court cannot be based on the relatively rare occurrence of circuit conflicts alone, the proponents of the bill have argued that each conflict situation may involve hundreds or thousands of taxpayers and that the law will become settled more quickly if there is only one tax appellate court since neither the Government nor taxpayers will be able to relitigate the issue in other circuits in hopes of creating a conflict. With due respect to the proponents of the bill, we of the private bar feel that such an argument proves both too much and too little.

It proves too much in that inordinate importance is attached to the first case on an issue to reach the proposed new tax appellate court. Even though that case may

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[3] See Exhibit B attached.

[4] See Appendix A to the May 7, 1979, testimony of Assistant Attorney General M. Carr Ferguson before the Subcommittee on Improvements in Judicial Machinery of the Senate Judiciary Committee.

have been improperly developed by the parties, poorly argued by the lawyers, contain unusual facts, or ill considered by the tax appellate court, it will become stare decisis on the issue with only the uncertain remedies of certiorari review by the Supreme Court or legislation by Congress available to change it. Moreover, the Government's ability to manage the flow of cases to the sole tax appellate tribunal significantly enhances the prospect that the court will be presented first with fact patterns more to the benefit of the Government's litigating position than is possible now with cases arising in up to eleven circuits.

The proponents' argument proves too little in that a change in the appellate structure will not prevent litigation by either the taxpayer or the Government when either feels that existing precedent can be distinguished (or, in light of the rotating membership of the court policy proposed in S.1691, when a litigant feels that a new, more "enlightened" majority will distinguish or overrule existing adverse precedent). Moreover, the bulk of the uncertainty in our tax system arises not from circuit court disagreements but from the enormous complexity of the Internal Revenue Code and the endlessly varied fact patterns to which fallible men, both in Government and private tax practice, must apply that Code.

In addition, the new court's jurisdiction would extend only to civil tax cases while tax issues in criminal and bankruptcy matters would continue to be decided by the

circuit courts of appeal. Thus, even within the small group of circuit conflict cases, the new court will not eliminate the possibility of conflicts. Also troubling is the possibility that the same litigant may receive inconsistent adjudications from his home circuit with respect to the non-tax civil aspects of a transaction and from the court of tax appeals on the tax aspects of the case. Finally, as stated earlier, the quantity of tax cases turning on issues of fact or the application of local law will not be reduced by changing the appellate structure for tax litigation.

The quality of federal tax adjudications may, however, significantly be affected adversely by removing from the process the long experience of regional circuit judges in harmonizing federal enactments with the state law and recurring factual patterns of their region. To make such a statement is not to question either the ability or knowledge of those who might be appointed to a national court of tax appeals, but simply to observe the obvious fact that a court consisting of one judge from each circuit cannot hope to match the experience and knowledge of local law and factual patterns possessed by the circuit judges who regularly hear and decide cases from their respective regions. For example, the judges of the Fifth Circuit both by reason of their backgrounds before appointment and their work on the bench may be expected to have more familiarity with oil and gas law, Louisiana civil code law and Texas community property law than judges from distant sections of the country.

Similarly, the judges of the Ninth Circuit have more experience with the western states community property laws and the extensive complex of laws and regulations governing public lands. Such knowledge of local law may often be critical to proper resolution of a tax dispute concerning property rights.

A significant difference of philosophy between the proponents of this bill and our position lies in the differing degrees of importance attached to the need for the federal tax system to give due regard to local law and factual differences in resolving tax disputes. The proponents have suggested in testimony to the Judiciary Committee's subcommittee that it is less important that the "right" answer be reached in tax litigation than that the answer be reached quickly and authoritatively. While no doubt such an approach may have appeal to the tax collector and academic commentator, we submit it finds little support among taxpayers and the Tax Section.

If speed of tax adjudication is the goal to be achieved, far less drastic measures, such as giving tax cases a docket priority similar to that afforded criminal cases, could be adopted with less dislocation to the tax litigation process than the establishment of the proposed new court.

The proponents' arguments are, in reality, arguments against the circuit court of appeals system in general, not merely in tax matters. Dean Griswold, in his testimony to

the Judiciary Committee,[5/] suggested the creation of a whole gamut of specialist tribunals and suggested that the same arguments could be made for those tribunals as were advanced in favor of the national court of tax appeals. Thus, in reality, the proponents' critique is not focused on particular problems with the appeals of tax cases but rather on the inherent fact that the regional court of appeals system will, from time to time, produce conflicting decisions. In our view the existence of circuit conflicts is a very modest price for preserving the strengths of the present circuit system. If the proponents' arguments for the specialist tax appellate tribunal are accepted, the Congress may expect to see a succession of such proposals in the future until the entire federal appellate process has been balkanized. The record of various federal specialized administrative agencies in failing to harmonize policies among themselves lends little expectation for having a specialist appellate system harmonize appellate court decisions among the specialized courts. We believe that there is a need for the entire fabric of federal law, including the tax law, to develop consistently. In the tax field, we are confident that such development is best assured by review of tax decisions by generalist appellate judges regularly hearing tax appeals along with the rest of the judicial business of their region.

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[5] Statement of Erwin N. Griswold before the Subcommittee on Improvements in Judicial Machinery of the Senate Judiciary Committee, May 7, 1979, pages 7-9.

Removal of tax appeals from the circuit courts of appeals not only involves loss of the courts' expertise but also their accessibility. Of necessity, the tax appellate process of the proposed national court of tax appeals will become more remote from most litigants. Most appeals can now be heard by the circuit courts of appeal reasonably near the taxpayer's home. The national court cannot hope to offer comparable access; indeed, the draftsmen of S.1691 have felt it necessary to include a requirement for the court to sit at least once a year in each circuit to make certain that the court sits in at least one city in each circuit. While such geographical remoteness will not be of significant concern to large taxpayers, it will add yet another burden to the already forbidding task facing the small taxpayer seeking to challenge the Internal Revenue Service.

Finally, the enormous existing body of "settled" circuit court case law will for some substantial period of time become "unsettled". Specifically, we submit that all tax issues not definitively settled by the Supreme Court will be open to relitigation before the new court of tax appeals. Admittedly, this is a transitional problem; however, the transition, given sixty years of circuit court precedents in tax cases to be reconsidered or reaffirmed, is likely to be both lengthy and extensive. Indeed, one of the ironies of the bill is that the proposed court of tax appeals is likely to create far more uncertainty than it will cure during a lengthy transition period.

For all the above reasons we believe that a centralized court of tax appeals, removed from the mainstream of federal appellate jurisprudence, has many more disadvantages than advantages, and we urge its rejection.

We turn now to the specifics of S.1691. The Judiciary Committee is to be commended for the candor of its report on this bill. That report states:

> The structure and composition of the new court were designated with two purposes in mind - to assure that the new court would not be viewed as a "tax specialty" court composed only of narrow tax specialists headquartered in Washington and that the court would not be labeled a permanent court requiring the nomination and confirmation of additional Article III judges just one year after the passage of the Omnibus Judgeships Act creating 152 new Federal judgeship vacancies.[6]

If this political judgment of the Judiciary Committee is accepted, then it must be concluded that a court of tax appeals consisting of permanently appointed judges is not feasible. Yet many witnesses who testified at the Judiciary Committee's hearings in favor of the court of tax appeals

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[6] Senate Report No. 96-306, page 5.

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concept stated that he favored permanent rather than rotating judges. This is further borne out by the Tax Section's own poll of tax practitioners at its May 1979 meeting, 73% of whom expressed opposition to the concept of rotating the membership of the court of tax appeals (if such a court were created at all).[7] The reason for such opposition is apparent. The benefit suggested by the proponents of the special tax appellate court is a perceived increase in "certainty". However, given the potential for complete turnover in member ship every three years under the rotation provisions of S.1691, it is difficult to perceive how such a court could be expected to achieve any substantial measure of doctrinal stability.

In addition, the rotating assignment feature coupled with the requirement for annual sessions in each circuit required by S.1691 is likely to make duty on the proposed court something less than a coveted assignment for the experienced circuit judges who would be the best appointees to such a court. Accordingly, S.1691 creates the risk that the new court will be staffed with judges the circuits might feel they can most easily spare.

Even if the proposed court were to be staffed with permanent judges we would still oppose its establishment for the reasons stated above.

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[7] See response B1 on May 19, 1979 Questionnaire attached hereto as Exhibit A.

While this Committee's jurisdiction is limited to S.1691, the record here today would be incomplete without mention of a significant change which was approved on the floor of the Senate during consideration of S.1477, the Federal Courts Improvement Act of 1979, which significantly affects appeals in tax cases. On September 7, 1979, the full Senate voted to retain trial jurisdiction over tax cases in the new United States Claims Court created by S.1477, while at the same time making tax cases from the Claims Courts appealable to the taxpayer's home circuit (as is now the case with United States Tax Court decisions). Thus, if S.1477 is adopted in the form already approved by the Senate, taxpayers will no longer be able to attempt to escape unfavorable precedents in their home circuits by litigating their case in the Court of Claims. If that provision is enacted one of the significant opportunities for conflicting appellate tax decisions will have been removed from the tax litigation system. This development is in accord with the views of the members and the Council of the Tax Section, as expressed at our May, 1979, meeting.[8/] We urge that this more modest solution be given a fair trial before any solution so radical as that contained in S.1691 is adopted.

We appreciate this opportunity to present the views of the Section of Taxation and your consideration of

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[8] See Exhibit A, May 19, 1979 Questionnaire, Responses under Part C.

those views. We are, of course, available to the members of the Committee and its staff to assist in your consideration of this matter in any manner which would be helpful.

Charles M. Walker
Chairman, Section of Taxation
American Bar Association

SECTION OF TAXATION
AMERICAN BAR ASSOCIATION

EXHIBIT A

QUESTIONNAIRE RE S.678

May 19, 1979

A. The Overall Concept of a National Court of Tax Appeals

1. Are you in favor of the concept of a national court at the level of the Circuit Courts of Appeals having exclusive appellate jurisdiction over appeals in all civil tax cases?

Members Poll	Yes 45	No 99
Council	Yes 4	No 14

B. Staffing of the Bench, Assuming there is to be a National Court of Appeals

1. Should the court be staffed with judges assigned for a given term (currently proposed as three years) from among the judges of the various Courts of Appeals?

Members Poll	Yes 37	No 105
Council	Yes 5	No 13

2. Should the court be staffed with permanently assigned judges appointed in the same manner as judges of the United States Courts of Appeals?

Members Poll	Yes 100	No 38
Council	Yes 13	No 5

3. Assuming that the court will be staffed with permanently assigned judges, should a specified minority of the judges be appointed from judges of the United States Tax Court?

Members Poll	Yes 60	No 81

C. Court of Claims Considerations

1. Should the Court of Claims (in its present or a revised form) continue to have jurisdiction over tax refund suits?

Members Poll	Yes 96	No 44
Council	Yes 16	No 0 (2 abstentions)

2. Assuming that the Court of Claims (in its present or a revised form) will continue to have jurisdiction over tax refund suits, should the decisions of the Court of Claims be subject to appeal to the Court of Tax Appeals?

Members Poll	Yes 111	No 31
Council	Yes 18	No 0

3. Assuming that the Court of Claims (in its present or a revised form) will continue to have jurisdiction over tax refund suits, should its decisions be subject to appeal to the Circuit Courts of Appeal even if there is no Court of Tax Appeals.

Members Poll	Yes 86	No 57
Council	Yes 16	No 2

EXHIBIT B

Courts of Appeals Conflicts in
Tax Cases Cited By Witnesses
Before the Senate Judiciary Committee's
Subcommittee on Improvements in Judicial Machinery

Four instances of circuit court conflicts were cited in the testimony by two witnesses, Assistant Attorney General, M. Carr Ferguson and Erwin N. Griswold on May 7, 1979. They are as follows:

(1) Valuation of mutual fund shares, resolved by Cartwright v. United States, 411 U.S. 546 (1973).

(2) Deductibility of incidental expenses in a section 337 liquidation resolved by acceptance by all circuits deciding the issue of the decision in Alpaco, Inc. v. Nelson, 385 F. 2d 244 (7th Cir. 1967).

(3) Exclusion from income of gift of corporate shares made by owner after passage of corporate liquidation resolution resolved by acceptance by all circuits deciding the issue of the decisions in Hudspeth v. United States, 471 F. 2d 275 (8th Cir. 1972) and Kinsey v. United States, 479 F. 2d 1058 (2nd Cir. 1973).

(4) Exclusion from gross income of cash allowances paid in lieu of meals by an employee resolved by Commissioner v. Kowalski, 434 U.S. 77 (1977).

It should be noted that in each of the four conflict situations listed above, the ultimate prevailing decision was not the decision adopted by the first court to decide

the case. For example, the issue in the Cartwright case cited by Dean Griswold was first decided against the taxpayer in Ruehlmann v. Commissioner, 418 F.2d 1802 (6th Cir. 1970). The circuit conflict arose when the Second Circuit decided the Cartwright case for the taxpayer, 457 F.2d 567 (2nd Cir. 1972) and the Ninth Circuit reached a similar result in Davis v. United States, 460 F.2d 769 (9th Cir. 1972). As noted above, the Supreme Court adopted the Second Circuit position one year later.

Thus all four conflict situations cited suggest that the first appellate decision on an issue may well not be the decision that would be reached after consideration of the issue in several different settings. Equally significant is the fact that in the second and third situations listed above the circuit courts of appeal were able to resolve their differences without the necessity of Supreme Court review to resolve the conflict.

To our knowledge, no other listings of circuit court conflicts in tax cases were presented to the Judiciary Committee. The relatively few cases enumerated in the foregoing list should be contrasted with the statistics concerning the annual numbers of appeals set forth in Appendix A to Attorney General Ferguson's May 7, 1979, testimony which demonstrate that several hundred tax appeals are processed each year.

Senator BAUCUS. Next, we will hear from a panel consisting of Mr. Vester T. Hughes, Jr.; Mr. James B. Lewis; and Mr. Meade Emory.

Welcome, gentlemen. I do not know in what order you want to proceed.

STATEMENT OF VESTER T. HUGHES

Mr. HUGHES. Mr. Chairman, my name is Vester T. Hughes. I am a tax lawyer in Dallas, Tex.

We would like to submit, for the record, the written statements of Mr. Emory and Mr. Lewis.

Senator BAUCUS. They will be included in the record.

Mr. HUGHES. We, three panel members, would like to spend a few minutes on some of what seem to us to be salient comments related to our various positions.

Mr. HUGHES. It seems to me, as a result of looking back over the history of this proposal, that the initial proposals back in the late 1930's and early 1940's for a national Court of Tax Appeals had a genesis, a beginning, a start, in facts that no longer exist and that the underlying basis for the proposal is not applicable today.

As may be evident from this introduction, I oppose creation of such a court.

Dean Griswold's very thoughtful law review article published in 1944 suggesting the creation of such a court begins with a statement that revenue collections were something under $5 billion in 1940 and that it was anticipated for 1943 that revenue collections would be in the range of $43 billion.

Thus, at a time when the number of taxpayers and the impact on taxpayers—that is the greatly increased taxes—were becoming so important, increasing tenfold in a 3-year period, the likelihood of taxpayers wanting to contest the law, wanting to test many of the existing and new laws that were exacting tenfold more taxes from them, was a great deal more likely than today.

There was a future shock element coming into play in the tax system because of many more taxpayers and many more tax dollars. With these drastic changes there was a question of whether the existing system could respond well or whether all tax appeals should be centered in a single Court of Tax Appeals. I think the existing system did respond to that challenge.

Dean Griswold may have been correct, that at that time the system could have responded better if there had not been many circuits sometimes having different viewpoints and consequent time lags in resolution of differences.

When the income tax system came in 1913, there were very few people who were affected by it. By the 1930's, even though more people were affected, courts were not nearly as familiar with the tax system as today. Tax was not taught in law schools. And when the article was published in 1944, tax was a small and specialized field.

But today in 1979, the situation has changed. I would suspect in Dallas there are at least 2,000 lawyers and accountants today who subscribe either to Prentice Hall or CCH and have access to the weekly reports or the daily reports out of Washington. Similarly

district courts, circuit courts and the Court of Claims have easy access to developing law as well as decided law.

In the 1950's and 1960's, Judges became more familiar with the tax rules. In the private sector tax specialists became the rule rather than the exception.

So I suggest that what appeared to several thinkers to be a good idea when first proposed is no longer a good idea. Indeed it may not have been even when first suggested.

But in any event, the time of its usefulness has passed.

The present system works and works well. The proposed court has many disadvantages over the present system and few if any advantages. Practitioners and judges throughout make the present system work and any significant difficulties in its administration lie in the Internal Revenue Service and Treasury and in the complexity of the law, not in the existing court system.

In his testimony, Dean Griswold suggested that perhaps we should have other specialized courts in addition to a U.S. Court of Tax Appeals. For example, he noted that we now have a new energy court of appeals that is called TECA, which hears only energy cases. But I would suggest in the tax field we have an entirely different situation. Energy law is like tax law may have been in the 1940's—an expanding and essentially new field. In addition, the cost considerations are different; those interested in energy problems can afford to go to the single court—and to come to Washington.

Under the proposal for a new Tax Court of Appeals, except for one time a year when the court meets in each circuit, cases would be heard in Washington. This would result in much higher travel and other costs to taxpayers. Thus since most citizens and most businesses throughout the 50 States are affected, the factors are far different than under the new energy laws. And there are other costs to the taxpayer entailed in a new system—indeed to the government as well—a new set of court rules for the new court will mean added costs in time of taxpayers and government counsel to say nothing of the costs of generating such rules.

If we need new court systems for various disciplines, I submit we need them for SEC problems, for environmental problems, for antitrust problems much more than we do for tax problems. So if we plan to try out new topical courts, let's do it where fewer people are affected to see how it works before changing a system which directly affects most Americans.

After all, the hallmark of our system has been to have the controversies that affect many people rise and be resolved in the areas where they live unless the issue is of such importance, and magnitude that it is to be considered by the Supreme Court. Under today's circumstances, there seems to be no better reason for having a special court consider cases arising under the 16th amendment to the Constitution than a special court to hear cases arising under the 1st, 5th and 14th. There is one thing of particular importance that I would like to bring before this committee. I think that the business of the Ways and Means Committee and the Finance Committee would really increase if you had such a court. I think Mr. Alexander's comments demonstrate this.

Senator BAUCUS. I missed that. Why would they increase?

Mr. HUGHES. With such a court, each decision would have the appearance of finality. At that point, either the Government, if the Government lost, or the taxpayer if the taxpayer lost, would see his remedy in Congress. Under the present system disagreements go to various circuits. A single circuit court decision may not be the ultimate answer. Issues are more completely considered, hence there is not the same press toward congressional action. Until there are many circuit court cases or Supreme Court action. Since proponents of change after the first or second case know that they will be met with a proper assertion that they are premature, they do not come as readily.

I have discussed this probability of increased legislative action if there is a court of tax appeals with some of those who direct government litigation and they agree that the result would be an increase of pressure for more legislation.

Two other matters: To the extent there is uncertainty in the tax laws, such uncertainity is much more generated by the procedure of the Internal Revenue Service in the nonacquiescence in Tax Court cases—they nonacquiesc in about half of them—than by conflicts between the circuits or the circuits and the Court of Claims. Maybe it is a good practice, but it causes uncertainty. If uncertainty is to be eliminated, this practice should be examined before a change in the court system is undertaken.

The second matter: new rulings and regulations that go against years of practice generate uncertainty. An example is the recent hearings this committee held to consider the proposed foreign tax credits regulations. The Service and Treasury by proposing regulations which reverse decades of regulations and court cases create far more difficulties in tax administration than do multiple circuits and the Court of Claims. Such actions take far more time of practitioners and to cause taxpayers to feel that there is an unequal application of the law than the present court system. An similarly uncertainty and confusion is created for Revenue agents. Confidence in equal treatment is eroded far more by a public Treasury announcement which changes the rules on a transaction in progress than by a different court decision which is handed down after briefs and arguments.

Senator BAUCUS. Mr. Lewis?

STATEMENT OF JAMES B. LEWIS

Mr. LEWIS. My name is James B. Lewis. I am engaged in the private practice of law in New York City. I formerly worked with the Treasury Department for about 21 years, longer than the three Commissioners who were here earlier combined.

I oppose S. 1691. I think that my deepest objection is to the form of selection of judges proposed under the bill. I think that the judges who are good tax judges in the courts of appeals are also good judges in security law cases and antitrust cases and labor cases and they will resist being appointed to this court and I am deeply concerned over the prospect that the selection process will rotate on to the Court of Tax Appeals, the weaker judges in the appeals court system, and that this process of mediocrity will feed upon itself.

If S. 1691 were amended to eliminate this disturbing method of selection of the judges, I would still be opposed on grounds that are set forth in my written statement and in my partner, Judge Rifkind's, 1951 article that I have attached to my statement in which he opposed a specialized patent court.

I will not repeat those points here. I will address myself to something that is not in my written statement and to one point only.

I think the former Commissioners that said that this legislation will improve compliance heavily exaggerate that point. I think that the effect of this legislation on taxpayer compliance would be minimal.

There are several reasons for that. Every day I sit at my desk and come across a new tax problem that the client has brought in to me and I cannot find an answer in the Tax Court or in the Court of Appeals decisions or in published rulings or even in the unpublished rulings that are now available.

I finally, in desperation, call an expert in the Internal Revenue Service and he says: "That is very interesting. That law has been on the books for 25 years but we have never had that problem. We have never ruled on it. I do not know what the answer is."

I think probably one in one hundred of the problems I run across would be problems that this legislation would have affected my decision on. Therefore, realistically, this legislation cannot have any significant impact on taxpayer compliance.

If you analyze the fields of taxpayer noncompliance, the large one, of course, is that taxpayers simply do not report. Dividends, interest, earnings of independent contractors, and other income that is fraudulently omitted from returns is much larger than everything else combined.

At the level of the clients that I and other practitioners in large firms represent, there are the tax shelters that are being peddled by people, most of them unsound, but they spread like wildfire.

None of those issues are before the courts. The Internal Revenue Service seems not to know how to grapple with them.

By the time they reach the courts, they will not be this year's tax shelters or last year's. They will be something that people quit doing 5 years ago.

I really think that point has been enormously exaggerated.

Thank you.

Senator BAUCUS. Thank you very much.

Mr. Emory?

STATEMENT OF MEADE EMORY

Mr. EMORY. My name is Meade Emory. I am a tax practitioner in Seattle. I am testifying on my own behalf, and not on behalf of any organization.

I support S. 1691. The essential thing to keep in mind is the importance of predictability on issues with respect to which we are requiring taxpayers to annually self-assess.

Mr. Hughes indicated that back in 1944 we may have needed a court like this one, but we do not today. I think that ignores the fact that a lot of the uncertainties in the law are in issues with respect to which taxpayers do not normally consult tax counsel.

You cannot put the millions and millions of taxpayers who annually self-assess, and who have routine issues that they have to decide in the preparation of their tax returns, in a position where they have to consult with tax counsel.

I have cited, on page 4 of my statement, three or four instances in which matters have gone to the Supreme Court dealing with matters like commutation, deductibility of expenses on overnight trips, subsistence payments to police officers—routine issues of that sort that affect middle and lower income taxpayers and situations which represented a considerable uncertainty in the law before those issues were resolved by the Supreme Court.

In my judgment, it ill-behooves the Federal establishment to demand, on the one hand, an annual self-assessment but not, at the same time, put taxpayers in a position where they will receive adequate guidance as to what the law is with respect to those issues.

Let me say something about the conflict among the circuits. It is true that the situations in which there are actual conflicts among the circuits are not frequent, but the uncertainty and the lack of predictability can arise when you have a single court of appeals decision standing alone.

For example, if the fifth circuit has spoken, taxpayers in that circuit know what the law is, as to them, but the millions of taxpayers outside of the fifth circuit are left only to speculation as to whether or not that holding has applicability to them.

I suppose that the strongest argument that is made against S.1691 is what I call the "ventilation" argument. The idea is that somehow better law results from seriatim consideration by various courts of appeal until the right rule, so-called, eventually emerges.

Consider the price at which that mulling of these issues by various courts of appeal is purchased. During that time—and it can be a decade or more—tax administration effective tax administration, with respect to that issue is effectively stalled.

Second, who is to say that a "better" result is reached by seriatim consideration. I have found just as many instances as the opponents have found instances in support of their view, wherein the result which was finally reached by the Supreme Court, was the result reached by the first, not the later, appellate court to consider that particular situation. I cited a major instance of that in my statement.

Further, and this is important, there is nothing in the S. 1691 approach that denies the opportunity for repeated testing of appellate judgments. We will have uniformity, but we will still have growth in the law. To the extent that the new court of appeals would affirm a prior reasoning or rationale it would probably issue a per curiam opinion, incorporating the prior rationale. Subsequent opinions may expand or contract or elaborate previous judgments. This is the way appellate decisional law has been growing for decades.

Let me say something, too, about the question of the staffing of the court. I prefer generalists on the court, and I said so in my statement. I think that constitutes an appropropriate offset to the specialist orientation of the Tax Court which most of the tax cases are originally heard.

I also think, as I said in my statement, that we are drawing from a pool of judicial talent which is, because of the concern that exists in the country on this point, of very high quality.

It seems to me, therefore, appropriate to staff the court with court of appeals judges. But I do say this—I am concerned about the lack of continuity which a 3-year term would provide. It seems to me that therefore Treasury's modification today, which would provide for a seven-judge panel with a split between four permanent specialists and three rotating generalists, might provide that necessary continuity.

One of the other arguments, which has not been discussed and which I want to knock down, is the point that is mentioned in several of the statements about the front end transitional problem that we are going to have with respect to uncertainty if a court, such as that proposed, is adopted. I really do not think the problem exists. It seems to me that this new court, mindful of its responsibility, is not going to throw out established precedent. Furthermore—and this is more important—it is unlikely that these cases are ever going to get to court because the Service would not set up cases which ran counter to what is now regarded as settled authority.

Thank you, Senator.

Senator BAUCUS. Thank you very much.

Mr. Lewis, why will the high caliber of those judges on the courts of appeals not take on assignment to the Court of Tax Appeals?

Mr. LEWIS. I think that they will not take those assignments because they will find a steady diet of tax cases too confining. I think it is that simple.

Mr. EMORY. I disagree with that. I think that a potential appointee of that court will realize that it is a short-term commitment, one in which he will be sitting on a court that will have nationwide jurisdiction and one in what he or she can play the role of being a Supreme Court Justice in the tax area and have a significant participation in the development and shaping of the law in the tax field for the time that that person is on the court.

I am not saying that every potential candidate would run to take the assignment, but I do not think there is going to be a wholesale reluctance to assume that responsibility.

Senator BAUCUS. I do not recall in the proposal, though, that the court would be meeting en banc all the time?

Mr. EMORY. Under the Treasury proposal they would meet en banc all the time.

Mr. LEWIS. I do not believe that a single en banc court can handle 200 cases a year. I do not think the Treasury proposal is realistic.

Senator BAUCUS. Do you agree?

Mr. EMORY. I am inclined to agree with that. I am not sufficiently familiar with statistics to make an accurate judgment on this, but something like a nine-judge court with a provision for a five judge en banc panel might be appropriate, so that not all of the judges are working on every case.

Mr. HUGHES. Senator, in this regard, it seems to me that maybe one thing that has not been said should be said, is the following: If such a court were created, serious thought should be given to

headquartering that court in Omaha, or Kansas City, or Oklahoma City, or Dallas, someplace outside of Washington. Under the proposal, judges move to Washington for 3 years. Any Court of Tax Appeals should be located outside of this area which is supersensitive to tax tremors, whether they be from the Internal Revenue Service, the Department of Justice, the Treasury Department, Capitol Hill, or whatever.

I think that the proposal would be far less subject to question by most practitioners, and by most citizens, if there were a Supreme Court of Tax Appeals, as this would ultimately be, if it were headquartered, as I say, in Ohio, Kansas City or Oklahoma City or Dallas, but not headquartered in Washington.

Senator BAUCUS. Let me ask you, I guess Mr. Emory, but any of you for that matter—have you found that there is a great interest in the tax bar, among the citizens for generalist judges from the present court of appeals system?

Is this featured at all in people's views or attitudes to this question?

Mr. EMORY. My own feeling—I do not intend to rush in; I will be brief—is that people outside of Washington generally—I can say this is so in the Northwest because I have talked to several practitioners about it, tend to prefer generalist judges as an offset to the specialist orientation of the Tax Court.

That is an advantage, of course, of the present system, but that advantage would be retained even under the Treasury proposal, by means of a substantial injection of so-called generalist talent in the national Court of Tax Appeals.

Senator BAUCUS. Thank you very much, gentlemen. I appreciate your testimony.

[The prepared statements of the preceding panel follow. Oral testimony continues on p. 168.]

SUMMARY OF STATEMENT
OF MEADE EMORY
REGARDING S. 1691

November 2, 1979

I support S. 1691. In my statement I have attempted to discuss both the arguments for and against and, with respect to the latter, attempted to meet those adverse arguments.

ARGUMENTS FOR:

1. The extent of the need for certainty in the tax field runs deeper than is suggested by the conflict among the circuits problem.

2. Predictability is required in a self-assessment system.

3. Trial court forum choices demand to be offset by appellate uniformity.

4. The importance of having generalist judges--but generalist judges who would be deciding cases in a specialist context.

5. Status quo preserves premium on specialization.

ARGUMENTS AGAINST:

1. "Ventilation" issue.

2. First case on an issue may be the wrong case.

3. Regionalism inherent in courts of appeal system should be preserved in tax cases.

4. Uncertainty regarding who will serve on court.

5. There is insufficient data to adopt a national court of tax appeals.

6. A national court of tax appeals is the first wedge in the establishment of a myriad range of special courts.

7. Even if a national court of tax appeals is established it will not insure certainty on all tax-related issues.

8. A national court of tax appeals will permit the government to control the development of appellate interpretation.

9. Administrative difficulties.

STATEMENT OF MEADE EMORY, SEATTLE, WASHINGTON
ON THE SUBJECT OF S. 1691
BEFORE THE SUBCOMMITTEE ON TAXATION AND DEBT
MANAGEMENT OF THE COMMITTEE ON FINANCE,
UNITED STATES SENATE

November 2, 1979

I am very pleased to have an opportunity today to express my views on S. 1691, a bill which would create a so-called national court of tax appeals. I hasten to say at the outset that the ideas and thoughts presented today are my own. However, the views which I express were formed against the backdrop of experience in the tax field in a number of capacities--as a trial attorney for the IRS, as a member of the staff of the Joint Committee on Taxation, as a law faculty member at several law schools and as Assistant to the Commissioner of the IRS.

What this bill does, and the changes which it would make to the present system, are well known. Rather than repeat that information here I wish to comment on some of the arguments for and against the proposal embodied in S. 1691--a bill which, I may say, I enthusiastically support.

I

ARGUMENTS FOR

1. The extent of the need for certainty in the tax field runs deeper than is suggested by the conflict among the circuits problem. Those who have opposed the concept of a national court of tax appeals have noted that the vast

majority of each circuit's tax decisions are not in conflict with any other circuit. Some will note that there are not, at any one time, more than a half dozen actual conflicts between circuits on tax issues. They urge that it is not necessary, therefore, to radically alter our system of judicial appeals to cure this relatively minor area of potential conflict.

This argument ignores the "iceberg" effect of judicial decision making in this area. Admittedly, the number of actual conflicts is not numerous. But true conflicts in judicial decision making reveal only a small part of the cause of uncertainty in the interpretation of the federal tax law today. Just as much uncertainty is created by the existence of a single court of appeals decision on a tax issue. If, for example, the Court of Appeals for the Fifth Circuit issues an opinion on an issue of first impression, tax advisors outside the Fifth Circuit are still left to wonder whether the court of appeals in their area would rule the same way. That Fifth Circuit decision does not represent a nationwide judgment. The same lack of predictibility could exist, as respects a significant or complex issue, even if another circuit joined in reaching the same decision as that reached by the Fifth Circuit. So while actual conflicts may constitute the most egregrious form of uncertainty,

they represent only the tip of the iceberg.[1/]

2. Predictability is required in a self-assessment system. One obvious factor often overlooked in the debate concerning a national court of tax appeals is that our tax system imposes an annual obligation on each taxpayer to self-assess his or her tax liability annually. A system which imposes this obligation on the one hand and neglects, with the other hand, to inform the self-assessing taxpayer what standards are to apply in that process, should not be regarded as functioning in a proper manner. The tax law is not a little nook or cranny of technical esoterica. Rather it is, perhaps, the most pervasive of all aspects of the federal legal thicket. Every taxpayer must, each year, step to the line and say "this is my tax." It ill behooves the federal establishment to demand this obligation and yet not provide the clear guidelines for meeting that obligation.

The issues on which predictability is absent do not deal exlusively, by any means, with the obscure technicalities of corporate taxation. Surprising results appear when one reviews the areas of relatively recent judicial uncertainty. The issues involved in many of these cases

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1. An actual split can result, also, from the reversal of a Tax Court decision by a court of appeals. The Tax Court decision will still stand as independent authority, and may even be followed by the Tax Court with respect to taxpayers living in other circuits.

affect individual taxpayers--individuals who would not be regarded as having anything other than the most routine kind of tax problems. If, for example, one looks at some recent decisions of the Supreme Court in the tax field (opinions that were issued as a result of conflicts in the circuits) it can be seen that thousands of taxpayers were, for many years prior to a Supreme Court resolution of the issue, without any clear idea of how to treat the most routine kind of tax issues. For example, it was not until the Supreme Court's decision in Fausner v. Comm., 413 U.S. 838 (1973), that the issue regarding a pilot's expenses to transport his flight bag to and from the airport was resolved. This issue was important not only to airline pilots--any taxpayer with equipment too large to carry on public transportation (e.g., a carpenter, a bass player with a symphony orchestra, etc.) needed, and deserved, guidance on this issue. Similarly, it was not until U.S. v. Correll, 389 U.S. 299 (1967), that the validity of the Service's rule that the cost of meals and lodging was deductible only if the trip required sleep or rest was tested. Here, perhaps, hundreds of thousands of taxpayers needed guidance on whether the Commissioner's "overnight" rule was valid. The same kind of situation was involved in Comm. v. Kowalski, 434 U.S. 77 (1977), involving the question of whether cash payments for meal allowances to state police represented taxable income. These, and many

issues like them, did not involve arcane technicalities of the tax law--areas in which taxpayers are likely to have the advice of experienced tax practitioners--but, rather "everyday" issues affecting a vast body of the taxpaying public. It would seem all to obvious that Congress should provide a conflict resolution system which, on questions affecting as wide a group of taxpayers as do issues of these kinds, is capable of informing taxpayers "how" to do that which it has mandated they do (under pain of a felony penalty for failure to do so). The important element is not really the number of issues on which there is uncertainty (either through a split among courts or as a result of an appellate decision standing alone) but is, rather, the number of taxpayers affected by the lack of predictability. Considering the importance of the mandatory self-assessment obligation, one can make the argument that a system which allows a single conflict in decisions to flower on an issue which affects many, many taxpayers should not be allowed to continue.

No one can claim, of course, that a national court of tax appeals will bring complete certainty to the tax law--an answer for every question. It will, however, significantly shorten the period of uncertainty. Not only will more answers be known but they will be known earlier and with greater clarity. At a time when our tax law is alledgedly more complex than ever before, and amidst a national yearning

for simplification, Congress can, and should, take a positive first step toward removing one of the principal causes of complexity--the lack of predictability in the tax law.

3. Trial court forum choices demand to be offset by appellate uniformity. Some have, in the past, criticized the forum shopping opportunities (i.e., the choice among the United States District Courts, the Tax Court and the Court of Claims), which the present law now affords. Even though this system is more the product of history than of logic there are strong arguments (apparently subscribed to by the supporters of S. 1691) for not tampering with this system. The very existence of this tripartite trial forum choice constitutes one of the strongest reasons for the adoption of an appellate court with exclusive jurisdiction from all three forums. For example, the so-called Golsen rule, pursuant to which the Tax Court will follow the holding of the Court of Appeals to which the case it is considering is appealable, results in a disparity of treatment which can only be described as wild. If the Tax Court is deciding a case involving a taxpayer who resides in a circuit which has not addressed itself to the particular issue it may decide the issue free of any appellate court influences. If, on the other hand, its decision would be appealable to a circuit which has spoken on the issue, it will (in the interests of judicial economy), follow that circuit's holding. The

result here is obvious--taxpayers with cases involving precisely the same issue can, by taking their cases to the Tax Court (a forum with an articulated "national" jurisdiction), and simply by living in different areas, be held to have obligations under the tax law which are diametrically opposed.

These, and many of the other assumed disadvantages of so-called "forum shopping" at the trial level, would not be present under a national court of tax appeals. In fact, the choice which is now available at the trial level might be regarded as desirable in a context in which there is a single appeal forum. The benefits of finality at the appellate level would be nicely complemented through the existence of a choice for presentation of the issues at the trial level.[2/]

4. The importance of having generalist judges--but generalist judges who would be deciding cases in a specialist context. For years--perhaps since Dean Griswold's original proposal for a national court of tax appeals in 1944--a good part of the discussion of this issue has involved the question of whether "generalist" or "specialist" judges should comprise

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2. S. 1691 does not deal with the so-called Court of Claims issue which, of course, it should. There are arguments, with which I do not disagree, for retaining that court's original jurisdiction in tax cases. Doing this, however, requires that its decisions be appealable to the national court of tax appeals.

the membership of the court. Although I do not see tax lawyers as the narrow, short sighted technicians that some do, I consider the use of judges with backgrounds other than solely in taxation as the best approach for staffing a national court of tax appeals. I do this for two reasons. First, injecting persons with this type of broad background into the decision making process seems to complement, nicely, the solid specialist approach which the Tax Court (before which a large segment of tax cases are heard) brings to the resolution of these issues. Second, one must consider the high standards which are generally attained in making appointments to the courts of appeal. We now seem to be in a time when all involved in making these appointments--the Senate, the Department of Justice and the American Bar Association--are dedicated to making appointments only of the highest quality. There is no certainty, however, that the public generally, and the bar specifically, would demand such a high level of appointment to a specialist court of tax appeals--at least initially. Staffing the national court of tax appeals with judges regularly appointed to the various courts of appeal, however, insures that those making up that court would be of the same high quality as the federal appellate judiciary generally.

Despite the advantages of using judges with a broad based background on the national court of tax appeals,

there is much to be said for the establishment of a facility, perhaps even a philosophy, in dealing with tax issues. This is the beauty of Senator Kennedy's proposal-it brings judges with a generalist's background to a court with specialized jurisdiction. The expectation is that this would achieve the best of both worlds. These judges, acting inter se, would bring to bear their broad, diverse, and "generalist" backgrounds in a specialized decision making atmosphere. The exlusivity, or near-exlusivity of the judges' committment, and the staggered terms of their tenure, would serve to give the decision making process a continuity and cohesiveness--two of the main advantages of a specialized decision making forum. Further, and this must be underlined in considering this issue, the judges comprising a national court of tax appeals will be speaking, in effect, as a Supreme Court in the tax field. Not only will the opinions issued have nationwide impact, but, as a body of law that will be distinguished, analogized and studied, time and again. It is human nature that this will cause them to bring to the decision making process the utmost care, reflection and deep consideration of the issues involved. Generalists will, indeed, be acting in a specialized atmosphere--the best of both worlds!

5. Status quo preserves premium on specialization. One of the most severe offshoots of the statute's complexity is the importance which it places on specialization. Presumably,

there will always be a need for specialists in this area but it can be fairly asked whether it is wise to permit a system to endure which fosters the need for those advising even low and middle income individuals to be, in effect, tax specialists. Under the present system, practitioners (be they tax lawyers, accountants, or simply return preparers) are required to speculate as to whether a court of appeals' decision in another circuit will apply to the taxpayer they are counseling. Even on issues pertaining to lower and middle income taxpayers, this requires a level of expertise which we should be slow to demand of rank and file counselors.

ARGUMENTS AGAINST

In the following paragraphs I shall set out what seem to me to be the major arguments lodged against the proposal contained in S. 1691. In most instances it will be demonstrated that the argument made is not valid. Even in situations where the argument made has some validity it can be shown that there is an effective counter argument.

1. "Ventilation" issue. In my judgment the strongest argument which opponents of S. 1691 have is that the present system beneficially permits a seriatim consideration of difficult tax questions. Assistant Attorney General Ferguson puts it best when he speaks of the present system as providing an "opportunity for reconsideration of an issue already decided by one circuit by another appellate court free of

the constraints of the doctrine of stare decisis."

A number of points can be made in this regard. Assuming arguendo, that "better" law results from this serial consideration of tax issues, consider at what price it is purchased! Not only are taxpayers (and the government) put to the expense of litigation (including not only the direct costs of litigation but the additional expense which the administrative system bears due to repeated consideration of the issue in an atmosphere of uncertainty), but the taxpaying public is denied the benefit of early resolution and predictibility.

Secondly, who is to say that "better" law results from seriatim consideration of tax issues? There is, certainly, no proof that it is always, or even most often, the situation that the later in the series of appellate decisions represents the view adopted by the Supreme Court. There are many instances, in fact, in which the eventual resolution adopted by the Supreme Court has been the approach taken by the first appellate court to consider the issue. For example, the result reached by the Supreme Court in U.S. v. Davis, 370 U.S. 65 (1962), holding that the transfer of appreciated property incident to a divorce resulted in realized gain to the transferor (another issue impacting many taxpayers), was the same as that reached in the first appellate decision (Commissioner v. Mesta, 123 F.2d 986 (3rd

Cir. 1941)), rather than the later inconsistent opinions.

Further, there is nothing inherent in the S. 1691 approach which denies the opportunity for repeated testing of appellate judgments. Once an opinion of the proposed national court of tax appeals is issued lawyers will, as they have done for ages, distinguish the opinion and urge that their case is different. Since an appeal to the national court of tax appeals is automatic an opportunity will exist for testing that view. It may be that a subsequent hearing on the issue in another case will simply result in a per curiam opinion incorporating the previously advanced rationale. On the other hand, it may result in the national court of tax appeals accepting the alleged grounds for differentiation. In this manner, therefore, opinions of this tribunal can be subjected to the same type of repeated testing which is available under the present system.

There is another feature of S. 1691 which insures consideration of difficult issues by a broad group of judicial talent. The concept of an en banc rehearing goes a good way toward providing this opportunity although I would like to see the mechanics for obtaining such a rehearing spelled out with more certainty. The idea has been suggested that a case be set down for en banc rehearing if five of the court's eleven judges felt the case should be reconsidered in that manner. Few could deny that a mechanism of this sort would create a

sufficiently broad range of judicial ability and background capable of permitting the most thorough and penetrating analysis of the issues involved.

2. First case on an issue may be the wrong case. A related argument to the so-called "ventilation" argument (in fact it may be the same argument) is the point that the case in which the first issue is decided by the national court of tax appeals may not be the right case in which to shape the uniformly applicable national rule. It is true that appellate court results often depend upon the manner in which, and the ability with which, the issues are presented to the deciding court. All lawyers are not equally able in this regard. The judges who comprise this court will know, however, that they are fashioning a uniformly applicable principle and will act with that responsibility in mind. Not every case presented to the U.S. Supreme Court is briefed or argued with equal capability and yet the decisional quality remains relatively uniform. In other words, in instances in which the presentation to the Court may have been lacking, the court is able to "pick-up", on its own, further analysis and argument, thereby improving upon the quality of the decision making process. One would expect no less from a national court of tax appeals. Further, as pointed out above, the first case is not necessarily the last case. It can be expected that a national court of tax appeals would issue

opinions distinguishing, modifying, elaborating, or, in rare instances, completely overruling, prior holdings. This inter-decisional analysis builds the fabric of the case law and is exactly what a forum of this sort is supposed to do.

Opponents of a national court of tax appeals cannot, however, have both sides of the argument. In one breath they argue that the first decision on a particular issue (which may be an improperly reasoned opinion) cuts off future consideration and reflection as respects that issue. In the next breath they urge that this court will not obtain the hoped for uniformity since constant attempts by subsequent litigants to distinguish the prior opinions will cast doubt upon the efficacy of the prior opinion. The fact is, of course, that neither argument is correct. The first decision does establish uniformity but, as is the case with the corpus of any appellate decisional authority, the opinion stands ready for further expansion, contraction or elaboration. This is the function of the appellate decisional process.

3. Regionalism inherent in courts of appeal system should be preserved in tax cases. Opponents of a national court of tax appeals argue that its adoption would forfeit the beneficial aspects of a regional approach to appellate decision making. It is beneficial to the appellate process, they urge, to have judges hearing matters arising from factual situations with which they may have a regional

attachment. Similarly, it is also desirable to place appellate judges in an appellate arena in which they are likely to be applying principles of local law with which they are familiar.

Several comments are in order here. It may be true that a certain regionalism was, indeed, intended when the circuit lines were first drawn in the 1890's. It is difficult to see, however, how that fact of judicial history has much relevance in thinking about the national court of appeals issue. First, no one is suggesting that Pakistani judges be installed to decide United States tax law problems. All of the judges appointed to the court will have been schooled in U. S. law--most, if not all, will have previously been judges in other forums. All of the judges will have been trained and educated in the same culture. In any event, in late twentieth century America regional pecularities are fading fast. If there once was an argument for a strict regional approach to appellate decision making, it seems less pertinent today.

Even the present system by no means insures that a court of appeals judge will have any regional background in the matter before the court. Despite the frequency with which oil and gas issues come before the Fifth Circuit, it is entirely possible for a case involving that subject matter to come before a panel with little or no experience in that field. Similarly, a fishing law question could, in

the Ninth Circuit, be heard by judges from Nevada, Idaho or Arizona. Further, there is no particular advantage in having judges deciding these issues to have been schooled or trained in local law questions which may apply. First, even under the present court of appeals system there is little or no chance that any direct familiarity will exist with respect to any local law aspects of federal tax cases. Certainly, also, it cannot be argued that a national court of tax appeals cannot appropriately deal with local law issues. The Tax Court--a forum with nationwide jurisdiction--has been doing so for decades.

4. Uncertainty regarding who will serve on court. The concern here is that there will be few, if any, volunteers for this assignment and, therefore, the national court of tax appeals may not be well staffed. First, I think you have to assume that the quality of any service on the national court of tax appeals is, at least, going to be as high as the caliber of that of appellate appointments generally--and that is high! It is unlikely that the person involved will have been a tax specialist prior to his, or her, appointment to the court of appeals--in fact, there are probably no more than two or three tax specialists in the entire federal appellate system. It is this aspect, of course, which would bring to the national court of tax appeals the desirable generalist flavor.

The point has been made that, since few will want

the appointment, it is likely that the newly appointed court of appeals member will be an unwilling appointee to the national court of tax appeals. I guess I don't agree that all, or even a majority of judges of the courts of appeal, will shy away from this appointment. Most will realize, will they not, that this is a rare opportunity for them to have a role in shaping the development of the law on a nationwide scale. Even if it is the "new person on the block" who comes to the national court of tax appeals, the quality of the appointment will be high and it is likely that he, or she, will have had some previous judicial background.

5. There is insufficient data to adopt a national court of tax appeals. This type of argument is commonly made by opponents of almost any kind of proposal. Further study or data is needed, they say. The fact is, however, that this particular idea has been subject to years of the closest scrutiny. One needs only to look at the copious footnotes to H. Todd Miller's article in the Yale Law Journal (A Court of Tax Appeals Revisted, 85 Yale L. J. 228 (1975)), in which all manner of law review articles and congressional and commission studies are cited. Would that many substantive changes in the tax law received this level of analysis prior to enactment. Further study is something that this proposal does not need; change possibly, due consideration, but not

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further study. As for the alleged need for data, one need only note that uncertainty can, and does, prevail concerning many tax interpretative issues. No expensive or time consuming studies need be launched to learn that, when one circuit speaks on an issue, it leaves taxpayers outside that circuit unsure of what the rule is as to them.

6. A national court of tax appeals is the first wedge in the establishment of a myriad range of special courts. From time-to-time suggestions have been made that other areas of federal judicial concern be placed under the jurisdiction of a special judicial forum. Except in rare instances, these proposals have not met with success. The proposed national court of tax appeals is, however, different from proposals of this sort. First, it is not a specialist court. The court does have a specialized jurisdiction but, as pointed out before, judges with generalist backgrounds will comprise its membership. Second, and more important, the establishment of a national court of tax appeals would, by no means, constitute a precedent for the establishment of similar tribunals in other areas. The essential reason for the establishment of a national court of tax appeals--that is, the general pervasiveness of the tax law--is singular to this field. In no other area is there an obligation similar to the mandatory self-assessment obligation which the tax law requires and, therefore, in no other area is there the

desperate need for certainty, uniformity and predictability.

7. Even if a national court of tax appeals is established it will not insure certainty on all tax-related issues. It is true that jurisdiction regarding certain questions, such as those relating to criminal tax matters and bankruptcy, will not be vested in the national court of tax appeals. This, by no means, results in the failure of that tribunal's purpose. On the contrary, even if jurisdiction of a national court of tax appeals were restricted to refund and deficiency proceedings, the boon to predictability and certainty would be enormous. Certainly it cannot be argued that cases arising in these tangential areas are a major source of uncertainty insofar as taxpayer compliance is concerned. Further, they do not, in percentage terms, comprise more than a small part of the tax litigation universe.

8. A national court of tax appeals will permit the government to control the development of appellate interpretation. The government, it is urged, can, by the judicious selection of cases in which it will take an appeal, control the development of appellate authority. The point here, obviously, is that taxpayers can appeal matters just as readily as the government can. Although not institutionalized, taxpayers are knitted together by a common interest. Their motivation is just as strong, if not stronger, as the government's in developing favorable case authority. In any

event, either party taking an appeal will have the burden of surmounting, before the national court of tax appeals, an adverse opinion (often a very well reasoned opinion) issued by the trial court.

9. Administrative difficulties. This point goes to accessability of the tribunal as much as anything else. Care should be taken, it would appear, to insure that a hearing, by a three-judge panel, of the national court of tax appeals would be available in every location in which a court of appeals hearing may now be obtained. Certainly, if this degree of accessability is present few can complain about the court's accessability. It may be that an en banc rehearing will be available only in Washington, D. C. or in some other centralized location. I do not regard this as imposing too great a burden on the litigants. Such cases are likely to involve important and significant tax issues and it would be surprising if the parties, having gone that far in the litigation process, would be unduly burdened by the travel requirement inherent in an en banc rehearing.

Statement of points made by
James B. Lewis, New York, N.Y.
before Senate Finance Taxation
subcommittee on 11/2/79 on
S. 1691

1. The law of taxation is not isolated from other bodies of law.

2. A judge should have the capacity to see the tax issue before him in its broad context.

3. The judges named to the proposed Court of Tax Appeals would, by being largely confined to tax cases, soon lose their generalist vision.

4. There is a substantial risk that the circuit judges of lesser talent would be impelled toward the Court of Tax Appeals.

5. Creation of the proposed Court of Tax Appeals would complete a circle of specialization and tend to immunize the tax law from refreshment from outside.

Statement of James B. Lewis,
New York, N.Y. before Senate
Finance Taxation subcommittee
on 11/2/79 on S. 1691

For 35 years we have been reading in law review articles that tax appeals should be heard by a single, specialized court. Thirty-five years ago I favored that proposal; today I do not.

The reasons for not creating special courts for particular branches of the law were trenchantly stated in 1951 by my partner Simon H. Rifkind, one year after he had retired from the federal bench to resume the private practice of law.[1/] In that article Judge Rifkind opposed the suggestion that a special court should be created to try patent cases. His article is so compelling and so highly relevant to the debate over S. 1691 that I have reproduced it as an appendix to my prepared statement.

The law of taxation is not isolated from other bodies of law. The law of taxation fastens upon virtually every form of legal entity--the individual, the corporation, the partnership, the trust, the estate. Taxation is intimately involved with family law--with the marital relationship, separation or divorce, support obligations, and the consequences of death. All forms of property protected by law have peculiarities

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1/ S. Rifkind, A Special Court for Patent Litigation? The Danger of a Specialized Judiciary, 37 A.B.A. Journal 425 (1951).

that affect their taxation--real property, natural resources, patents, copyrights, trademarks, good will, or securities. The taxation of commercial transactions may turn on their legal classification as purchases or sales, leases, contracts not to compete, contracts for natural resource or other royalties, restrictions on alienation, joint ownerships, or the relationship of employment or of independent contractor. In its enforcement and procedural aspects, taxation may intertwine itself with the law of bankruptcy or insolvency, liens, contract, creditors' rights, insurance, subordination or estoppel. The trial of tax cases is no less subject to the laws of evidence and jurisprudence than litigation in other areas.

To understand any branch of the law well, a judge must understand those branches that adjoin it; indeed he must have a grasp of the general body of the law. He should have the capacity to see the issue before him in its broad context. It is not surprising that the landmark tax decisions have been written by judges who were great generalist judges.

It is no answer to say that the eleven judges who would be named to the Court of Tax Appeals if S. 1691 is enacted are already generalist judges. By being largely confined to tax cases, they would soon lose their generalist vision. They could not long retain that vision if they cut their lines of communication with litigations involving the whole body of law.

What is most troublesome is the prospect that the most able judges on the eleven Courts of Appeals would generally resist the invitation to confine themselves to a steady diet of tax cases. The antipathy of the more competent circuit judges to submit to such specialization would inevitably impair the quality of the Court of Tax Appeals. The risk that the judges of lesser talent would be impelled toward the Court of Tax Appeals is an inherent one. Once initiated, that process would feed upon itself.

We already have a specialized tax bar, a specialized Internal Revenue Service and a specialized Tax Court. Creation of a Court of Tax Appeals would complete the circle of specialization. The dangers of such action were vividly described by Judge Rifkind in 1951:

> "[A] body of wisdom...[becomes] the exclusive possession of a very small group of men who take their purposes for granted. Very soon their internal language becomes so highly stylized as to be unintelligible to the uninitiated. That in turn intensifies the seclusiveness of that branch of the law and that further immunizes it against the refreshment of new ideas, suggestions, adjustments and compromises which constitute the very tissue of any living system of law. In time, like a primitive priestcraft, content with its vested privileges, it ceases to proselytize, to win converts to its cause, to persuade laymen of the social values that it defends. Such a development is invariably a cause of decadence and decay."

Supporters of S. 1691 see as its chief benefit the speedier, more definitive resolution of complex tax issues. That is also its chief defect. The prompt resolution would also be more arbitrary, less well-considered, and less supple.

The tax system would be insulated from the self-correcting forces of our commonwealth of law, cease to be informed by the multiplicity of views that sustain legitimacy, and, in Judge Rifkind's words,"lose its hold on the respect and allegiance of the people--in the last analysis its major sanction." That may be too high a price to pay for acceleration of resolution.

If tax issues have become so complex that they cannot be entrusted to the eleven federal courts of appeals, then something has gone seriously wrong with tax legislation. If that is so, then, as Judge Rifkind said in 1951, "the cure lies in correcting the law, not in tinkering with the Bench."

A Special Court for Patent Litigation?

The Danger of a Specialized Judiciary

by Simon Rifkind • of the New York Bar (New York City)

■ In this article, Judge Rifkind answers the recurring demand that a special court for trying patent cases be created. His argument rests on the assumption that judges should be men with a broad outlook upon the law and he declares that creating specialized judges in the patent field would soon lead to sterility in that area of the law.

■ Periodically one hears the suggestion that patent cases should be tried before patent judges. The proposals take a variety of forms but they all revolve about the proposition that the judicial product of patent litigation would be improved if the trials were conducted by judges specializing in patent cases.

I deny this pivotal proposition; consequently I am opposed to patent courts or patent judges.

The highly industrialized society in which we live has a great appetite for "know-how". Such a society elevates and aggrandizes the position of the expert. His is the voice with the ready answer. His opinions become the facts upon which lesser mortals—laymen—risk life and fortune.

Against the citadel of the expert I tilt no quixotic lance. My contention is that the judicial process requires a different kind of *expertisse*—the unique capacity to see things in their context. Great judges embrace within their vision a remarkably ample context. But even lesser men, presiding in courts of wide jurisdiction, are constantly exposed to pressures that tend to expand the ambit of their ken.

The patent law does not live in the seclusion and silence of a Trappist monastery. It is part and parcel of the whole body of our law. It ministers to a system of monopolies within a larger competitive system.

This monopoly system is separated from the rest of the law not by a steel barrier but by a permeable membrane constantly bathed in the general substantive and procedural law. Patent lawyers tend to forget that license agreements are essentially contracts subject to the law of contracts; that infringements are essentially trespasses subject to the law of torts; that patent rights are a species of property rights; and that proof in patent litigation is subject to the laws of evidence. Changes in all these branches of the law today have an effect on the patent law as well. As long as judges exercising a wide jurisdiction also try patent cases, so long do the winds of doctrine, the impulses towards slow change and accommodation, affect the patent law to the same degree as they affect the general body of the law.

In a democratic society the law, in the long run, tends to approach commonly accepted views of right and wrong. Thereby it continues its hold on the respect and allegiance of the people in the last analysis its major sanction. Once you segregate the patent law from the natural environment in which it now has its being, you contract the area of its exposure to the self correcting forces of the law. In time such a body of law, secluded from the rest, develops a jargon of its own, thought-patterns that are unique, internal policies which it subserves and which are different from and sometimes at odds with the policies pursued by the general law.

Such conflicts, when they emerge in spectacular form, induce a public cynicism about the law and a sense of injustice. In such a climate the patent system may not fare too well.

Specialized Judiciary Leads to Decadence of Law

Moreover, a specialized patent court would breed other unfortunate consequences. The patent Bar is already specialized. At present, however, patent lawyers practice before nonspecialized judges and accommodate themselves to the necessity of conveying the purposes of their calling to laymen. Once you complete the circle of specialization by having a specialized court as well as a spe-

cialized Bar, then you have set aside a body of wisdom that is the exclusive possession of a very small group of men who take their purposes for granted. Very soon their internal language becomes so highly stylized as to be unintelligible to the uninitiated. That in turn intensifies the seclusiveness of that branch of the law and that further immunizes it against the refreshment of new ideas, suggestions, adjustments and compromises which constitute the very tissue of any living system of law. In time, like a primitive priestcraft, content with its vested privileges, it ceases to proselytize, to win converts to its cause, to persuade laymen of the social values that it defends. Such a development is invariably a cause of decadence and decay.

The root of the matter is that there is a difference between specialization on the administrative level and specialization on the judicial level. On the administrative level there is advantage to be derived from close familiarity with the pattern of activity which is the subject of administrative action and regulation. The very essence of the judicial function, however, is a detachment from, a dispassionateness about the activity under scrutiny.

The views thus far expressed are of general derivation. They are not especially related to the patent law. They are equally pertinent to the admiralty law, to bankruptcy, to security regulation, or any other of the great provinces of the law. The views expressed stem from a conception of the place and function of the law in a democratic society as the arbiter and mediator of conflicting social interests and demands. A one-function court cannot assist the law to discharge that responsibility.

No Benefit Will Be Obtained from Having Patent Court

The patent law itself contributes a number of considerations which weigh against the proposal for a patent court. One of these is that the benefits of expert knowledge which are forecast by the proponents of the change will not be realized in any substantial degree. It is hardly to be supposed that the members of a patent court will be so omniscient as to possess specialized skill in chemistry, in electronics, mechanics and in vast fields of discovery as yet uncharted. The expert in organic chemistry brings no special light to guide him in the decision of a problem relating to radioactivity. Consequently, even judges serving upon a specialized patent court will, in any particular case, prove to be nonexperts except only with respect to the patent law itself. But knowledge of the patent law has never presented any grave problem. The patent law presents no greater difficulties to its mastery than any other branch of the law. Reading the judicial literature created through patent litigation I am not aware of any marked deficiency on the part of the present judiciary in comprehending the principles of law relevant to a decision in patent cases.

Another consideration derived from the patent law is that changes in patent litigation have already made the proposal stale. Patent litigation has overflowed its ancient channel. Today one who can navigate only in so-called pure patent law is inadequate as a patent lawyer and insufficient as a patent judge. Today patent litigation is most frequently met with in close association with other branches of the law such as unfair competition, trade-marks, confidential submissions, antitrust and corporate reorganizations. It is apparent that the patent expert can be only moderately learned in all these additional departments. It follows that, like most experts, he can bring his special knowledge to bear on the problem but is not especially fitted to perform the judicial task of extracting a solution by subjecting the problem to the filtering process of many strata of knowledge.

Greystone Studio

Simon H. Rifkind was judge of the United States District Court for the Southern District of New York from 1941 to 1950 when he resigned to return to active practice in New York City. Born in Russia, Judge Rifkind was educated at the College of the City of New York and Columbia Law School.

Very recently, Judge Harold Medina in an address to the patent Bar, widely published, described the distressing experiences he encountered in trying his first patent case. The address was very entertaining as it was meant to be. However, it did not support the inference which some have drawn from it that the cure for such judicial distress is a special patent Bench. Every new judge is confronted by cases in fields of law in which he had not previously practiced. Every competent judge overcomes this handicap of lack of familiarity within a reasonable time. If the patent law has already become so esoteric a mystery that a man of reasonable intelligence cannot comprehend it, then something has gone seriously wrong with the patent law. If that is so—and I do not hold this view—the cure lies in correcting the law, not in tinkering with the Bench.

Senator BAUCUS. Our final panel consists of four stalwart souls: Mr. Robert E. McQuiston, Ms. Sharon King, Mr. David Glickman, and Mr. Donald Wood.

Probably it would be best if each of you, when you testify to introduce yourselves and explain whom, if anyone, you are representing.

Please proceed in any order that you wish.

STATEMENT OF ROBERT E. McQUISTON ON BEHALF OF THE TAX SECTION, THE PHILADELPHIA BAR ASSOCIATION

Mr. McQUISTON. My name is Robert E. McQuiston. I am appearing this afternoon in my capacity as chairman of the Philadelphia Bar Association section on taxation.

Our association consists of approximately 250 Philadelphia lawyers who spend a great deal of their time practicing in the income tax, and estate tax, areas.

Our association has had a keen interest in this legislation. We have followed its progress, and it has been the subject of debate and discussion by our Federal tax committee and by our executive council. Both bodies concluded that the concept of a centralized Tax Court of Appeals should be opposed.

Fearful that we might be speaking for too small a group, we went the extra step and had a mail ballot sent out to all of our members together with supporting materials. That ballot disclosed that of those responding, 71 percent opposed the concept of a centralized Court of Tax Appeals. Only 29 percent supported it, and among that 29 percent, there is a strong difference in views as to how that court should be constituted.

Senator BAUCUS. That was sent to whom?

Mr. McQUISTON. That was sent to all the members of the section on taxation, 250 lawyers, one-sixth responded, which is a very high response for us.

Senator BAUCUS. In the Philadelphia area?

Mr. McQUISTON. That is right.

In connection with that poll, I would like to comment on what I consider to be the unfortunate suggestion in the hearings earlier today that bar associations oppose this legislation out of self-interest, for fear that the ability to forum shop may decrease.

I have two comments. One, I was very pleased with the caliber of discussion and interest that our section has shown in this legislation. They debated it long and hard, and I heard no comment at any time which would evidence a self-motivation in favor of clients. These were ladies and gentlemen who are very concerned about our tax system. They have to deal with it on a daily basis. We want it to work as much as anybody else.

The second comment is that forum shopping is really a subject that has to do with the trial court level when you select a district court, the court of claims or the tax court. Our discussion today is about the appellate end of the tax litigation system. In the case of individuals, an individual has his or her tax appeal heard by the circuit in which he or she resides and I have never personally run up against a situation where a taxpayer has moved in an effort to forum shop. I do not think that is a legitimate issue for discussion in the context of this particular bill.

Now, speaking for 250 lawyers, I would not try to articulate what each and every one of them used as a basis for arriving at his or her decision. I came away with the impression that the opposition is attributable to two things.

One, a feeling that there simply has not been a case shown that the established system should be replaced by an entirely new, untried system.

Second, I came away with the distinct impression that the tax practitioners believe that the present system is working and working, on the whole, effectively.

It is for that reason that our membership would urge that the present system, with its strengths, be retained and that this particular legislation not be enacted into law.

Thank you.

Senator BAUCUS. Thank you very much.

STATEMENT OF SHARON KING, ON BEHALF OF THE CHICAGO BAR ASSOCIATION

Ms. KING. My name is Sharon King. I am here today on behalf of the Chicago Bar Association. We have filed a written submission which we would like to have made part of the record.

I will try to touch on just a few points from our written submission, which is in opposition to the creation of a national Court of Tax Appeals as proposed under Senate bill 1691.

Of particular concern to us is the departure from the longstanding philosophy of avoidance of specialization at the appellate level of judicial review. The tax law is not the only complex area of the law. There are others—antitrust, securities laws—that could be mentioned, other areas that are unique.

We feel that the system of a general appellate review has worked well and that it continues to work well and we think this is certainly true in the tax area. Tax matters do not arise in a vacuum. We think they ought to be considered in a general appellate judicial atmosphere.

We certainly think that a step of this sort, which is a substantial departure from the present system, should not be taken without considerable caution and without considerable justification.

It appears from some of the comments today and from other materials that we have read with respect to this bill that, in part, this proposal is an effort to simplify the tax laws by modifying the judiciary.

We think that the simplification of the tax laws is best achieved as the Senate Finance Committee has approached it—namely, by amending the Internal Revenue Code to simplify its provisions. We do not think that a modification of the judiciary is going to accomplish the goal of simplification.

We also think that it is unlikely that a national Court of Tax Appeals will have a substantial effect in decreasing litigation and uncertainty in the tax area.

First of all, it takes many years before a case even reaches the courts. After legislation is enacted issues take a long time in developing. Even after they reach the court, there are still a number of years before the cases are tried, argued, briefed and decided at the trial level and then again at the appellate level.

We hardly think that a national Court of Tax Appeals is going to have a substantial effect on a speedier, more definite resolution of these tax issues.

I think also that we have to recognize that in the tax area it frequently is not the question of law that is the problem. It is the application of the law to the facts. So while a rule of law may be settled, litigation continues because of factual distinctions.

This will certainly happen, even if there were a national Court of Tax Appeals.

I think there is an additional problem, and that is that tax practitioners and Government attorneys tend to narrowly construe court decisions. A specific example, I think, is a case which I argued about 1½ years ago—or it was decided about 1½ years ago—in the Supreme Court involving a withholding tax question.

When the case was in the seventh circuit, the Government took the position that the same principles would apply to FICA tax withholding, as to income tax withholding though the former was not directly involved in the case. When the Supreme Court held against the Government, the Government had a change of view on the FICA tax question and it proceeded to litigate that question and for the year and a half since the Supreme Court's decision, substantial litigation has ensued with the uncertainty and the problems that arise from that.

So I think if a Supreme Court decision in the tax area cannot avoid this type of hairsplitting litigation, it will not happen with a national Court of Tax Appeals, either.

Senator BAUCUS. Thank you very much.

Ms. King, did you poll the Chicago bar by chance on this question?

Ms. KING. We did not poll the entire bar association. We did have substantial input from the Federal tax section. This was also presented to the board of managers of the Chicago Bar Association, which represents not necessarily tax, but a diverse group of practice and has been approved by them as a position of the bar association.

Senator BAUCUS. Do you have any sense of what percentage of the tax bar in the Chicago area would oppose the proposal?

Ms. KING. The procedural division which I chair was unanimous in its opposition. The executive committee of the Federal tax section was virtually unanimous in its opposition.

Senator BAUCUS. Thank you very much.

STATEMENT OF DAVID GLICKMAN, ON BEHALF OF THE TAX SECTION OF THE TEXAS BAR ASSOCIATION

Mr. GLICKMAN. My name is David Glickman. I am the chairman of the tax section of the State bar of Texas. I appreciate the opportunity to share with you our views with respect to S. 1691.

In the few minutes I have, I will attempt to outline the points which we considered in reviewing this proposed legislation. We have submitted a more detailed report in writing . It is our understanding that that report will be included in the record.

Senator BAUCUS. That is correct.

Mr. GLICKMAN. Unfortunately, unlike Mr. McQuiston's organization, our section began reviewing this matter at a very late date.

As a result, the report was not submitted to the board of directors of the State bar and thus it represents solely the views of the tax section of the State bar of Texas. However, in my view, the tax section is the appropriate body to address this issue.

The report was primarily the work of an ad hoc committee of our section, which committee was chaired by Robert Edwin Davis and cochaired by Katherine Hall, both of Dallas. Ms. Hall is with me today.

I advised the ad hoc committee that the position adopted should be based on an unbiased and evenhanded review of the pros and cons of S. 1691, and the conclusion reached should "let the chips fall where they may. The report has been reviewed by the officers and council of the section of taxation, and we believe that the reasoning of the report and the conclusions reached therein are based upon an objective analysis of available information. I would like to review a few of the thumbnail points that we did consider.

First, the two major goals as set forth in the report of the Judiciary Committee accompanying S. 1691 are: First, the elimination of uncertainty resulting from conflicts in the circuit courts and second, the elimination of unfairness to taxpayers as a result of such conflicts. However, our review indicates that these goals are not directed toward the solution of meaningful problems.

Only six tax cases were reviewed by the Supreme Court during the October term of 1977 because of such conflicts. The average time between the inception of the conflict and resolution by the Supreme Court for five of these cases was 2.6 years. As of July 15, 1979, the Supreme Court reviewed only three tax cases during the October term of 1978 involving conflicts, the resolution time for which averaged 2 years. Additionally, the cases which were decided, for the most part, involved issues unrelated to the needs of the majority of the Nation's taxpayers. Thus, we question whether the proposed court can accomplish anything significant with respect to the elimination of uncertainty.

As an aside, we would like to point out that the complexities of the tax statutes create a greater problem than do conflicts in judicial decisions. The courts are heavily burdened by the difficulties encountered in interpreting these statutes, as well as in correctly analyzing the regulations, rulings and cases which interpret the statutes. This burden is compounded by IRS "nonacquiescence" in various Tax Court cases and the issuance of regulations which are sometimes inconsistent with statutory language and Congressional intent. These, rather than circuit court conflicts, create problems for taxpayers.

We also question whether the proposed court can eliminate either the few conflicts which occur or the problems created by complex statutes. Since the IRS and taxpayers will continue to litigate on the basis of distinctive fact situations, a single precedent undoubtedly would not prevent subsequent litigation regarding similar issues. Moreover, the rotating membership of panels of judges could well result in conflicts within the proposed court.

As between the proposed court and our present appellate tax system, we believe that the circuit courts provide the most acceptable framework for the continuing evolution of the tax laws. Since only 5 out of 456 tax cases heard by the circuit courts in 1977 have

been reviewed by the Supreme Court on the basis of conflicting opinions, 451 cases remain which were presumably decided satisfactorily or consistently. We believe that the proposed court might well harm the overall development of the tax laws by precluding further appropriate analysis of these laws by the circuit courts.

The second goal of the bill is to eliminate the unfairness assertedly resulting to taxpayers whose circumstances are otherwise identical because judicial conflicts allegedly cause such taxpayers to pay different amounts of tax solely because they reside in different circuits. We have been unable to locate any statistics indicating differences in the tax revenues attributable to such conflicts, and we are unaware of a discernible demand from the public for reform in this regard. Thus, we have difficulty viewing this as a significant problem.

There are also a number of practical considerations that concern us. One practical consideration concerns the costs and the inconvenience to taxpayers and their attorneys who might have to travel to Washington for hearings that may be required throughout the 11-month period during which it is possible that no panel will meet within a given circuit. In addition, it seems to us that the judges selected to sit on the proposed court may quite possibly be those who are less senior and less experienced, since they will be the ones who will be most easily spared by the circuit courts.

Finally, and possibly most important, we also believe that there is a need for expertise regarding local law problems. Texas, for example, has developed laws in the oil and gas area, the community property area and various other areas.

After reviewing this matter closely, we feel that the judges on the fifth circuit are better equipped to handle tax problems that turn on unique laws of our State than are judges who have not dealt with our State laws.

Thus, based upon this analysis, we recommend that S. 1691 not be enacted into law.

Senator BAUCUS. Thank you, Mr. Glickman.

Mr. Wood?

STATEMENT OF DONALD F. WOOD, ON BEHALF OF THE TAX SECTION OF THE HOUSTON BAR ASSOCIATION

Mr. WOOD. My name is Donald Wood. I am here today representing the section on taxation of the Houston Bar Association in Houston, Tex. We are an organization of approximately 200 members, practicing tax lawyers in the city of Houston.

The position which I will express today has been adopted by the officers and counsel of the section. We did not make a poll of the membership, although we have discussed the issue at our meetings, and at no time has anyone expressed any support for this proposal. I think it is a fair statement that the Houston tax bar is strongly opposed, to the proposal here.

I will not try to repeat what other people have said today. Suffice it to say that I am in agreement with the bulk of the comments that have been made by people in opposition to this proposal. I think that the grounds for this opposition is that we believe strongly in review by generalist appellate judges. We are strongly against

cutting off Supreme Court review of taxation issues, believing that those cases are as important as any others that this court hears.

We believe that the development of tax law is really no different than the development of any other law and the same appellate procedure should be applied in the tax area as is applied in the antitrust area, labor area, energy area, or any other area. It is unfair to single out the tax area for special treatment.

I would like to spend a minute or so on the problem that Mr. Glickman mentioned that may be somewhat peculiar to Texas and that pertains to the specialized areas of State law that the appellate courts frequently deal with, for example, oil and gas law, but let's take community property law as an example.

As you probably are aware, several States have community property systems. Those systems vary State by State. It is not at all infrequent to have an estate tax or a divorce tax case or an income tax case that turns on the interpretation of State community property law.

I was personally involved recently in an estate tax case where it was crucial that a new and novel issue of Texas community property law be decided.

It was very comforting to know that on the fifth circuit panel listening to the argument of that case there was a judge from Texas who was obviously intimately familiar with that system, another judge from Louisiana, another community property State, and a third judge who is from a neighboring State, a common law jurisdiction.

Those judges, in my opinion, realized the importance of that decision, not only to the Federal tax system but to the community property tax system in the State of Texas. Realizing that, the judgment they came down with is one that our client and the lawyers involved, I think, find much more acceptable than having a judge from Massachusetts or States of that sort with common law systems decide the case.

That case, interestingly enough, was cited later by the Tax Court, about 3 months ago, in a divorce income tax case. The Tax Court obviously is a very fine institution. But right next to the citation of our case, which we had tried under the Texas community property system was the citation of California property law cases.

I know from personal experience those California cases are not, in the slightest way, relevant to the issue involved: Texas community property law. And I think that is indicative of the kind of thing you are likely to find happening with a national Court of Tax Appeals—judges confusing laws of local jurisdictions, perhaps not caring how those laws of local jurisdiction are applied, and therefore causing havoc, in areas of state law where it should never be created.

Thank you.

Senator BAUCUS. Thank you, Mr. Wood. I know that judges rarely take a position on this type of issue in the courts of appeals. Would you hazard a guess as to what the feeling among the circuit court judges is on this question?

You do not know?

The Commissioners by and large, at least with one exception, are in favor of the proposal. The tax bar, with some exceptions, is opposed.

I am sure both the Commissioners in favor and the tax bar opposed would like to see speedier justice and lots of these problems decided more quickly.

Why is it that the Commissioners and the bar is split? I am trying to get the reason for the split.

Mr. McQUISTON. If I may make a comment here, I do not know why they are split. I think one of the three today testified in opposition. I heard Commissioner Kurtz give a presentation several months ago and I believe his bottom line was that he was on the fence but would tilt in favor of this.

Commissioner Alexander and Commissioner Thrower would do more than tilt, obviously from their testimony.

But I have a comment that occurs to me, listening to the debate this afternoon, and that was, our Federal Judiciary system with 11 circuits, is like our method of Government. It is not the most efficient by any means. A dictatorship method of Government would operate more efficiently.

I suspect for one court in each specialty would operate much more effectively and efficiently, but this is the system. It ventilates issues. It makes the taxpayer think and feel that he or she has had his day in court in the area in which he or she resides.

It is a safety valve for a system that has been described earlier as touching more of our citizens than most any other law, and I disagree with Commissioner Caplin with the thought that by adoption of this bill somehow we increase taxpayer acceptance.

Tax laws are debated and made in Washington. They are enforced in Washington, but when there is a question of interpretation and application they, like the Government, are entitled to have their day in court before their circuit court.

And I question whether changing that and having their day in court coming out of Washington will increase acceptance for that principle.

Senator BAUCUS. There is an analogous statement there. I am sure you know of it. Mr. Churchill once said, "a democracy for all its fits and starts, the problems it raises, is absolutely the world's worst form of government except there is none better." That could be said here too.

I have no further questions, unless you have some more points to make.

Thank you very much for your testimony.

That concludes the hearing.

[The prepared statements of the preceding panel follow:]

2-121

SECTION ON TAXATION
PHILADELPHIA BAR ASSOCIATION

Statement of
Robert E. McQuiston, Chairman
Before the Finance Committee
of the United States Senate

November 2, 1979

Re: S.1691, Tax Court Improvement Act of 1979

SUMMARY OF PRINCIPAL POINTS

1. Enactment of S.1691, which would establish a centralized Court of Tax Appeals, is opposed by

- The Federal Tax Committee of the Section on Taxation
- The Executive Council of the Section on Taxation
- By more than 71% of the general membership of the Section on Taxation (determined on the basis of a special mail ballot).

2. Most members of the Section on Taxation do not believe that a case has been made for discarding the present system for handling tax appeals.

3. Most members of the Section on Taxation believe that the present system of appellate circuits, while not perfect, is operating in an effective manner.

SECTION ON TAXATION
PHILADELPHIA BAR ASSOCIATION

Statement of
Robert E. McQuiston, Chairman
Before the Finance Committee
of the United States Senate

November 2, 1979

Re: S.1691, Tax Court
Improvement Act of 1979

My name is Robert E. McQuiston and I am appearing today in my capacity as Chairman of the Philadelphia Bar Association's Section on Taxation. Our Section is composed of approximately 250 Philadelphia lawyers who devote a significant portion of their practice to Federal tax matters.

Because of the fundamental changes which S.1691 would make in the present system of tax appeals, our members have been following this legislation with keen interest. It has been the subject of detailed review and discussion by our Federal Tax Committee and by our Executive Council - both of which ultimately concluded that the establishment of a centralized Court of Tax Appeals should be opposed. Our general membership was also recently polled by mail ballot, the results of which indicated that:

First, 71% of those responding oppose centralization of tax appeals in a single national court, irrespective of the method used in constituting the court's membership.

Second, only 29% approve of the concept of a centralized Court of Tax Appeals and among the members of this group there is strong disagreement as to whether such a court should be

staffed with permanently assigned judges or rotating judges as provided in S.1691. Thus, substantially more than 71% of our membership opposes enactment of S.1691.

In view of the strong sentiment which exists among the members of the Philadelphia Bar against a centralized court, in general, and against enactment of S.1691, in particular, our Section has decided to break with tradition and, for the first time - at least in recent years - to go on record as opposing enactment of particular Federal tax legislation; in this case S.1691. The depth and breadth of feeling among our members is reflected by my presence today.

As with any large group that considers legislation involving complex issues, it is impossible to attribute to each member of the group a uniform set of reasons for the decision reached by each.

It is my impression, however, that at the heart of the opposition of most of our members is the belief that:

(1) the need for a national Court of Tax Appeals has not been demonstrated, and

(2) the present system, while not perfect, is functioning in an effective fashion.

Yes, on occasion a court of appeals for one circuit will reach a decision in a tax case which is in direct conflict with a decision in another circuit - as happens in nontax cases - but these instances are few. Some conflicts work to the benefit of the Government; others benefit the taxpayer. The vast

majority of tax appeals, however, are decided in an expeditious fashion without giving rise tc a conflict in the circuits. Also, all tax lawyers know that, in general, a decision in one circuit is viewed as strong authority in other circuits.

Our members believe that the present system of appellate circuits enjoys the respect of most members of the taxpaying public and of the tax bar generally. The circuit courts are accessible. They are a known quantity to taxpayers and practitioners within the circuit. They are staffed with judges who are familiar with local law - an important factor in many tax decisions. The most respected of these circuit judges, who might be unwilling to hear tax appeals as a steady diet for three years, contribute to the advancement and improvement of tax jurisprudence. And, not to be overlooked, there now exists a well defined body of tax law in each of our appellate circuits which provides invaluable guidance to taxpayers in the circuit.

Our members urge that the strengths of the present tax appeals system, of which there are many, not be discounted or discarded in favor of an entirely new untested system which, on balance, could prove to be less effective, less accessible and, indeed, less able to eliminate the perceived deficiencies in the present system.

Thank you.

THE CHICAGO BAR ASSOCIATION
29 South LaSalle Street
Chicago, Illinois 60603
Phone: 782-7348

October 4, 1979

Mr. Michael Stern
Staff Director
Senate Finance Committee
Room 2227
Dirksen Office Building
Washington, D.C. 20510

Re: Senate Bill 1691

Dear Mr. Stern:

The Chicago Bar Association has reviewed Senate Bill S. 1691 which provides for the creation of a United States Court of Tax Appeals. The proposed new court would be at the same level as existing Federal circuit courts of appeals and would have exclusive intermediate appellate jurisdiction over all civil tax appeals.

After careful study, The Chicago Bar Association has concluded that on balance the limitations of the proposed Court of Tax Appeals far outweigh the benefits. In fact, the benefits described in the Senate Judiciary Committee Report appear to be of minor significance.

The Senate Judiciary Committee concluded that the following benefits would result from the proposed court:

1. Speedier, more definitive, resolution of complex tax issues.

2. Reduction in the existing caseload of Federal courts of appeals.

3. Less burden on the Supreme Court to resolve tax conflicts among the circuits.

4. Reduction in trial level litigation and IRS administrative proceedings.

5. Creation of a court well versed in the complexities of tax law.

1. Speedier, More Definitive, Resolution of Complex Tax Issues.

If the purpose of the proposal is to avoid conflicts in the decisions of courts of appeals, the fact is that such conflicts rarely occur and certainly they do not occur more often in the tax field than in many other areas. In a study made by the American Bar Association, only 3 out of 90 conflict cases surveyed, or only 3.33%, involved tax cases. See Hearings on S. 2762 and S. 3423 before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 94th Congress, 2nd Session, Pt. 1, at 31 (1976). Even more important is that it often is not the rule of law which is troublesome in tax cases but rather its application to the facts. The factual distinctions are the cause of considerable litigation and uncertainty. A court of tax appeals would not change this situation. Further, it takes many years before issues raised by tax legislation reach the courts and the creation of a court of tax appeals also would not remedy this situation.

Not only would a specialized court of tax appeals not bring about a speedier resolution of tax issues but it would tend to stifle the benefits flowing from successive consideration of the same tax issue by different circuits. In testimony before the Judiciary Committee, Assistant Attorney General M. Carr Ferguson, Tax Division, Department of Justice, testified that:

> "Part of the genius of our system of circuit appellate courts is the opportunity for reconsideration of an issue already decided by one circuit by another appellate court free of the constraints of the doctrine of stare decisis. This opportunity for an issue to be ventilated in more than one circuit seems to me especially important in tax cases. The first appellate review of a tax issue may be shortsighted, distorted by the particular record or omission of an argument, or simply mistaken."

2. Reduction in the Existing Caseload of Federal Courts of Appeals.

A study by the American Bar Association reveals that of the 16,000 appeals filed in 1977, 456, or less than 3%, were tax cases. See Hearings, supra, p. 31. Thus, the reduction in caseload would indeed be small as the Senate Judiciary Committee has recognized. Further, to achieve this result, 11 judges would be transferred from the existing courts of appeals, a number well in excess of 3% of the existing 97 court of appeals judges, to hear these tax cases. While the Judiciary Committee Report contemplates that the court of tax appeals judges, if workload requirements permit, would spend some time on the work of the court of appeals from which they were assigned, the fact remains that the remedy proposed is likely to aggravate rather than alleviate caseload problems in the court of appeals.

3. Less Burden on the Supreme Court to Resolve Tax Conflicts Among the Circuits.

Because the Supreme Court grants certiorari in very few tax cases, this asserted benefit can be of little significance.

4. Reduction in Trial Level Litigation and IRS Administrative Proceedings.

As noted above, the resolution of tax issues frequently is based upon factual distinctions. Thus, even assuming a definitive rule of law, its application to a set of facts can and does result in extensive litigation. Further, in many tax cases state law determines the outcome, such as in areas of property rights, and disputes would continue to exist on the application of these laws. In addition, tax questions arising in bankruptcy and criminal cases apparently still will be resolved by the other courts of appeals, without regard to the court of tax appeals. For these reasons, the existence of a court of tax appeals is unlikely to have any meaningful effect on the caseload in trial level litigation and in IRS administrative proceedings.

5. Creation of a Court Well Versed in the Complexities of Tax Law.

If specialization at the appellate level is desirable, it would be applied to many areas of the law. We question the reasoning for treating the tax area specially considering the long-standing philosophy of avoidance of specialization at the appellate level.

6. Other Considerations.

The creation of a court of tax appeals will cause inconvenience and additional expense to litigants. The court would not be able to sit in as many areas and with the same frequency as the existing courts of appeals. Further, pleading and procedural matters will become more difficult and cumbersome to handle because of geographical distances. Jurisdictional disputes also are more likely because of overlapping jurisdictions in some tax cases. Moreover, an additional bureaucracy will need to be established to handle court procedures and to deal on a long distance basis with the various judges assigned to the court.

A question arises as to the precedential value of cases previously decided by courts of appeals in the tax area if a specialized court of tax appeals is created. If such cases no longer would be valid precedent, considerable confusion would result in the tax area for many years until the proposed court of tax appeals had ruled on the tax issues involved in these cases.

A related aspect of the proposed court of tax appeals is the elimination of the Court of Claims' jurisdiction in tax refund suits. The Court of Claims is the only non-specialized forum in which nationally distributed taxpayers can effectively consolidate their cases for joint resolution. It also is the most efficient forum for certain types of complex cases, such as those involving widely distributed witnesses. The Court of Claims, which is held in high esteem and respect, should not be divested of its jurisdiction (which it has held for over a half a century) in tax refund suits.

We note our disagreement with the statement in the Senate Judiciary Committee's Report that the endorsements of this proposal by two New York bar associations are representative of the practicing tax bar. The practicing tax bar in Chicago, many of the members of which have extensive federal tax litigation experience, do not support the proposed creation of a specialized court of tax appeals.

Very truly yours,

RWA

RICHARD WILLIAM AUSTIN
President

RWA/ss
cc: Senator Russell B. Long
Senator Max Baucus

bcc: George T. Donoghue, Jr.
Donald A. Gillies
Jack M. Greenberg
Sharon L. King

STATE BAR OF TEXAS

SECTION OF TAXATION

SUMMARY OF PRINCIPAL POINTS AND STATEMENT TO THE SUBCOMMITTEE ON TAXATION AND DEBT MANAGEMENT OF THE SENATE FINANCE COMMITTEE ON S.1691 REGARDING THE ESTABLISHMENT OF A COURT OF TAX APPEALS

STATE BAR OF TEXAS
SECTION OF TAXATION
DAVID G. GLICKMAN
CHAIRMAN

AD HOC COMMITTEE ON
U.S. COURT OF TAX APPEALS
ROBERT EDWIN DAVIS
CHAIRMAN

KATHERINE C. HALL
CO-CHAIRMAN

November 2, 1979

SUMMARY OF PRINCIPAL POINTS

I. GOALS OF S.1691 AS SET FORTH IN THE REPORT OF THE SENATE JUDICIARY COMMITTEE ACCOMPANYING THE BILL

A. Elimination of Uncertainty

1. Circuit court conflicts do not create long periods of uncertainty
2. Significant uncertainty is created by factors other than conflicts between the circuit courts
3. The proposed court may be unable to eliminate either conflicts or the uncertainty created by other factors
4. The present tax litigation system provides an acceptable method for eliminating uncertainty

B. Elimination of Unfairness to Taxpayers

1. Infrequent conflicts are unlikely to cause taxpayers to pay different amounts of tax solely because of their residence
2. Taxpayers' perceptions of the fairness of our tax system are unlikely to be adversely affected by conflicts

II. DISCUSSION OF BENEFITS AS SET FORTH IN THE REPORT OF THE SENATE JUDICIARY COMMITTEE ACCOMPANYING THE BILL

A. The proposed court will not produce speedier, more definitive resolutions since conflicts in judiciary decisions will undoubtedly continue

B. The proposed court will not significantly reduce the caseload of the Federal courts of appeals

C. It is not clear that the proposed court will reduce the burden on the Supreme Court since both the Internal Revenue Service and Taxpayers will undoubtedly continue to use the Supreme Court for review of questionable decisions

D. For similar reasons, the proposed court will not reduce trial and administrative proceedings

E. In view of the rotating membership of the panels of the proposed court, this bill will not necessarily result in decisions being made by judges who are well versed in complex tax issues

III. PRACTICAL CONSIDERATIONS AFFECTING IMPLEMENTATION OF THE BILL

A. The proposed court will result in increased costs to taxpayers, panels may be composed of judges who are less senior and experienced, and the proposed court will undoubtedly have to adopt additional rules of practice before the court.

B. The proposed court will be less likely to properly apply tax laws relating to issues which turn on unique laws of the various states

C. The government's ability to control the development of tax laws by the selection of cases will be enhanced

D. The estimated budget of the proposed court is questionable in view of the number of cases likely to be presented

IV. CONCLUSION: The Section of Taxation of the State Bar of Texas recommends that S.1691 not be enacted into law.

Mr. Chairman and Members of the Subcommittee:

As Chairman of the Section of Taxation of the State Bar of Texas, I appreciate the opportunity to share with you our views with respect to S.1691, the passage of which would establish a United States Court of Tax Appeals. In the few minutes I have, I will attempt to outline the points which we considered in reviewing this proposed legislation. We have submitted a more detailed report which we have been advised will be included in the official record of these hearings.

Unfortunately, our Section began considering this matter at a relatively late date. Our involvement is the result of the request of several persons, including members of our Section who were of the opinion that this legislation will affect the tax laws of every state, and that this was, thus, an appropriate matter for consideration by the Bars of the States. As a result of our late start, the report was not submitted to the Board of Directors of the State Bar of Texas for comment or approval, and, thus, the report represents the views of only the Section of Taxation and not the State Bar of Texas. However, in my judgment, the Section of Taxation is the appropriate body to speak to the issue.

The report was primarily the work of an Ad Hoc Committee of the Section appointed by me, which Committee

was chaired by Robert Edwin Davis and co-chaired by Katherine C. Hall, both of Dallas, Texas. Ms. Hall is with me today. I advised the Ad Hoc Committee that the position adopted should be based upon an unbiased and evenhanded review of the pros and cons of S.1691, and the conclusion reached should "let the chips fall where they may." The report has been reviewed by the Officers and Council of the Section of Taxation, and we believe that the reasoning of the report and the conclusion reached therein are based upon an objective analysis of available information. Now I would like to give a "thumbnail" sketch of the report.

I. DISCUSSION OF GOALS

First, the two major goals as set forth in the report of the Judiciary Committee accompanying S.1691 are (1) the elimination of uncertainty resulting from conflicts in the circuit courts and (2) the elimination of unfairness to taxpayers as a result of such conflicts. However, our review indicates that these goals are not directed toward the solution of meaningful problems.

Only six tax cases were reviewed by the Supreme Court during the October term of 1977 because of such conflicts. The average time between the inception of the conflict and resolution by the Supreme Court for five of these cases was 2.6 years. As of July 15, 1979, the Supreme Court reviewed only three tax cases during the

October term of 1978 involving conflicts, the resolution time for which averaged two years. Additionally, the cases which were decided, for the most part, involved issues unrelated to the needs of the majority of the nation's taxpayers. Thus, we question whether the proposed court can accomplish anything significant with respect to the elimination of uncertainty.

As an aside, we would like to point out that the complexities of the tax statutes create a greater problem than do conflicts in judicial decisions. The courts are heavily burdened by the difficulties encountered in interpreting these statutes, as well as in correctly analyzing the regulations, rulings and cases which interpret the statutes. This burden is compounded by IRS "nonacquiescence" in various Tax Court cases and the issuance of regulations which are sometimes inconsistent with statutory language and Congressional intent. These, rather than circuit court conflicts, create problems for taxpayers.

We also question whether the proposed court can eliminate either the few conflicts which occur or the problems created by complex statutes. Since the IRS and taxpayers will continue to litigate on the basis of distinctive fact situations, a single precedent undoubtedly would not prevent subsequent litigation regarding similar issues. Moreover, the rotating membership of panels of

judges could well result in conflicts within the proposed court.

As between the proposed court and our present appellate tax system, we believe that the circuit courts provide the most acceptable framework for the continuing evolution of the tax laws. Since only five out of 456 tax cases heard by the circuit courts in 1977 have been reviewed by the Supreme Court on the basis of conflicting opinions, 451 cases remain which were presumably decided satisfactorily or consistently. We believe that the proposed court might well harm the overall development of the tax laws by precluding further appropriate analysis of these laws by the circuit courts.

The second goal of the bill is to eliminate the unfairness assertedly resulting to taxpayers whose circumstances are otherwise identical because judicial conflicts allegedly cause such taxpayers to pay different amounts of tax solely because they reside in different circuits. We have been unable to locate any statistics indicating differences in the tax revenues attributable to such conflicts, and we are unaware of a discernible demand from the public for reform in this regard. Thus, we have difficulty viewing this as a significant problem.

It has been suggested that the real concern about conflicts arises in connection with the effect of such conflicts on taxpayers' perceptions of the tax system rather

than on the dollar amounts of taxes paid. Since only five of the 456 tax cases noted above were reviewed by the Supreme Court on the basis of conflicts, we believe that the effect on taxpayers' perceptions of the tax system, if any, is probably negligible.

II. DISCUSSION OF BENEFITS

The report of the Judiciary Committee accompanying the bill also set forth five anticipated benefits. Our view of the proposed court's ability to produce these benefits is as follows.

We do not believe that the proposed court can provide speedier, more definitive resolutions of tax issues since taxpayers will continue to litigate on the basis of distinctive fact situations and the rotating membership and panel system for judges will probably result in conflicts within the proposed court. Moreover, we believe that the number of tax cases appealed will not be significantly reduced. These cases will simply be spread among the fewer judges assigned to the proposed court. Furthermore, since only 2.85% of the appeals filed in 1977 were tax cases, we fail to perceive any merit in removing them from the circuit courts as opposed to removing cases involving other specialized areas, such as antitrust or bankruptcy cases.

With respect to the diminished burden on the Supreme Court to resolve conflicts among the circuits in tax matters, it is uncertain that this burden will be removed

or lightened, especially in view of the fact that the Supreme Court reviews relatively few cases and the fact that decisions of the proposed court would continue to be reviewed by the Supreme Court. Additionally, we believe that the Supreme Court's review of conflicting decisions provides useful guidance in settling questionable issues and that relieving the Court of its ability to provide this guidance is not desirable.

As for the anticipated reduction in trial level litigation and IRS administrative proceedings, we believe that the continued litigation on the basis of distinctive fact issues and different interpretations between the proposed court's panels will make improbable any such reduction. Moreover, since the majority of tax cases turn on the application or interpretation of a few words or lines of a specific section of the Internal Revenue Code, even judges assigned to the panels who might hear a substantial number of tax cases each year are unlikely to obtain sufficient expertise useful for resolving other cases.

III. PRACTICAL CONSIDERATIONS

Finally, we question the necessity for this legislation in light of several practical considerations which concern us. One of these is the cost and inconvenience to taxpayers and their attorneys who must travel to Washington, D.C. for hearings which must be held throughout

the eleven months of a year during which no panel will meet in a given circuit. Another is the risk that the circuit judges assigned to serve on the court may quite possibly be those judges who are less senior and less experienced since they will be those who can most easily be spared from each circuit court.

We also believe that the need for expertise regarding questions of local law is an important consideration. Texas, for example, along with other states in our region, has evolved complex laws dealing with oil and gas, community property, and other matters. We believe that judges from the Court of Appeals for the Fifth Circuit are more likely to properly apply tax laws relating to tax issues which turn on unique laws of our state than are judges who have not dealt with these laws.

IV. CONCLUSION

In conclusion, in light of our analysis of available information, it is our judgment that the proposed court will not achieve the stated goals of the bill nor produce the benefits anticipated. It is, therefore, our recommendation that S.1691 not be enacted into law.

STATE BAR OF TEXAS

SECTION OF TAXATION

REPORT TO

THE SUBCOMMITTEE ON TAXATION AND DEBT MANAGEMENT

OF

THE SENATE FINANCE COMMITTEE

ON S.1691

REGARDING THE ESTABLISHMENT OF A COURT OF TAX APPEALS

STATE BAR OF TEXAS
SECTION OF TAXATION
DAVID G. GLICKMAN
CHAIRMAN

AD HOC COMMITTEE ON
U.S. COURT OF TAX APPEALS
ROBERT EDWIN DAVIS
CHAIRMAN

KATHERINE C. HALL
CO-CHAIRMAN

November 2, 1979

CONTENTS OF REPORT

Mr. Chairman and Members of the Subcommittee:

Thank you for inviting us to share with you the views of the Section of Taxation of the State Bar of Texas on S.1691, a bill which is intended to provide for improvements in our system for the adjudication of Federal tax controversies. In what follows, we will direct our comments primarily to considerations affecting the establishment of a Court of Tax Appeals ("the proposed court") and will not comment on the elimination of the tax refund jurisdiction of the Court of Claims. Members of our Tax Section have prepared this report in the hope that we can aid the Subcommittee in determining whether these proposals will benefit our tax system. It is in this spirit that we are testifying as the representative of the Section of Taxation of the State Bar of Texas. *

The analysis which follows will consider whether the proposed Court of Tax Appeals can achieve the objectives set forth by S.1691 and produce worthwhile benefits by adjusting the structure of our appellate tax system. We have based our analysis of the bill primarily on an examination of goals set forth by its proponents because the court's utility will depend

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* As a result of time limitation, this report was not submitted to the Board of Directors of the State Bar of Texas for comment or approval. Accordingly, this report represents only the views of the Section of Taxation and not of the State Bar of Texas or of its Board of Directors.

on whether it can, in fact, achieve the goals specified. We will first discuss these goals, and then will discuss the benefits which are anticipated from the proposed court. We will also comment on practical considerations affecting implementation of the bill.

I.

DISCUSSION OF GOALS

The stated objective of S.1691 is to improve the structure and administration of the Federal tax courts. The first major goal of the bill is the elimination of the long period of uncertainty which assertedly exists due to conflicts in decisions of the various circuit courts and which is claimed to adversely affect both the interpretation and the application of the tax laws. The second major goal is the elimination of the unfairness which is claimed to result to taxpayers because such conflicts cause taxpayers to pay different amounts of tax solely because they reside in different circuits. Although at first blush these goals are certainly laudable, in our judgment, for the reasons set forth below, legislation of this nature is not warranted.

A. Elimination of Uncertainty

1. Circuit court conflicts do not create long periods of uncertainty. Proponents of the bill claim that the proposed court will eliminate the "long period of uncertainty" created by such conflicts among the circuit court of appeals. We do

not believe that this goal is directed toward the solution of a meaningful problem since, from the statistics we have seen, the administration of our tax system is not significantly affected by such conflicts.

Only six tax cases were reviewed by the Supreme Court during the October term of 1977 because of such conflicts. The average time between the inception of the conflict and resolution by the Supreme Court for five of these cases was 2.6 years.[1] During the October term of 1978, as of July 15, 1979, the Supreme Court reviewed only three tax cases involving conflicts, the resolution time for which averaged two years. Additionally, the cases which were decided, for the most part, involved issues unrelated to the needs of the majority of the nation's taxpayers.[2] Thus, we have concluded that the period of uncertainty created by such few conflicts is not a significant problem.

Along similar lines, it is instructive to note that in 1977 only 456 out of 16,000 appeals filed in the circuit courts

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[1] We omitted the time involved for the sixth case, 14 years, since it would have established an average time in excess of the actual time taken to resolve four of the cases. The resolution time for the cases was as follows: 1 year (1 case), 2 years (3 cases), 6 years (1 case), and 14 years (1 case).

[2] See case notations in Appendix A.

were tax cases.[3] Thus, tax cases constituted only 2.85% of the entire caseload of the courts of appeals for that year. The percentage of these tax cases which involve potential conflicts regarding tax issues is negligible. Additionally, we are aware of no discernible plea for reform from the taxpayers at large or the business or investing communities with regard to such conflicts in judicial decisions. In light of these facts, we question whether the proposed court can accomplish anything significant with respect to the elimination of uncertainty. Since the proposed reduction of conflicts involves an insubstantial number of cases, the benefit produced by achieving that goal would be similarly insubstantial.

2. Significant uncertainty is created by factors other than conflicts between the circuit courts. To those of us who represent taxpayers in tax controversies on a daily basis, the inordinate concern with certainty or with consistency of appellate decisions seems inappropriate and exaggerated. The uncertainty which plagues our tax system is produced by many factors other than conflicts in judicial decisions. In the real world of tax audits, trials and appeals, the relative ability and dedication of taxpayers' representatives and the competence and thoroughness of the auditing agent of the Internal Revenue

[3] ABA, Section of Taxation, Panel Discussion: Proposed Court of Tax Appeals (May 19, 1979).

Service ("IRS") are often the single most important variables in the whole process of dealing with tax controversies. These factors have a much greater bearing on the outcome of cases than do uncertainties engendered by isolated conflicts in appellate decisions.

To the tax planner, of course, certainty and consistency is desirable. But those of us who plan transactions for our clients are accustomed to uncertainty, and its presence is inevitable so long as we must deal with ever-changing statutory rules and endlessly variable fact situations. To the greatest extent possible, we simply plan around those conflicts when we can, and explain the risks to our clients when we cannot. In fact, the inconsistencies and conflicts between the circuit courts are a healthy indication that our present tax system is sufficiently flexible and adaptable to apply the tax laws to situations not contemplated when the various statutes were drafted. As pointed out hereafter, we do not believe that the creation of the proposed court would provide us or our clients with significant comfort or relief since it is questionable whether the proposed court can eliminate such conflicts.

Consistency in appellate decisions is probably of more concern to tax theoreticians and academicians than to the taxpaying public, their representatives, or even those who must

administer the tax laws. We believe, however, that the complexities of the tax statutes create a greater problem for our system of tax litigation than do the limited conflicts in judicial decisions. The Federal tax courts are heavily burdened by the difficulties encountered in interpreting these complex statutes, as well as in correctly analyzing the regulations, rulings and cases which interpret the statutes.

This burden is compounded by the practice engaged in by the IRS of "nonacquiescence" in the results or reasoning of Tax Court cases. In 1978, the IRS nonacquiesced in a total of 47% of the cases on which it took an official stand.[4] Similarly, the IRS expresses its disagreement with decisions of the district and appellate courts through positions taken in revenue rulings and instructions to revenue agents and district counsel. Although this approach of the IRS is not inappropriate within an adversarial system, uncertainty does result from the same.

Additional uncertainty is created by the Treasury's issuance of retroactively effective revenue rulings and regulations which are sometimes inconsistent with statutory language and Congressional intent. These are the things which cause taxpayers to be burdened with uncertainty regarding the Federal

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[4] The IRS nonacquiesced in 60 Tax Court cases and acquiesced in 67 such cases. 1978-2 C.B. 1.

tax laws. We believe that any attempts to improve the administration of the appellate tax system should begin with these types of problems rather than with the less significant problem of conflicts between the circuit courts.

3. The proposed court may be unable to eliminate either conflicts or the uncertainty created by other factors.

To the limited extent that such conflicts create uncertainty within our tax system, we do not believe that the proposed court can solve this problem. Although, theoretically, a central tax tribunal could provide certainty by issuing opinions based on consistent interpretaions of tax provisions, consistent or uniform interpretations are, in fact, unlikely to result. Both the IRS and taxpayers will continue to litigate and to urge varying decisions on the basis of distinctive fact situations. A single precedent, therefore, would not prevent subsequent litigation in connection with a similar tax issue. Moreover, the rotating membership of panels of judges could well result in as many conflicts within the proposed court as there are presently between the circuits. Litigants, even litigants with facts resembling those of an initial precedent, undoubtedly would continue to seek more favorable decisions in the hope that one panel of judges might rule differently from another. Thus, we do not believe that the proposed court would eliminate much of the uncertainty of which the bill's proponents complain.

Additionally, the uncertainty created by other factors discussed above is due to factors beyond the control of our appellate tax structure. The proposed court would face as many difficulties as other courts in resolving problems created by statutory complexity, or inconsistencies between the statutes, the lower court cases, treasury regulations, and revenue rulings. Therefore, the proposed court is unlikely to eliminate the uncertainty due to these factors.

4. The present tax litigation system provides an acceptable method for eliminating uncertainty. Since, as stated above, we do not believe that conflicts are a significant problem, our primary concern centers on the uncertainty which is created by other factors. The circuit courts are able to eliminate much of this by examining and resolving the inconsistencies created by complex statutes, treasury regulations and prior case law. The tax case statistics for 1977 strongly indicate their success in this regard. Of 456 tax cases heard by the circuit courts in that year, only five have been reviewed by the Supreme Court on the basis of conflicts between the circuits. Thus, 451 cases remain which were presumably decided satisfactorily, or, at least, consistently.

In light of this successful record, S.1691 proposes to eliminate the maturation process of the tax laws which is provided by consideration of these provisions by the various

circuits. Rather than bringing the minds of the numerous circuit court judges to bear on the intricacies and ambiguities of these laws, the bill would limit our judicial resources for this purpose to those eleven judges who might consider the issues presented during a given term of the proposed court. We believe that any possible advantages which could be provided by the proposed court might well be outweighed by the harm that would be done to the overall development of the tax laws.

We conclude, therefore, that the proposed court may interfere with and harm our present system rather than eliminating any uncertainty. We believe that our present tax appellate system provides the best environment for the evolution of our tax laws and that it should not be replaced by the proposed court.

B. Elimination of Unfairness to Taxpayers

1. Infrequent conflicts are unlikely to cause taxpayers to pay different amounts of tax solely because of their residence. The second goal of the bill is to eliminate the unfairness which is claimed to result to taxpayers because circuit court conflicts allegedly cause taxpayers whose circumstances are otherwise identical to pay different amounts of tax solely because they reside in different circuits. As noted above, the Supreme Court's disposition during the October term of 1977 of only six tax cases reviewed because of conflicts indicates that

such conflicts are, at best, infrequent. Moreover, because we have been unable to locate any statistics indicating differences in the tax revenues attributable to such conflicts, and because we are unaware of any discernible demand from the public for reform of the court system in this regard, we question whether this is a significant problem.

To the very limited extent that conflicts do create problems in the administration of our tax system, we question whether the proposed court can provide greater uniformity than is presently available. This is because the judges of the proposed court will be faced with cases involving distinctive fact situations. Tax provisions cannot be applied uniformly to every situation in which they are applicable. These provisions were never intended to be so applied and, in fact, one of the advantages of our present court system is its flexibility to apply these laws to different situations in light of the relevant legislative history and the unique factual circumstances involved.

For the tax laws to be uniformly applied in all circumstances, the draftsmen of these laws would have to create increasingly complex provisions to take into account all possibilities. This is impossible in light of the present com-

54-877 O - 80 - 14

plexity of these laws.[5] Thus, the occasional differences in circuit court opinions, rather than creating problems for our tax system, are generally more indicative of the courts' assistance in applying laws enacted by Congress. Additionally, these differences in opinions sometimes highlight the need for further clarification by Congress, clarification which might not otherwise occur were it not for the courts' discernment of certain ambiguities in these laws.

2. Taxpayers' perceptions of our tax system are unlikely to be adversely affected by conflicts. It has been suggested that the real concern about conflicts arises in connection with the effect of such conflicts on taxpayers' perceptions of the tax system rather than on the dollar amounts of taxes paid.[6] Since only 456 of the cases heard by the courts of appeals in 1977 were tax cases, only a small number of taxpayers perceptions could have been directly affected by their experiences regarding the administration of the tax system. Additionally, since only five of those tax cases have been reviewed by the Supreme Court on the basis of conflicts, an even smaller number of taxpayers were affected by the conflicts between circuit

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[5] See, e.g., McDaniel, Simplification Sumposium, Federal Income Tax Simplification: The Political Process, 34 Tax L. Rev. 27 (1978).

[6] Written statement by Mortimer Caplin (May 10, 1979), P. 11.

courts. Although we have no way of knowing the effect of these conflicts on the taxpayers at large, we can surmise that, in fact, the effect on taxpayers' perceptions of the tax system, if any, is probably insignificant.

In light of the infrequency of conflicts, and the improbability that these few conflicts affect the amounts of tax paid or the perceptions which taxpayers have of our tax system, we have concluded that the proposed court will also not accomplish anything significant with regard to the second goal of the bill.

II.

DISCUSSION OF BENEFITS

The Committee on the Judiciary has concluded that the court will achieve five benefits. These expected benefits are as follows:

1. A speedier, more definitive resolution of complex tax issues;

2. A small but important reduction in the existing caseload of the Federal courts of appeals;

3. A diminished need for the Supreme Court to resolve conflicts among the circuits in tax cases;

4. A reduction in trial level litigation and IRS administrative proceedings as the new, centralized court issues definitive decisions binding on all the trial courts; and

5. The creation of a new court well versed in the complexities of the tax law.

A. Speedier, More Definitive Resolutions.

Proponents of the bill believe that removal of the opportunity for conflicts between circuits will result in speedier, more definitive resolutions of tax issues. As noted above, however, conflicts between the circuits regarding such issues are infrequent. Further, we believe that to the limited extent that such conflicts exist, the proposed court will not alleviate the problem because of continued litigation on the basis of distinctive fact situations. Additionally, the rotating membership and panel system for judges may well result in as many conflicts within the proposed court as there are presently between the circuits. It seems unlikely, therefore, that the court will result in speedier, more definitive resolutions of tax issues.

B. Reduction in Caseload of Federal Courts of Appeals.

The second benefit anticipated is a small but important reduction of the existing caseload of the circuit courts. It is our expectation that the number of tax cases appealed will not be significantly reduced, however, they will simply be spread among the fewer judges assigned to the proposed court. To the extent that some judges will be relieved of a portion of their caseloads and be able to take on additional cases, the judges who become burdened with the responsibility for the tax cases reassigned to the new court will very probably shift non-tax cases to them.

Even if the proposed court could provide some relief on this point, such relief would be very minor as only 2.85% of the appeals filed in 1977 were tax cases. Since these cases constitute so small a percentage of the cases appealed, we fail to perceive any merit in removing them from the circuit courts as opposed to removing cases involving other specialized areas, such as antitrust or bankruptcy cases. In light of the insignificant number of cases involved, we do not believe that the proposed court will produce an important reduction in the existing caseload of the circuit courts.

C. Diminished Burden on Supreme Court.

The third benefit anticipated is a reduction in the burden on the Supreme Court to resolve conflicts among the circuits in tax matters. Since conflicts created by panels of the proposed court would be reviewable by the Supreme Court by writ of certiorari, to the limited extent that such a burden exists it is uncertain that it will be removed or lightened.[7] Additionally, we believe that the Supreme Court's review of conflicting decisions provides useful guidance in settling questionable issues and that relieving the Court of its ability to provide this guidance is not necessarily desirable.

[7] There is no reason to believe that the IRS will not refuse to follow unfavorable decisions of the proposed court, thereby necessitating a review by the Supreme Court to resolve this type of a "conflict."

D. Reduction in Trial and Administrative Proceedings.

The fourth claimed benefit is a reduction in trial level litigation and IRS administrative proceedings due to the anticipated issuance of definitive decisions binding on all of the trial courts. As stated previously, because of continued litigation on the basis of distinctive fact situations and potential conflicts between panels of the proposed court, the proposed legislation is unlikely to achieve this benefit. The above conclusion that trial and administrative proceedings will not be reduced is further supported by the issuance of Revenue Procedure 78-9, which Revenue Procedure could result in fewer cases being settled prior to the initiation of trial proceedings.[8] IRS Commissioner Jerome Kurz informed the Michigan Bar Association in September, 1978, that, as a result of this Revenue Procedure, trial preparation would be initiated earlier, and that District Counsel would not be bound by prior settlement proposals considered by appellate conferees.[9] Moreover, Judge Cynthia Hall of the United States Tax Court recently noted that this change of position by the IRS had made settlements in some parts of the country more difficult to achieve.[10] Thus, the continued existence of conflicts and the

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[8] 1978-1 C.B. 563.

[9] Daily Exec. Rep. No. 183, J-7, 8, Sept. 20, 1978.

[10] Hall, Problems Facing the United States Tax Court, 31 So. Cal. L. Center, 1023, 1028 (1979).

possibly more litigious position of the IRS with regard to disputed issues will make improbable any reduction in the number of cases resolved by trial or administrative proceedings.

E. New Court Well Versed in Tax Law Complexities.

We also question whether judges who will serve for staggered terms of one to three years will be able develop the special understanding necessary to provide the nation with a court well versed in the complexities of the Federal tax law. The majority of tax cases turn on the application or interpretation of a few words or lines of a specific section of the Internal Revenue Code ("Code"). Thus, in view of the complexity of current tax law, even judges who would be assigned to a panel of the proposed court and who would hear a substantial number of tax cases each year are unlikely to obtain sufficient expertise useful for resolving other cases.

The judges' familiarity with other areas of the law may also suffer because their exposure to all areas of the law will be restricted to the extent that tax cases make greater demands on their time. The operation of our entire judiciary system, as it affects the broad spectrum of all fields of the law, could be disadvantaged in this respect. Therefore, the proposed court will not only fail to achieve this last intended benefit, it could create additional problems for the judiciary system as a whole.

III.

PRACTICAL CONSIDERATIONS AFFECTING IMPLEMENTATION OF THE BILL

A. Costs, Qualifications of Judges, Additional Rules.

Several practical considerations have also caused us to question the need for this legislation. One of these is the cost and inconvenience to taxpayers and their attorneys who will have to travel to Washington, D.C. for hearings which must be held throughout the eleven months of a year during which no panel will meet in a given circuit. This increase in fees for attorneys' time, as well as for travel expenses, could effectively deny a right of appeal to taxpayers with limited dollar amounts in issue.

Another practical consideration which has been raised is the risk that the circuit judges assigned to serve on the proposed court may quite possibly be those judges who are less senior and less experienced since they will be those who can be most easily spared from each court of appeals. Furthermore, it would appear that the proposed court must necessarily draft its own set of rules of practice, thus burdening taxpayer's counsel with another set of procedural guidelines to master.

B. Need for Expertise Regarding Questions of Local Law.

A practical consideration which concerns us even more is the need for expertise regarding questions of local law. Many

litigated tax cases turn upon the proper interpretation of the substantive property or contract law of the state in which a transaction was consummated. Texas, for example, along with other states in our region, has evolved complex laws dealing with oil and gas, community property, and probate or inheritance matters. We believe that judges from the Court of Appeals for the Fifth Circuit are more likely to properly apply tax laws relating to tax issues which turn on unique laws of our state than are judges who have not dealt with our state laws.

C. Government's Control Over Development of Tax Laws.

Another concern which has been raised is that the creation of the proposed court will allow the government to further influence the development of tax laws by increasing its control over the cases to be litigated. We are also concerned with this potential problem. The government already influences this development to a significant degree because of its ability to select cases for appeal presenting the most advantageous facts for decisions in its favor. The majority of tax cases decided in 1978 were decided in favor of the government. The taxpayer prevailed in only 36.6% of the combined tax cases decided in 1978 in the courts of appeals, the Tax Court, the Court of Claims, and the district courts. We believe the government's already impressive ability to control the evolution of the tax

laws in this way would be enhanced by the creation of the proposed court.

D. Budget.

Another important consideration is that the bill will create a new court with attendant costs and red tape. In this regard, we believe that the estimated cost of operating the proposed court during the first year is unreasonably low. An estimate released August 3, 1979, suggests a total budget of $450,000. Six administrative positions are budgeted at $110,000, travel expenses at $100,000 and a miscellaneous expense category which includes space, equipment and printing is budgeted at $240,000.

Assuming that four to five hundred cases would be heard in the first year, it would seem that the secretarial help alone necessary to type opinions and file petitions and briefs for eleven judges would far exceed the $110,000 allocated to six administrative positions. We believe that this budget should be reviewed closely to make sure that it comports with reality.

IV.

CONCLUSION

In conclusion, in light of our analysis of available information, it is our judgment that the proposed court will not achieve the stated goals of the bill nor produce the benefits anticipated. S.1691 is designed to eliminate conflicts

between circuit courts, but such occasional and temporary conflicts are simply not a significant problem in the administration of the tax laws. To the limited extent that such conflicts present difficulties, the proposed court may well be unable to resolve them as varying panels reconsider those issues from year to year. In fact, the proposed court may not only fail to solve the problems which do exist, but it may create new problems by inhibiting the reasoned development of the tax laws. Additionally, the practical considerations attending the operation of the proposed court are further cause for opposition. Taxpayers would be burdened with the cost of supporting another court, travel costs and another set of procedural rules. Taxpayers would also lose the advantage of presenting their cases before judges familiar with local law issues and would be unfairly disadvantaged by the government's increased control over the selection of issues to be litigated. In light of all these factors, we recommend that S.1691 not be enacted into law.

Respectfully submitted,

STATE BAR OF TEXAS
SECTION OF TAXATION
DAVID G. GLICKMAN, CHAIRMAN

AD HOC COMMITTEE ON
U. S. COURT OF TAX APPEALS
ROBERT EDWIN DAVIS, CHAIRMAN

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APPENDIX A

Following is a list of the tax cases involving conflicts between the circuit courts which were decided by the Supreme Court during the October terms of 1977 and 1978:

1. U.S. v. Kimbell Foods, Inc., _____ U.S. _____, 99 S.Ct. 1448 (1979) (analogy of federal tax lien principles to commercial liens where the U.S. government acts as a lender).

2. National Muffler Dealers Ass'n. Inc. v. U.S., _____ U.S. _____, 99 S.Ct. 1304 (1979) (availability of "business league" exemption for trade organization for muffler dealers).

3. United California Bank v. U.S., _____ U.S. _____, 99 S.Ct. 476 (1978) (alternative capital tax reducible by charitable set-asides made by estate).

4. U.S. v. LaSalle National Bank, _____ U.S. _____, 98 S.Ct. 2357 (1978) (IRS summons authority in criminal tax cases).

5. U.S. v. Sotelo, _____ U.S. _____, 98 S.Ct. 1795 (1978) (liability of bankrupt taxpayer to pay withholding taxes).

6. Frank Lyon Co. v. U.S., _____ U.S. _____, 98 S.Ct. 1291 (1978) (deductions related to sale-leaseback transaction).

7. Central Illinois Public Service Co. v. U.S., _____ U.S. _____, 98 S.Ct. 917 (1978) (definition of "wages" with regard to withholding taxes).

8. Fulman v. U.S., _____ U.S. _____, 98 S.Ct. 841 (1978) (treasury regulation correctly limits a deduction arising from a personal holding company's distribution of appreciated property).

9. Comm'r v. Kowalski, _____ U.S. _____, 98 S.Ct. 315 (1977) (inclusion of gross income of cash meal allowance payments for state police troopers).

APPENDIX B

Comparison of Bar Positions

The following is a comparison of the positions of the New York State Bar Association (NYSBA), the American Bar Association (ABA), and the State Bar of Texas (SBOT). The positions noted indicate whether each Bar believes that the Court of Tax Appeals will achieve the goals and benefits sought by S.1691:

	NYSBA	ABA	SBOT
GOALS			
1. Elimination of uncertainty created by circuit court conflicts	Yes	No	No
2. Providing uniformity to remove unfairness to taxpayers who may have to pay different amounts of taxes because of circuit conflicts	Yes	No	No
BENEFITS			
1. Speedier, more definitive resolution of complex tax issues	Yes	No	No
2. A small but important reduction in the existing caseload of the Federal courts of appeals	No Comment	No Comment	No
3. Less burden on the Supreme Court to resolve tax conflicts among the circuits	Yes	No Comment	No
4. Reduction in trial level litigation and IRS administrative proceedings	Yes	No	No
5. Creation of a new court well versed in the complexities of tax law	No Comment	No	No

APPENDIX C

Discrepancies In The Language of The S.1691

The amendment adding paragraph (2)(a) to 28 U.S.C. §44(a) provides that if the Chief Justice of the United States is unable to designate a circuit court judge for appointment to the Court of Tax Appeals, he shall designate a district court judge of the same circuit to serve.[1] The amendment adding subsection (f) to 28 U.S.C. §292, however, provides that the Chief Justice may designate temporarily any district judge to serve as the judge of the Court of Tax Appeals.[2] Note that there is no limitation on time in the first provision, that is, a district judge appointed under authority of that provision could well serve for a one, two, or three year term. There is no requirement that he be designated only temporarily. Thus, there is a clear conflict between proposed 28 U.S.C. §292, a general provision dealing with the assignment of judges to other courts, and proposed 28 U.S.C. §44(2)(a), the more specific statutory provision dealing with appointment, tenure, residence and salary of circuit judges. Since the latter is the primary statute governing the designation of judges to serve on the Court of Tax Appeals, language should be inserted

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[1] S.1691, 96th Cong. 1st Sess. §101(b) (1979).

[2] Id. §102(c).

indicating that district judges may serve only temporarily. Additionally, some guidelines should be set forth indicating a reasonable length of time which may be viewed as "temporary". Otherwise, in the event a circuit judge is not available, a district judge assigned temporarily to sit on the court might serve for as long as three years.

A second discrepancy between the language of these two provisions is that a judge appointed under the authority of proposed §292(f) does not have to be from the circuit court from which a circuit judge should have been appointed. Thus, a district court judge from the Fifth Circuit could be appointed to serve in a position which should have been filled by a judge from the Tenth Circuit. This is clearly contrary to the proposed §44(2)(a) which specifies that a district judge must be appointed from the circuit from which the Chief Justice was unable to appoint a court of appeals judge. Proposed §292(f) should be amended to reflect the requirement that a district judge must be selected from the same circuit as the appeals court judge whose position he is to fill temporarily.

The amendment adding subsection (a)(2)(b) to 28 U.S.C. §44 states clearly that a circuit judge who serves on the Court of Tax Appeals "shall remain a judge of the circuit court from which he was designated.[3] (emphasis added). No such provi-

[3] Id. §101(b).

sion, however, is made for district court judges. Thus, there is a question of whether a district court judge designated to sit on the Court of Tax Appeals would remain responsible for his obligations as a judge of the district court. The Committee on the Judiciary anticipated that a district court judge would, in fact, continue to carry the case load from his court, consistent with his case load from the Court of Tax Appeals. Therefore, proposed §44(a)(2)(b) should clearly specify that a district court judge would remain a judge of the district court from which he was designated.

Finally, the bill provides that sessions of the court shall be held at least once per year in each of the circuits and "at such other times and places as the court may by order select. . . ."[4] Although the draftsmen of the bill may have anticipated that the court would establish its own supplemental rules, thus providing for procedures for determining whether to hold additional sessions, it would be beneficial to specify in the bill, as you have done regarding en banc sessions, a particular number of judges whose agreement is required in order to hold additional sessions. Rather than the agreement of six judges, as is presently required for an en banc session, addi-

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[4] S.1691, 96th Cong., 1st Sess. §101(d).

tional sessions could be held upon agreement by three judges. This would be consistent with the intention of establishing panels of three judges to hear cases in the various circuits.

54-877 O - 80 - 15

Section of Taxation

Houston Bar Association

STATEMENT BEFORE THE SUBCOMMITTEE ON TAXATION AND DEBT MANAGEMENT OF THE COMMITTEE ON FINANCE OF THE UNITED STATES SENATE ON S.1691, "TAX COURT IMPROVEMENT ACT OF 1979"

General Concept of the Bill

S.1691 would create a centralized appellate court, based in Washington (referred to in these comments as the "new court."), to hear all civil tax appeals replacing the present system of review of Tax Court and District Court decisions by the regional Courts of Appeals and certiorari review of Court of Claims decisions by the Supreme Court. The primary argument advanced for so fundamental a change in our judicial system is that the new court would eliminate uncertainty now prevalent in the tax system by more speedily creating final national precedent on tax issues. We question not only the solutions proposed but the perception of the problem inherent in the proposals.

A. Uncertainty in the Tax Law is not a Product of Appellate Court Conflicts

Few would disagree with the proposition that our tax laws are too complex and that such complexity creates uncertainty both for taxpayers and the Internal Revenue Service.

However, few of the present uncertainties arise from conflicts between Court of Appeals decisions on the same issue. Moreover, given the willingness of the Supreme Court to resolve such conflicts promptly in recent years, neither the number nor duration of such conflicts justifies so radical a departure from the national appellate process as is proposed by the bill.

Equally important, the uncertainties in the tax law arise much more frequently from variations in underlying factual patterns rather than conflicts as to the basic principles to be applied to those facts. Predictably, most tax litigation concerns issues such as valuation, intent, and characterization of transactions under local law. Appellate court restructuring will not remove the uncertainties inherent in shifting fact patterns. Indeed, it may exacerbate them by eliminating the binding effect of existing Courts of Appeals precedent and removing judges familiar with local pecularities (e.g., community property) from the appellate review process.

B. Circuit Conflicts may Arise Between the New Court and the Existing Circuits

The bill contemplates that the new tax appellate court will hear only civil tax cases. However, tax issues arise in criminal tax cases and bankruptcy, both of which will be appealed to the regional Courts of Appeal. Moreover,

the proposed establishment of the new court also raises the possibility of a new and even more disturbing type of conflict between the new court reviewing the tax aspects of a transaction and the regional Court of Appeals reviewing the non-tax aspects of the same transaction. For example, the tax appellate court could conclude that an oral contract was unenforceable under local law for federal income tax purposes while the regional Court of Appeals hearing a civil suit involving that same contract could reach a contrary result in a contractual dispute between the parties. Such a conflict, presenting the unfair result of the same taxpayer's being subjected to inconsistant adjudications, is to us far more disturbing than the limited conflicts arising with respect to different taxpayers by the present system.

C. Adoption of Either Proposal would Create a Lengthy Period of Uncertainty until the New Court Had Spoken in Virtually Every Area of Existing Tax Law

While the existing opinions of the Court of Appeals in tax matters would be considered by the new court, such decisions would not be binding precedent. Hence, many issues regarded as "settled" for years would again be open for conflicting interpretation until the new court decided the issues again. Moreover, if the provisions of S.1691, providing for a rotating bench are adopted, we question whether the "certainty", which is the whole reason for the

proposed court to exist, would be achieved. Close decisions, in particular, could be subject to revision with each annual change in the court's membership.

Advantages of the Present System of Tax Appeals which would be Lost under the Proposed New Court

A. Ease of Access

At a time when the federal government is generally seeking to decentralize its activities to provide greater accessibility to its citizens, these proposals represent a significant step backwards toward increased centralization and remoteness. Forcing taxpayers to come to Washington for all tax appeals can only exacerbate an already high level of frustration with the tax system.

The existing Courts of Appeals sit in locations relatively convenient for taxpayers. For example, the Fifth Circuit regularly holds sessions in nine cities, thereby reducing the travel burden for litigants substantially. By comparison, the proposed court simply could not provide similar convenience of access. While in cases involving large sums and major issues such considerations may not be important, in smaller cases the increased burden of access may significantly dampen the taxpayer's inclination to seek appellate review at all.

B. Loss of Knowledge of Local Law Possessed by the Court of Appeals Judiciary

Frequently, decisions in tax cases depend not on federal law but on the characterization of property interests under local law. The judiciary of the Courts of Appeals, drawn as they are from the bar of the regions in which they sit, are familiar with local peculiarities such as community property (which itself varies from state to state), probate matters and the like. Indeed, they confront such questions regularly in cases other than tax cases coming before them. Hence they are able to assure the development of the tax law consistently and harmoniously with local law concepts. By comparison, the judges of the proposed new court simply can not have the same familiarity with local law. Accordingly, the chances that the new court may decide cases in a manner inconsistent with local law on the subject is increased.

C. Loss of Development in the Case Law

As stated above, we question whether the bill will in reality cause a significant gain in "certainty" in the tax law. Even if there is a real gain in certainty, however, we do not believe it is worth the price which must be paid. If the bill becomes law, the first case on an issue which reaches the new court assumes critical significance. Although such a case may present an aberrant fact pattern, it may not be vigorously argued (for any number of reasons including

lack of commitment, resources, or talent), and may, generally, be a poor vehicle for resolution of an important issue, the decision in such a case will, nonetheless, control all that follow. Moreover, such a "one-shot" approach presents the Government with "case-shopping" opportunities far greater than those found in the present system. By settling fact patterns favorable to taxpayers and litigating only those most favorable to the Government, the Government's ability to "manage" the flow to the new court will be considerably enhanced.

In addition, the rationale of the proposal would logically lead to a proliferation of specialist tribunals in fields such as criminal law, antitrust, and the like. Indeed, areas such as criminal law involving little interaction with local law are probably better candidates for specialist review than the tax law. However, we oppose the concept of specialist review because we believe it is important for there to be consistent development of all areas of the law, and we believe this is best accomplished by generalist judges.

Alternatives to the Bill

While we believe that there are uncertainties in our tax system, we do not believe that S.1691 will significantly alleviate those uncertainties. Moreover, we believe

that the proposed new court will be perceived by most taxpayers as increasing the barriers which are already too numerous to challenges of arbitrary Government action. Other proposals, such as the Hruska Commission proposal can resolve the fairly limited problem of uncertainty posed by conflicting decisions of the Courts of Appeals without making appellate justice less accessible to most of our citizens. We believe that the costs of S.1691 are far too high in light of the limited advantages it offers. We urge that the Committee reject a centralized system of tax appeals and report unfavorably on S.1691.

[Whereupon, at 12:25, the subcommittee recessed, to reconvene at the call of the Chair.]

[By direction of the chairman the following communications were made a part of the hearing record:]

11/13/79

STATEMENT

OF

CHARLES S. LYON

In Submission to The Committee on Finance

Re: S. 1691 -- U.S. Court of Tax Appeals

I strongly support the proposal for a Court of Tax Appeals. Based on my experience in private practice, in government, and in teaching this seems to me a reform that is long overdue.

I have been at the bar specializing in tax law since 1942. In 1951-3 I was Counsel to the Ways and Means Subcommittee on Administration of the Tax Laws (the "King Committee") and then Assistant Attorney General in charge of the Tax Division of the Department of Justice. For the past twenty years I have been a professor of law in the graduate tax program at New York University Law School teaching a variety of subjects, including courses in federal tax procedure. I am also presently a member of the Department of Justice's Advisory Committee on Tax Litigation.

Many years ago our scheme of federal tax litigation was thus described by the late Roswell Magill, an eminent tax practitioner and scholar who had served as Undersecretary of the Treasury:

> "If we were seeking to secure a state of complete uncertainty in tax jurisprudence, we could hardly do better than to provide for 87 Courts with original jurisdiction, 11 appellate bodies of coordinate rank, and only a discretionary review of relatively few cases by the Supreme Court." Magill, The Impact of Federal Taxes 209 (1943).

My comments herein are by way of amplifying Magill's summation.

(1) Not only are numerous issues of tax law reached by several courts of appeal. This has also sometimes occurred as to the same transaction. This is illustrated by pending cases involving the question whether the acquisition in 1970 by ITT of stock of Hartford Fire Insurance Company constituted a reorganization and thus caused no recognition of gain to the Hartford shareholders. Some 800 shareholders filed petitions to the Tax Court, which by a divided vote upheld the taxpayers early this year. Reeves v. Comm'r, 71 T.C. 727 (1979). Shortly later the federal district court in Delaware reached the same result as to a shareholder pursuing the refund route. Pierson v. U.S., 4/24/79, 79-2 USTC ¶ 9432. The Tax Court cases had the potential for reaching all courts of appeals. But the parties, in selecting test cases, agreed to limit review to four courts of appeal. Only if all four courts of appeal should affirm the Tax Court will the matter be settled in the foreseeable future. If the taxpayers should lose in one or more of the four circuits this would by no means end the matter, for the Tax Court decision was based on one of three taxpayer contentions, with the other two held in reserve.

(2) The Supreme Court is too burdened to handle more than about ten tax cases a year, usually involving conflicts among the circuits. There have been cases where a conflict among the circuits has persisted so long that it has been resolved by the Supreme Court only after Congress has amended the Code for future years. See Colony, Inc. v. Comm'r, 357 U.S. 28 (1958) and U.S. v. Price, 361 U.S. 304 (1960). In the Price case the issue was one of tax procedure which had required the Service to use a different and more cumbersome procedure in the Ninth Circuit for over twenty years.

(3) It has been argued in defense of the present system that it promotes a thorough "ventilation" of issues by several courts of appeal and thus a greater likelihood of a sound ultimate result. This argument is unimpressive for several reasons.

(a) Such "ventilation" normally consumes at least ten -- and usually more -- years from the first taxable year that is litigated.

(b) There is typically no single answer that is clearly right. It is far more important to get some answer within a more reasonable time.

(c) Congress is continuously occupied with the tax law and available to take corrective action when needed.

(d) In short our present system suffers from hyperventilation.

(4) An important side-effect of our court system is to legitimize tax return reporting positions that are contrary to

court of appeals decisions. This problem is especially serious in view of the Service's limited audit capability. The Service has never had sufficient personnel to audit more than 5% of income tax returns; and its current limit is about 2%.

(5) Another side effect, for better or worse, is to magnify the power of the Service in the issuance of private letter rulings. Taxpayers often must have assurance of tax results before entering into a transaction. This they can get through a private ruling. But to do so they must adopt the Service's view of the law. This is not said in criticism of the Service, which, like the courts, is a prisoner of a court system no one in particular is guilty of having created.

(6) The position of the Tax Court is strange and difficult. About three-fourths of income, estate, and gift tax litigation goes to the Tax Court. With possible appeals to any of the courts of appeal the structure is an inverted pyramid. What should the Tax Court do when it is reversed by a court of appeals? It quite properly does not feel bound to change its views to conform with a reversal. However it decided in 1970 to modify its policy by following the views (if any) of the court of appeals to which appeal would lie for the particular taxpayer before it. Golsen v. Comm'r, 54 T.C. 742 (1970). Thus we now find the Tax Court dispensing different results for taxpayers in identical circumstances. This is not said in criticism of the Tax Court. Its posture in light of our present court system is certainly defensible and probably

preferable.

(7) The posture adopted by the Service to cope with our present court system presents some oddities. It is the long-established practice of the Service to announce whether it "acquiesces" or "non-acquiesces" in its losing Tax Court decisions. The Service also sometimes announces that it will not follow a court of appeals decision even though it does not seek Supreme Court review. This means that Service agents will not respect such Tax Court or appellate decisions in audit negotiations looking toward settlement. Another phenomenon is the publication of issues as to which the Service will not grant private letter rulings. This is sometimes called the "lifted eyebrow"; and it can have the effect of discouraging many transactions by taxpayers who fear the expense and trouble of litigation.

(8) The tax jurisdiction of the Court of Claims is anomalous. It is the only tax trial court that is virtually unreviewable, since the only possible review is by the Supreme Court. Its major importance is to add to the forum-shopping possibilities under our present scheme of things. The Court of Claims should probably be eliminated from the tax scene in any event. Certainly this is so unless its decisions are made reviewable by the proposed court of tax appeals.

(9) Some have questioned the proposal for a court of tax appeals by asking why tax matters should be treated differently from other important matters that come before the federal courts,

for example anti-trust or securities cases. The answer is found in the sheer volume of tax questions. Some 100 million returns are filed each year. Behind these returns lie countless transactions with tax effects one hopes could be predicted with reasonable assurance.

Respectfully submitted,

Charles S. Lyon

November 13, 1979

Charles S. Lyon
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STOEL, RIVES, BOLEY, FRASER AND WYSE
(DAVIES, BIGGS, STRAYER, STOEL AND BOLEY)
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Counsel
DAVID L. DAVIES
HUGH L. BIGGS

October 31, 1979

Senator Max Baucus
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

Re: U. S. Court of Tax Appeals -- S.1691

I understand that a subcommittee of the Senate Finance Committee will soon hold hearings on the proposal contained in S.1691 for the creation of a U. S. Court of Tax Appeals. I would like to take this opportunity to forward the views of the Oregon State Bar Tax Section and to express my personal views with regard to this legislation.

I have been authorized by the Oregon State Bar Tax Section to inform you that on September 26, 1979, at the meeting of the Oregon State Bar Tax Section, the Section, after some debate, passed a resolution in favor of the creation of a U. S. Court of Tax Appeals in the form reflected in S.1691.

Personally, I support the proposal for a U. S. Court of Tax Appeals. I have been involved with federal tax law for many years as a law professor and practitioner, and have served as a consultant to the Commission on Revision of the Federal Court Appellate System with regard to tax cases. I am presently Editor in Chief of the Journal of Corporate Taxation. I come by my support of a U. S. Court of Tax Appeals with some difficulty. At one time I supported the recommendations of the Commission on Revision for the creation of a National Court of Appeals which would have reference jurisdiction from the Supreme Court. It was thought that the Supreme Court would refer tax cases to the National Court of Appeals. After considerable reflection on the

subject since my entry into private practice on a full time basis, I have concluded that a U. S. Court of Tax Appeals can reasonably be expected to cure the inadequacies of our present system of tax appeals.

Our tax system is complicated enough without fostering further complexity by the means in which conflicts between the Internal Revenue Service and taxpayers are resolved. Creation of a U. S. Court of Tax Appeals would provide a system of judicial resolution of these conflicts which would facilitate and promote certainty in the law. Under the present system a split among various courts of appeal is likely. It may take many years, even decades, before a taxpayer or his representatives can be certain of a result. Splits in the circuits reverberate down to the Tax Court because of the Golsen Rule (Jack E. Golsen v. Commissioner, 54 TC 742 (1970)) under which the Tax Court will "follow a Court of Appeals decision which is squarely in point where appeal from [the Tax Court] lies to that Court of Appeals and to that court alone." Because of Golsen, the Tax Court has decided cases involving the identical issue and the same corporation inconsistently -- Kenneth W. Doehring, TC Memo 1974-234, and Paul E. Puckett, TC Memo 1974-235. The first held for the government, adopting the rationale favored by the Tax Court, as there was no controlling contrary precedent in the Eighth Circuit to which the case would normally be appealed. In the second, however, the court felt obliged to rule for the taxpayer since an appeal from the case would be made to the Fifth Circuit, which had a controlling precedent.

One of the features of S.1691 which is appealing to me is that it would not create a specialty court based in Washington. Instead it would create a court which would draw personnel, on a rotating basis, from existing courts of appeal, and it would allow jurists who are basically generalists in the law to consider tax cases. The court would sit on circuit around the United States. That is, cases which would normally be heard on the West Coast from the Ninth Circuit would still be heard on the West Coast by the U. S. Court of Tax Appeals. The Supreme Court would still have certiorari jurisdiction if that Court felt the need to consider an issue in greater depth.

One of the arguments which has been raised against a National Court of Tax Appeals is the so-called "ventilation" argument. It is argued that part of the beauty of our system of circuit appellate courts is the opportunity for reconsideration of tax issues decided by one court in another appellate court

free of the normal legal restraints concerning precedent in the same circuit. This, it is argued, is especially important in tax cases where appellate review may be distorted by the particular record, omission of an argument, or simply mistaken. The cost of such reconsideration of specific tax issues is that their resolution is left in the air for a number of years; in some cases for more than a decade, and in at least one case more than two decades. It appears to me that a good deal of the benefit of "ventilation" is obtained through Section 102(b) of S.1691 which provides that six of the eleven judges of the U. S. Court of Tax Appeals can call for an en banc rehearing if they determine "that it is in the interest of justice." At least nine judges are required to hear a case en banc. In considering whether or not to hear a case en banc, S.1691 provides that judges should consider among other things whether the question presented in the case was thought to be novel and unlikely to reoccur or was likely to apply to many taxpayers, whether there was unity in the panel which decided the case, whether any of the judges who composed the panel which heard the case suggested that it be reheard and whether the case presented issues of first impression. I suspect that this procedure for obtaining en banc rehearings should suffice to allow the "ventilation" argument to be adequately met.

If I can be of any help to you or your staff in answering any particular questions that might arise in connection with the S.1691, please feel free to communicate with me.

The foregoing views are mine alone and are not necessarily the views of my partners, associates or my firm.

Very truly yours,

Gersham Goldstein

GG:as
cc: Senator Russell Long
Mr. Michael Stern

Comments of Executive Committee of the Taxation Section--State Bar of California Concerning S. 1691--The Tax Court Improvement Act of 1979

The Executive Committee of the Taxation Section of the State Bar of California appreciates the invitation which it has received to submit comments on S. 1691, to the Senate Finance Committee. We regret that we were unable to send a representative to testify in person at the hearing held on November 2.

I. INTRODUCTION

At its meeting on October 26, 1979, the Committee took a series of votes on S. 1691, after studying a draft report prepared by one of its members, and after having discussed the issue briefly at a meeting held in September. Our Section takes no position on the abstract question whether a single tribunal should be established to hear all appeals in civil tax cases. However, we definitely believe that the method for constituting and staffing the court currently found in S. 1691 would not contribute to the advancement of justice in federal tax dispute resolution, and urge the Finance Committee to seek out more acceptable alternatives.

II. DISCUSSION OF GENERAL CONCEPT OF SINGLE COURT OF APPEALS

S. 1691, in its current form, is the product of a rather long intellectual and administrative history. Proposals to establish a single court of appeals for tax controversies have attracted notice periodically, since the publication of Dean Griswold's landmark 1944

article entitled "The Need for a Court of Tax Appeals", 57 Harv. L.Rev. 1153 (1944). See generally, Report of New York State Bar Association Tax Section, to Subcommittee on Judicial Machinery of the Senate Committee on the Judiciary, on S. 678, dated April 30, 1979, and Appendix A thereto. The Office of Improvements in the Administration of Justice of the Department of Justice tentatively proposed in 1978 that a special court of appeals to consider appeals in tax, energy and patent matters be created; however, opposition was fairly widespread to this proposal, because of the rather loose linkage of its subject matter, and the current bill is confined to tax matters only. We understand that Title III of S. 1477, a companion measure which was reported by the Judiciary Committee, but not referred to the Finance Committee, contains a further proposal for establishment of a special Court for the Federal Circuit, which would hear appeals in matters now heard by the Court of Claims and the Court of Customs and Patent Appeals.

The arguments both in favor of and against a centralized review tribunal are well-known, as the result of the frequent consideration of this issue both by governmental bodies, by writers in legal periodicals, and by bar association studies. Perhaps the most telling argument in favor of a single review court is that it would cut down on strategic maneuvering, both by taxpayers and by the litigation arms of the Government, which places a premium on forum-shopping and relitigation of issues already decided by courts of stature. Conflict among circuits leaves some taxpayers with different liabilities from their brethren in other areas, and this appears

inconsistent with the goals of a harmonious and nationwide system of law. It has also been suggested that a specialized court will increase the quality of tax opinions, since the judges will become more familiar, and better able to grapple, with the often stupefying complexities of Code, regulations, and prior authority.

On the other hand, opponents of the plan point out that the complexities of the tax law differ only in degree from the issues raised by a wide variety of federal legislation enacted over the years, much of which is at least as significant to citizens generally, as the more recondite provisions of the Internal Revenue Code. Further, a great number of unsettled issues in the tax law are not the product of statutory detail, but rather of the inherently contested nature of such ordinary language concepts as "ordinary and necessary" business expenses, "contributions" to a charity, property "held primarily for sale to customers in the ordinary course of business", and other phrases of like import found throughout the Code. Many responsible people feel that entrusting the interpretation of such phrases to specialized judges will, in effect, make the tax disputes resolved in an administrative mode rather than a judicial mode. The argument can be made that some repetition of litigation and even inconsistency of result is a price worth paying for proper consideration of issues, and that temporary diversity of results is a healthier and more equitable situation than the virtual foreclosure of an issue which would arise after the initial consideration of it by a single court of review.

Additionally, the American Bar Association has pointed out that relatively few tax issues are identical factually, as well as legally; the existence of a particular precedent in a single court may invite attempts to distinguish as much as the existence of a sister circuit precedent currently tempts counselors and advocates to discount. We see considerable force to this objection.

Given the strength of the arguments on both sides of the issue, we are unable to express any consensus on the merits of a single court of review; for some of our members the gains will outweigh the costs, while for many others, the reverse will be true.

III. THE PROPOSED SELECTION PROCESS FOR JUDGES IS WORKABLE AND NOT CONSONANT WITH THE LEGISLATION'S GOALS

We strongly oppose the concept of a semi-specialized court currently embodied in S. 1691. Those members who support the concept of a single court believe that the provisions of the bill regarding selection of judges will likely result in a loss of the advantages of specialization, and possibly an actual deterioration in the quality of tax opinions from the present level. Those who oppose the concept do not feel that a tribunal whose judges are drawn from eleven different circuits, will be the equivalent of the full bench of those circuits in fostering the growth of tax jurisprudence.

The basic problem with the current proposal, from the standpoint of those who support a single tribunal, is that its staffing provisions are unlikely to produce judges with a long-term commitment to and interest in furthering the adjudicative side of the pro-

cess of making tax law. Given the variety of tax controversies and the diverse nature of the statutory and other provisions from which they arise, a three-year term on the court is simply not long enough. Furthermore, service on the Court of Tax Appeals is not likely to be regarded as a "plum" by most judges who now sit in the circuits, due to the frequent travel which will be required of judges assigned to the court and the necessity to spend considerable periods of time in locations far removed from their normal places of residence. It may become necessary to draft judges for that service, and it may be difficult to attract the highest-calibre federal appeals court judges for this assignment. Assistant Attorney General Ferguson's concerns, expressed in testimony to the Judiciary Committee, are shared by many of our number. (See National Law Journal, June 4, 1979, page 17, for excerpts from his testimony.)

We believe, then, that the goals of a Court of Tax Appeals would be better served if a greater degree of permanence were associated with service on it. Perhaps the problem can be solved by lengthening the term of service to six years or more; a reasonable alternative, advanced in Miller, "A Court of Tax Appeals Revisited", 85 Yale L.J. 228 (1975), is a court composed about half or life-time permanent appointees, with other judges serving by designation for a period of time. If the latter format were adopted, we would have no objection to eliminating the present requirement that one judge of the court be drawn from each circuit; indeed that feature of the proposal seems rather artificial and unlikely to contribute significant-

ly to the goal of a truly nationwide court.

IV. TECHNICAL SUGGESTIONS

In the course of our review, we came across a number of linguistic and generally technical questions concerning the bill, which should probably be addressed if the Committee determines to report it out favorably. These include:

A. Section 101(b) of the bill amends Section 44(a) of Title 28 to provide that the Chief Justice shall designate one judge of each court of appeals to serve on the Court of Tax Appeals; further "in the event that the Chief Justice is unable to designate a judge of a circuit court to serve on the Court of Tax Appeals, a district judge of that circuit shall be designated to serve on the court."

The last sentence seems defective in the following respects:

1. No standards are provided for "inability"; if what is meant is that the Chief Justice may appoint a district court judge if he determines that the workload of a particular court of appeals is such as not to permit "sparing" a court of appeals judge, the language should so state.

2. Use of the passive voice in line 20 is inappropriate; reference should be made to the Chief Justice appointing a district court judge.

3. The terms "circuit court" and "district court of that circuit" in lines 19 and 20 are inaccurate; the reference should be to a "court of appeals for a particular circuit" and to a "judge of a district court embraced within that circuit", respectively.

B. Proposed Section 48(d), as added by Section 101(c) of the bill, whould be revised to indicate that the taxpayer may have the option of having his case heard at the home of the Court of Tax Appeals in Washington, if he so desires. In many cases, a Washington session will be just as convenient for taxpayer's attorneys, and scheduling the appeal there may enable the case to be heard more promptly.

C. The amendment proposed by Section 102(b) of the bill to 28 U.S.C. 46(c), relating to hearings en banc, should be revised as follows:

1. Page 4, line 12,--the reference should be to "hear or rehear", in order to conform to 28 U.S.C. 46(b) and to Federal Rules of Appellate Procedure Rule 35.

2. In line 16, the word "novel" should probably read "narrow", since the thrust of this clause appears to be to encourage en banc consideration of issues affecting many taxpayers, whether or not "novel".

3. In line 23, the word "presents" should replace "presented".

D. Section 104 of the bill amends 28 U.S.C. to provide a new Section 1296, relating to the jurisdiction of the Court of Tax Appeals. As presently written, jurisdiction of the court over appeals depends on the source of jurisdiction of the district court from which an appeal is taken; appeals lie to the proposed court where jurisdiction of the district court was founded on either Sections 1340, 1346(a)(1), 1346(a)(2) (in the case of a claim founded on an Act of Congress or regulation relating to Internal Revenue), and 1346

(e), which provides for district court jurisdiction of a particular proceeding set out in the Internal Revenue Code.

The basic issue presented by this Section of the bill is the extent to which appeals in a variety of proceedings collateral to the establishment of tax liability are to lie to the new court. Illustrative of such actions are suits to enforce, cancel or subordinate filed tax liens, suits to set aside sales of property levied on by the Service in satisfaction of an assessment; suits relating to administrative subpoenas and summonses; among many others. It is not clear to us that the reference to jurisdiction under Section 1340, a broadly drafted section vesting the district courts with jurisdiction over any act of Congress providing for internal revenue, is sufficiently specific to ensure that all of such litigation is embraced within the appellate jurisdiction of the new court.

Section 1340 clearly seems to grant jurisdiction to hear causes of action expressly provided for in the Code, e.g., IRC §§ 7401-7407, 7426 (for which jurisdiction is specially provided in Section 1346(e)), and 7604, but the scope of the phrase "arising under a law providing for internal revenue" remains somewhat murky. Some cases have given the phrase a broad reading, holding that Section 1340 given the district courts jurisdiction in any case where a plaintiff's claim "really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends." See, e.g., United States v. Corson, 286 F.2d 453, 452-458 (9th Cir., 1961). However, in other

situations, a more limited scope has been accorded the statute.

For example, consider Falik v. United States, 343 F.2d 38 (2d. Cir., 1965), which was a suit brought by a taxpayer to cancel filed tax liens. "Responsible officer" liability for unpaid corporate taxes had been assessed by the Service against her, but had not been paid. The Court of Appeals held that Section 1340 gave the district court general subject matter jurisdiction over the action, but that the complaint failed to state a claim on which relief could be granted because it appeared to be an indirect way of challenging an assessment without complying with the provisions of law requiring payment of the tax liability before instituting an action. Would a similar case be appealable to the Court of Tax Appeals?

We believe that the committee reports, if not the statute itself, should address the issue in order to provide guidance to taxpayers and government attorneys, as to the intended scope of the jurisdiction of the Court. Further, it might be appropriate to include an amendment authorizing appeals to be transferred between the established courts of appeals and the Court of Tax Appeals, where a good faith error is made in taking an appeal to the wrong court. Cf. proposed 28 U.S.C. S. 1631, as proposed to be added by Section 211(a) of S. 1477.

V. OMITTED TOPIC - THE VALUE OF EXISTING DECISIONAL LAW

A problem not addressed in the proposed statute or in the ac-

companying report of the Judiciary Committee is the precedential value of the present body of decisional law in cases brought to the new court. Obviously, where cases are in direct conflict, the court will be free to render a de novo decision; however, most tax disputes will not be of that character. It may be worthwhile to indicate, in the legislative history or in the text of the new bill, whether the court is expected to follow any particular standard in utilizing existing precedent; especially precedent arising in only one or a handful of appellate courts, and precedent in the Court of Claims.

Executive Committee
State Bar of California Tax Section

By Norman H Lane
Norman H. Lane
Vice Chair

NHL/vb

TAX SECTION

New York State Bar Association

November 28, 1979

Honorable Harry F. Byrd
United States Senator
Chairman, Subcommittee on
Taxation and Debt
Management
Senate Committee on Finance
2227 Dirksen Senate Office Building
First Street and Constitution
Avenue, N.E.
Washington, D.C. 20510

Dear Senator Byrd:

I enclose a report of the Tax Section of the New York State Bar Association dated April 30, 1979, directed to the Subcommittee on Judicial Machinery of the Senate Committee on the Judiciary, on S.678, the then-proposed "Federal Courts Improvement Act of 1979."

The report supported creation of a United States Court of Tax Appeals while offering suggestions for changes in certain provisions of the proposed legislation. A report urging many of the same changes was submitted by the Committee on Taxation of the Association of the Bar of the City of New York. That report contained comments in answer to certain questions raised by the Assistant Attorney General in charge of the Tax Division of the Department of Justice in hearings before the Subcommittee on Judicial Machinery. Those questions related to the intermingling of tax and non-tax issues in the course of litigation. By letter dated June 29, we endorsed the position the Association of the Bar of the City of New York took on that issue.

Most of the changes recommended in our report were incorporated in S.1691, the proposed

"Tax Court Improvement Act of 1979". We strongly urge this bill's approval for the reasons set forth in our May report.

Very truly yours,

John P. Carroll, Jr.
Co-Chairman
Committee on Practice &
Procedure

Weil, Gotshal +
Manges
767 - 5th ave
N.Y., N.Y. 10022

NEW YORK STATE BAR ASSOCIATION

TAX SECTION

REPORT TO

THE SUBCOMMITTEE ON JUDICIAL MACHINERY

OF

THE SENATE COMMITTEE ON THE JUDICIARY

ON S. 678

REGARDING THE ESTABLISHMENT OF A TAX COURT OF APPEALS

COMMITTEE ON PRACTICE AND PROCEDURE
JOHN P. CARROLL, JR.
CO-CHAIRMAN

April 30 1979

We urge strongly the establishment of a United States Court of Tax Appeals as provided for in Title IV of S.678. Proposals to establish a court of this kind have been put forward over the past forty years. [1] We opposed the two most recently advanced proposals for substantial changes to the federal appellate judiciary. [2] We did not believe either would provide workable solutions to the problems of delay, uncertainty, and lack of uniformity which plague the current system of tax appeals. We felt each would have introduced new complexities into the appellate process without a corresponding benefit to the tax law. We believe, however, a United States Court of Tax Appeals established under Title IV of S.678 could accomplish the major goals sought by all proponents of reforming the tax

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[1] E.g., Traynor, Administrative and Judicial Procedure for Federal Income, Estate and Gift Taxes - A Criticism and a Proposal, 38 Colum. Law Rev. 1393 (1938).

[2] Executive Committee, New York State Bar Association, Tax Section, Report to the United States Department of Justice, Office for Improvements in the Administration of Justice, Regarding a Proposal to Improve the Federal Appellate System (January 1979) hereinafter "NYSBA 1979 Report" (a copy of which is Appendix A to this report); Executive Committee, New York State Bar Association, Tax Section, Report to the Commission on Revision of the Federal Court Appellate System Regarding the Need for a Court of Tax Appeals (May 1975) hereinafter "NYSBA 1975 Report" (a copy of which is Appendix B to this report).

appellate structure and we do not see in Title IV the fundamental weaknesses evident in the proposals we opposed in 1975 and earlier this year. In short, we believe Title IV of S.678 is markedly superior to any prior proposal for reforming the appellate structure which has attracted sufficient support to be considered actively by Congress.

At the same time as Title IV meets the fundamental criteria of a practical reform, the need for reform is more urgent than ever. There is a consensus among those who know it from their professional work that our once satisfactory tax system is no longer adequate to the needs of the country, and that it is becoming less adequate every day. The weight of that consensus is growing. [3] The economic and social consequences of an inadequate tax system are serious, and the consequences which could follow if our system continues to deteriorate are frightening.

The inadequacy of the tax system stems from causes and produces effects far beyond the subject of S.678, but

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[3] E.g., American Law Institute - American Bar Association Committee on Continuing Professional Education, Simplification Symposium, republished in 34 Tax Law Rev. 1-77 (1978); Roberts, Simplification Symposium Overview: The Viewpoint of the Tax Lawyer, 34 Tax Law Rev. 5 (1978).

the delays, conflicts, uncertainties and complexity of the tax appellate procedure all contribute to that inadequacy. There is an urgent need to simplify the process of appealing decisions by trial courts in tax cases and an urgent need to reduce drastically the time required for the judicial process to produce definitive answers to questions of tax law. Improving the tax appellate procedure will contribute discernibly to restoring the tax system to a state which meets the needs of the country.

The need for a unified and expeditious tax appeal process is evident and the reasons for having a Court of Tax Appeals have been stated and restated so often we will not dwell on them here. [4] Rather, we will comment on specific aspects of Title IV S.678. The weaknesses in it are serious but easily cured. They can be remedied without altering the basic structure of the Court envisioned in the Bill.

Each suggestion for amendment offered in this report is made for one or more of three general reasons.

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[4] E.g., NYSBA 1975 Report; Roberts, Friedman, Ginsburg, Louthan, Lubick, Young, and Zeitlin, A Report on Complexity and the Income Tax, 27 Tax Law Rev. 325, 354-58 (1972); Griswold, The Need for a Tax Court of Appeals, 57 Harv. Law Rev. 1153 (1944).

First, we believe a Court of Tax Appeals could make more effective use of judicial resources than it would under Title IV as it now stands. Second, we think it essential that a Court of Tax Appeals be constituted to provide adequate appellate review of difficult and novel issues, and we believe that Title IV should offer greater assurances on this score than it now does. Third, we think it essential that a Court of Tax Appeals be a national court in all of its aspects and we suggest amending Title IV at various points to ensure that it will be.

Many of our specific suggestions for amendment envision a closer and more active connection between the Circuit Courts of Appeals and a Court of Tax Appeals than Title IV as it now stands would provide. That is not the consequence of concluding that such a connection is in itself important or valuable. Our study of narrow and specific questions raised by Title IV led us to specific conclusions and specific suggestions. From these it became evident that practical solutions to many of the difficulties we perceived would draw the proposed Court of Tax Appeals and the existing Circuit Courts of Appeals more closely together, than would Title IV as it now stands.

Geographic Distribution of Appointments

Title IV provides for a Court of Tax Appeals composed of twelve circuit judges, but does not require a geographic distribution of appointments to the Court. Section 401(b)(2). If the Court is to achieve its purpose, it must be truly national in every aspect and universally perceived to be so. The geographic distribution of appointments to the Court will determine at the outset whether it is actually perceived as a national court. We urge that Title IV be amended to provide that at least one judge from each of the eleven judicial circuits be a member of the Court of Tax Appeals at all times. [5]

If judges could be appointed to the Court without reference to geography, there would be a strong temptation to call upon the circuits with the least crowded dockets to provide judges. It would be most unfortunate, however, if appointments to a Court of Tax Appeals were employed to equalize burdens among circuits. The overburdening of circuit judges stems from causes far beyond the tax laws and must be dealt with in its own right. Moreover, one of the

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[5] Further on in this report, we urge that a Court of Tax Appeals be constituted of eleven judges plus any sitting by designation. The reasons for that go beyond the suggestion made in this section of this report. By accident of history, the appointment of one circuit judge from each judicial circuit to a Court of Tax Appeals would mesh readily into what we believe would be a generally satisfactory structure.

principal benefits expected from establishing a Court of Tax Appeals is a reduction of the number of tax appeals and thus a reduction of the overall burden on circuit judges. Accordingly, we do not think it would unduly burden the Circuit Courts of Appeals if the amendment to Title IV suggested here were adopted.

Status of a Judge of the Court of Tax Appeals

Title IV implies that a circuit judge appointed to the Court of Tax Appeals would be a judge of that Court and only of that Court for the term appointed. If that is the intention, we doubt if it is wise. If that is not the intention of Title IV as written, we suggest an explicit provision to the contrary.

The Bill provides for a Court of Tax Appeals composed of twelve judges. We believe it is desirable that a Court of Tax Appeals be composed of eleven judges. [6] At the same time, however, it is not entirely clear that the case load of a Court of Tax Appeals would be large enough to justify removing eleven circuit judges from all other judicial business to constitute that Court.

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[6] One of the reasons for that conclusion is our conclusion that each of the eleven judicial circuits should be represented on the Court. The portion of this report dealing with the adequacy of appellate consideration also supports that conclusion, for it seems desirable that the Court sit in panels of three, but also that it contain within itself enough judges, other than those sitting on a particular panel, to put in motion an internal process of review.

We have not analyzed case load statistics in detail, and we doubt whether even the most sophisticated analysis would produce anything like certainty on the question whether the docket of a Tax Court of Appeals would occupy eleven circuit judges fully. It is impossible to translate the number of cases on a docket into a realistic appraisal of the actual workload of a judge, for the matters before appellate courts range from the trivial to the most complex and important. Moreover, establishing a Court of Tax Appeals can be expected to reduce the total number of tax appeals, but the extent of the reduction is beyond anyone's capacity to predict. Thus case load data must be adjusted if one is to project what the burden of a judge of the Court of Tax Appeals would be, and any such projection is highly problematical.

Despite these reservations, some very rough data are worth considering. For a number of years there have been something over 450 appeals per year from decisions of the Tax Court and of District Courts in tax cases. [7] Appeals in this number would result in each member of an

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[7] Department of Justice, Office for Improvements in the Administration of Justice, A Proposal to Improve the Federal Appellate System (July 21, 1978). A recent discussion of Internal Revenue Service statistics makes the core of the tax appellate case load appear considerably smaller. The Commissioner's Annual Report, 7910 CCH Stand. Fed. Tax Serv. ¶8305 (1979).

eleven judge Court of Tax Appeals having a case load of just over forty cases per year. This number would be increased slightly by appeals from decisions in cases rerouted from the Court of Claims to District Courts by Title III of the Bill. At the same time, establishing a Court of Tax Appeals would tend to reduce the total of tax appeals, since a given issue would ordinarily be settled on one appeal. It seems fair to expect a case load in the range of forty per year. At the same time, the "filings" per judge in the Second, Fourth, Fifth and Ninth Circuits have recently ranged between 220 and 240 per year. [8]

The number of appeals which are relatively uncomplicated or pro forma makes these statistics highly unreliable. Nevertheless they do suggest the possibility that, if eleven circuit judges appointed to a Court of Tax Appeals functioned only as judges of that Court, their case loads would be discernibly lighter than those of other circuit judges.

We believe it would be wrong to respond to this by reducing the number of judges constituting the Court of Tax Appeals below the eleven required to represent each judicial circuit. In addition, there is no way of knowing accurately

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[8] Department of Justice, Office for Improvements in the Administration of Justic, op. cit. supra.

in advance how many judges devoting their full time to the work of that Court will actually be required to do its business.

We think the practical course is to provide explicitly in Title IV that a judge appointed to the Court of Tax Appeals will remain a judge of the circuit from which that judge was appointed, though his or her primary duties will be those of a judge of the Court of Tax Appeals. That would enable the judges of each circuit to adjust case loads among themselves, employing the services of a colleague on the Court of Tax Appeals if and to the extent the work of that Court permitted.

Locus of the Court

Title IV now provides that the United States Court of Tax Appeals is to sit at least once each year in each of the eleven judicial circuits. Section 401(c). Though this will establish the national presence of the Court, the strength of that presence is so important to the satisfactory fulfillment of the Court's purpose that we urge expanding and elaborating this provision of the Bill.

In the existing tax appellate structure, the appeal of a tax case will almost always be heard in the

judicial circuit in which the taxpayer in that case is located. It would be most unfortunate if the establishment of a Court of Tax Appeals significantly altered that general rule.

Many inadequacies of the tax system as it stands are summed up in the perception that the workings of the system are remote from those whom it affects. The causes for that are legion, but no aspect of the functioning of the tax system should be made more remote from the people subject to it than it is now. It would be ironic if the establishment of a tribunal intended to improve tax administration produced that result in any degree.

We suggest that Title IV be amended to provide that any appeal from a decision in a tax case normally be heard by the Court of Tax Appeals in the judicial circuit in which the taxpayer is domiciled or, if the taxpayer is a corporation or other association, has its principal place of business or, in the case of a cooperative or an organization claiming tax exemption, its principal place of activity. Additionally we believe it would be helpful if Title IV required the Court of Tax Appeals to conduct its business within any judicial circuit by sitting in the same places as the Circuit Court of Appeals for that circuit with a view to

hearing appeals in places convenient to taxpayers appearing before it to the extent feasible.

Title IV as it stands deals specifically with hearings of a Court of Tax Appeals en banc. Another portion of this report suggests such hearings should be more frequent than they now are in Circuit Courts of Appeals. It would, obviously, be impossible to apply the rules suggested here to hearings en banc and we believe Title IV should provide specifically for the Chief Judge of the Court to set the place for any such hearing.

Selection of Judges

Mode of Selection. The Bill now provides that the Chief Justice of the United States is to appoint circuit judges to the Court of Tax Appeals. Section 401(b)(2). We urge that it be amended to impose upon the judges of each circuit the duty of selecting from among their number those who are to serve as judges of the Court of Tax Appeals, imposing upon the Chief Justice of the United States only the limited and specific duties described further on in this section of this report.

Title IV as it now stands would confer upon a single person an extraordinary power to influence the development of an important segment of the law over a long period

of time. Though it would require the Chief Justice to select judges for the Court from among those already appointed by the President and confirmed by the Senate, the powers of the Chief Justice would, in a significant sense, be greater than those of the President in this one aspect of the selection of the judiciary. Chief Justices of the United States have usually enjoyed much longer tenures than Presidents. Accordingly, the time span over which the appointive duty contemplated by Title IV as it now stands would settle upon one person would be longer than the time span of the powers of any one President to select the judiciary. Additionally, it is often the case that more is known of a judge's view of the law after he has sat for some time than was known at the time of his appointment. Thus, the duty to select imposed by Title IV as it now stands is a duty to make a selection based on greater and more specific knowledge than that available to a President in making appointments to the judiciary.

The extent of the power of selection which Title IV in its present form would confer foreshadows difficulties for anyone required to exercise it. We question whether it is wise for Congress to put the duty of exercising that power upon the Chief Justice of the United States. The

choices made by a Chief Justice could, conceivably, generate criticism of the sort from which the occupant of that office should be shielded entirely.

We suggest that the designation of judges to sit on the Court from each circuit be made by the Chief Judge of that circuit with the consent of the judicial council of that circuit. We believe that the number of judges can and should be reduced to eleven. Among other things, keeping the Court to that number would facilitate the designation procedure we have suggested. If, however, the Court of Tax Appeals is to be composed of twelve judges, as the Bill now provides, and if one is to come from each of the eleven judicial circuits, and if the power of selection is to reside in the circuit judges, there would remain the question how to select the twelfth. In that case, we suggest that the Chief Justice of the United States be required to designate one of the eleven judicial circuits to provide two judges to the Court of Tax Appeals, leaving the actual selection to the circuit judiciary in every case.

The provisions of Title I of the Bill for the designation of Chief Judges in the Circuit Courts of Appeals do not seem appropriate to a Court of Tax Appeals. We suggest that the Chief Justice of the United States be

required to designate a judge of the Court of Tax Appeals to be the Chief Judge of that Court. Alternatively, this responsibility could be left entirely with the Court itself. In that case, the Bill should provide for the judges to elect a Chief Judge for a fixed term from among their number.

Our conclusion that the selection of Judges for the Court of Tax Appeals should be left to the circuit judges is not merely the result of our conclusion that it would be unwise to thrust that duty upon the Chief Justice of the United States. Rather, it seems to us to follow logically from the recommendations we have made which would have the effect of drawing the Court of Tax Appeals and the Circuit Courts of Appeals more closely together than the Bill now contemplates doing.

Understaffed circuits. If senior circuit judges are excluded, six of the eleven judicial circuits now have fewer than nine circuit judges in service. Accordingly, the Chief Judge of a Circuit Court of Appeals, with the approval of the judicial council of that circuit, should be entitled to determine that so few circuit judges are available to conduct its business that it would burden that circuit excessively to provide a circuit judge to the Court of Tax Appeals. We suggest that Title IV provide that, upon any

such determination by the judiciary of a circuit, the Chief Judge of that circuit could (with the consent of its judicial council) appoint a district judge to serve on the Court of Tax Appeals in lieu of a circuit judge.

Judges sitting by designation. Title IV now provides that both district judges and judges of the Tax Court may be designated by the Chief Justice to sit as judges of the Court of Tax Appeals from time to time. Section 402(c). We think the provision for the temporary designation of district judges is sound. We understand the Subcommittee is considering whether the designation of a judge of the Tax Court to sit on the Court of Tax Appeals would raise Constitutional questions because the Tax Court has been established under Article I of the Constitution, rather than under Article III. We are not prepared to express a view on the question whether a Constitutional difficulty would actually be presented but, to eliminate the possibility of any controversy, we recommend that the provision of Title IV permitting judges of the Tax Court to sit by designation on the Court of Tax Appeals be stricken.

Restructuring of the Court of Claims

This report is directed only to the proposal to establish a United States Court of Tax Appeals embodied in Title IV of S.678 as it stands. We have not, therefore, stated any view on the overall merits of Title III or any view on the details of the proposal to alter the structure and jurisdiction of the Court of Claims contained in Title III. [9] We feel very strongly, however, that it is important to recognize that a Court of Tax Appeals can be established on the principles underlying Title IV regardless of what decisions are taken on the questions dealt with in Title III.

If the decision is to establish the existing trial judges of the Court of Claims as judges of a new Claims Court, there is no inherent barrier to giving that Court jurisdiction in refund suits concurrent with that of the District Courts. If that were done, review of determinations by trial judges of that Court could and should be done by the Court of Tax Appeals. Variations on that general notion are conceivable and would not be destructive of the notions of unity and certainty which underpin Title IV.

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[9] In the NYSBA 1975 Report this Association took the position that the jurisdiction of the Court of Claims over tax cases should be terminated as Title III of the Bill would do. This report is not intended either to change or to review that recommendation. We have simply not addressed the question in this report.

It would, however, seriously impair the effectiveness of a Court of Tax Appeals if the tax jurisprudence of the existing Court of Claims were not integrated into the orderly hierarchy of decision making which is the goal of Title IV. If, for example, the structure and jurisdiction of the Court of Claims were to remain exactly as they are today, it would be important to make its decisions appealable to the Court of Tax Appeals. The practical result would be that judicial consideration would be given to a refund suit brought in the Court of Claims at three levels; at trial by a trial judge, upon consideration of a trial judge's findings and report by the judges of the Court of Claims and upon consideration again at the Court of Tax Appeals. (This assumes what everyone expects; that only in the most extraordinary instances will a case decided by a Court of Tax Appeals be heard on certiorari in the Supreme Court.) In prior reports on appellate procedure, we have criticized proposals which would create an additional layer of appellate jurisdiction as unduly burdensome. [10] If, however, Congress decides that the structure and jurisdiction of the Court of Claims should remain as they are, we believe sacrificing this principle to the extent required is infinitely preferrable

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[10] NYSBA 1975 Report, (Appendix B at 21-22, 28). See also NYSBA 1979 Report (Appendix A at 5).

to leaving the taxation jurisprudence of the Court of Claims isolated from the rest of the country's tax jurisprudence.

Adequacy of Appellate Consideration

Some of those who agree that a Court of Tax Appeals such as that envisioned by Title IV of S.678 would bring desirable qualities of uniformity, certainty and expedition into tax jurisprudence are, nonetheless, reluctant to endorse a proposal for such a court because they fear that lodging all tax appellate jurisdiction in a single court and thus giving the decision of a single appeal almost final effect would lead to inadequate appellate consideration being given to important or difficult issues of tax law.

Those who share this concern begin with the proposition that a Court of Tax Appeals would be very nearly a court of last resort and in this they are correct. That is not only the likely result of establishing a Court of Tax Appeals but one of the principal results intended. The jurisdiction of the Supreme Court in taxation cases today is principally a device for patching up differences between the Circuit Courts of Appeals. This is a burden for the Supreme Court which does not produce enough in the way of a benefit to the bar, the bench, the Treasury or the public to justify

it. The establishment of a Court of Tax Appeals would leave it to the Supreme Court to hear only those taxation cases which the Justices of the Supreme Court themselves regarded as presenting issues of national importance.

If the consequence is that any question of tax law decided by a trial court could be considered only on one occasion by a single panel of judges before the principle which emerged from that case became fixed in the law subject only to change by legislation, it would be a considerable disadvantage to be weighed against the advantages which lie in establishing a Court of Appeals. This need not be the case, and Section 402(b) of the Bill as drafted addresses the problem. We believe, however, that the Bill could and should deal with the issue more specifically, and that Title IV could and should do more to ensure adequacy of appellate consideration than it now does.

Section 402(b) of the Bill proposes to amend 28 USC §46(c) by adding provisions under which the Court of Tax Appeals could initially hear appeals in panels of more than three judges and under which it could sit en banc on the motion of any six of its judges. There is no specific provision for the rehearing of cases. We doubt if that is a satisfactory way of ensuring adequate consideration of difficult or novel or important questions of tax law.

If the Court of Tax Appeals is to be a fully satisfactory substitute for eleven Circuit Courts of Appeals, its procedure must provide opportunities for reflection and revision, for it is perhaps the only virtue of the existing structure that it provides these qualities in full measure. Increasing the number of judges who hear a case in the first instance as it comes from a trial court will not introduce those qualities into the proceedings of a Court of Tax Appeals and could tend to produce the opposite effect. To the extent it drew more than three judges into the hearing of cases, the Court would have fewer resources of judicial time and energy to expend in rehearings. Moreover, if the Court of Tax Appeals is to have a national presence (and we think it must if it is to succeed in accomplishing everything hoped of it) it would compound the difficulties of administration if it were to sit often in panels of more than three judges at various places in the country.

We suggest providing specifically in Title IV that, except in the rehearing of a case, the Court of Tax Appeals is to sit in panels of three judges. At the same time we believe Title IV should provide explicitly for rehearings in a way which makes it clear that the intention of Congress is that the practice of the Court is to be different

from that of the Circuit Courts of Appeals under the Federal Rules of Appellate Procedure.

A Circuit Court of Appeals may sit en banc in any case and may rehear cases en banc or otherwise. FRAP Rules 35(a) and 40. The rules explicitly discourage such proceedings. Moreover, hearings en banc, and rehearings in a Circuit Court of Appeals are even more infrequent than a reader of the rules might gather from nothing more than his reading. We feel strongly that, if a Court of Tax Appeals is to be a fully satisfactory substitute for the Circuit Courts of Appeals, it must review the decisions of its panels much more frequently than they now do. A Court of Tax Appeals functioning under FRAP Rules 35(a) and 40 as they stand could review the decisions of its panels frequently enough to meet the point made here. Nevertheless, we believe it would be desirable if the law which created the Court encouraged the practice of rehearing by providing specific machinery for initiating rehearings. We urge that Title IV provide specifically that the Court is to rehear any case en banc if any five of its judges endorse a petition for rehearing.[11] We believe, further that it would be desirable if Title IV were to state explicitly that this provision of the statute was intended to facilitate rehearings when appropriate and if

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[11] The court should have authority to grant a rehearing with or without an oral re-argument.

it also stated that a judge of the court, when determining whether or not to endorse a petition for rehearing in any case was to take into account:

> (i) whether the question presented in that case was thought to be novel and unlikely to recur or thought to be far-reaching in the sense that the decision upon it was likely to apply to many taxpayers or to very large amounts;
>
> (ii) whether there had or had not been unanimity in the panel which decided the case;
>
> (iii) whether any of the judges who composed the panel which heard the case had suggested that it be reheard;
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> (iv) whether the decision of the panel which heard the case reversed a decision of a lower court, and
>
> (v) whether the case presented issues of first impression.

We have considered the question whether it would be desirable to provide that a party to a case before the Court of Tax Appeals would, in specified cases, have the right to a rehearing en banc. For example, litigants could be entitled to a rehearing on the reversal of a case that

was reviewed by the Tax Court, but this would not produce a corresponding standard for cases decided in District Courts. A rehearing of right whenever a taxpayer questioned the constitutionality of a Code provision or the validity of a regulation was considered but we felt that this would force the rehearing of many frivolous cases and thus reduce the capacity of the Court to rehear important cases. We do not believe any rule conferring an absolute right to rehearing en banc in specific cases would function satisfactorily in practice.

If the Court rehears en banc more cases decided by its panels than a Circuit Court of Appeals now does, it may be useful that it not be composed of an even number of judges. Though this is not a major consideration, it supports to an extent our suggestion that the Court be composed of eleven judges, one from each judicial circuit.

Designation of a Judge as the Chief Judge of a Circuit Court of Appeals

If a circuit judge designated to serve on the Court of Tax Appeals is to be regarded in every respect as a circuit judge for the judicial circuit from which he or she comes (and we believe that should be the rule) mechanical

difficulties could arise out of the relationship between Title I and Title IV of the Bill. Section 101 provides a method of determining who is to be the Chief Judge of a circuit according to age and length of service. It does not seem appropriate for a judge serving on the Court of Tax Appeals to be the Chief Judge of a judicial circuit, for that post carries administrative burdens of a kind which a judge of the Court of Tax Appeals would find very difficult. Moreover, it is possible that a circuit judge serving on the Court of Tax Appeals might prefer remaining on the Court of Tax Appeals to serving as the Chief Judge of a Circuit Court of Appeals.

We believe Title I should be amended to provide specifically that a judge who would otherwise be Chief Judge of a Circuit Court of Appeals shall not be so long as he or she continues to be a judge of the Court of Tax Appeals. Title IV should be correspondingly amended to permit a judge sitting on the Court of Tax Appeals to terminate his or her service on that Court if and when eligible to be the Chief Judge of a Circuit Court of Appeals so that he or she can choose to assume that office.

COMMITTEE ON PRACTICE AND PROCEDURE
JOHN P. CARROLL, JR.
CO-CHAIRMAN

APPENDIX A

NEW YORK STATE BAR ASSOCIATION

TAX SECTION

REPORT

To The United States Department of Justice, Office For Improvements In The Administration Of Justice, Regarding a Proposal To Improve The Federal Appellate System

By

The Executive Committee of the Tax Section

January 1979

NEW YORK STATE BAR ASSOCIATION

TAX SECTION

REPORT

To the United States Department of Justice, Office for Improvements in the Administration of Justice Regarding a Proposal to Improve the Federal Appellate System.

By

The Executive Committee of the Tax Section

In July 1978 the Office for Improvements in the Administration of Justice of the Department of Justice issued a tentative proposal for restructuring of a portion of the intermediate federal appellate courts entitled "A Proposal to Improve the Federal Appellate System" (the "OIAJ Proposal"). By letter of transmittal dated July 21, 1978 comments on the proposal were invited and this Report of the Tax Section of the New York State Bar Association, adopted by the Executive Committee of the Section on December 14, 1978, responds to that invitation.

The Proposal

The OIAJ proposal is that the Court of Claims and the Court of Customs and Patent Appeals be merged into one intermediate Appellate Court. The judges of this Court would be the judges of the two constituent courts plus three new appointees, making a total of 15 judges. The Court's jurisdiction would encompass the jurisdiction of the two existing Courts and,

in addition, exclusive appellate jurisdiction of all appeals in patent, civil tax and environmental cases from the U.S. District Courts and the Tax Court. Review (by the U.S. Supreme Court) of the new appellate court's decisions would be by writ of certiorari. The Court would be headquartered in Washington, in the Court of Claims building on Lafayette Square and would be called the "United States Court of Special Appeals". However, it would sit elsewhere throughout the country, normally in five judge panels.

Before commenting on this proposal it would perhaps be helpful to consider the background from which it derives.

Background

For some time now the federal appellate system has generally been regarded as being burdened by too many appeals and handicapped by too few judges. This perceived problem has led to a number of studies which in turn have produced various proposals for restructuring the system.

For example, a committee headed by Professor Freund of Harvard Law School (the "Freund Committee") reported in December 1972 that the Supreme Court was overburdened and proposed a National Court of Appeals, comprised of seven active circuit judges appointed on a rotating basis to screen out non-meritorious petitions for Supreme Court review. This Proposal provoked substantial controversy and was criticized primarily as

violating the constitutional mandate of "one supreme court" and as decreasing final appellate review. This proposal for a National Court of Appeals gained little support but encouraged further study of the federal appellate courts.

Thus in October 1972 Congress created the Commission on Revision of the Federal Appellate System headed by Senator Hruska (the "Hruska Commission"). The Commission, after study, recommended (i) splitting the fifth and ninth circuits and (ii) the creation of a National Court of Appeals. However, the Hruska Commission's National Court of Appeals bore little relation to the court proposed by the Freund Committee as the Commission perceived the problem not as one of an overburdened Supreme Court but as a problem of inadequate final appellate capacity compounded by conflicting decisions at the intermediate appellate level. The Commission proposed a new Appellate Court interposed between the current Courts of Appeal and the Supreme Court whose jurisdiction would depend upon cases referred to it by the Supreme Court or transferred to it from the Courts of Appeal. In support of its proposal the Commission relied in part upon a study made of conflicting appellate decisions.

This data was, however, subject to criticism on the basis, among others, that a substantial portion of the conflicting decisions were relegated to narrow areas of the law

(for example, of eighteen illustrated cases of unresolved inter-circuit conflicts, uncertainty and relitigation eight involved solely issues of Federal taxation). See, New York State Bar Association, Tax Section, Report to the Commission on Revision of the Federal Court Appellate System Regarding the Need for a Court of Tax Appeals (May 1975),* page 12. The New York State Bar Tax Section pointed out, in the above cited report, that the data more reasonably supported a Court of Tax Appeals than a National Appeals Court of general jurisdiction. Others made the same point, including, however, patent cases as well in the problem case category to be included in such a new Appeals Court's jurisdiction.

However, the principal reason for failure of the Hruska Commission's proposal to gain support was that in fact it would not have helped the problems to which it was addressed -- it would probably have increased the work of the Supreme Court by requiring it to act as a switching station for cases going to the National Appeals Court and would not have alleviated the workload of the Circuit Courts of Appeal nor materially reduced the problems of conflict, uncertainty and relitigation. These points of criticism were made in the New York State Bar Tax Section Report, supra, which concluded with the recommendation for the creation of a Court of Tax Appeals.

Political and Policy Considerations

The Justice Department, having reviewed this history,

*Reproduced at Vol. II, 1975 Hearings, Commission on Revision of the Federal Appellate System, pages 1348-61.

has concluded that any future court reform effort would have to meet the following criteria:

(a) No automatic fourth level of review should be added to the federal system.

(b) If intermediate review is added, a court of permanent Article III judges given important tasks must be created.

(c) If a new court is created, it should be so established as to maintain the stature of existing courts and judges.

(d) Undue specialization of courts and judges should be avoided.

(e) Any new tribunal should provide built-in flexibility to meet changing federal court docket conditions.

(f) Access to and review in the Supreme Court should be maintained.

(g) The federal judiciary should not be unduly expanded.

(h) A new court should operate free of jurisdictional disputes.

The Department has concluded that, based on the data developed by the Hruska Committee and others, the scope of review could be limited to patent and tax cases with, in the Deparment's view, the addition of environmental cases. The latter were felt to comprise an equally difficult and technical body of law that should be given uniform national interpretation. Following the criteria set out above, the OIAJ proposes that a national court, having appellate jurisdiction over these three areas, be created by combining the existing Court of Claims and Court of Customs and Patents Appeals. This court would have the following appellate jurisdiction:

(1) civil tax cases arising under any Act of Congress relating to income, estate, or gift taxation, in cases either in the United States District Courts or the Tax Court, including extraordinary proceedings and suits for refund, for impartial assessments, for judgments against delinquent taxpayers, and to enforce summonses.

(2) patent cases arising under any Act of Congress relating to patents, including suits for injunctions against infringement and declaratory judgments of invalidity of noninfringment.

(3) environmental cases arising under the Clean Air Act, the Federal Water Pollution Control Act, the National Environmental Policy Act, the Solid Waste Disposal Act, the Costal Zone Management Act of 1972, the Radiation Control for Health and Safety Act of 1968 and the Federal Environmental Pesticide Control Act of 1972.

Comments on the Proposal

A Court of Tax Appeals, as previously recommended by this Section, would be preferrable to the proposed Court of Special Appeals. Such a conclusion is supported by the need for special expertise in tax matters, the fact that tax cases comprise the majority of unresolved conflicting and relitigated cases and that the area of legal uncertainty is most detrimental in the tax area. All the arguments for such a Court of Tax Appeals are cogently set forth in the New York State Bar Tax Section Report noted supra.

The OIAJ Proposal for a Court of Special Appeals does not adequately meet the needs for Federal appellate court reform and, at the same time, introduces significant ad-

ditional problems for the Federal appellate system.

The OIAJ Proposal provides that the new court will have appellate jurisdiction in three areas: tax, patent and environmental cases. However, the proposal does not limit the jurisdiction of the Court to this appellate function, for the new court also retains all of the original jurisdiction of its two constituent courts. Thus, the OIAJ Proposal states that

> No deletions from the existing jurisdictional scheme are proposed. Instead, the proposal is that the new court additionally handle all patent, civil tax, and environmental appeals, whether from the district courts or the Tax Court.... The Trial Commissioners of the old Court of Claims would have to be given the power to enter dispositive judgements, with appeals lying to the new court. OIAJ Proposal at 21-22.

The new court would accordingly have both appellate and original jurisdiction in tax cases, as well as in, inter alia, suits for damages against the U.S., including contract cases, military and civilian pay cases, and government taking cases, Indian claims cases, patent cases (when the U.S. is an alleged infringer) and, with the consent of the parties, Federal Tort Claims Act cases. Thus, with appeal to the new court lying from decisions of the Trial Judges in original jurisdiction cases, the appellate judges could well be required to decide a wide spectrum of

cases other than those within the scope of its external appellate jurisdiction. Such a caseload, while negating any criticism on the basis of over-specialization, could well prevent the judges from developing sufficient expertise in the primary areas of the Court's external appellate jurisdiction. See, New York State Bar Tax Section Report, supra, page 18 et. seq. with respect to the need for such an expert tax tribunal.

Assuming, for the moment, the desirability of one of the imperatives on which the OIAJ Proposal is based, that undue specialization of courts and judges should be avoided, the broad scope of the jurisdiction of the new court may, nevertheless, have gone too far. Thus, the OIAJ Proposal may serve to merely reshuffle a certain number of cases into a separate court in the interest of relieving the caseload on the existing appellate courts. However, there can be no expectation that the judges will be able to achieve a level of expertise in any of the particular areas which have been singled out as problematical. This is particularly troubling to the Tax Bar which has indicated a need and desire for a higher standard of appellate review of tax issues. Therefore, under the proposal there would be the worst of everything: the judges would not be generalists and litigants would not have the benefit of expertise.

This could, for example, result in tax experts trying to decide patent cases, patent experts trying to decide tax cases, and both struggling with environmental matters.

To the extent that specialization of judges is an undesirable result, it is likely that potential judges for the new court will recognize this as well. Thus, it may be difficult to find judges willing to serve on a specialized court dealing with such disparate areas as taxation, patents and environmental problems. The proposed areas of jurisdiction for the new court are so disparate as to make it unlikely that candidates will be found with experience in more than one field. On the other hand, an adequate pool of potential judges would be available to serve on a Court of Tax Appeals. Specialization in tax law has never been a deterrent to the members of the Tax Bar. However, the emphasis on engineering, scientific and technical expertise, so clearly a part of the adjudication of patent and environmental cases, may serve as a disincentive to potential judges who might be willing to serve on a Court of Tax Appeals.

The OIAJ Proposal has focused its attention on tax, patent and environmental law as presenting such notable and unusual cases as to call for special treatment in the

Federal system. By establishing a new court with jurisdiction over these three areas of law, the OIAJ Proposal, if adopted, would leave open the possibility that the jurisdiction of the new court will be expanded to include additional specialties. Thus, as particular areas of law expand and become more technical and specialized and as conflicts among the courts develop, the tendency will be to shift these matters to the jurisdiction of the new court. The above criticisms of the OIAJ Proposal will be exacerbated by any further expansion of the new court's jurisdiction. A Court of Tax Appeals would not be subject to this potential for dilution of its expertise.

Conclusion

The Executive Committee of the Tax Section believes that the Department's proposal for a new Court of Special Appeals falls short of the goals for revision of the Federal appellate system. As discussed in the comments above, the adverse effects of retention of the existing original jurisdiction and the joining of three fields of expertise within the jurisdiction of the new court could produce a Federal appellate system which is less desirable than either the present system or the proposal for a specialized Court of Tax Appeals previously made by the Tax Section.

APPENDIX B

NEW YORK STATE BAR ASSOCIATION

TAX SECTION

Report

To the Commission on Revision of the Federal Court Appellate System Regarding the Need For a Court of Tax Appeals

By

The Executive Committee of the Tax Section

May 1975

NEW YORK STATE BAR ASSOCIATION

TAX SECTION

Report

To the Commission on Revision of the Federal Court Appellate System Regarding the Need For a Court of Tax Appeals

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The Executive Committee of the Tax Section

In April, 1975 the Commission on Revision of the Federal Court Appellate System published a Preliminary Report entitled "Structure and Internal Procedures: Recommendations for Change." The Preliminary Report of the Commission invites comments and suggestions. This report of the Tax Section of the New York State Bar Association, adopted by the Executive Committee of the Tax Section on May 14, 1975, responds to that invitation.

The Preliminary Report of the Commission recommends the creation of a National Court of Appeals, a new tribunal to consist of seven Article III judges to sit only en banc, to which court cases would be brought by "transfer jurisdiction" (the regional courts of appeals would transfer cases that would otherwise be heard by those courts) and by "reference

jurisdiction" (the Supreme Court would refer to the National Court of Appeals any case within its appellate jurisdiction). Decisions of the National Court would be precedents of nationwide effect, binding upon the district courts, the regional courts of appeals and state courts until modified or overruled by the United States Supreme Court. In its reference to the history of conflicting judicial decisions and uncertainty in the area of federal tax law, the Preliminary Report appears to contemplate substantial activity in that area by the National Court of Appeals.

For the reasons explained below, the Executive Committee believes:

1. There is a need for a court of tax appeals.

2. The proposed National Court of Appeals will not adequately fill that need.

1. Our Report Entitled "Complexity and the Income Tax"

In the spring of 1972 the Committee on Tax Policy of the Tax Section submitted to the Section's Executive Committee a document entitled "A Report on Complexity and the Income Tax" (hereafter, the "Complexity Report"). The Executive Committee, in May of 1972, approved the Complexity Report in various respects, although it neither approved nor disapproved the report's specific wording or its evaluation of the causes of complexity, and the Complexity Report thereafter was published and widely disseminated in 27 Tax L. Rev. 327 (1972). Since that time the Complexity Report has received the favorable attention of various commentators, see, e.g., Statement of George P. Schultz, Secretary of the Treasury, Before the House Ways and Means Committee, Introducing the Administration's Proposals for Tax Change, 19-20 (April 30, 1973); Judge Henry J. Friendly, Federal Jurisdiction: A General View (James S. Carpentier Lectures), 162 n39, 171 n75 (Columbia University Press 1973), as well as the endorsement of such other organizations as the State Bar of Texas (Tax Section) on March 23, 1973, the Association of the Bar of the City of New York on April 12, 1973, and the American Institute of Certified Public Accountants (Federal Tax Division) on December 6, 1973.

A major part of the Complexity Report was devoted to analyzing the ways in which the present method of judicial review of tax issues contributes substantially to the complexity of the tax system. The report first concluded that with the exception of cases involving liens or collections (and such special matters as bankruptcy and criminal proceedings), the district courts should be divested of tax jurisdiction, the Court of Claims should be divested of jurisdiction in tax matters, and the jurisdiction of the Tax Court should be broadened to include refund cases in the income, estate, gift and excise tax fields. 27 Tax L. Rev. 327, 351-54. The Complexity Report then set forth the following analysis of and conclusions with respect to the system of appellate review of tax cases (pages 354-58, footnotes omitted):

> The Present System of Appellate Review Causes Great Delay
>
> With 11 courts of appeals deciding appeals from the Tax Court, it is obvious that diverse results may be reached by the various courts. Until there is a square conflict, it is rare that the Supreme Court will grant certiorari and decide the question. In the meantime, there is the incongruous situation that the Tax Court will decide cases involving identical issues in different ways merely because

involving identical issues in different ways merely because they are appealable to courts of appeals which have reached divergent results or have not passed on the issue. The rule has been carried to the logical extreme of reaching different decisions in cases involving the same issue and the same taxpayer for different years, merely because the taxpayer had changed his residence and the decisions were appealable to different courts of appeals, one of which had reversed the Tax Court on the point in another case and the other of which had not passed on the point. As a general proposition it may take nine to ten years for a final decision to be reached on a particular tax question. In the meantime, both the taxpayer and the administrator have been faced with the frustrating situation of being completely uncertain as to the correct rule. The fact that even three or four courts of appeals have decided the question the same way does not guarantee that a much later case will be decided by another circuit the same way. If a conflict develops, there is always the uncertainty as to how the Supreme Court eventually will decide the matter.

A Tax Court of Appeals Should Have Exclusive Jurisdiction To Review Tax Court Decisions

The 11 courts of appeals should be divested of jurisdiction to hear appeals from the Tax Court and a new tax court of appeals should be established which would have sole jurisdiction to hear appeals from the Tax Court.

The Reasons for the Change

Giving this tax court of appeals sole jurisdiction to hear appeals from the Tax Court would seem desirable for a number of reasons. It would result in review by a court which would have great expertise in the subject as contrasted with the usual court of appeals, the judges of which generally have no great familiarity with tax matters.

The tax court of appeals would be an important enough court to encourage outstanding members of the tax bar to accept appointments, so that there is no reason why it should not be a strong and capable court. Further, it would appear that there should be no reason for the court to become narrow and parochial; tax law cuts across so many other fields of law that a good tax lawyer inevitably must have considerable familiarity with the broad legal principles governing other fields of law. The court might include some nontax lawyers, perhaps selected from incumbent federal judges.

In order to ensure a prompt disposition of appeals, it would appear desirable to limit the jurisdiction of the tax court of appeals, so that appeals of right would lie only in cases where a constitutional issue is involved or there is a dissenting opinion in a case reviewed by the full Tax Court. All other cases would proceed to the tax court of appeals only if that court granted certiorari. In this manner the court could confine its activities to the important cases and avoid being overloaded with unimportant issues which would only congest its calendar.

The Benefit to be Gained

Certainty would thus be achieved without the long delay which often occurs under the present system. Having only one appellate court would stop the current practice (both by the government and taxpayers) of bringing appeals in numerous circuits in the hope of securing a conflict which will serve as a basis for a grant of certiorari by the Supreme Court. Thus there would be a considerable diminution in the volume of appeals.

The much earlier resolution of tax questions which would result from taking all appeals to the new tax court of appeals would reduce the period in which taxpayers could resolve questions in their favor on their returns or gamble on the chance of successfully litigating the matter or of working out a settlement based upon the risks of litigation. Obviously this would reduce the administrative problems of the Service. Furthermore, tax advisers would more frequently be able to give unequivocal advice to their clients, which would result in better compliance by them. An earlier resolution of tax issues also would enable taxpayers either to proceed with or abandon contemplated transactions, instead of being paralyzed by uncertainty as is often the case today.

The speedy certainty which can result from restricting appeals to one intermediate appellate court has been recognized by the Congress in creating a temporary emergency court of appeals to hear all appeals from injunctions granted by district courts or from decisions of the Wage Board or Price Commission with respect to controversies arising under Phase II of the President's economic controls program.

The lot of the unfortunate taxpayer who is involved in a test case, even though his tax liability is not large, would be better than it is today, since his expenses normally would terminate with the proceedings in the tax court of appeals.

Giving the Tax Court and the tax court of appeals exclusive jurisdiction in tax matters would greatly reduce the ability of taxpayers on opposite sides of an issue to whipsaw the government by adopting inconsistent positions.

The tax court of appeals necessarily would have to sit by panels and go on circuit. This would not appear to raise any great problems since the Tax Court has operated very successfully in that manner. Decisions of the different panels should be reviewed by the Chief Judge to ensure uniformity and in an important case the full court should review the decision.

Appeals from the tax court of appeals would be taken to the Supreme Court only if certiorari were granted. Since there would no longer be conflicting decisions of courts of appeals, the Supreme Court presumably would grant certiorari only in a limited number of cases.

The courts of appeals in most circuits have been badly overloaded and presumably would welcome being relieved of the tax cases they now are called upon to handle.

In the event that the Treasury or even a large part of the tax bar should conclude that a final decision of the tax court of appeals was wrong, it is likely that Congress would change it by legislation as it has so frequently done in the past with Supreme Court decisions. Even if that does not happen, it is better to have prompt resolution of the question, even though the answer is incorrect. Taxpayers may at least accommodate to a certain rule, while uncertainty may lead to complete paralysis.

The arguments for the creation of a tax court of appeals are overwhelming. Such a court should be established without further delay.

2. Current Tax Section Position on A Court of Tax Appeals

In 1972 the Executive Committee of the Tax Section neither approved or disapproved the specific wording of and recommendations advanced in the Complexity Report's proposal of a court of tax appeals. The Preliminary Report of the Commission has impelled the Executive Committee to review this portion of the Complexity Report. That review has led us to the following conclusions.

First, appeal of federal tax cases to the court of tax appeals should be a matter of right, and not pursuant to a certiorari process. The concept of certiorari was advanced in the Complexity Report because of a fear that unrestricted access to the new court might excessively burden its calendar. At an earlier time this would not have been a concern. See Griswold, The Need for a Court of Tax Appeals, 57 Harv. L. Rev. 1153, 1179-80 (1944); Del Cotto, The Need for a Court of Tax Appeals: An Argument and a Study, 12 Buffalo L. Rev. 5, 20-22 (1962). In Judge Friendly's words, "Happily, although unexpectedly, that is still true." See Friendly,

supra, at 163-64 (analyzing and extrapolating from 1972 statistical materials, and concluding that the case load of the court of tax appeals would be less than that of ten of the eleven regional courts of appeals).

Second, we agree with the Complexity Report that access to the court of tax appeals to a reasonable extent should be regionally available throughout the country. However, recognizing that uniformity and finality of appellate tax decisions may call for a higher percentage of en banc determinations than is usual in regional courts of appeals, we take no position as to the amount of time that should be spent by the new court in traveling on circuit, the number of cities in which it may sit, or the procedures to be utilized in calling forth en banc determinations. Cf. Friendly, supra, at 164.

Third, the Complexity Report does not specifically state, but in its negative reference to lien and collection proceedings does suggest, that issues relating to the validity of a tax assessment would not fall within the proposed expanded jurisdiction of the Tax Court and thus would not fall

within the jurisdiction of the court of tax appeals. Judicial experience during the past 15 years confirms that issues of this kind arise with some frequency, may involve considerations of the assessment procedure that are of a highly technical nature, and may give rise to decisional conflicts that are not resolved for many years. See, e.g., United States v. Coson, 286 F.2d 453 (9th Cir. 1961); United States v. Falik, 343 F.2d 38 (2d Cir. 1965); Mulcahy v. Phinney, 388 F. 2d 300 (5th Cir. 1968); Yannicelli v. Nash, 354 F.Supp. 143 (D.N.J. 1972); Globe Products Corporation v. United States, 386 F. Supp. 319 (D.Md. 1974)(all relating to the remedy that may be available to a taxpayer who has been subjected to a procedurally invalid tax assessment). We do not here take a definitive position, but we believe that further consideration should be given to including within the jurisdiction of an expanded Tax Court and the court of tax appeals responsibility for matters of this kind.

With the amendations and comments noted above, the Executive Committee adopts the portion of the Complexity

Report calling for the prompt establishment of a court of tax appeals.

In proposing (pages 352-54) an expanded jurisdiction for the United States Tax Court, the Complexity Report contemplates withdrawing refund suit jurisdiction from the Court of Claims and the district courts. Trial by jury is not available in the Court of Claims; the proceedings before the Court's Trial Judges are equivalent to those in a district court and the Court itself is equivalent to a Court of Appeals. The Executive Committee believes that incident to the creation of a court of tax appeals, tax refund suit jurisdiction should be withdrawn from the Court of Claims. However, in significant part because of the availability of a jury trial in the district courts, the Executive Committee neither approves nor disapproves the Complexity Report's recommendation that first instance jurisdiction over tax refund suits also be withdrawn from the district courts and lodged exclusively in the Tax Court. If district court jurisdiction is maintained, appeals from the tax decisions of the district courts, like

appeals from the decisions of the Tax Court, should be to the court of tax appeals.

3. The Proposed National Court of Appeals Is Not an Adequate Substitute

As proposed, cases would be brought to the National Court of Appeals under either of two heads of appellate jurisdiction: "Transfer jurisdiction" under which the regional courts of appeals could transfer cases that otherwise would be heard by these courts, and "reference jurisdiction" under which the Supreme Court would refer to the National Court any case within its appellate jurisdiction. The National Court would sit only en banc and, presumably, only in Washington, D.C. The National Court would be empowered to decline to accept the transfer of any case which, either for reasons having to do with the nature of the case itself or for reasons of docket control, it concluded would be more appropriately heard initially by the court in which the case originally was filed. However, the National Court would have no discretion to decline cases

coming to it via the reference jurisdiction from the Supreme Court. Decisions of the National Court would be precedents of nationwide effect, binding upon the district courts, the regional courts of appeals and state courts until modified or overruled by the United States Supreme Court. Cases decided by the National Court, whether transferred to it by a regional court of appeals or referred by the Supreme Court, would be subject to review by the Supreme Court upon petition for certiorari.

It is abundantly clear in the Preliminary Report of the Commission on Revision of the Federal Court Appellate System that a high percentage, and conceivably a majority, of the cases expected to reach the National Court will be tax cases. Of the eighteen illustrative cases of unresolved inter-circuit conflicts, uncertainty and relitigation set out in the Appendix to the Preliminary Report, eight involve solely issues of federal taxation (pages A-9 through A-32).

These issues also are focused in text at a number of places, including pages 98 and 102 of the Preliminary Report and pages A-42, A-81 through A-83, A-93 through A-102, and A-114 of the Appendix. Finally, a lengthy section of the Appendix, beginning at page A-117 under the heading "Tax Law," is devoted to a perceptive report by the Commission's consultant, Professor Gersham Goldstein of the University of Cincinnati College of Law. Professor Goldstein's report, based upon questionnaire responses from tax attorneys throughout the country, concludes that (1) virtually every respondent had some perception of the lack of national law precedent in tax law, (2) many problems were attributed to factors other than the present multi-court appellate system, (3) there is "widespread agreement" that the present system leads to delay and unnecessary litigation, (4) the present system, coupled with the practices of the Internal Revenue Service and the Tax Court's deference to the law of the circuit of appeal, generates significant difficulty in the area of tax planning and advice, (5) the absence of nationally

binding precedents under the existing system results in elements of unfairness, particularly to "the small taxpayer who cannot afford legal counsel," and (6) a substantial number of practitioners nonetheless "indicate a satisfaction with the present system which comes from years of adaptation to the unusual situations which are sometimes created" -- more particularly, "the lack of a national tax law creates valuable opportunities in both planning and litigation" through the practice of "forum shopping." *

The Commission's mandate to which the Preliminary Report responds (P.L. 92-489) is "to study the structure and internal procedures of the Federal courts of appeal system, and to report ... its recommendations for such additional changes in structure or internal procedure as made be appropriate for the expeditious and effective disposition of the caseload of the Federal courts of appeal, consistent with fundamental concepts of fairness and due

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* As the Complexity Report points out (pages 328-31), the attitude attributed by professor Goldstein to "a substantial number of practitioners" reflects the unfortunate and parochial view of those who appear more concerned with narrow advantages of the present system to some taxpayers (and their lawyers) than with the broad public need of a more viable tax system. Rather than offering a reason to retain the present system, it strongly suggests the need for change.

process." Pursuant to this mandate, and mindful also of the burden of review now shouldered by the Supreme Court (see pages 9 through 14), in its Preliminary Report the Commission has proposed the establishment of a National Court of Appeals in the expectation that the largest category of cases to come before that court will be tax cases. It seems clear, therefore, that if the National Court is established, the possibility of establishing a court of tax appeals will be foreclosed.

In recommending a court of tax appeals, our primary concern is to alleviate the uncertainty and complexity of the tax system -- to end "forum shopping" -- and thereby to protect and enhance the integrity of that system. The Commission's concern is with "changes in structure or internal procedure [of the court of appeals system] as may be appropriate for the expeditious and effective disposition of the caseload of the Federal courts of appeal."

Although our area of concern and that of the Commission may at first look appear different, to a greater extent we find them to overlap. A court of tax appeals, designed to reduce significantly uncertainty in the tax law, by reducing the caseload of the regional courts of appeal also serves the objectives of the Commission. Thus, for the

reasons set out below, we believe the proposed National Court of Appeals is unlikely to achieve the results that are important to a properly operating tax system, but that a court of tax appeals will achieve those results and, with respect to tax cases, should achieve the objectives of the Commission as well or better than would the proposed National Court of Appeals.

a. The Need for an Expert Tax Tribunal.

The National Court of Appeals, although its docket would be heavy with tax cases, would not be comprised of judges who are specialists in matters of federal taxation. The judges of a court of tax appeals would bring to that tribunal great expertise in tax matters. The tax system would benefit greatly from a unified expert appellate structure. The system of appellate justice, we believe, also would benefit greatly if responsibility for tax appeals were placed in the hands of judges who, through experience and interest are best able to deal with them. Judge Learned Hand, no stranger to tax cases but not a specialist in the field, provided a compelling note (57 Yale L. J. 167, 169 (1947)):

> 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.

More recently, Judge (then Chief Judge) Friendly, in his 1972 James S. Carpentier Lectures at page 165, quoted Judge Hand's description with approval and, strongly supporting the creation of a court of tax appeals, noted the advantage of tax experts coming to that bench "equipped with a knowledge of tax law, which spares them the Herculean efforts at mastering the intricacies of the Internal Revenue Code...." In that paper Judge Friendly, believing as do we that tax cases do not cry out for decision by a panel of generalists, also noted that "[t]ax lawyers are not narrow specialists; they deal with problems touching every phase of life and, consequently, of law."

A court of tax appeals will be better equipped to decide tax cases than would be the proposed National Court of Appeals. By definition, tax cases would fall within the

exclusive jurisdiction of a court of tax appeals. Under the Preliminary Report of the Commission, the National Court would have jurisdiction over a tax case only if certified to it, either by a transferring regional court of appeals or by a referring Supreme Court. The non-specialist nature of the National Court would, we believe, influence the development of decisional law in the tax field. In the absence of experience the impact of that influence cannot be determined but the risks seem clear: (1) tax decisions of the National Court will not be accorded the finality that is essential both to the tax system and to achieving the objectives of the Commission; (2) tax decisions by the regional courts of appeals, and the conflict, uncertainty and relitigation potentials that attend, will continue to be dominant factors in the judicial tax equation.

b. Supreme Court Review of Tax Decisions.

An objective in creating a National Court of Appeals is reduction of the workload of the Supreme Court by reducing the number of circuit conflicts which, otherwise, either would be resolved by the Supreme Court or, for lack of overriding immediate importance, initially would be left unresolved by it. Creation of a court of tax appeals would, we believe, aid in the obtaining

of this objective. We think it less clear, with respect to tax cases, that creation of the National Court will provide an equivalent benefit.

The decision to transfer a case to the National Court will, in the first instance, be in the discretion of the regional court of appeals. If the regional court seeks to transfer, the National Court will have discretion to accept or refuse it. Compounding the uncertainty, it must be anticipated that in a measurable number of cases the regional court will not perceive the desirability of a National Court determination until a substantial amount of time, perhaps through the oral argument, has been invested by the regional court. This, in turn, is likely to discourage the regional court from seeking transfer or, if it does, may lead the National Court to refuse transfer. Thus, it must be anticipated that, under the proposed system, the first appellate decision of most tax cases will be by the regional courts of appeals and of some will be by the National Court. This system cannot be expected to achieve, in the tax field, the goal of substantially eliminating conflicts, uncertainty and relitigation.

If a tax decision by a regional court of appeals brings forth a petition for certiorari, the desirability of a nationally binding precedent is recognized and the Supreme

Court then refers the case to the National Court, the possibility of four tiers of decision will be presented. The Commission's Preliminary Report, at page 52, concludes that this possibility would not become fact "save in the rarest instance." Given a National Court of no special expertise in tax matters, we would view this conclusion to be merely an anticipation, possibly correct but by no means assured.

Whether a tax case is brought to the National Court of Appeals under transfer jurisdiction or reference jurisdiction, the decision of that tribunal is subject to review by the Supreme Court. If the Supreme Court is asked to review but forbears, the decision of the National Court becomes precedent nationally binding unless and until the Supreme Court, at some later time, grants a petition for certiorari in a subsequent case. But, because the determination of the National Court is national precedent, a subsequent tax case will arise only if either the Commissioner of Internal Revenue chooses not to follow this national precedent and to relitigate,

or a taxpayer chooses not to follow this national precedent and to relitigate, in the hope of securing Supreme Court review. As the Preliminary Report notes, the Commissioner has been more than willing to relitigate in another regional court of appeals law determined adversely to him in one or more regional courts; it is impossible now to know whether the Commissioner will follow this course in the face of a National Court determination adverse to him. And, of course, different taxpayers may be expected to do different things.

The focus of concern, however, would seem to be the Supreme Court itself. Under the present system the Supreme Court rarely chooses to review the tax decision of a regional court of appeals in the absence of a conflict among the circuits and, as the Preliminary Report correctly notes, often chooses not to review when a conflict first appears. Certainly the present state of affairs as regards tax cases is unsatisfactory, but the Justices of a busy Supreme Court may with some reason pass up early opportunities for resolution simply because under the present system no court of appeals determination is nationally conclusive and thus the matter in issue, if sufficiently

important, all too likely will be presented another time.

The proposed system for a National Court of Appeals will not furnish this comfort. If the non-expert National Court resolves a tax issue in a way that seems doubtful to some of the Justices and a petition for certiorari is filed, the Justices must proceed in the knowledge that, in failing to grant the petition, they likely are determining the law on a nationwide basis for all time. Indeed, the only basis for a contrary belief would be an anticipation that tax decisions of the National Court will not be accorded the respect of finality in the litigation world. Should this belief be embraced and prove correct, then the National Court of Appeals will have failed to achieve its important objective of eliminating the uncertainty and relitigation that now abounds in the tax field.

A court of tax appeals, we believe, should reduce substantially if not eliminate the potential for continued uncertainty and relitigation. The tax law, unfortunately, is an expanding sea of complex and interlocking technicality. Except in the rare case that presents an issue of constitutional

dimension, a burdened Supreme Court may be expected to accord the deference of non-review to an appellate tribunal the Judges of which are tax experts, the jurisdiction of which encompasses all tax appeals, and the sole business of which is to develop a coherent and consistent body of nationally binding tax precedent.

Professor Lowndes' often quoted conclusion is in point: "It is time to rescue the Supreme Court from federal taxation; it is time to rescue federal taxation from the Supreme Court." Lowndes, Federal Taxation and the Supreme Court, 1960 Sup. Ct. Rev. 222 (1960). A court of tax appeals is designed to accomplish these goals. The proposed National Court of Appeals, we think, is not.

c. Transfer Jurisdiction

Much of what is said in the preceding section of this report is pertinent here as well.

The illustrative cases summarized in the Appendix to the Preliminary Report confirm the general experience of tax practitioners: The potential of conflict, uncertainty and relitigation is not confined to the great issues in the field. To the contrary, there is no telling at the outset

whether a question of interpretation will be presented for judicial resolution more than once and, if it is, whether it will attract divergent views.

A court of tax appeals responds to these realities. When an issue of tax law first reaches the appellate level, it is determined by this specialized tribunal and precedent of nationwide impact is established. In the tax field, as much or more than in any other, certainty is more important than perfection. An unpleasantly clear answer in the substantial majority of cases is, or ought to be, better than an attractive doubt. In the relatively few cases in which the clear answer proves impossibly unpleasant, the aggrieved taxpayer or the aggrieved Treasury may follow the familiar route to Congressional relief.

The proposed National Court is not well designed to react appropriately to these realities. There is no anticipation that tax appeals routinely will be transferred by the regional courts of appeals to the National Court,

and there can be none lest the National Court become an "unspecialized" court of tax appeals, its docket too crowded to perform satisfactorily any other function. Inevitably, therefore, a large number of tax cases bearing the potential for conflict, uncertainty and relitigation will be decided by the regional courts of appeals. The assurance of conflicting tax decisions, uncertainty and relitigation thus will remain a built in defect of the system. The National Court, as an active surrogate for the Supreme Court, would provide useful aid in fostering the ultimate resolution of conflicts. But it could not perform the more useful task of preventing decisional conflict and the uncertainty and renewed litigation that flow from contrary interpretations of the tax law.

Laying aside the extraordinary case in which a regional court of appeals diagnoses a strong potential of conflict at the first appearance of a tax issue and immediately initiates transfer, the only possibility of avoiding relitigation under the proposed system depends upon a prompt reference by the Supreme Court to the National Court if a petition for certiorari is filed. When conflict is nascent, there is no sound basis for concluding that the Supreme Court will

perceive it, grant certiorari and refer to the National Court. Reference is more likely when a conflict among the regional courts of appeals has become apparent. But reference resolution is not an inevitably comfortable answer: The National Court is not tax expert; because its response will be nationally binding unless reviewed concerned Justices may be more rather than less likely to grant certiorari; and the potential of four trips to the courthouse is in the background.

Professor Goldstein's analysis, contained in the Appendix to the Preliminary Report, in focusing the forum shopping practices of the Commissioner and of private practitioners, seems to us telling support for an expert court of tax appeals. The proposed National Court structure is an inadequate response to the defects in the present system of appellate tax justice.

d. Additional Taxpayer Burdens

In the presumably rare case when a taxpayer is forced into the courthouse four times, the burden upon him will be obvious. The proposed structure accommodating a National Court of Appeals contemplates an additional burden

on taxpayers that will not be rare.

The National Court is to sit only in Washington. If, as the Preliminary Report suggests it must in order to respond to conflicts in the field, the National Court annually hears a substantial number of tax cases, a large number of taxpayers will be put to an unpalatable choice. The taxpayer who resides far from Washington either must bear substantial additional expenses -- travel, hotel, and possibly hourly charges for travel and waiting time -- if he wishes to be represented by the local counsel who likely represented him at trial, or must retain new counsel located in Washington or in a conveniently near city such as Philadelphia or New York. Since the National Court, to perform any significant conflict resolving function in the tax area, must take on a goodly number of tax cases each year, the potential of financial unfairness to those living and working in the western parts of the United States seems clear.

A court of tax appeals, because it would sit regionally and in panels, would not impose an equivalent burden.

4. Conclusion

For the various reasons discussed in this report, the Executive Committee of the Tax Section believes that, with regard to the appropriate resolution of federal tax disputes and the potential for conflict, uncertainty and relitigation that attends them, the requirements of a properly functioning tax system and the objectives of the Commission on Revision of the Federal Court Appellate System are in harmony. There is a need for a court of tax appeals. In the resolution of federal tax disputes, the proposed National Court of Appeals will not adequately fill that need.

Respectfully submitted,

Martin D. Ginsburg
Chairman, Tax Section

May 14, 1975

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