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The Proposed National Court of Appeals:  
A Threat to Judicial Symmetry

JUDGE LUTHER M. SWYGERT *

The creation of a National Court of Appeals would involve a drastic restructuring of the federal judicial system. It is no less (perhaps even more) seminal than the creation by Congress in 1891 of the intermediate appellate federal court system—the regional courts of appeals.¹ The pyramidal symmetry of the present federal judicial system will be disrupted by the creation of a fourth tier of federal courts. The resulting asymmetry is likely to bring a diffusion of power and, in its train, functional maladjustments and loss of regard for and confidence in the system which would affect the Supreme Court, the lower federal courts, and the principle of federalism.

On December 10, 1975, Senator Roman L. Hruska of Nebraska, Chairman of the Commission on Revision of the Federal Court Appellate System, introduced in the United States Senate S. 2762, a bill to establish a National Court of Appeals.² The bill embodies the recommendations for change in the structure of the federal court system contained in the Commission's report dated June 20, 1975,³ which was addressed to the President, the Congress, and the Chief Justice.

The bill provides for the establishment of a National Court of Appeals consisting of seven Article III judges appointed by the President by and with the advice and consent of the Senate. The principal seat of the court would be in the District of Columbia. As proposed, the court will have two types of appellate jurisdiction: (1) reference jurisdiction which would authorize the National Court of Appeals to decide appeals referred to it by the Supreme Court, and (2) transfer jurisdiction which would confer on the court the authority to decide appeals transferred to it by the regional courts of appeals.

The jurisdictional scope of the proposed National Court and the perplexing constitutional and practical problems with which the judiciary

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*United States Court of Appeals for the Seventh Circuit.
¹ Act of March 3, 1891, 26 Stat. 826.
and the bar may be confronted should the court be established are the subject matter of this article.

REFERENCE JURISDICTION

Section 1271 of S. 2762 provides: "The National Court of Appeals shall have jurisdiction of cases referred to it by the Supreme Court." Section 1259 reads in part:

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

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

Section 1273(a) provides: "The National Court of Appeals may deny review in any case referred to it by the Supreme Court unless directed by the Supreme Court to decide the case."

The provisions permit the Supreme Court a number of choices as the Commission Report indicates:

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

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

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

(1) to retain the case and render a decision on the merits; or
(2) to refer the case to the National Court for decision on the merits.4

The Commission Report states, in regard to Supreme Court review of the decisions of the National Court of Appeals: "We contemplate that any case decided by the National Court, whether transferred by a regional court of appeals or referred by the Supreme Court, would be

4 Commission Report at 32-33.
subject to review by the Supreme Court upon petition for certiorari. Access to the Supreme Court would not be cut off in any individual case or class of cases." An analysis of the proposed reference jurisdiction demonstrates that the Commission's conclusion that "[t]he appellate process would not be unduly prolonged; there would not be, save in the rarest instance, four tiers of courts," is not likely to be true. As the diagram below illustrates there are actually four appellate procedural processes involved in reference jurisdiction: (1) the appeal from the proceedings in the district court to the regional courts of appeals; (2) the initial certiorari procedure in the Supreme Court; (3) the reference procedure to the National Court for a decision by that court on the merits; and (4) a second certiorari procedure in the Supreme Court.

As this analysis illustrates, it may be that the Justices of the Supreme Court are quite likely to consider petitions for certiorari twice in the same case. It is also apparent that the time involved for both the Justices and counsel will be considerable, not to mention the extra cost and delay in the appellate process.

It is not presumptuous to suggest that the proposed plan involves two additional expenditures of time. The Justices must first consider whether the case should be referred and then, after a subsequent decision on the merits by the National Court of Appeals, whether the case merits review by the Supreme Court.

The Commission's report states, in regard to Supreme Court review:

We anticipate . . . that few decisions of the National Court in cases which came to it from the Supreme Court would in fact be reviewed thereafter by the Supreme Court. To avoid prolonging the appellate process any more than absolutely necessary, the Commission

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5 Id. at 38.
6 Id. at 39.
recommends that in such cases the Supreme Court give expedited consider-
lation to requests for review of the National Court decision, and that such requests take the form of brief statements of the reasons why the Supreme Court should now hear a case it has already once decided not to review.\(^7\)

In its conclusion, the *Commission Report* projects that: "[t]here would be no interference with the powers of the Supreme Court, although the Justices of that Court would be given an added discretion which can be expected to lighten their burdens."\(^8\) Implicit in this statement is the assumption that the decisions to refer or to review will not consume much time and will lessen the present burden of the Justices.

The Commission by its suggestion has rendered a disservice, no doubt unwittingly, to the Justices. Whether to exercise the options the reference procedure provides is a question which will surely consume a considerable amount of time, particularly the decision whether to refer the case to the National Court or to hear and decide the case themselves. Even more burdensome will be the time required to consider a petition for certiorari after the National Court has spoken on a case referred to it for decision.

That a denial of certiorari has not represented a tacit affirmance of a decision is constitutional dogma. That dogma could not apply to a denial of a request for certiorari in a case decided by the National Court on referral. Decisions of the National Court made after referral by the Supreme Court would take on a dimension far different from those rendered by the courts of appeals. A decision not to review such an opinion by the National Court would imply that the Supreme Court not only adopted the result in that case but also tacitly approved the reasoning of the National Court in reaching the result. Will not deciding whether to review under such circumstances increase rather than decrease the burden of the Justices? Judge Henry J. Friendly of the United States Court of Appeals for the Second Circuit has noted:

Equally serious are possible difficulties in the relationship between the National Court and the Supreme Court. The Commission’s anticipation (p. 51) "that few decisions of the National Court in cases which come to it from the Supreme Court would in fact be reviewed thereafter by the Supreme Court" seems to me to be unfounded. The problem of conscience that would be faced by a Justice when confronted with a decision of the National Court with which he tentatively disagrees would appear to me to be very serious. At present he can justify voting to refuse such a decision of a court of appeals or a state court on the grounds that the Supreme Court is a tribunal for the

\(^7\) *Id.*

\(^8\) *Id.*
making of law and not the correction of error and that if the law that has been made in the particular case is really bad, some other court will disagree and the Supreme Court will have another chance to correct matters. When he is confronted with a decision of the National Court which he tentatively thinks to be wrong, refusal to exercise his powers would mean that he was allowing bad law to be made on a nation-wide basis and with no possibility of subsequent disagreement (unless some particularly enterprising litigant should pursue a battle for overruling, with the further problems which this creates). I would find this a hard ethical pill to swallow. Beyond this, I predict that as a practical matter, the Justices simply will not refrain from reviewing decisions, especially divided decisions, of the National Court on any issues of real importance even though they were willing to let the National Court have a first crack at them.\footnote{Letter from the Honorable Henry J. Friendly to Professor A. Leo Levin, Executive Director of the Commission on Revision of the Federal Court Appellate System, April 22, 1975. \textit{Hearings 1974-1975}, Vol. II, at 1313 [hereinafter cited as \textit{Hearings II}].}

If, however, the Commission’s “anticipation” is correct, will not this result in a lessening of the prestige and standing of the Supreme Court? The answer seems obvious. The Supreme Court’s sharing of the power to declare constitutional and national law with the National Court is bound to dilute the prestige of the Court. A mystique has developed in America surrounding the United States Supreme Court relating to, and derived from, its standing at the apex of our governmental structure and as the guardian of the Constitution and its amendments. That standing is very likely to be diluted by sharing the pinnacle with a National Court of Appeals which will, through the back door, decide constitutional and federal law questions which are in need of resolution on a national level, but for which the Supreme Court does not have time to devote itself.

It is anticipated that the National Court of Appeals will hear 150 cases a year.\footnote{\textit{Commission Report} at 39.} Presumably, the Supreme Court will continue to hear its average caseload. Therefore, if the Justices agree with the result reached by the National Court of Appeals, pressure will be generated on them to deny certiorari even though the doctrinal development is not exactly as they might have set forth. Legal arguments are constructed through analogy and through the extension of principles previously expounded. Even though the Supreme Court will not have guided the development of the law in the opinions of the National Court, the analytical approaches and philosophy set forth in those opinions will have the same effect as if pronounced by the Supreme Court itself.

If in fact the National Court of Appeals process evolves into one in which there is only expedited review of its decisions by the Supreme
Court, an additional question raised in the hearings is presented. This concerns the constitutionality of the reference jurisdiction.

The Constitution commands that there shall be “one supreme Court.” The argument is made that except for those classes of cases over which the Constitution grants original jurisdiction to the Supreme Court, final appellate jurisdiction is vested in the Supreme Court and that it cannot constitutionally be delegated.

The proponents of the National Court idea assert that the “Exceptions and Regulations” clause of article III allows Congress to authorize the Supreme Court to refer a case docketed in that court to the National Court for a decision on the merits, particularly in light of the fact that any decision of the National Court would still be subject to review on certiorari by the Supreme Court. There is a vast difference—and perhaps a constitutional one—between the Supreme Court’s denial of certiorari of an appeal from a regional court of appeals, the Court of Claims, or the Court of Customs and Patent Appeals, and its reference to a National Court of Appeals of a case initially docketed in the Supreme Court with subsequent summary treatment of a second petition for certiorari after the National Court’s decision on the merits. In the latter case can it be logically disputed that the Supreme Court by a denial of certiorari has impliedly adopted the National Court’s decision as its own, and thus divested itself of the duty imposed upon it by the Constitution?

It is important to note in this connection that Section 1273 of the proposed legislation provides that the National Court “may deny review in any case referred to it by the Supreme Court unless directed by the Supreme Court to decide the case.” It is difficult to imagine a clearer


12 U.S. CONST. art. III, § 1:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

13 Article III reads in part:

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.
delegation of power despite the fact that theoretically the Supreme Court could grant certiorari on a second round of petitions after the denial of review by the National Court. In essence then the National Court, while not formally designed to perform a screening function for certiorari petitions as proposed by the Study Group on the Caseload of the Supreme Court (the Freund Committee), would in fact share with the Supreme Court the important task of selecting those cases which would be used as vehicles to pronounce constitutional and national law.

In the final analysis, of course, the constitutionality of the National Court of Appeals with regard to reference jurisdiction will have to be passed upon by the Supreme Court, should that jurisdiction be challenged. In that connection, we should keep in mind the famous remark of Charles Evans Hughes that the "Constitution is what the judges say it is."\(^{14}\)

Another aspect of the criticism concerning the National Court of Appeals relates to federalism and was characterized by Professor Robert Dixon of George Washington University as "quasi-constitutional."\(^{15}\) *Cohens v. Virginia*\(^{16}\) and *Martin v. Hunter's Lessee*\(^{17}\) established the constitutional position of the Supreme Court in regard to constitutional questions arising in decisions made by state tribunals. In *Cohens*, Mr. Chief Justice Marshall, in broadly construing the authority of the Supreme Court to review such decisions, declared:

> Let the nature and objects of our Union be considered; let the great fundamental principles, on which the fabric stands, be examined; and we think the result must be, that there is nothing so extravagantly absurd in giving to the Court of the nation the power of revising the decisions of local tribunals on questions which affect the nation, as to require that words which import this power should be restricted by a forced construction.\(^{18}\)

Even if the objection based on the nature of our federal system does not rise to constitutional dimensions, a serious policy question will still remain. The establishment of a National Court of Appeals would permit the Supreme Court to delegate its duty to pass on the constitutionality of the decisions of the highest courts of the states to an inferior tribunal. As noted by Justice Samuel J. Roberts of the Supreme Court of Pennsylvania:

\(^{14}\) Speech at Elmira, New York, May 3, 1907.
\(^{15}\) *Hearings II* at 1273.
\(^{16}\) *6 Wheat. (19 U.S.)* 264 (1821).
\(^{17}\) *1 Wheat. (14 U.S.)* 304 (1816).
A proposal for direct review of decisions of the highest state court by any federal tribunal other than the Supreme Court of the United States will be greeted with less than enthusiasm by state judges. It is a drastic change and one which should be pursued only after the strongest of justifications and only after we are certain that it will further the proper relationship between state and federal courts.\(^\text{10}\)

Thus an impairment of the concept and workings of federalism will likely result if the Supreme Court is empowered to refer to a National Court appeals from the decisions of the highest courts of the states.

**TRANSFER JURISDICTION**

Section 1272 of S. 2762 contains the provisions covering the discretionary transfer of jurisdiction from the courts of appeals, the Court of Claims, and the Court of Customs and Patent Appeals to the National Court. Those provisions provide:

\[\text{§ 1272. Transfer jurisdiction}\]

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

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

1. the case turns on a rule of Federal law and the courts have reached inconsistent conclusions with respect to such rule;
2. the case turns on a rule of Federal law applicable to a recurring factual situation and a showing is made that the advantages of a prompt and definitive determination of that rule by the National Court of Appeals outweigh any potential disadvantages of such a determination; or
3. the case turns on a rule of Federal law previously announced by the National Court of Appeals, if there is a substantial question about the proper interpretation or application of that rule in such case.

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

During the course of his remarks in introducing S.2762 Senator Hruska noted the precarious nature of the transfer jurisdiction features of the bill:

\[^{10}\text{Hearings I at 1323.}\]
For transfer jurisdiction to accomplish the purposes for which it is designed, it is essential that it function smoothly and efficiently. As the Commission itself recognized, neither underutilization nor overutilization of transfer was critical; efficiency was. In the words of the report:

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

Despite the technical and practical problems inherent in the Commission's proposal, the Senator then, without offering concrete suggestions, minimized the problems that the new system might create. He assured Congress that the system could be designed to operate efficiently: "The Commission was confident that the mechanism for transfer which would meet the stated criteria could be readily fashioned and that the potential for gain envisioned from this sort of jurisdiction could be realized." That confidence was not shared in some quarters.\footnote{Id.} The "potential for gain" is recognized in the Commission Report in those areas where there was a perceived "failure of the federal judicial system to provide adequate capacity for the declaration of national law."\footnote{Id.} Four major areas of concern are recognized: (1) conflicts among the circuits on the same rule of law; (2) the inordinate delay before a resolution of the conflict in either the circuits themselves or in the Supreme Court; (3) the burden placed on the Supreme Court to hear cases "otherwise not worthy of its resources;" and (4) the lack of capacity of the present system for a "definitive declaration of the national law... even though a conflict never develops." The Commission commented on these consequences:

The need for additional appellate capacity to maintain the national law is most starkly manifested by the existence of unresolved conflicts between different courts of appeals (or between a court of appeals and a state court or between state courts) on an issue of federal law. Often the conflicts are direct and frontal, arising because two or more courts have come to opposite conclusions in cases which cannot be distinguished. Less direct conflicts, however, can also produce uncertainty and confusion in the national law. The term conflict

\footnote{121 Cong. Rec. 21,586 (daily ed. Dec. 10, 1975).}
is "shorthand," a federal judge wrote to the Commission. It "should include substantial divergences in approach to a common legal problem as well as outright conflict of holding." Such divergences have also been termed "sideswipes," and it is clear that they exist in substantial numbers, and are often of great practical importance.\textsuperscript{23}

In its report, the Commission attempted to demonstrate the high frequency of intercircuit conflicts, and the need, not met by the Supreme Court's resources, for resolution of "conflicts, uncertainties and delays" which, according to the Commission, plague the federal judicial system "to a far greater extent than is desirable or than should be allowed to continue."

It must be observed initially that there is some dispute as to the number of actual intercircuit conflicts that are created within any one year. Chief Judge Irving R. Kaufman of the Second Circuit Court of Appeals believes the problem is "neither as serious nor as intractable as the Report indicates." Commenting on the figures the Commission compiled to support its appraisal of the conflicts problem, Judge Kaufman noted:

\begin{quote}
[I]t strikes me that 50, or even 75, direct conflicts per year [extrapolating from the figures in the Commission's Tables and the accompanying text] would provide little work for a court of seven judges. Moreover, I was rather startled to find such homogeneity among the cases which Appendix I lists as illustrative of the conflict problem which is so urgently in need of solution. [Considering the similarity among] the eighteen examples given of serious intercircuit conflicts during the past few years . . . it appears rather clear that what in fact is needed is not a National Court of Appeals, but specialized appellate courts whose consideration perceptive commentators have long urged.\textsuperscript{24}
\end{quote}

Even should one apply the Commission's projected conflicts ratio formula and arrive at the same figures it does, the projection of 70 to 75 direct intercircuit conflicts does not compel the creation of a National Court of Appeals which would resolve these conflicts. As Judge Donald P. Lay of the Eighth Circuit has noted:

A basic difficulty with the Commission's plan . . . is that there are few conflicts among the courts of appeals on substantial questions of national law which the Supreme Court does not resolve within a reasonable time. . . . Exploration of the factual basis of their disagreement is warranted.

Of the more than 3,000 1972 and 1973 cases in which the Supreme Court denied certiorari the Commission found about 70 to 75

\begin{footnotes}
\item \textsuperscript{23} Id. at 16.
\item \textsuperscript{24} Hearings II at 1331-32.
\end{footnotes}
presented questions on which circuit courts had reached directly conflicting results. In November 1974, more than half of those questions were still unresolved by the Supreme Court. As the Commission itself no doubt realized, it is difficult to attach much significance to this figure of 75 conflicts. The Supreme Court denies certiorari for a variety of reasons, usually without explanation. For example, the Court may think that the issue is one that would be illuminated by further consideration by the lower courts or that another branch of government is planning to act so as to moot the controversy. The record in the particular case presented may be ambiguous or otherwise unappealing. Thus, denial of certiorari despite a conflict among the circuits does not necessarily mean that the Supreme Court was too busy to take the question or that the question should have been resolved at the time it was first presented to that Court. A National Court of Appeals would presumably have to reject similar cases on similar grounds.25

In sum, the Commission’s conclusion that the resolution of intercircuit conflicts by a National Court constitutes a major justification for its creation is disputed by the analysis of respected critics.

Although the impact of direct conflicts may not justify the creation of a National Court, the Commission has, to support its case, adopted a broad perspective as to what constitutes “conflicts.” The fourth consequence noted above alludes to the inability of the present system to set forth a “definitive declaration of the national law frequently result[ing] in uncertainty even though a conflict never develops.”26 The Commission attempted to be more explicit about the fourth consequence:

Even where there is neither disagreement nor uncertainty about the governing rule of law, in some situations litigation will continue to arise, focusing instead on whether the facts put a case on one side of the line or the other. In such situations, the greater the number of national authoritative decisions pricking out the contours of a rule, specifying whether it does or does not apply to the facts of a particular record, the easier it is to achieve predictability and consistency throughout the country in still other factual settings.27

How the above quoted language will be applied to concrete factual situations is unclear. The Commission did offer one hint by noting that the problem is particularly acute in the patent field where the “perceived” disparity in results in different circuits leads to widespread forum shopping. The Commission quoted Judge Friendly:

26 COMMISSION REPORT at 14.
27 Id. at 15.
Madd and undignified races [forum shopping] between the patentee who wishes to sue for infringement in one circuit believed to be benign toward patents, and a user who wants to obtain a declaration of invalidity on non-infringement in one believed to be hostile to them.28

In the view of the Commission's consultants, the root of the problem is the "lack of guidance and monitoring by a single court whose judgments are nationally binding."29

It seems that the thrust of this logic would lead to the establishment of a specialized court. Instead, the Commission's recommendation is the National Court which would hear patent appeals, but only on a discretionary basis—with that discretion standing as a double hurdle to the implementation of nationwide standards, residing as it would in both the regional courts of appeals in the first instance, and the National Court even after a transfer is made. If the Commission wished to bring about the desired result, a more rational method would be the establishment of a specialized court where there was no discretion in jurisdiction.30

The most fundamental objection to the transfer jurisdiction of the proposed National Court lies in its partial impairment of the Supreme Court's historical role in shaping constitutional and national law. Under the present system the Supreme Court exercises virtually complete control in determining which cases it wishes to hear. There may be many

29 COMMISSION REPORT at 15.

See for suggestions for a National Court of Tax Appeals, letter & attachment, Donald C. Alexander, Commissioner of Internal Revenue, and Mead Whitaker, Chief Counsel, Internal Revenue Service, Hearings II at 1273; New York State Bar Association, Tax Section Report, id. at 1348. The New York Report felt the establishment of a National Court of Appeals would "not adequately fill" the need for such a National Court of Tax Appeals. Id. at 1349.

The COMMISSION REPORT stated:

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

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

Nevertheless, substantial objections to the proposal were presented. A survey of the patent bar by the Commission's consultants, Professor James Gambrell and Donald R. Dunner, Esq., demonstrated that the practitioners themselves are sharply divided on the issue.

Id. at 28–29.
reasons why certiorari is not granted in a particular case. Rather than paraphrase my views on this phase of the matter, I refer to my letter of May 15, 1975 to the Commission:

The Court has the rare privilege of shaping the law by deciding certain cases at the time which it deems appropriate. This privilege of control may be impaired by the transfer provisions of the Commission’s proposal. Under the transfer procedure one court of appeals and the National Court of Appeals can determine that an issue, by way of a certain case, will be decided on a national basis at a particular time. Quite possibly the Supreme Court would not wish to decide that issue at that time or by way of that case. But it is confronted with a situation in which a national decision has been reached. There will be great pressure to take the case even if it is not the ideal time. Once there is a national decision it is much less likely that a similar case will arise. This is very different from living with a decision of one court of appeals knowing that another opportunity for review will exist since the issue can be fought anew in a different circuit. We should be very careful about changing the power of the Supreme Court to determine when it considers a case “ripe” for its own review.31

Thus the Supreme Court’s ability to ensure an orderly development of both constitutional and federal law will diminish and the public’s confidence in the Court as the fountainhead of that development will inevitably erode.

The proposed bill and the Commission Report on which it is based present a host of procedural difficulties.32 Initially, there is the problem of identifying those cases of national importance in which there is a need for a “definitive declaration of the national law . . . even though a conflict never develops.” The Commission Report noted:

As we have already emphasized, the need is not limited to situations of actual conflict. Issues may become pressing, and require national answers long before circuit disagreements have arisen. Some have attempted to identify the kinds of issues which particularly deserve early decision on a national basis. There is need, one jurist wrote the Com-

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31 As noted earlier in this article, see text accompanying notes 9-10 supra, the advantages of the traditional certiorari process are also impaired by reference jurisdiction. As Judge Kaufman has noted, both processes, which allow courts other than the Supreme Court to decide which questions shall be immediately resolved on a national level, ignore the very real value which inheres in the percolation permitted by the present system. To opt for an immediate and nationally applicable solution to as many problems as possible ignores the fact that in many cases the Supreme Court’s refusal to decide a case is a political choice, intentional, and not based on lack of time or resources. It is often the wisest course, for the judiciary no less than the legislature, to await a broader sampling of opinion before deciding.

Hearings II at 1332.

32 It should be recognized that many of the procedural impediments noted in this section might be remedied by more precise drafting of the proposed legislation.
mission, "to provide an early authoritative national ruling on matters that will affect nationwide planning of resources—by government agencies, private institutions or both."\(^{33}\)

The question that immediately arises is: How is a case of important national interest to be identified? What standards shall be applied? Will not those standards be likely to vary in the different circuits and among the individual judges within a circuit?

Another problem is who shall decide whether a transfer should take place? The *Commission Report* stated:

The Commission recommends that the procedures to be followed by the court in passing upon transfer motions and effecting sua sponte transfers be fashioned on an individual basis by the several courts of appeals. Of course, the procedures should be designed to minimize both the burdens on the judges and the delay for the litigants. In the ordinary case the transfer decision might well be lodged with a panel of the court—for example, the court's regular motion panel, or, in those circuits which screen cases, a screening panel. Some circuits may choose to follow the procedures now utilized in deciding whether to grant en banc consideration. As noted above, the court ordinarily would not have full briefs; however, the parties' memoranda, perhaps supplemented by a statement from the trial judge, should provide adequate information on which to make the decision, whether the responsibility be assigned to all of the active judges or to a lesser number.\(^{34}\)

Without intending to be overly critical, it does not seem appropriate that a motions or screening panel should have the final decision as to whether the Court should divest itself of jurisdiction through the transfer of a particular case to the National Court. If left to a panel assigned to hear a case would a majority of the panel be allowed to affect a transfer or would a unanimous vote be necessary? Another procedural question would arise if the panel was composed in part of an assigned judge (or judges) sitting by designation. On such an important matter should not the entire Court make the decision?

The second procedural problem relates to the timing of transfer. On this the *Commission Report* noted:

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

\(^{33}\) *Commission Report* at 25.

\(^{34}\) *Id.* at 37-38.
The question of timing is of course related to the kind of case involved. With complex cases that have large records (for example, many environmental cases and antitrust cases no longer appealable to the Supreme Court), the effort required to identify an issue appropriate for the National Court is likely to be small compared with the total amount of work that the regional court would have to put into the case to decide it on the merits. Thus, the regional court may find it desirable to transfer such a case at a later time than would ordinarily be appropriate, and the judges of that court may indeed achieve a substantial saving of time by doing so.\(^5\)

The Commission's recommendation seems to allow unfettered authority to transfer during the entire period from the time the appeal is docketed to the issuance of the decision of the panel or to the decision of the full Court on a rehearing en banc. This also may present difficulties. Should the important matter of transfer be made in a summary fashion at the motion or screening stage as the recommendation would permit or should it wait until the panel (or all the judges) have read the briefs, or after oral argument? Under this recommendation, a panel might, even after a case has been tentatively decided and an opinion prepared, order a transfer to the National Court. No further elaboration is necessary in order to emphasize the many difficult procedural problems which a court of appeals will face in regard to the timing of the transfer.

In its report under the heading, "Details of Transfer Procedure," the Commission said it was:

confident that the transfer mechanism can be made operational through a variety of procedures that would be both effective and efficient. . . .

. . . .

We have referred to the use of the rulemaking process to define the procedure for transfer. While the rules should be promulgated at the national level, they should allow for variations among the circuits to reflect local conditions. However, the decision as to what matter should be regulated at the circuit level is one that should be made on a national basis.\(^6\)

This statement provokes many questions. What is meant by "local conditions" in this context? How can a decision to regulate matters at the circuit level be made "on a national basis"? Who would promulgate the rules at the national level? The Supreme Court? The Judicial Conference? It is important to note that S. 2762 is silent as to most details of the transfer procedure.

The Commission contemplates that: "In the ordinary course, the initiative for transfer would come from one of the parties, although

\(^5\) Id. at 37.

\(^6\) Id. at 36.
the court of appeals would be empowered to transfer on its own mo-
tion." The Commission envisioned a procedure in which a litigant would file a motion for transfer accompanied by a brief memorandum indicating why the case meets the criteria for transfer. Nothing is said about permitting the adverse litigant to oppose the transfer. It is hard to imagine a court of appeals not permitting both parties to be heard on such a significant matter. This anticipates another disturbing ele-
ment of the transfer procedure. Would counsel be tempted to forum-
shop between the regional courts of appeals and the National Court?

The Commission recommended the exercise of a rather cursory discretion by the courts of appeals when deciding whether to transfer:

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

Again, without meaning to be overly critical, one must wonder whether the Commission was too sanguine with respect to the amount of "judge time" occasioned by requests for transfer. Given the importance of the decision as to whether a transfer should be effected, we would impugn the conscientiousness of the circuit judges if we were to believe that they would treat transfer in a superficial or summary manner.

It may be appropriate at this point to examine the role played by the proposed National Court after a transfer from a regional court of appeals. Section 1272(c) of S. 2762 provides:

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

Even without assuming that an opportunity would be given a litigant either to request or oppose a remand, a certain amount of delay would be inevitable before the case could be heard in the regional court of appeals after remand by the National Court.

If not remanded, delay would also be inevitable. Moreover, since the Court would ordinarily sit in the District of Columbia, extra time

37 Id. at 37.
38 Id. at 36.
on the part of counsel and additional expense to the litigant would be involved. The question of delay in the transfer process is not an insignificant factor in considering the advisability of the National Court of Appeals. As my letter to the Commission indicated:

I do not think we can treat this aspect lightly because slow justice often is of little aid to litigants. I can envision a situation in which a case might be on appeal for many years. A panel of a court of appeals, after briefing and argument, would transfer it to the National Court. The National Court would then remand it, again after considering some type of jurisdictional briefs. The court of appeals would then decide the case. A petition for certiorari or referral would be filed in the Supreme Court. The Supreme Court would refer the case to the National Court of Appeals which then would have to hear it. After the National Court's decision the Supreme Court would grant certiorari and decide the case itself. I agree that this would be an extremely rare situation, but it is possible and the delay would be indefensible. In any event, the delay and expense to litigants in attempting or opposing transfer and attempting or opposing remand added to the expenditure of judicial time on jurisdictional petitions (or even sua sponte transfers or remands) render this aspect of the proposal quite impractical in my opinion.90

Even if this extreme situation seldom arises, the proposed National Court would introduce into the appellate process an additional step. The Commission asserts in its report: "There would not be, save in the rarest instance, four tiers of courts."40 Earlier in this article, this conclusion was examined in regard to the reference jurisdiction provisions. Although, technically, from the standpoint of decisions on the merits, in cases transferred to a National Court, it may be true that there will be no fourth "tier," from a practical point of view four courts are likely to be involved in transfer cases as the following diagram illustrates.

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89 Hearings II at 13.
CONCLUSION

In conclusion, it is important to note, as the Freund Committee acknowledged, that the idea of a National Court has been "in the air" for a long time.\textsuperscript{41} It is interesting to observe, however, that the justifications for establishing a National Court have been shifting.

The Freund Committee focused on the need for relief to the Justices of the Supreme Court. The increasing workload of the Court was stressed and the Committee recommendations included the creation of a National Court which would screen certiorari petitions and pass on to the Supreme Court only those cases thought worthy of being heard. The Special Committee on Coordination of Judicial Improvements of the American Bar Association took a different tack and emphasized the increasing workload of the courts of appeals. In addition, both of these earlier studies reflected a desire to devise a mechanism which would handle some conflicts or provide more guidance to the courts of appeals.

The Commission's report, however, does not address the proposal's effect on lessening the workload of the Supreme Court or the courts of appeals, but reflects the concern that there be definitive declarations of national law:

The new court would be empowered to resolve conflicts among the circuits, but its functions would not be limited to conflict resolution alone: It could provide authoritative determinations of recurring issues before a conflict had ever arisen. The cost of litigation, measured in time or money, would be reduced overall as national issues were given expedited resolution and the incidence of purposeless relitigation was lessened. The effect of the new court should be to bring greater clarity and stability to the national law, with less delay than is often possible today.\textsuperscript{42}

This shifting of justifications for the creation of a National Court creates the impression that it is a "solution" looking for a problem to which to attach itself.

During the course of his remarks in introducing S. 2762, Senator Hruska said: "Simplicity is the keynote of the [National] court's juris-

\textsuperscript{41} The Freund Committee noted that the idea for a National Court was "in the air" when recommending a "variant" of it. Federal Judicial Center, Report of the Study Group on the Caseload of the Supreme Court 16 (1972). The "Freund Report" is reprinted in 57 F.R.D. 573 (1972).

The idea of a National Court of Appeals dates back at least to the Philadelphia Plan, sponsored by the American Bar Association in 1883 and offered as an alternative to the creation of the circuit courts of appeals. 6 ABA Rpts. 324-32 (1883). Proposals for such a court at that time also suggested seven judges, id., and designated Washington, D.C. as the seat of such a tribunal. See statement of Congressman Bates, Alabama, 21 Cong. Rec. 3406.

\textsuperscript{42} Commission Report at 39.
With deference to the distinguished Senator and Chairman of the Commission, the opposite appears to be true. Instead of being simple, the National Court of Appeals as contemplated is fraught with complexities, some glaring, others subtle.

The foregoing strictures are relatively insignificant when one considers the potential threat to the prestige of and public confidence in our present federal judicial system, and in particular to the prestige of the Supreme Court. The creation of a National Court of Appeals has the potential to produce grave maladjustments in the system in addition to creating more work for the Justices of the Supreme Court and the circuit judges, more litigation, greater costs, and longer delays in the appellate process. The price of the experimental implementation of an idea, which has been "in the air," is too high.

The creation of a National Court on an experimental basis would be to blink at reality if not to evade responsibility. The Commission, however, disavows its intention to establish the court only on an experimental basis:

The Commission has carefully considered the suggestion that the National Court of Appeals be established initially as a temporary, frankly experimental, tribunal. In one sense any legislatively-created court is temporary; it exists subject to the pleasure of Congress. If the need for the new court proves ephemeral, or if the experience proves otherwise disappointing, Congress has power under Article III to abolish the tribunal and designate its judges for service elsewhere in the judicial system, as was done with the Commerce Court.

The "fail safe" component of the Commission Report does not take into account practical considerations.

Structural changes in established institutions ordinarily have long gestation periods, but once made, those changes usually endure. The dynamics leading to such changes are replaced by inertia rendering fur-
ther progress unlikely and a reversion to that which existed before im-
possible. It is for these reasons that, before opting for the drastic solu-
tion to the problems of the federal judicial system embodied by S. 2762,
less extreme and less potentially injurious alternatives should be ex-
plored, and perhaps tried.46

46 The Special Committee on Coordination of Judicial Improvements of the American
Bar Association recommended to the House of Delegates in February 1976 that they approve
S.2762, excepting so much of the bill as relates to transfer jurisdiction. The report accom-
panying the recommendation noted that two major “symptoms” are evident because of the
need for greater capacity in the federal system to resolve questions of national law.

The first “symptom,” the decline in the number of non-constitutional cases decided
by the Supreme Court, would seem to require more study. Recognition that this is occurring
at a time when “federal legislation has proliferated and become vastly more complex”
should be only the beginning of an assessment of the implications of this symptom vis-a-vis
the proposed National Court.

The second “symptom” was the increase in noted dissents from denials of petitions for
certiorari. Insofar as the Committee uses this development to support its conclusions that
a National Court of Appeals should be created, it should be pointed out that the reasons
for denial of certiorari are not stated. Dissents from such denials then only illuminate
one or more Justices’ reasons for voting to grant certiorari, but do not address the logic
behind the majority’s denial of the petition. Without this information, it would be difficult
to predict whether the proposed National Court would in fact cure this “symptom.”