TESTIMONY OF THE HONORABLE FRANK M. COFFIN, CHIEF JUDGE, U.S. COURT OF APPEALS FOR THE FIRST CIRCUIT

(The prepared statement of Judge Coffin follows.)

Mr. Chairman. I appreciate and value your giving me this opportunity to comment on the Preliminary Report of this Commission. Ever since the Freund Committee started the national soul searching for new devices to enable judicial decision-making of quality to survive in this justice oriented society, I have been an increasingly interested observer. But I did not take the trouble to put pen to paper and ask myself what I really thought until I read Senator Hruska's lucid explanation of your tentative proposal for a new National Court of Appeals, given to the National Conference on Appellate Justice at San Diego on January 26, 1975.

I took seriously his closing statement that the Commission's "very specific proposal ... is not set in concrete" and his invitation for those who prefer another proposal or deny the need or would amend the proposal to come forward. The substance of much of what I am about to say I circulated to several judges and scholars whom I know and respect with an assurance that I was not looking for support for my ideas but only their judgment as to whether these thoughts were worth bringing to the surface. The consensus was "Yes". I hasten to add that this did not mean great enthusiasm on their part and it does not mean that on mine. What it does mean is that we share an attitude of uncertainty about the task of institution building, and so feel that further debate and exploration are likely to prove fruitful. So my gratitude for having this opportunity is real, as is my respect for the deliberate process pursued by this Commission.

Indeed, my chief wish is that you be allowed to pursue your deliberations to ripeness without the prospect of an imminent deadline. The task of justifying and charting the jurisdiction of such an institution as a National Court of Appeals is such a novel and solemn one that, were the Congress to understand the implications of the task, it should not insist on your June 21, 1975 reporting date on this issue. Only two times in our history, since the adoption of the Constitution itself, have there been structural reforms affecting the judiciary of as great moment -- the remarkable and "astutely contrived"[1] First Judiciary Act of 1789 establishing (inter alia) district and circuit courts, and the Evarts Act of 1891, establishing the courts of appeals. Indeed, the present proposal, contemplating a court which, while an "inferior" court, is superior to the courts created by those two acts, is admittedly ploughing new -- and high -- ground. Your mandate calls for making "recommendations for such additional changes in structure or internal procedure as may be appropriate for the expeditious and effective disposition of the caseload of the federal courts of appeal." For reasonably minor changes of structure your time deadline is appropriate. But, in these days when it is difficult for the Congress to carve out spacious time for lengthy and thoughtful debate, I would not like to see a proposal for the second most prestigious court in the nation submitted without the most probing exploration and meticulous care having been invested in identifying the need, the purpose, and the jurisdiction of such a court.

What I say today is divided into two parts: a questioning of justification for the proposed National Court based on the two present heads of jurisdiction; and a temporizing suggestion for dealing with the most acute cases of direct conflict among the circuits. I add some concluding comments on what I would like to see you enabled to pursue. The suggestion which I lay on the

[1] Goebel, The Oliver Wendell Holmes Devise History of the Supreme Court of the United States, Vol. I, Antecedents and Beginnings to 1801, p. 457.

table is that, at least for the time being, there exists an alternative way of meeting this need without taking the momentous and effectively irreversible step of creating a new seven judge high court. There would be no virtue in delaying the creation of a new institution if there were a clear consensus as to its need, function, and composition. But to the extent that uncertainty exists, there would seem to be merit in attempting to meet present needs while keeping institutional options open. The suggestion also has obvious shortcomings. In the first instance, an important instance, it will be your task to weigh the advantages and disadvantages.

I. Questions concerning justification and jurisdiction.

At the outset I recognize that the Commission is acutely aware of the restraint under which it operates; it is excluded by the Congress from grappling with ways of reducing federal district court jurisdiction. Ideally, your task would be, not eased, but more intellectually satisfying if you could first recommend the proper dimensions of the federal jurisdiction cart before recommending another horse to help draw it. Many proposals to curtail federal jurisdiction have been made.[2] But you do not have the luxury of considering them, and the likelihood is that by the time any take effect, any curtailment in jurisdiction will be offset by other factors. I therefore accept your conviction that there is a need for additional, nationally effective decision capacity to enable issues of less than paramount importance to be more promptly resolved. But this is a different need than that addressed by the Freund Study Group on the Caseload of the Supreme Court. That Court will continue to face some 5000-plus petitions for review and will in addition, under the Commission's proposal, have the task of selecting cases for reference to the new National Court of Appeals and in passing on applications for review of that court's decision. Nor is the need that addressed by the Reifsnyder report -- relieving the courts of appeals. While some relief will be given, to the extent that cases are transferred or referred, the relief will be unevenly felt and marginal.

It is therefore only prudent to take a hard look at the nature and extent of the needs to be served by the new court so that we do not commit institutional overkill or misfire. The more precisely identified head of transfer jurisdiction is the conflicts situation. The extent and urgency of the problems in this domain have too long been left to guesses and horror stories, as if the terrain were Ultima Thule. The Commission has made an invaluable contribution by charging Professor Feeney with an in-depth and comprehensive analysis of intercircuit conflicts. His tentative estimate, based on his partial review of paid applications for review in the 1971 and 1972 terms, is that between 70 and 75 direct conflicts are presented for, and denied, plenary review each term, some 100 strong partial conflicts, and perhaps 75 weak partial conflicts. (Preliminary Report, p. A-39.) Of the direct conflicts, he estimates that 35 had remained unresolved for at least two years. Professor Feeney counsels caution in interpreting these figures: (1) "genuine conflict tends to be reduced as the analysis is intensified"; (2) some of the conflicts involve issues where "percolation" among the lower courts may well be desirable; (3) some involve very minor issues; and (4) some cases were denied Supreme Court review because of their procedural posture. (Id., pp. A-40,41.)

[2]I refer to such important ones as eliminating diversity jurisdiction, doing away with three-judge courts, reducing the repetitiveness of federal habeas corpus applications, providing threshold administrative relief apparatus for prisoner petitions, considering specialized review tribunals for some technical fields of the law, decriminalizing some conduct presently the basis of federal criminal jurisdiction, and allowing state priority of prosecution of some crimes which are both federal and state are some of the areas of exploration.

Whatever may be the hard core conflicts figure, there is one further significant reduction which must be made to assess the need for the proposed new court. Transfer jurisdiction in conflicts cases would exist only when a case is presented to a court of appeals after two other circuits have created a conflict. The relevant figure, therefore, is the number of conflicts where at least three circuits are involved. Moreover, the figure will be further limited to cases where counsel perceive in advance of briefing and argument that two circuits are in significant conflict.[3] I suspect that the number of cases where a prior conflict between two circuits is (a) discerned from the outset, (b) is not of such overriding importance as to warrant Supreme Court review or further "percolation" among the circuits, and (c) is yet of sufficient importance to warrant prompt decision will not prove to be large. The number could be embarrassingly small.

The other part of transfer jurisdiction encompasses federal issues likely to be recurring, where "an immediate determination of the question by the National Court is in the public interest". The ascertainment of a conflict meeting transferability criteria, though not simple, is undoubtedly manageable. But urgency of need for decision in the public interest lacks any concreteness. It is probable that in any week's sitting of any court of appeals there is at least one and are probably several cases of first impression involving criminal law, civil rights, environmental law, the First Amendment, or some other dynamic field of the law where it could persuasively be argued that the question is of pressing national interest. Indeed, the more important the issue, the more likely it is that a court of appeals would think it important for it to contribute to a national dialogue -- and to an eventual decision by the Supreme Court. If courts of appeals are left free to decide when the threshold for transfer has been reached, not only will this threaten the interposition of a mini (or maxi) "transfer calendar", but the results may well be chaotically uneven -- with the National Court experiencing feast from some of the eleven circuits and famine from the others. If more definite criteria emerge, this will introduce a truly jurisdictional issue, and an automaticity of decision which will tend to eliminate the "percolating" and wisdom-jelling effect of consideration over time by the various circuits. Indeed, to provide for the transfer and decision of such "public interest" cases without preliminary screening by the Supreme Court might effectively divest it of its historic capacity to allow time for the maturation and crystallization of fundamental issues. For example, had the DeFunis case been decided on the merits by a National Court of Appeals, it would have been awkward or impossible for the Supreme Court to preserve the issue for a later day.

As for the referral jurisdiction I can do no better than quote one of my correspondents: "With respect to the referral jurisdiction, while the studies made for the Commission do indicate the existence of a significant number of cases where there would be some value in giving the Supreme Court this resource the number is pretty small. All this would create pressure on the Supreme Court to provide the new court with business by enlarging the grants of certiorari beyond what is really needed, with consequent delay and expense to litigants."

All this leads me to question, on the basis of present data, and the presently contemplated jurisdiction, whether it is realistic to envisage a proposed caseload for the new court of 150 significant cases a year. Even if this estimate is realistic, the new court of seven judges would be the most under-employed federal appellate court in the nation. It would have the same opinion

[3] As one of my correspondents put it, the figure "will be limited to cases where counsel have asked for a transfer sufficiently in advance of argument that a court of appeals has not already made such a substantial investment in the case as to cause it to believe that judicial economy will be enhanced by its rendering a decision rather than starting all over again in the next court."

load as the Supreme Court, but without the certiorari burden. And, while the average judge on a federal court of appeals in FY 1974 wrote 33 signed opinions a year and 33 per curiams, in addition to other dispositions, the average judge on the new court would be responsible for twenty-one. If the estimate were to be dramatically low, and if the output of the new court were to be doubled, to 300 or more cases, the serious question would then be whether it had achieved such a dominant role in national decision-making that it would depreciate the function of the courts of appeals if not the Supreme Court itself.

Looking at the quantity of work estimated for the National Court of Appeals, and the quality (cases not pressing enough for the Supreme Court but where decision would be useful), one must ask whether the job to be done merits creating another institution, at least before harder data of demonstrated need appear. The relevant factors include the question of the attractiveness of service on such a court, the overhead and continuing cost of facilities and staff, the diminution of authority and prestige of the courts of appeals, and the adding of issues of at least a quasi-jurisdictional nature to be briefed and/or argued in many cases.

II. A Non-Institutional, Temporary Approach.

I realize that it is far easier to engage in negative comments on others' proposals than to make positive and creative suggestions. In the spirit of trying to make sure that the Commission has before it a full range of alternatives, I have asked myself whether it is possible to meet the present need for more prompt, nationally effective decisions in cases of less -than top importance on a basis where experience can be gathered without freezing the mode in a new institution. A traditional device suggests itself as being adaptable for the purpose -- an ad hoc panel of several judges convened under statutory authority. While this instrumentality on the district court level may be coming to the end of its usefulness, a mutation of the idea on the circuit court level seems well worth exploring. Where an inter-circuit conflict exists, as might be determined on the suggestion of a party or a court of appeals by a standing panel analogous to the Panel on Multi-District Litigation, a panel of five or seven judges might be designated by the Chief Justice, with the assistance of staff help. The panel could consist of circuit judges from circuits other than those involved in the conflict, or could include minority representation from the circuits which have passed on the question. A larger number of judges than three is suggested, in order to recognize the fact that their decision would, subject to Supreme Court review, be controlling on the circuits. There could be a prerequisite of a minimum number of years of service before a judge could serve on such a panel. If designation of panels were not thought appropriate for the Chief Justice, a special committee of the Judicial Conference could undertake the function, as in the case of multi-district litigation.

Such an approach would seem feasible, at least for run-of-the-mill conflict situations. The reservoir of active circuit judge positions is now 97, with 10 more presently recommended in an omnibus bill. If, from a pool of 107 of active circuit judges it can be assumed that (1) 35 or 50 judges are qualified by length of service to sit on ad hoc panels of 7 judges; (2) cases can be accumulated in groups of 14 or 15 to provide a week's sitting; and (3) that the number of cases in conflict is as high as 70 and 100 -- I think unrealistically high -- the results are as follows:

Fifty judges:

100 cases — Each judge would sit one week a year, hearing 14 cases (7 panels x

14 cases = 98 cases), and writing an average of 2 opinions.

70 cases — Each judge would sit for three days, hearing 10 cases, and writing an average of 1.4 opinions.

Thirty-five judges:

100 cases — Each judge would sit for one week, hearing 20 cases and writing an average of 3 opinions.

70 cases — Each judge would sit for one week, hearing 14 cases and writing an average of 2 opinions.

To the extent that half of the federal appellate judiciary would qualify for service, the use of 35 judges a year would reduce the frequency of service for any one judge to once every year and a half. The frequency would be further reduced if the size of panels were reduced to five.

If the numbers of cases involving a substantial intercircuit conflict are as large as 70 or 100, the effect would be to add to the burden of an active judge the equivalent of an extra sitting of court, but with only about half of the opinion writing load of an average sitting. This would be too onerous in the long run, but evidence of a sustained intercircuit conflicts load of this magnitude would clearly support the creation of a new national court.

If, however, as I believe, the numbers of cases involving conflicts were shown on an annual basis to be substantially less, say 40 or 50, then three or four 7-men panels sitting for 3 or 4 days a year, with each judge writing no more than two opinions could perform the task. Service on such a panel would be no more frequent than once every two or possibly three years. The burden would be correspondingly less if the sustained annual caseload proved to be 20 or 25 cases.

If it is indeed feasible to add to cases of conflict among jurisdictions cases where a question of public interest urgently demands national decision, or if the Supreme Court refers a case it deems of particular importance, adequate response to the need for authoritative decision and public acceptance may be made by constituting a special panel of chief judges of some of the circuits or other judges most senior in service. There would always, of course, be a right to seek review from the Supreme Court itself. Resort to seven (or five) judge panels would not ordinarily be made in critically important conflict or public interest cases. These would warrant Supreme Court attention without intervening review.

I submit this suggestion with full awareness of its shortcomings as a permanent solution and of the danger that a temporizing device may be seized on as the final answer to a problem. In the first place, shifting panels will vary in their quality, since seniority is not a warranty of merit. My guess is, however, that in panels of seven fairly senior appellate judges, there will be a dominance of high quality -- at least high enough to settle the less than paramount issues they will rule upon. A second disadvantage is the obvious one that panels will not have the prestige of a court. I think, however, we could tolerate this for a time. At least a panel drawn from judges across the nation would have sufficient prestige for the parties, if unresolved issues were indeed promptly decided.

A third disadvantage is that shifting panels would not develop collegiality of spirit or, more important, consistency in the evolution of doctrine. One of my correspondents pointed out

this defect, but added that the same defect inheres in the proposed National Court of Appeals. For it receives only cases referred to it by other courts; it would not be able to pick cases which lent themselves to further doctrinal development, nor could it enforce an announced doctrine. A fourth disadvantage is the burden on the present federal appellate judiciary. This is admittedly a real burden but, if my guess of 40 to 50 cases a year (or fewer) is realistic, the burden is manageable for a brief interlude. Finally, there are the administrative difficulties of collecting and scheduling a critical mass of cases justifying the time of a panel.

If, however, the size and nature of the need are not yet clear, the suggested device provides a means of responding to present needs with certain advantages. Only minor legislation and appropriations would be required to implement these suggestions. Permanent space would not seem necessary; indeed, panels might be able to sit in various courthouses around the country. Apart from the expenses of travel, the chief investment would be a small staff, to assist in coordinating the assignment of panels to cases, in scheduling briefs, issuing opinions, etc. It may well be that any such legislation should be for a limited period of time in order to force a reassessment before the new procedure has permanently grafted itself into the federal judicial system. Such reassessment may indicate that, with minor changes, the system is adequate, or it may indicate that a permanent institution is needed, what kind of institution it should be, and what jurisdiction it should have. In any case, the experience gained ought to be invaluable in assuring that the wisest course of action will be taken, with prospects of enduring for at least several decades.

In sum, I am uneasy about recommending a new court, second only to the Supreme Court, on the basis of the present data and jurisdictional headings. One of my judicial friends responded to me by saying that, while my specific points were valid, he felt that the wise course was to create the court with confidence that in time it would find sufficient valuable work to do. He may be right. On the other hand, as we know from the sluggish history of the bill to curtail federal jurisdiction, changes in basic jurisdiction are worked only by the labors of Hercules.

I cannot help but think that this Commission would profit from another lease of life for a year or even more. You started with the intransigent problem of circuit reorganization in Phase I. In Phase II you dig deeply into the complex field of internal procedures and revealed the need for more prompt nationally accepted decisions. No one can say that you have been either idle or uncreative. I look on your thinking about a new court as a promising beginning. To think that you must submit your final thoughts to the Congress in two months' time dismays me.

If you had more time, what could you do? I think you could go back to the starting point, the problem faced by the Freund Committee. You have no jurisdiction over the Supreme Court but you could try to stimulate renewed discussions about meeting the certiorari problem, for to deal with the problem of more expeditious national decision-making without considering the Court is to see Hamlet sans the prince. Surely the discussions since December of 1972 may have developed some ideas worth exploring. For example, Professor Wechsler's suggestion of shifting panels of three might well deserve more attention, particularly if conjoined with Judge Friendly's suggestion that one vote be enough to bring the petition before the full Court and three be sufficient to grant certiorari. Perhaps even more productive of additional national decision capacity and less widely controversial would be an effort by the Commission to lend crucially needed support to the legislation abolishing the three-judge court device. This alone would free the Supreme Court of a significant part of its present load and enable it to hear and decide a substantial number of additional cases. A third relevant area in the realm of the Supreme Court is further analysis of dissents on certiorari, which might reveal more about the standards which

could govern reference to a new court.

Apart from this, Professor Feeney's work on inter-circuit conflicts should be pursued, broadened and deepened. The incidence of three-circuit conflict should be ascertained, for those are the cases which a new court would inherit. The problem of cases involving issues likely to recur, where prompt national decision is necessary, deserves continuing study. My thought is that this category is meaningful only for cases which the Supreme Court would refer to the new court. For purposes of transfer by the courts of appeals, more precise definition of jurisdiction is required. I suspect that the search for useful criteria will be fruitless. More promising is the identification of certain areas of judicial review of administrative action in several technical fields. In this connection the Court of Appeals for the District of Columbia Circuit may well be an increasing resource for the future.

Finally, there are the areas of review of decisions of state supreme courts and review in lieu of en banc procedure in some instances. As to the former, I suspect that further study would reveal criteria which could be stated. As to the latter, the Commission appropriately has asked for comment. I am in the one circuit which has had no experience with this. Nevertheless, I would think that any blanket takeover of en bancs in, say, the larger circuits would be unwise and subject a National Court of Appeals, on occasion, to matters of only local importance or cases involving the use of supervisory power. Again, it seems to me that analysis of cases which have been en banced might reveal some standards or, in lieu of substantive standards, a procedure by which petitions for en banc consideration, could be referred to the new court.

I view your mission as one akin, although on a smaller scale, to that of the Founding Fathers. Forgive me if I counsel further deliberation. Important institutions should have a long period of gestation.

JUDGE COFFIN: Thank you, Mr. Chairman and members of the Commission.

In listening to the last presentation I was prompted to observe that at least in one area the Commission has made a firm pre-judgment of principle, and that is that at least coffee does not percolate.

(Laughter.)

PROFESSOR LEVIN: I hate to ask whether that is good or bad.

JUDGE COFFIN: I observed also that its instant coffee, and we are engaged in institution building on a very solemn object here.

I particularly appreciate the opportunity to be here. I had not really taken enough pains to follow the national dialogue until I read Senator Hruska's very lucid speech, explaining the proposal, and that prompted me to start thinking and writing. And what I'm going to say to you today I put down on paper some weeks ago and circulated to some judges, and academic friends to see whether or not the idea was worth surfacing to this Commission. The consensus was that this was worth surfacing, but that neither they nor I approach with tremendous enthusiasm the present parameters of the National Court at this time.

My chief wish, as I say on page 2 of my statement, is that this Commission would be allowed to pursue its deliberations on this issue without being confined to a deadline which will expire in a couple more months.

You are engaged in a task which has been tackled only twice before in our history since the Constitution, once in the first Judiciary Act of 1789, and again in the Evarts Act of 1891. So,

you are ploughing new and high ground.

I think it is speculative on the part of the Congress to assume that you will come in with all the other recommendations or procedures and minor changes which would concern the effective disposition of case loads of the court of appeals, which is your challenge. But - and I am sorry that we don't have the members of this Commission who are now in Congress here, but if only we had a Chairman Celler who is acquainted with this problem in Congress at the present time, he could persuade his colleagues to give you a lease on life, that I think would be very fruitful.

What I say today is divided in two parts - and I am now on page 3 of my statement - first the question of present justification of the two present heads of jurisdiction. I then make a temporizing suggestion for dealing with the most acute cases. And if you think Judge Leventhal thought small when he said you should delegate circuit judges to this court, you haven't seen anything yet, I can think even smaller for a temporary period of time.

And finally I say that there are certain chores which remain to be done, and I can think of no better body than this Commission to undertake them. If there is consensus about the National Court, and you may decide there is, then there is no more justification to delay it, after all there is a time to end one's study. But to the extent that there are serious questions throughout the nation affecting the consensus, and preventing a real consensus, then there seems to me great merit in undertaking something for the near future while keeping your institutional options open.

Coming to justification, I realize that you have been hand-tied -- feet-tied as well -- in not being able to consider the various proposals for limiting the jurisdiction of the federal district courts. You are in effect being asked to dream up a new horse to carry the federal jurisdictional task without any chance to make recommendations as to the size of that cart.

I think it is urgent at the present juncture to take a hard look at the need that exists for this new court because it is not addressing the need which the Freund Committee addressed; it is not addressing the need which the Reifsnyder report addressed; this is a new need, and the contribution of this Commission is that it exposed that need.

Referring to your own report, in Appendix 3 you have the kinds of cases where the Supreme Court has denied certiorari.

JUDGE LUMBARD: Judge Coffin, if I might interrupt, I do give my excuses to you. Judge Robb has been good enough, in the absence of the Chairman, and now in the absence of the Vice Chairman to act as presiding officer.

JUDGE COFFIN: I told Judge Lumbard I didn't mind his leaving, he is a good reader.

(Laughter.)

JUDGE COFFIN: To the extent the Supreme Court refers cases in Parts 2 and 3, those are going to be highly important, and highly controversial cases. The point was made this morning that the Supreme Court would receive back a number of those cases. So, the Supreme Court's load is not decreased.

Now, I don't need to repeat what your report Professor Feeney about the number of conflicts says: 75 direct conflicts, and you know the other figure. The point I wish to make -- and I have not read it anywhere, perhaps it has been made -- is that whatever the higher conflict figure -- taking into consideration Professor Feeney's caveat -- there is one further significant reduction which must be made. I am on page 6 now. Transfer jurisdiction in conflicts cases would exist only when a case is presented to a court of appeals after two other circuits have

created a conflict. So, the relevant figure is the number of conflicts where at least three circuits are involved because the new National Court does not get a transfer until, say, the First Circuit took a case and said, "Yes, counsel has told us that the Second and the Fifth are in conflict, that's a good case for the new National Court."

I don't know how much conflict is in that category. To be sure, the examples that you have in your report -most, not all - do represent conflict in more than two circuits.

Moreover, as a very practical matter, if counsel got to the point in the research when he comes to the circuit court to say that the Second and Fifth are in conflict; and not always do counsel know all of the law of the nation when they have reached the point of starting work on their brief -- only after they have done their research do they know the full extent of the conflict. That is another factor that must be taken into consideration.

I suspect the number of conflicts -- prior conflicts between two circuits that are discerned at the outset are not of such overriding importance as to command the Supreme Court's attention, and yet of sufficient importance to warrant prompt national decision -- will not prove to be large; they could be embarrassingly small.

The other part of transfer jurisdiction, where immediate determination by the National. Court is in the public interest, lacks concreteness. It is no news to you to learn that any court of appeals in the country, each week it sits, faces one or more cases which could fall under that category. Judge Robb in his court probably can top that figure considerably.

The problem is, if this jurisdiction is left without any further adjuration, and the circuit courts must use their common sense and sense of responsibility and trust the National Court of Appeals, we may get into a situation where you have arguments and briefs on the question of transferability; and you may get a feast and famine situation.

I agree, in the long run we have to trust the common sense of the National Court of Appeals, but I am worried about the jurisdictional issues and the lack of standards.

If I may digress a moment because I was stimulated by the discussion between Mr. Kirkham and Professor Field on percolation; and I take it from what Professor Levin said, the Commission has trod this ground many times. But the matter of percolation, although it can be abused to the disadvantage of a litigant, does seem to be worth the price sometimes. I am not certain that you can classify the advantage in a precise field, but I mention the field of class actions where the circuit courts were allowed to mess around with some for quite a while, and finally the Supreme Court came out with an answer.

The question of prisoners' rights, the Supreme Court came down on that recently. I am sure the decision meant more, having stemmed from a number of circuits that had equally worked their will in this field.

The same is true with the new field of rights of students and faculty in universities. It would be great if we could get an answer in the very beginning; and it is perhaps a disadvantage for the image of the law that Mr. Segal has to tell his questioners that in one circuit you can, while in the other circuit you can't. On the other hand, if a national decision were made that experience were to show was unwise, and on the national level there was a reversal or a perpetuation of something which obviously was not working, that too affects the image of the law; and the last example was the DeFunis case. Maybe it would be good if right off the bat we could have a national decision on quotas for minority groups. I have an instinct the Supreme Court ducked this, feeling that they wanted to let it percolate for a while. I don't disagree with the wisdom of doing that in some cases.

JUDGE ROBB: Judge, isn't this a facet of our wonderful system of federalism?

JUDGE COFFIN: I think so, and as I contemplated the possibility of eliminating this I felt like George Mason at the Constitutional Convention who was fighting against this new creation of a national government, feeling that the great National Court and great federal city would gobble up everything the states did. I never thought myself a profound states-righter, but I can develop some feeling as I contemplate the prospect of there being a drastic reduction on this.

JUDGE ROBB: And while Mr. Segal's hair controversy may be a good example of this, what might seem right and proper in a court in Alabama might not be in Massachusetts.

JUDGE COFFIN: I agree, and obscenity is a case in point.

On referrals, I don't belittle the conflict jurisdiction, with the necessity of getting some harder figures on three-circuit conflicts. And I talked a little bit about the important question of transfer jurisdiction. As to referral jurisdiction, I have quoted in my statement one of my correspondents, who said the number might be pretty small and could create pressure on the Court to provide the new court with business.

Rather I would say in reflection -- looking at Parts 2 and 3 of your appendix referring to the dissent in certiorari in cases that might be transferred -- they would be important cases, but they would also ultimately be acted on, in the last analysis, by the Supreme Court. For example, Justices Douglas, Brennan and Marshall want to probe further the question of use of out-of-court statements for impeachment purposes. And if the National Court would get it, there is no question in my mind that the Supreme Court would get that back pronto, and would have to work its will on that.

So, all of this leads me to the question of basis of jurisdiction. And let's assume for a moment that you do get 150 cases a year, and I don't think you will; but even at 150 your new court - now I am on page 9 - of seven judges would be the most under-employed federal court in the nation. They wouldn't have the certiorari role of the Supreme Court, and they wouldn't have the administrative work, the curiams work, or even the assigned opinion role of the average federal court of appeals.

So, having in mind all of these things, what do I suggest? How small can I think? On page 10 I am suggesting that a way to start would be to keep options open, and to borrow the guts of that much maligned, and probably properly maligned device, the three-judge district court, but use it on the circuit court level where you have conflict if a party so suggested it, or a court would respond. Then a standing panel, analogous to the panel on multi-district litigation, could designate a panel of five or seven judges, and that panel could hear an accumulation of 14 or 15 cases, enough to make a week's sitting.

They could be chosen either from circuits not involved or they could include a minority representation from circuits which have been involved. They probably would be of a certain minimum number of years in service. And if the Chief Justice were not thought an appropriate official to designate the panel for cases identified by the standing panel, a panel equivalent to a multi-district litigation panel, a special committee of the Judicial Conference could do it.

Now, on page 11 you see how it would work out if we had as many as 100 cases, figuring that with the federal appellate judiciary of 97 now, and hopefully 107 when the omnibus bill becomes law -- with 50 judges qualified by length of service to sit on the special panel, even if the caseload were 100 cases, each judge serve one week a year, or to put it another way, would be involved in two opinions.

I call your attention now to the bottom of page 12, to find out where we really are, I say, "If, however, as I believe, the number of cases involving conflicts were shown on an annual basis to be substantially less, say 40 or 50, then three or four seven-man panels sitting for three or four

days a year, with each judge writing no more than two opinions, could perform the task. Service on such a panel would be no more frequent than once every two, or possibly three years. The burden would be correspondingly less if the sustained annual caseload proved to be 20 or 25 cases."

MR. KIRKHAM: Judge, your proposal eliminates the transfer jurisdiction.

JUDGE COFFIN: No, this is transfer jurisdiction.

MR. KIRKHAM: I mean the referral jurisdiction.

JUDGE COFFIN: No, I am coming to that because at the top of page 13 I address the referral jurisdiction. I say, "If it is feasible to add to cases of conflict among jurisdictions cases where a question of public interest urgently demands national decision, or if the Supreme Court refers a case it deems of particular importance, adequate response to the need for authoritative decision and public acceptance may be made by constituting a special panel of chief judges of some of the circuits or other judges most senior in service. There would always, of course, be the right to seek review from the Supreme Court."

JUDGE ROBB: How would they be chosen?

JUDGE COFFIN: I would say the judges most senior, and you would again have this panel analogous to the panel on multi-district litigation, designated by the Chief Justice, as I suspect would be proper.

JUDGE ROBB: Now, you have, say 50 judges who might be eligible, how would you choose the five to go on the panel?

JUDGE COFFIN: There would be a panel of judges, say the Judicial Conference, and they would have a list, a roster of 50 judges; and they would then start off as they saw fit. They wouldn't start with the most senior because you want some of the younger ones with over five years service.

JUDGE ROBB: Would they be drawn by lot?

JUDGE COFFIN: I think that would be the way to start. Because if you have only 40 or 50 cases a year, or say they have 20 or 25, you could use four panels a year, and every two or three years you would be repeating. But to me the lot would sound very proper.

JUDGE ROBB: Well, this wouldn't be permanent.

JUDGE COFFIN: No, it wouldn't.

MR. KIRKHAM: So really, as a practical matter, you would eliminate the referral jurisdiction. It's not likely under this system that there would be a referral of cases, would there?

JUDGE COFFIN: Let me think. I don't see why not. Take the easiest case, the Supreme Court has some case of statutory interpretation and it's not able to get to it. I don't see why it couldn't refer this to one of the judges drawn, as Judge Robb has said.

Now, on the bottom of page 13 I note the disadvantage. These shifting panels will vary in their quality, since seniority is not a warranty of merit. The panels would not have the prestige of the courts. And on top of page 14, they would not have consistency in the evolution of doctrine, but note, members of the Commission, the National Court suffers from the same defect when you were talking earlier about developing doctrine in the patent law. Remember that under your proposal, your present proposal, there is no power for the National Court to grab a case; there is only power to review the case which is offered to it.

And then there is, finally, the burden on the present federal judiciary, and this would be a real burden if it were a permanent thing. But my caveat would be that this is a timed experiment, first of all, to ascertain the breadth and depth of the conflict cases, and perhaps referral cases that arise, and gives you time to carve out the parameters of a court with heads of jurisdiction that are

as sound and precise as you can make them.

On the bottom of page 14 I mention the advantages that would result from minor legislation and minor appropriation, no permanent space, only a small staff.

Finally, the third part of my remarks, beginning at page 15, I spoke to one of my friends, much as I have spoken to you, and he said, "Well, let this new court come into creation on the present basis, we will at least have it, and in time we can work out the best way of using it", and he may be right. On the other hand, I also have a feeling, watching legislation curtail diversity jurisdiction and making other changes, that it is an extremely risky business to expect changes in jurisdiction to come about easily, once an institution is created.

So, I say to the Commission as I said to Judge Lumbard before he left, I don't know of any group of citizens who have done more in a shorter time than you have. You started with Phase I, a tough nut to crack; you went into Phase II, dealing with broad areas of internal procedure, and then happened upon this issue which is worthy of a great deal of thought, and I think is one of the more solemn institution-making effort that we have ever made in the nation.

If by any great good fortune you did have the luck to lose more time from your family and your work, and have a lease on life, what would you do with the Commission? I think you could go back to the starting point, the problem faced by the Freund Committee. You don't have jurisdiction over the Supreme Court, but you can try to stimulate some renewed discussions about the certiorari problem.

But it seems to me that in dealing with national decision-making to not be able to think about the Supreme Court is, as I say, Hamlet without the Prince. Anything that relieves the Supreme Court for an opportunity to make 20 or 30 more national decisions in a year is a great achievement. And even though you can't enforce it, this body would be a powerful source of recommendation.

I have mentioned Professor Webster's suggestion, which I think receives all too little attention, that it should be a panel of three; and I mentioned Judge Friendly's additional suggestion that one vote on one of the panels should be enough to bring the matter before the full court and that three should be sufficient to grant a certiorari.

I also suggested, and this seems to me to be less controversial and even more effective - again not directly within your jurisdiction - but your jurisdiction is' significantly related to the three-judge court institution and anything that you can do to push their abolishment along would be of value. I don't refer to it as a circuit judge though it's a great drain on my energy to seek judges to appoint and a circuit judge to sit; but the big drain is on the Supreme Court which has to hear all these appeals, amounting to a significant fraction of its hearing and opinion time.

I think the third area is further analysis of the extent of certiorari, and this would reveal more about standards which would govern reference to the new court.

I think apart from this that Professor Feeney's work on conflicts should be pursued, and honed in on the number of conflicts that involve more than two circuits. As for cases involving national decisions, my best guess is that it is going to be difficult unless we rely wholly on the good will of the courts of appeals to be sure what kinds of cases we are getting. I think referral jurisdictions may be the chief feeders unless we think of certain technical areas, administrative review in certain fields demanding expertise. And it may be that the District of Columbia Circuit Court, after the two-court system in the District settles down, will have some capacity for dealing with that.

JUDGE ROBB: I doubt it.

JUDGE COFFIN: But there I would certainly be a fool to rush in when we have one of

the members of that circuit on the Commission.

Then, finally, there is the area of reviewing decisions of the state supreme courts, and review in lieu of en banc procedures. As to state court decisions, I suspect that further study there might reveal some criteria which could be stated. As for en banc review, I am from one circuit which has had no experience with it, I would say however, that any blanket take-over in the larger circuits of en banes would be unwise because there are a number of matters which agitate the members of the larger circuits greatly, and properly, but they might involve wholly local matters of procedure, or the use of supervisory power, and it would, from the view of the National Court of Appeals, not be worth the time and effort.

In conclusion, I view your mission as a very solemn and important one. Forgive me if I counsel further deliberation, but important institutions should have a long period of gestation.

JUDGE ROBB: Judge, we certainly thank you for your very thoughtful and penetrating analysis.

MR. CELLER: Judge, I want to thank you very much for your kind reference to me, and I am reminded of our very pleasant association when we both were in Congress.

JUDGE COFFIN: Well, I almost began my remarks with, "Mr. Chairman, and Mr. Chairman".

(Laughter.)

MR. CELLER: I assure you, I will do all I can, even while I am out of Congress, of furthering the work of this Commission.

JUDGE COFFIN: Thank you.

JUDGE ROBB: Judge, may I ask you one question? Suppose -- and it is likely to come to pass -- Congress accepted our recommendation in toto, and the National Court was set up at a salary of $50,000 a year, let's say, then in two or three years, or five years, it turns out to be unworkable. Could the Congress abolish the court, constitutionally?

JUDGE COFFIN: I think it could. I think it has power over the inferior courts.

JUDGE ROBB: I suppose it could, the way it did the Commerce Court.

JUDGE COFFIN: I think so. Now, whether it would --

MR. CELLER: How long do you think we ought to deliberate on this. You think we ought to go beyond the statutory period, our life; how long do you think we ought to deliberate on this?

JUDGE COFFIN: Well, I think you ought to -- of course there would be some study that would continue if you could find an interim way of having the court of appeals practice the business of referring cases for a year. I would think that another year or two would be --

JUDGE ROBB: Oh boy, another year.

PROFESSOR LEVIN: You are talking to a tired group.

JUDGE COFFIN: I know it. Some people have said, do your best, live with it in the time limit, and submit it to the Congress. That may well be what you have to do. In the past there have been some great debates on judicial structure. I am just not sure that in these days there is much time for Congress to give this the months of deliberation that it gave, for example, to the creation of the courts of appeals.

JUDGE ROBB: I suppose they will have hearings in Congress.

JUDGE COFFIN: They certainly should. They should be very deliberate about it.

MR. KIRKHAM: Could I ask you just one question, Judge Coffin? Yesterday Judge

Aldisert told us that in his opinion every litigant should have an opportunity to have a federal question reviewed by an Article 3 court; and that now is supported by the Supreme Court on appeal from decisions of the highest courts of the states. His recommendation was that decisions on federal questions decided by the highest courts of the states should be reviewed by the various circuits.

Having in mind your acquaintance with the judiciary, don't you think it would be more acceptable to these courts if the Supreme Court, which is still the only appellate court from which an appeal or certiorari can be taken from the state courts, would have the right to refer it, and that would be a substantial amount of jurisdiction.

Do you think the state supreme courts would be content if the National Court reviewed their cases on referral by the Supreme Court; and I guess a corollary question is, would that not be preferrable to review by the courts of appeals?

JUDGE COFFIN: I think the latter question is easier to answer, it would be preferable. But I think the states would not really be happy with anything besides the Supreme Court.

JUDGE ROBB: We will adjourn now until 2 o'clock for lunch.