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WHITE SCHOLAR NOTES

AN INTERCIRCUIT TRIBUNAL OR A COURT OF TAX APPEALS: A TAX LITIGATION PERSPECTIVE

INTRODUCTION

Legal periodicals are replete with scholarly writing describing the plight of the federal judicial system. Although scholars agree on the problems—the litigation explosion, the judiciary's inability to cope with swelling caseloads and the increasing delay in adjudication of cases—they sharply disagree as to their resolution. Nevertheless, the message is clear: the federal judicial system is imperiled.1 The problem has reached a crisis point warranting immediate action.2

In response to this quandary, scholars have advanced an array of proposals addressing these concerns and recommending solutions.3 The proposals range from sweeping structural reforms to minor refinements of the present system.4 Congress is presently considering legislation which would create an Intercircuit Tribunal (Tribunal) to act as a

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1. In the past year alone, all nine justices of the United States Supreme Court have publicly addressed the problems confronting the federal judicial system. Burger, Annual Report on the State of the Judiciary, 69 A.B.A. J. 442 (1983); Jenkins, A Talk with Justice Blackmun, N.Y. Times, Feb. 20, 1983, § 6 (Magazine) at 20; Address by Justice Brennan, Remarks at the Third Circuit Judicial Conference, in Philadelphia (Sept. 9, 1982); Address by Justice Marshall, Remarks at the Second Circuit Judiciary Conference (Sept. 9, 1982); Address by Justice O'Connor, Comments on Supreme Court's Case Load, in New Orleans (Feb. 6, 1983); Address by Justice Powell, American Bar Association Division of Judicial Administration, in San Francisco (Aug. 9, 1982); Address by Justice Rehnquist, Remarks at the MacSwenford Lecture, University of Kentucky (Sept. 23, 1982); Stevens, Some Thoughts on Judicial Restraint, 66 JUDICATURE 177 (1982) (Address before The American Judicature Society, Aug. 6, 1982); White, The Work of The Supreme Court: A Nuts and Bolts Description, 54 N.Y. ST. B.J. 346 (1982).
2. Chief Justice Warren E. Burger, in his annual report on the state of the judiciary to the American Bar Association (Feb. 6, 1983), stated: "Today I will focus on only one subject, which is perhaps the most important single immediate problem facing the judiciary, and that is the caseload of the Supreme Court and the need for the 'time and freshness of mind and reflection . . . indispensable to thoughtful unhurried decision.'" Burger, supra note 1, at 442.
3. Many of these proposals merit serious consideration, such as the creation of en banc procedures in each circuit to preclude the development of intercircuit conflicts. See Wallace, The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?, 71 Calif. L. Rev. 913, 935-40 (1983). See also M. Handler, What to do with the Supreme Court's burgeoning Calendars?, 46-47 (1983) (unpublished manuscript). Other examples include the increased use of summary dispositions and brief per curiam opinions. See Wallace, id. at 919-24. This note foregoes consideration of the above-mentioned proposals so as to consider in depth the national court of appeals and the court of tax appeals.
4. An example of a non-structural proposal is that of direct congressional action to clarify legislation quickly to reduce the need for judicial interpretation of a statutory problem. See Address by Judge Rubin, Remarks at the Meeting of the American Judicature Society (Feb. 5, 1983), reprinted in Rubin, Rx for an Overburdened Supreme Court, 66 JUDICATURE 394, 401 (1983).
national court of appeals, exercising jurisdiction over cases referred to it by the United States Supreme Court. Proponents of the Tribunal contend that it will relieve the workload of the Supreme Court and provide greater national uniformity of federal law. Opponents argue that creation of the Tribunal will simply add a fourth tier to an overgrown bureaucracy, increasing delay in the resolution of national law. A proper analysis of the merits of the Intercircuit Tribunal requires a comprehensive study examining the manner in which the Tribunal addresses and eliminates the problems plaguing the federal judiciary.

This note analyzes the benefits and drawbacks of the proposed Tribunal in one area of federal law, federal taxation, and proposes a court of tax appeals as an alternative solution to eliminate many of the problems inherent in tax litigation. The host of problems facing the federal courts are accentuated within the tax field where uniformity of national law is a pressing need.

**THE STRUCTURE OF TAX LITIGATION**

The present tax litigation structure breeds inconsistency and delay

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6. According to Senator Dole, sponsor of S. 645, this legislation “would relieve the dramatically increased workload of the Supreme Court” and “provide desperately needed decisional capacity for the resolution of disputes where nationwide conformity is needed, many which are now left unsolved because the Supreme Court can not make room on its docket.” 129 CONG. REC. at S1947-48 (daily ed. Mar. 1, 1983).


8. Judge Wallace notes that “[c]hange should not be rejected merely because it is different. But neither should change be implemented without determining if a need exists and whether the proposed solution adequately meets the need.” Wallace, supra note 3, at 941.

9. To focus only on the Tribunal and the Court of Tax Appeals requires a large but calculated assumption that many of the proposals advanced, while of considerable merit and perhaps worthy of implementation, are not extensive enough to effect a lasting solution in tax litigation. The concept of an “incremental approach [to] structural reform,” Wallace, supra note 3, at 941, has considerable merit in preserving the essential elements of a federal judicial system which has proven remarkably effective and resilient in adapting to rapidly changing currents of litigation. However, the crux of the problem in tax litigation lies in a dysfunctional structure, and nothing short of structural reform will help significantly. The authors believe that specialization of the appellate tax function is the preferable structural reform precisely because it preserves the advantages and stability of the existing federal judicial structure and simultaneously equips the structure with the capacity to effectively adjudicate tax questions which now go unanswered.

10. Patent law is another area where uniformity of national law is essential. See, e.g., S. REP. No. 275, 97th Cong., 1st Sess. 4, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 11, 14 (1982) (citing uniformity of patent law as a primary reason for enacting the new Court of Appeals for the Federal Circuit). The removal of patent cases from the jurisdiction of the geographic courts of appeals, however, has largely accomplished the task of making patent law nationally uniform. infra note 12. The proposed Intercircuit Tribunal would not, therefore, affect patent law, but would affect tax law, which remains within the general court structure. It seems pertinent, then, to examine the impact of the Tribunal in alleviating the myriad problems in tax litigation. If the proposed court’s value to the entire federal court system is dubious, its value in a particular area which it purports to affect significantly, such as federal taxation, would have to be great to justify its enactment.
in the final resolution of tax issues. A massive bureaucracy, the tax litigation system is comprised of three different forums at the trial level, thirteen courts of appeals (including the Court of Appeals for the Federal Circuit) and discretionary review by the Supreme Court. Tax cases originate in three different types of trial forums: the district courts, the Tax Court, and the Claims Court. District court decisions are appealable to the appropriate circuit court of appeals where the action could have originally been brought. Thus, Tax Court appeals fan out to the various courts of appeals, effecting an inverted pyramid (see Diagram 1). The Court of Appeals for the Federal Circuit reviews Claims Court decisions. Ultimately, decisions of the Court of Appeals for the Federal Circuit are reviewable by the United States Supreme Court on certiorari.

The Tax Court's unique function compounds this problematic structure. The Tax Court considers itself a national court bound only by a Supreme Court decision or a circuit court opinion "squarely in point where appeal lies to that court of appeals and to that court alone." In the absence of a controlling circuit precedent directly in point, the Tax Court will apply its view of the law, disregarding precedents established in other circuits.

In sum, the present tax structure provides for judicial interpretation of tax law on the appellate level by thirteen different courts of appeals and a semi-independent Tax Court, with only occasional review by the United States Supreme Court on certiorari.

12. The trial level consists of (1) the United States Tax Court, an article I tribunal with jurisdiction over all disputes arising under The Internal Revenue Code, 26 U.S.C. § 7422 (1982); (2) the district courts, which have jurisdiction over suits involving revenue matters, 28 U.S.C. § 1340 (1982); and (3) the United States Claims Court. The Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (1982), combined the Court of Claims and the Court of Customs and Patent Appeals. Previously, the Court of Claims, an article III tribunal, consisted of a trial level and an appellate level. At the trial level, all taxpayer suits have been consolidated into the United States Claims Court, an Article I tribunal, and all appeals have been consolidated into the newly created Court of Appeals for the Federal Circuit. The United States Claims Court has the same jurisdiction as the old Court of Claims to render judgment on most claims against the United States. For a further analysis, see The New Court of Appeals For the Federal Circuit, 37 REC. A.B. CITY N.Y. 732 (1983).
14. 26 U.S.C. § 7842 (1982). In addition, an appeal of right may be made to the Supreme Court when a lower court holds an act of Congress unconstitutional, 28 U.S.C. § 1252 (1976) and review may be had by certification, 28 U.S.C. § 1254 (1982). However, both of these occur only in very rare instances.
15. See discussion supra note 12.
19. See discussion supra note 12.
Supreme Court. This system results in inconsistent interpretations of tax issues, creating intercircuit conflicts and delay in the resolution of tax cases.

**DIAGRAM 1**

TRIAL COURT JURISDICTION AND ROUTES OF APPEAL IN TAX LITIGATION UNDER PRESENT LAW

![Diagram of court structure]

**SOURCE:** REPORT ON 1979 TAX COURT BILL, supra note 22.

**THE INTERCIRCUIT TRIBUNAL**

The proposed Intercircuit Tribunal parallels past recommendations from various scholars and commissions for a national court of appeals. The Freund Committee and Hruska Commission proposals for a National Court of Appeals in 1972 and 1975 spurred a decade of bitter debate over the merits of adding a fourth tier to our federal court structure. The debate has not subsided with the failure of these proposals,

22. **CONGRESSIONAL RESEARCH SERVICE, REVISIONING THE TAX LITIGATION STRUCTURE: A PRELIMINARY ANALYSIS OF THE LEGAL AND ADMINISTRATIVE CONSIDERATIONS OF THE PROPOSED COURT OF TAX APPEALS (Sept. 11, 1979) (prepared by Leland Beck, Legislative Attorney, American Law Division, U.S. Department of Justice) [hereinafter cited as REPORT ON 1979 TAX COURT BILL]. Diagrams one, two, and three in this note are based on factual data from this source.

23. See **FEDERAL JUDICIAL CENTER, REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT, reprinted in 57 F.R.D. 573 (1972) [hereinafter cited as FREUND COMMITTEE REPORT].** The Freund Committee, chaired by Paul Freund, was established by the Chief Justice in 1970 to study the workload of the Supreme Court.

24. See **U.S. COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATION FOR CHANGE, reprinted in 67 F.R.D. 195 (1975) [hereinafter cited as HRUSKA COMMISSION REPORT].** The Hruska Commission was established by Congress in 1973 to study the structure of the federal judicial system. It was chaired by Senator Roman L. Hruska and consisted of a sixteen-man panel.

25. For a summary of the profuse literature on the national court of appeals proposals, see Leventhal, *A Modest Proposal for a Multicircuit Court of Appeals*, 24 Am. U.L. Rev. 881, 888-
but has raged on, breeding new proposals in the wake of earlier failures. Current proposals, more streamlined and sophisticated than their predecessors, eliminate many of the more objectionable features of the original proposals.26

The existence of more palatable proposals and the realization that the problems highlighted by the Freund and Hruska studies have become more acute have propelled the idea of an intermediate appellate court into a live and controversial subject.27 Chief Justice Warren E. Burger proposed a temporary intermediate court of appeals in his 1983 State of the Judiciary Address.28 Two parallel bills introduced in the House and Senate during the 98th Congress were each designed to implement the Chief Justice's proposal.29

Each bill seeks to create a temporary Intercircuit Tribunal which would be a division of the United States Court of Appeals.30 A sunset provision in each bill provides that the Tribunal would cease to exist after five years unless Congress acted to retain the Tribunal.31 The Tribunal's jurisdiction would be limited to cases referred from the Supreme Court rather than through direct appeals from the lower federal courts.32 The Tribunal would not technically be a fourth tier, nor a circuit court of appeals, but somewhere in between (see Diagram 2).33 Its function, although not entirely clear,34 would be similar to an overflow chamber which absorbs cases referred to it by the Supreme

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26. The Freund Committee proposal envisioned an intermediate appellate court which would perform the screening function of the Supreme Court by reviewing petitions for certiorari and deciding which cases were suitable for Supreme Court resolution. See Freund Committee Report, supra note 23, at 18. This feature of the proposed court was roundly criticized by commentators and by the Justices themselves. See Wallace, supra note 3, at 914 nn. 9-10. The Hruska Commission proposal was criticized for potentially increasing the burden on the Supreme Court rather than reducing it, by requiring the Justices to spend a considerable amount of time deciding which cases to refer to the National Court of Appeals. See W. Coleman, The United States Supreme Court: Managing its Caseload to Achieve its Unique Constitutional Purpose, Remarks at the 13th Annual John F. Sonnett Lecture at Fordham University School of Law 35 (May 9, 1983) (unpublished manuscript) [hereinafter cited as Coleman Remarks].

27. In the year ending June 30, 1981, the number of appeals filed in the federal courts of appeals had increased 400% since 1960, 58.3% since 1975, the year the Hruska Commission published its report, and 13.6% over the number filed in the previous fiscal year. It is uncertain at present whether caseloads will continue to increase as rapidly. See Posner, Will the Federal Courts Survive Until 1984? An Essay on Delegation and Specialization of the Judicial Function, 56 S. Cal. L. Rev. 761-62 n.2 and accompanying text. (1983).


31. S. 645, supra note 5, § 607(d)(1); H.R. 1970, supra note 5, § 7(d)(2).

32. S. 645, supra note 5, § 1271; H.R. 1970, supra note 5, §§ 4(b), 1271.

33. For the Tribunal to technically constitute a fourth tier, it must stand between the circuit courts and the Supreme Court, as the official Freund Committee proposed. The Tribunal, as presently conceived, has no direct contact with the courts of appeals (see Diagram 2); it serves only one master, the Supreme Court. Its entire jurisdiction is within the discretion of the Supreme Court. Nevertheless, the Tribunal creates a fourth layer of procedural process for cases which are referred from the Supreme Court to the Tribunal.

34. Letter from Alan B. Morrison to Representative Peter W. Rodino, Jr., D-N.J., Chairman,
Considerable disagreement exists concerning the judicial composition of the Tribunal. Both the House and Senate bills proposed that existing judges in active service or senior judges designated from each circuit court of appeals comprise the court. The Tribunal would hear cases in random panels of seven or nine judges. Rotation of the

**DIAGRAM 2**

**TRIAL COURT JURISDICTION AND ROUTES OF APPEAL IN TAX LITIGATION UNDER H.R. 1970 AND S. 645**

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House Comm. on the Judiciary (July 19, 1983) (statement drafted by 14 attorneys in federal practice). Part of the letter reads:

Our initial concern is the uncertainty as to which cases now heard by the Supreme Court would be heard by the new Tribunal. Undoubtedly, different people have different ideas of which cases would and should be referred by the Supreme Court to this Tribunal, but the bills as now written fail to provide any standards or limitations that would guide the Court in making referrals or Congress in evaluating the efficacy of providing for such referrals.

See also, Letter from C.J. Donald P. Lay (2nd Cir.) to Representative Robert W. Kas-tenmeier, D-Wis. (June 7, 1983) (incorporating Sneed, Comments on H.R. 1970 and S. 645, at 2-8).


36. Compare id. at 9-10 (statement of Charles L. Wiggins) with id. at 10-12 (statement of John P. Frank) (both witnesses speculating on the consequences of the rotating panels of judges). In fact, the Tribunal's composition was heavily criticized at the *Hearings on H.R. 1970* by proponents and opponents alike. See, e.g., id. at 9-10 (statement of Charles L. Wiggins); id. at 15 (statement of Leo T. Levin, Director of the Federal Judicial Center).

37. S. 645, *supra* note 5, § 61(a)(1); H.R. 1970, *supra* note 5, §§ 2(a), 61(a)(1). The selection of two judges from each circuit creates a pool of 26 judges; the panels of the Intercircuit Tribunal are chosen from this pool. The total of 28 judges cited in H.R. 1970 is apparently an oversight.

panels would be staggered with each judge serving a three- or five-year term.\footnote{S. 645, supra note 5, as amended in the Senate Judiciary Committee, designates a three-year term for Tribunal judges. H.R. 1970 designates a term of "not more than five years". H.R. 1970, supra note 5, §§ 2(a), 61(a)(1).}

The nature of the Tribunal’s workload has been the subject of much speculation, which suggests that current proposals are dangerously vague about the Tribunal’s function.\footnote{See, e.g., supra text accompanying note 17.} Apparently the Supreme Court would refer cases involving statutory interpretation to the Tribunal, reserving the larger part of its own docket for thornier constitutional issues of national importance.\footnote{See, e.g., Hearings on H.R. 1970, supra note 35, at 11-12, (statement of Leo Levin).}

A typical case referred to the Tribunal would involve a conflict between two or more circuit decisions interpreting a federal statute which the Supreme Court felt required a nationally binding decision, but did not have the time or inclination to consider itself.\footnote{See, e.g., Coleman Remarks, supra note 26, at 35.} Tax cases would fall within this category because of their statutory nature and the Supreme Court’s historic reluctance to hear tax cases.\footnote{See Leventhal, supra note 25, at 914-15; cf. Coleman Remarks, supra note 26, at 35.} Estimates of the number of tax cases which the Tribunal would adjudicate are speculative;\footnote{See, e.g., Hearings on H.R. 1970, supra note 35, at 11-12, (statement of Leo Levin).} however, tax cases would comprise one of the largest categories of cases which the Supreme Court would refer.\footnote{See, e.g., Hearings on H.R. 1970, supra note 35, at 11-12, (statement of Leo Levin).} The remainder would be a combination of labor, antitrust, immigration and naturalization, administrative agency appeals, federal civil procedure, and federal jurisdictional cases.\footnote{H. Miller, A Court of Tax Appeals Revisited, 85 YALE L.J. 228, 235-36 (1975).}

The alleged benefits of the Tribunal to the federal court system are

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\footnote{Arthur D. Hellman, Professor of Law at the University of Pittsburgh, has estimated that a full-time, seven-judge panel of the Tribunal could hand down about 150 decisions annually. He points out, though, that Chief Justice Burger foresees a temporary panel that would decide only about 50 cases a year, the rough equivalent necessary to reduce the number of decisions issued by the Supreme Court to a hundred a year. Hellman, Caseload, Conflicts, and Decisional Capacity: Does the Supreme Court Need Help?, 67 JUDICATURE 29 n. 41 and accompanying text (1983). Very few of the 35-50 cases referred to the Tribunal from the Supreme Court's current docket would be tax conflicts. See The Supreme Court, 1981 Term, 96 HARV. L. REV. 1, 309 (1982) (showing that of 167 decisions handed down by the Court in 1981, only four were tax cases, and only three of those did not involve a constitutional question.) Proponents of the Tribunal suggest, however, that many tax cases now denied review by the Supreme Court will be referred to the Tribunal. Estimates of the quantity of tax cases that the Tribunal will hear, then, vary with estimates of the number of tax cases which currently are denied (or do not seek) Supreme Court review and which would "float up" to the Tribunal. See, e.g., Hruska Commission Hearings, supra note 7, at 185-86 (testimony of K. Martin Worthy, former Commissioner of Internal Revenue and John B. Jones, Jr. estimating 50 tax cases would be decided by the proposed national court of appeals).}

\footnote{Hruska Commission Hearings, supra note 7, at 186 (testimony of K. Martin Worthy and John B. Jones, Jr. explaining that the intercircuit panel "would have the capacity to handle a substantial number of other cases, and thus would not be only a tax court, explicitly") (emphasis added).

\footnote{Compare H. Miller, supra note 43, at 241, with Lumbard, The National Court of Appeals: Is it Necessary?, 32 REC. A. B. CITY N.Y. 111 (1977) (both sources include patent cases which, of course, are now the province of the Court of Appeals for the Federal Circuit. See discussion supra note 12).}
by now familiar. The Tribunal would enlarge the federal courts' capacity to render nationally binding decisions and thereby reduce uncertainty and increase uniformity among circuits. The Tribunal would alleviate the Supreme Court's burden of deciding many intercircuit conflicts and ultimately reduce the amount of litigation and delay inherent in the present structure.47

Many of these purported benefits, however, pale upon closer analysis. The lengthy process which tax litigants must endure to reach the Intercircuit Tribunal for a decision on the merits may even increase the delay inherent in present tax litigation. Assuming a tax case manages to wind its way from the trial level to the circuit court level, appeal to the Supreme Court must still be sought through a discretionary writ of certiorari. The Supreme Court may deny certiorari, summarily dispose of the case, hear the case on its merits, or refer it to the Intercircuit Tribunal.48 If referred to the Tribunal and unless the appeal is mandatory or unless the Supreme Court so directs, the Tribunal may either decline to hear the case or consent to hear it on the merits.49 Regardless of the action taken by the Tribunal, further appeal by certiorari to the Supreme Court always exists, adding yet another layer of appellate procedural process.50 Any apparent reduction in the quantum of tax litigation through the use of the Tribunal is mitigated by the increased time required for individual conflict resolution.51

A SPECIALIZED COURT OF TAX APPEALS

As with proposals for a national court of appeals, proposals for a specialized court of tax appeals have a long lineage.52 Equally as long, if not longer, has been the vehement opposition to such proposals.53

47. See HRUSKA COMMISSION REPORT, supra note 24, at 39.
49. Id.
50. Appeal to the Supreme Court by certiorari is available to litigants in all cases referred to the Tribunal, thus, the chances are good that the losing party will generally file a certiorari petition, having come that far already. Even if the Supreme Court only rarely grants certiorari to Tribunal cases, as proponents claim will be the case, the Court must still review each and every petition. See Diagram 2.
51. There are also possible constitutional and procedural problems with the altered precedential effect of a subsequent denial of certiorari by the Supreme Court after the Tribunal had disposed of a case. See Swygert, supra note 48, at 332.
53. See generally R. Miller, Can Tax Appeals be Centralized?, 23 TAXES 303 (1945); R. Miller, The Courts of Last Resort in Tax Cases: A Specialized Court of Tax Appeals?, 40 A.B.A. J. 563 (1954); A.B.A. Section of Taxation, 70 A.B.A. REP. 144 (1945) (resolution formally opposing the establishment of a Court of Tax Appeals); FREUND COMMITTEE REPORT, supra note 23, reprinted in 57 F.R.D. 585-86; HRUSKA COMMISSION REPORT, supra note 24, reprinted in 67 F.R.D. 234; Remmlein, Tax Controversies - Where Goes the Time?, 13 GEO.
Justice Traynor’s initial proposal in 1938 was “engulfed in opposition.” Other scholars, including Professor Erwin Griswold, former Solicitor General of the United States, have advocated an appellate tax court to sit at the geographic courts of appeals and review all district court, Tax Court, and Court of Claims decisions.

The reasons advanced for a specialized appellate tax court are not new, and mirror many of the justifications cited for a national court of appeals. The desirability of a specialized tax court has increased, however, as the problems underlying its inception have grown acute.

The flow of cases into the courts of appeals must be reduced to effect any lasting solution to the workload crisis at all levels of the federal judiciary. A specialized court of tax appeals would divert tax appeals originating in the district courts, Tax Court, and Claims Court from the overburdened circuit courts of appeals to a single appellate tax court (see Diagram 3). Appeals from this court would lie to the Supreme Court on certiorari. The most recent attempt to enact an appellate tax court was the Tax Court Improvement Act of 1979. Though the bill was defeated, the proposed court’s structure is useful for analysis.

Provisionally named the United States Court of Tax Appeals, this court would have exclusive jurisdiction over civil tax appeals arising out of the district courts, Tax Court, and Claims Court. The Chief Justice of the Supreme Court would designate one judge from each
circuit court of appeals to sit on the Court of Tax Appeals for a three-year term. The court would normally sit in panels of three or more judges, and would sit en banc to hear any case in which at least six judges believed the case to be of extraordinary importance. Each judge would additionally be expected to maintain a partial caseload in his own circuit. Though permanently housed in Washington, D.C., the court would "ride circuit", visiting each circuit at least once a year to resolve tax appeals. The Supreme Court might review the Court of Tax Appeal's decisions by a writ of certiorari, but such writs are granted only in rare instances. The Court of Tax Appeals, for all practical purposes, would be the final arbiter in non-constitutional tax cases.

Even to those with no conceptual difficulties with a specialized tax court, the proposal had several significant drawbacks: the shifting composition of the court, the practice of riding circuit, the failure of the proposal to eliminate forum shopping by the government and to address the treatment of tax issues arising in non-tax cases, and the exclusion of Court of Claims' (now U.S. Claims Court) appeals from the jurisdiction of the Court of Tax Appeals. Any new bill proposing a Court of Tax Appeals would have to resolve these problems to merit

63. Id. at 5.
64. Caplin & Brown, supra note 52, at 363.
66. Id. at 8.
67. Id. at 7.
68. See 1979 Tax Court Hearings, supra note 21, at 37-38 (testimony of Maurice Rosenberg, former Assistant Attorney General, Office for Improvements in the Administration of Justice, Department of Justice).
69. Many of those who testified at the Tax Court Hearings took issue with the bill's proposed court composition of temporarily assigned judges, shifting panels of short duration, and the requirement that judges maintain a dual caseload. They recommended a permanent panel of judges for the court. See, e.g., 1979 Tax Court Hearings, supra note 21, at 26-27 (testimony of John M. Samuels, Tax Legislation Counsel, Department of Treasury); id. at 36-37 (testimony of Maurice Rosenberg); id. at 57-58 (testimony of Mortimer Caplin); id. at 95-97 (testimony of Randolph W. Thrower, former Commissioner of Internal Revenue).
71. Id. at 14-15.
72. 1979 Tax Court Hearings, supra note 21, at 39 (testimony of Maurice Rosenberg).
73. See Report on the 1979 Tax Court Bill, supra note 22, at 7 n.8 (stating that the omission of a clause in S. 1691 abolishing the Court of Claims jurisdiction over tax cases was apparently an oversight, because otherwise the proposed Court of Tax Appeals would not have jurisdiction over all tax appeals). Regardless of the reason for the omission, the jurisdiction of the old Court of Claims, which included both trial and appellate authority, now rests with the new U.S. Claims Court at the trial level, and with the new Court of Appeals for the Federal Circuit at the appellate level. See discussion, supra note 12.

The issue which must be addressed in any subsequent court of tax appeals bills, then, is what to do with U.S. Claims Court appeals? Obviously, any jurisdiction over tax appeals not resting with a Court of Tax Appeals will mitigate the beneficial effects of installing such a court; alternative litigation routes encourage forum shopping. The relatively small number of tax cases which the Court of Appeals for the Federal Circuit currently hears could multiply rapidly if that court handed down decisions in favor of taxpayers which conflicted with decisions of the Court of Tax Appeals. Corporate taxpayers, or rather tax lawyers, have considerable experience in shopping for the most favorable forum in which to litigate their issue.
serious consideration. 74

Both the Intercircuit Tribunal and the Court of Tax Appeals pur-
port to resolve many of the problems inherent in tax litigation. These
problems emanate primarily from two sources: the structure of tax li-
tigation and the lack of uniform and coherent application of tax laws. 75

74. The following salient features of a new court of tax appeals are essential to its proper func-
tioning, and should not be compromised in the enactment of any proposal for such a court.

(1) The composition of the Court should consist of a permanent panel of seven or nine
judges, sitting substantially en banc, chosen from the ranks of current courts of ap-
peals judges, or from Tax Court, district court, and U.S. Claims Court judges. His-

tory demonstrates that this type of court requires additional and expensive judicial
appointments, which makes it politically distasteful. It is paramount, however, that
the very purpose of the court's creation, to promote stability and certainty in tax law,
not be undermined by crippling the judges of the court with short terms and dual
case loads.

1979 Tax Court Hearings, supra note 21, at 37-39 (testimony of Maurice Rosenberg). No less
than five-to-seven year terms will accomplish this purpose. The caseload estimates for a court
of tax appeals leave little doubt that a judge of that court could not be expected to carry an
additional caseload on another court. See Del Cotto, supra note 52, at 32 (estimating in 1962
that 340 cases would be decided after hearing or submission by a court of tax appeals); H.
Miller, supra note 52, at 244 (estimating in 1975 about 500 annual case filings in a court of
tax appeals). Several witnesses at the 1979 Tax Court Hearings recommended seven judges
as an appropriate number for a court of tax appeals, although nine may be required to allow
the court to expeditiously dispose of its caseload. See 1979 Tax Court Hearings, supra note
21.

(2) The jurisdiction of the court should encompass all civil tax appeals, including U.S.
Claims Court appeals. It may also be prudent to devise a method of certification of complex or noveau tax issues arising in nontax cases in the other courts of appeals,
such as bankruptcy and collection cases.

1979 Tax Court Hearings, supra note 21, at 37-39. See discussion, supra note 73.

75. A structural realignment of the present system would not affect one of the main contributors
to the problems inherent in tax litigation, the Internal Revenue Code. The proliferation of
A closer analysis of the actual effect of both proposed courts on the problems generated by the defective tax litigation system, such as government relitigation, forum shopping, and actual and potential intercircuit conflicts, will bring the relative merits of each court into better focus.

GOVERNMENT RELITIGATION AND FORUM SHOPPING

The present structure of federal tax litigation encourages both government relitigation and forum shopping. The Internal Revenue Service (IRS) policy of relitigating issues adversely decided in another forum aggravates the uncertainty resulting from a lack of nationally binding tax decisions.\(^{76}\) The tax structure encourages duplicative litigation by providing multiple forums in which to litigate an issue. Paul Carrington, Professor of Law at the University of Michigan, conducted a study of appeals by the IRS and concluded:

> [The IRS] is quite prepared to continue to litigate in other circuits a question that had been resolved in only one; even in the same circuit, the United States may be willing to re-litigate an issue if minor factual distinctions can be made between a pending matter and a preceding decision.\(^{77}\)

In addition, the IRS only seeks certiorari to the Supreme Court in cases where the facts especially favor its own position.\(^{78}\) The government's refusal to acquiesce to decisions of the circuit courts of appeals underlies the uncertain precedential value of such decisions and burdens both courts and taxpayers with unnecessary litigation.

The corporate taxpayer also engages in forum shopping, attempting code provisions, treasury regulations, revenue rulings, and case law interpreting tax laws has increased the complexity of taxation beyond the expertise of the average taxpayer, lawyer and judge. In Commissioner v. Idaho Power Co., 418 U.S. 1, 19 (1974), Justice Douglas, in his dissent, commented on the complexity of the tax laws:

> This Court has, to many, seemed particularly ill-equipped to resolve income tax disputes between the Commissioner and the taxpayers. The reasons are (1) that the field has become increasingly technical and complicated due to the expansions of the Code and the proliferation of decisions, and (2) that we seldom see enough of them to develop any expertise in the area. Indeed, we are called upon mostly to resolve conflicts between the Circuits which more providently should go to the standing committee of the Congress for resolution.

Underlying this problem is the frequency of legislative revision of the tax code. Within the past eight years alone, 3,156 subsections of the tax code have been revised by Congress. Approximately 198 tax bills are presently pending before Congress. This flood of tax legislation makes it impossible to digest and understand the tax laws.

This note does not address reform of the Code, an altogether separate problem, but rather, it focuses on structural reform of the present judicial system. Elimination of the problems inherent in tax litigation requires both structural reform and reform of the present Code.

\(^{76}\) See Hruska Commission Report, supra note 24, at 349-54.


\(^{78}\) See generally Hruska Commission Report, supra note 76. See also Hellman, supra note 44, at 36 n. 29.
to litigate an issue in the forum most favorable to his position. The liberal jurisdiction and venue rules followed in federal tax litigation permit both the taxpayer and the government a choice of a variety of courts in which to file suit.

The enactment of an Intercircuit Tribunal would not address the causes of government relitigation and forum shopping: multiple forums of entry, a semi-independent Tax Court, and the segmented courts of appeals. The Tribunal would merely absorb the excess litigation spawned by such practices.

A Court of Tax Appeals, however, would eradicate the causes of government relitigation and forum shopping by unifying all tax appeals in a single appellate court. Although existing multiple forums of entry would remain, the incentive to shop for a favorable forum would be seriously diminished by the Court of Tax Appeals' direct review of decisions from all three trial forums. This revised structure would also bring the Tax Court into line by subjecting it to appellate review by the Court of Tax Appeals (see Diagram 3).

INTERCIRCUIT CONFLICTS

The United States judicial system has traditionally valued uniformity of national law. "The imperative need for a uniform body of national law underlies the judicial article of the Constitution." Indeed, one of the Supreme Court's most crucial functions is to preserve uniformity of national law among the appellate courts. Commenting on the spurious law of the circuit, Justice Walter B. Schaefer stated that:

Deliberate disregard of the decisions of coordinate United State Courts of Appeals have become so common that it has achieved a dubious respectability under the euphemistic phrase, 'the law of the circuit.'

Uniformity in tax law is essential because the tax system relies on self-assessment and because tax consequences are often planned in advance. Thus, it is essential that the judicial structure possesses the
capacity to resolve tax issues in an expedient, competent and authoritative manner. The uncertainty inherent in the present system manifests itself at the tax planning plateau where taxpayers resolve controverted issues in their own favor. Ensuring the viability of self-assessment begins with earning the respect and cooperation of the taxpayer. Tax planners, businessmen, corporations, sole proprietors, and other citizens plan future tax consequences based on current tax law. Uncertainty about current tax law, on the part of both the taxpayer and the government, hampers effective tax planning.

The IRS has indicated that compliance with tax laws has decreased in recent years. This decrease has been attributed to a loss of respect for the integrity and legitimacy of the present system.

Mortimer Caplin, former Commissioner of the Internal Revenue, refers to the rapid emergence of an “underground economy” which he defines as “a polite term for tax evasion.” This underground economy consists of unreported and untaxed income. Most of this tax evasion escapes IRS detection due to inadequate IRS manpower and capital resources.

Inconsistency in national law and uncertainty regarding the ultimate interpretation of federal legislation thwart the valued tradition of uniformity. The most dramatic manifestation of this inconsistency and uncertainty lies in the presence of intercircuit conflicts.

liability annually. A system which imposes this obligation on the one hand and neglects, with the other hand, to inform the self-assessing taxpayer what standards are to apply in that process, should not be regarded as functioning in a proper manner. The tax law is not a little nook or cranny of technical esoterica. Rather it is, perhaps, the most pervasive of all aspects of the federal legal thicket. Every taxpayer must, each year, step to the line and say ‘this is my tax.’ It ill behooves the federal establishment to demand this obligation and yet not provide the clear guidelines for meeting that obligation.

1979 Tax Court Hearings, supra note 21, at 143 (statement of Meade Emory) (emphasis in original).

85. Caplin & Brown, supra note 52, at 361-62.
86. See 1979 Tax Court Hearings, supra note 21, at 39-40 (statement of Maurice Rosenberg).
87. See generally id. at 143-46 (statement of Meade Emory).
88. See generally 1979 ANNUAL REPORT, COMMISSIONER OF INTERNAL REVENUE FOR YEARS 1970-1982. Statistics published by the Commissioner indicate a drop in compliance with tax laws. The 1982 Report indicates that new programs which were established to catch tax invaders have been moderately successful.

89. See 1979 Tax Court Hearings, supra note 21, at 49.
90. Id. at 44 (statement of Mortimer Caplin).
91. Testifying at the 1979 Tax Court Hearings, Mortimer Caplin stated that Americans file approximately 90 million individual tax returns every year with only 20,000 I.R.S. agents able to audit 2 million returns. He concluded that much revenue is lost because it inadequate resources to police returns. Id. at 44. The number of individual tax returns filed has increased to over 95 million. 1982 ANNUAL REPORT COMMISSIONER AND CHIEF COUNSEL OF INTERNAL REVENUE, at 7 (1983).

92. Other factors producing uncertainty and the lack of uniformity of the tax laws include the following: (1) the Internal Revenue Code, see discussion, supra note 75; (2) the government policy of relitigation, see HRUSKA COMMISSION REPORT, supra note 24, at 349-54, see also Carrington, supra note 77, at 1104; Hellman, supra note 44, at 36 n. 29; (3) forum shopping, see STAFF OF THE JOINT COMMITTEE ON TAXATION, supra notes 62-63 and accompanying text; (4) divergence between position of Tax Court and the courts of appeals, see Golsen v. Commissioner, 54 T.C. 742 (1970), aff’d on other grounds, 455 F. 2d 985 (10th Cir.), cert. denied, 404 U.S. 940 (1971); and (5) the divergence between positions taken by the three types of trial forums.
The definition of intercircuit conflicts,\textsuperscript{93} although fugitive in nature, connotes: "... different interpretations of the same rule of national law, each of equal force within specified territorial limits."\textsuperscript{94} Different definitions of the term inevitably lead to different conclusions regarding both the extent and impact of intercircuit conflicts. The definition of intercircuit conflicts "should include substantial divergences in approach to a common legal problem as well as [an] outright conflict of holding."\textsuperscript{95}

The study of the extent and impact of intercircuit conflicts is not an exact science, but one of degree.\textsuperscript{96} The subjective element in determining the presence of an intercircuit conflict results in great disparity among the various estimates of the number of unresolved intercircuit conflicts at any given time.\textsuperscript{97} Intercircuit tax conflicts have a larger destructive impact on the judicial system than almost any other area of the law, for "no other branch of the law touches human activities at so many points."\textsuperscript{98} Whatever the actual number of intercircuit tax conflicts, a sufficient number exist to seriously impede the consistency of federal tax law.\textsuperscript{99}

The Intercircuit Tribunal establishes a mechanism precisely to resolve intercircuit conflicts, including tax conflicts. While the Tribunal may ultimately resolve the bulk of these conflicts, the inordinate delay in resolving them undermines the purpose of the Court's creation. K. Martin Worthy, former Commissioner of the Internal Revenue, in his testimony before the Hruska Commission, remarked that:

[f]or any given litigation there may be literally hundreds of thousands of cases, or even a million cases, pending on returns, in circuit, or in suspense, awaiting the final answer on the point. Often, it's not nearly

\textsuperscript{93} This note addresses the problems connected with intercircuit conflicts and not the problems connected with intracircuit conflicts, conflicts among the trial forums, nor conflicts among the Tax Court and the courts of appeals, which are altogether different inquiries.

\textsuperscript{94} \textit{HRUSKA COMMISSION REPORT, supra} note 24, at 217-18.

\textsuperscript{95} \textit{Id.} at 221.

\textsuperscript{96} Commenting on the nature of conflicts, Justice Frankfurter stated that despite any definition, questions of degree remain:

What constitutes a conflict? The answer to this question of course, imparts into the matter the whole of the lawyers' traditional technique of analysis and distinguishing of cases. The concept is not an exact one. One point may be stressed. The Court is interested in conflicts which impair uniformity of decision where uniformity is significant [citation omitted], conflicts which its decision in the particular case will remove [citation omitted]. This rules out, of course, hosts of particularistic applications of general rules turning upon the analysis of special states of fact [citation omitted]. But many questions of degree remain.

\textit{Frankfurter, Supreme Court at October Term, 1933, 48 HARV. L. REV. 238, 268-69 (1934).}


Estimates vary as to the magnitude of these intercircuit conflicts; they range from as few as a dozen up to several dozen a year. Whatever the precise magnitude, however, there seems to be a general agreement that there are a sufficient number of these conflicts to make worthwhile a mechanism for resolving them and that a mechanism does not exist in the overloaded Supreme Court. \textit{Compare} the findings of the \textit{Hruska Commission Report, supra} note 24, at 221 and app. B, concerning the number of conflicts with G. Casper & R. Posner, \textit{The Workload of the Supreme Court} 89-91 (1976).

\textsuperscript{98} Dobson v. Commissioner, 320 U.S. 489, 494-95 (1945).

\textsuperscript{99} \textit{See infra} note 103.
as important as how the point is resolved, as that it be resolved with reasonable promptness and with reasonable finality.100

While the Tribunal provides greater appellate review of tax conflicts than the Supreme Court presently provides, the underlying problem—interpretation of tax issues by multiple courts of appeals—still exists.101 Removing circuit court jurisdiction over tax cases and vesting this jurisdiction in a single court of tax appeals would eliminate intercircuit tax conflicts.102

A court of tax appeals would produce definitive resolutions of many tax conflicts which require national attention but are currently ignored.103 The quantum of tax litigation would eventually decline as increasing numbers of tax conflicts were resolved. An expert appellate tax court would develop a more stable body of tax law through a consistent approach to interpretation of the internal revenue laws.104 This consistency facilitates tax planning and the taxpayer self-assessment process.

Some scholars argue that benefits are derived from the “percolation” of issues among the various circuits.105 Percolation provides each circuit court with an opportunity to reconsider an issue already decided by another circuit free of the constraints of the doctrine of stare decisis.106 Theoretically this rehashing provides the Supreme Court with the benefit of a variety of views on an issue while preserving regional differences.107 The taxpayer and the courts, however, bear the cost of this benefit through delay in the resolution of national tax law.108 The

100. *Hruska Commission Hearings*, supra note 7, at 179.
101. *See supra* notes 11-22 and accompanying text.
102. *See supra* notes 60-61 and accompanying text.
103. Ernest Griswold amplified this in 1979:

   [T]here are a great many cases clearly worthy of review which the Supreme Court is simply unable to take and one consequence is that we have now in this country a massive system of discretionary justice. . . . By establishing a Court of Tax Appeals, we will provide a court, below the Supreme Court, which can make decisions which are nationally binding on federal tax cases . . . .

   *1979 Tax Court Hearings*, supra note 21, at 18, 25 (testimony of Ernest Griswold).
106. The present system beneficially permits a seriatim consideration of difficult tax questions. Assistant Attorney General Ferguson puts it best when he speaks of the present systems as providing an opportunity for reconsideration of an issue already decided by one circuit by another appellate court free of the constraints of the doctrine of stare decisis.

   *Id.* at 154-56.
107. *Id.* at 151. Opponents of a specialized court of tax appeals argue that the Supreme Court is a sufficient mechanism to provide uniformity of national tax law. Often, however, many years pass before the Supreme Court grants certiorari to provide a nationally binding precedent. In the interim, the taxpayer bears the cost of this delay in final adjudication of the tax law. *See supra* note 103 and accompanying text. The following chart indicates the delay period in final adjudication of tax conflict cases (not involving constitutional questions) decided by the Supreme Court during the October terms of 1980 and 1981.
presence of conflicting circuit decisions causes taxpayers in separate circuits to receive different treatment with regard to the same issue of law. In 1979, Professor Griswold warned that percolation of issues results in "continuing uncertainty, encouragement of litigation, and a premium on continued litigation."

Percolation does not necessarily produce better-reasoned tax opinions. The benefit to taxpayers of expedient and authoritative rulings on tax issues would outweigh any purported benefits gained from a lengthy percolation process.

The Intercircuit Tribunal does not discourage percolation of issues among the separate court of appeals; rather, it attempts to resolve conflicts by creating an additional appellate level. The establishment of a court of tax appeals would eliminate percolation of issues at the court of appeals level but allow for differences among the trial forums. This would shorten the percolation period for tax cases.

The uncertainty flowing from existing conflicts is augmented by the uncertainty created by potential conflicts—those that are anticipated

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109. 1979 Tax Court Hearings, supra note 21, at 68 (statement of Mortimer Caplin).

110. 1979 Tax Court Hearings, supra note 21, at 24 (statement of Erwin Griswold).

I am sure that the burden on the courts in this country would be considerably reduced if we had a system which would enable lawyers, both private and public, and judges of the lower courts, to know somewhat more definitively than is now the case what the law is.

111. See 1979 Tax Court Hearings, supra note 21, at 79-81 (statement of Mortimer Caplin), at 150-54 (statement of Meade Emory). See also Schaefer, supra note 81, at 453.
but have not yet manifested themselves in outright conflict. Although some scholars have downplayed the significance of potential conflicts, the Hruska Commission noted:

The lack of capacity for the definitive declaration of national law frequently results in uncertainty even though a conflict never develops. The possibility of a conflict, not knowing when a potential conflict will mature into an actual conflict, is yet another consequence of our present system. In many cases there are years of uncertainty during which hundreds, sometimes thousands of individuals are left in doubt as to what rule will be applied to their transactions.

The uncertainty regarding the ultimate meaning of the provisions of the Internal Revenue Code results in an inefficient and unproductive allocation of resources by both taxpayers and the Federal Government.

The Intercircuit Tribunal would have a de minimis effect in discouraging potential conflicts. The possibility that courts of appeals may interpret identical tax provisions differently breeds potential conflicts. The Intercircuit Tribunal does little to alter the structure which creates potential conflicts, other than to superimpose another court to resolve them. The Tribunal's failure to reduce the development of potential conflicts would encourage actual conflicts to develop and result in a higher general level of uncertainty.

A specialized court of tax appeals would eliminate many of the causes of potential conflicts and uncertainty by routing all tax appeals directly to a single court. Resolution of most tax conflicts and areas of uncertainty at the court of appeals level would reduce the lengthy "conflict resolution period", which currently provides fertile ground for divergent interpretations of Internal Revenue Code statutes and regulations.

112. See Wallace, supra note 3, at 926; Hellman, supra note 44, at 36.
114. Daniel J. Meador, Professor of Law at the University of Virginia, stated that "[u]ncertainty about the ultimate meaning to be given statutory provisions can make the work of lawyers and administrators difficult and more costly to the government." Meador, A Comment on the Chief Justice's Proposals, 69 A.B.A. J. 448, 449 (1983).
115. See Diagram 2.
116. See Del Cotto, supra note 52, at 30.
117. This note has identified factors which cause uncertainty in the tax field and it has examined their effects on the tax litigation system in a vacuum. A specific case study, an examination of the history of income tax consequences of conditional gifts, highlights the problems confronting the tax litigation system and places them in perspective. In 1982, the United States Supreme Court in Diedtrich v. Commissioner, 457 U.S. 191 (1982) held that a donor of a conditional gift received taxable income to the extent that the gift tax paid by donee exceeds the donor's adjusted basis in the property transferred. In short, the donor received income and assumed a tax liability. This issue was first litigated in 1968 in Turner v. Commissioner, 49 T.C. 356 (1968). The Tax Court, applying a donative intent analysis, held that the transfer produced no taxable income to the donor. This decision was affirmed per curiam by the Court of Appeals for the Sixth Circuit, aff'd per curiam 710 F.2d 752 (6th Cir. 1989). Five years later the government relitigated the same issue in Johnson v. Commissioner 59 T.C. 791 (1973), and persuaded the Court of Appeals for the Sixth Circuit to reject the Turner donative intent analysis and apply a part-sale part-gift analysis which resulted in income to the donor 495 F.2d 1079 (6th Cir.),
TAX SPECIALIZATION

The recent enactment of the Court of Appeals for the Federal Circuit[118] and the success of other specialized courts[119] indicate that the validity of traditional arguments against specialization has considerably lessened.[120] Critics of specialization have often excepted the area of taxation because of its unique statutory nature and the absence of demonstrable benefits from the percolation of issues among the circuits.[121] Mortimer Caplin recently stated that "[c]areful analysis strongly indicates that the dangers of over-specialization have been exaggerated and that, on balance, a court of tax appeals would be best served by judges who are to some degree specialists in tax matters."[122]

Proponents of the Intercircuit Tribunal emphasize that Tribunal judges would develop an expertise in statutory interpretation through frequent exposure to tax cases.[123] Through the use of rotating panels of circuit judges and a caseload encompassing multiple areas of federal statutory law, the Tribunal attempts to retain the concepts of generalist courts and generalist judges which are considered essential to maintaining a leavening effect between tax and other areas of the law.[124]

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[118] See discussion supra note 12.
[119] Two examples are the United States Court of Military Appeals and the Temporary Emergency Court of Appeals. See Griswold, Cutting the Cloak to Fit the Cloth, 32 CATH. U.L. REV. 805-06 nn. 54-57 (1983).
[120] See 1979 Tax Court Hearings, supra note 21, at 150-60 (statement of Meade Emory).
[121] Posner, supra note 27, at 782.
[122] Caplin & Brown, supra note 52, at 363.
[123] See Leventhal, supra note 25, at 914.
[124] It is also said that the deflection of complex tax cases not raising constitutional issues would permit the Supreme Court to focus its energies on cases more crucial to the proper function-
While Tribunal judges would develop an increased familiarity with tax law, their knowledge would be in coming "up to snuff" in the field rather than acquiring a substantial tax background enabling them to contribute to the development of tax law. Tribunal judges would simultaneously hear non-tax cases, delaying their familiarization with tax law.ironically, the proposed three-year term for Intercircuit Tribunal judges would force a judge to leave the court at approximately the time he has become competent to contribute to cohesive and progressive tax law. Furthermore, the present Intercircuit Tribunal proposals, with shifting panels of circuit judges carrying dual caseloads, attempts to maintain the concept of generalist judges. Critics of this staffing method assert that the random panels of Tribunal judges contribute to the instability and uncertainty which the Tribunal is designed to alleviate. This instability and uncertainty could be avoided by altering the composition of the Court to consist of seven or nine permanent judges, although this sacrifices the concept of generalist judges. Also, the Tribunal's caseload would consist largely of statutory interpretation in complex, highly regulated areas; a diet inconsistent with a generalist court.

By staffing the Tribunal with shifting panels of judges and providing it with a specialized caseload, proponents of the Tribunal have simultaneously failed to take full advantage of the benefits of specialization and forewarned the benefits of a generalist court. The Intercircuit Tribunal is, in effect, a poorly designed specialty court and an example of a legislatively forged compromise which could prove disastrous if enacted.

An often-voiced objection against specialized courts is that such
A New Court of Tax Appeals

A New Court of Tax Appeals will lose sight of regional considerations because it has subject-matter jurisdiction, rather than geographic jurisdiction.\textsuperscript{130} Theoretically, a tax court centered in Washington, D.C., whether or not “riding circuit”, could not adequately appreciate the special considerations inherent in tax decisions which sometimes justify disparate treatment among taxpayers residing in different circuits.\textsuperscript{131} This argument has little relevance today with the present roulette system of tax litigation involving multiple courts of entry and appellate courts which often carry tax problems far from their geographical origin.\textsuperscript{132} In fact, the enactment of either an Intercircuit Tribunal or a Court of Tax Appeals would not structurally affect the present system in regard to the geographical district courts or the already specialized Tax Court and Claims Court.\textsuperscript{133} Presently, most tax appeals originate in the Tax Court, a specialized court with no unique competency in matters of local law.\textsuperscript{134} If preserving regional differences is desirable, the remedy lies in tightening jurisdiction and venue provisions,\textsuperscript{135} not in opposing the enactment of a Court of Tax Appeals. Furthermore, the creation of such a court will obviate many of the reasons corporate taxpayers and the government engage in forum shopping.

The Freund Commission recognized as early as 1972 that otherwise valid arguments against specialization may be misleading within the area of taxation.

[A] case might be made for a specialized administrative court of appeals, national in scope, in one or more fields. Federal taxation, because of the complexity of the subject, the volume of litigation, and the urgent need to resolve uncertainties and conflicts in the interest of both taxpayers and Treasury, may be deemed a particularly appropriate subject for a specialized court of appeals.\textsuperscript{136}

\textbf{CONCLUSION}

The numerous and recurring proposals for a new appellate tax court over the past fifty years have all met an untimely death, in large

\textsuperscript{130} See, e.g., \textit{id.;} Schaefer, \textit{supra} note 81, at 454 (1983).
\textsuperscript{131} See \textit{1979 Tax Court Hearings, supra} note 21, at 154.
\textsuperscript{132} \textit{id.} at 155.
\textsuperscript{133} See Diagrams 2 and 3.
\textsuperscript{134} See \textit{1979 Tax Court Hearings, supra} note 21, at 156.
\textsuperscript{135} This raises a critical issue which ultimately will have to be addressed: whether the number of trial forums for tax cases should be reduced. One alternative would be to require all federal tax litigation to commence in the Tax Court, although this would remove taxation from the generalized court system. Martin Ginsburg, Professor of Law, at Georgetown University Law Center, stated recently:

Replacing the present trifurcated trial system with a single specialist court of first-instance tax jurisdiction would further promote uniformity of interpretation and decision. But the issues here are more turbulent . . . . A cautious champion will reserve consideration of the trial level for another day and focus on revamping the appellate system.

Ginsburg, \textit{supra} note 52, at 77.
\textsuperscript{136} Freund Committee Report, \textit{supra} note 23, at 585.
part due to the strong opposition of the organized tax bar. The Tax
Section of the New York State Bar Association was the first to break
tradition and publicly support a unified appellate tax court in 1972, and again in 1979. Other bar associations have since joined in the
call for such a court. The major historical justification cited by the
American Bar Association for opposing a court of tax appeals concerns
the effect of specialization of courts and judges on the development of
tax law, and the "drastic" nature of the structural reform in relation
to the problems in federal tax litigation. Predictably, however, crit-
ics of a court of tax appeals have recently acknowledged the urgency of
the problem and the need for change, but still disagree as to the proper
solution. The Tax Section of the American Bar Association now

137. See Miller, supra note 43, at 230-33 (describing the immediate and forceful opposition of the
Tax Section of the ABA to Professor Griswold's 1944 proposal for a court of tax appeals).
138. In 1972, the Committee on Tax Policy of the New York State Bar Association issued a report
to the Executive Committee of the Tax Section of the New York State Bar Association
clearly supporting the creation of a court of tax appeals. See Roberts, Friedman, Ginsburg,
Complexity Report]. The Executive Committee approved the report "in various respects" in
May of 1972. See 1979 Tax Court Hearings, supra note 21, at 289.
139. On Sept. 26, 1979, the Tax Section of the New York State Bar Association submitted a report to the
Subcommittee on Judicial Machinery of the Senate Committee on the Judiciary strongly
urging the establishment of a United States Court of Tax Appeals. See 1979 Tax Court
Hearings, supra note 21, at 302 (New York State Bar Association
Tax Section Report).
140. In 1972, the Committee on Tax Policy of the New York State Bar Association issued a report
141. See id. at 289. The Complexity Report was endorsed by the State Bar of Texas (Tax Section)
on Mar. 23, 1973, the Association of the Bar of the City of New York on April 12, 1973, and
the American Institute of Certified Public Accountants (Federal Tax Division) on Dec. 6,
1973. Id. The Oregon State Bar Association (Tax Section) endorsed a Court of Tax Appeals
on Sept. 26, 1979. See id. at 235 (Letter from G. Goldstein on behalf of the 'Tax Section of the
Oregon State Bar Association to Senator Max Baucus, D-Mont.).
142. 1979 Tax Court Hearings, supra note 21, at 108. "Surely before trying to rearrange or adjust
the system to remedy this so-called evil in the intercircuit conflicts, we should try to find out
if the system is really not working properly." (testimony of Charles M. Walker, on behalf of
the Section of Taxation of the ABA).
143. See, e.g., Wallace, supra note 3, at 932-34. Judge Wallace agreed that reform is necessary,
and that the proponents of a national court of appeals "have not proved their case," but
rejected the specialized courts except in "areas of the laws in which unacceptable conflict,
supports the Intercircuit Tribunal bills currently under consideration in various congressional committees\textsuperscript{144} as the only acceptable structural tax reform.\textsuperscript{145} This note, as well as other recent articles,\textsuperscript{146} has demonstrated that the proposed Intercircuit Tribunal/national court of appeals structure is "an inadequate response to the defects in the present system of appellate tax justice."\textsuperscript{147} A new United States Court of Tax Appeals should be enacted as an initial step in cleaning up the long neglected tax litigation system.

\textit{J. Patrick Galvin, Jr.*}

\textit{Peter J. Reilly**}

\footnotesize{together with other significant and decisive factors, produces an intolerable burden on both the federal judiciary and the parties subject to conflicting rules." Judge Wallace did not view taxation as an area suitable for a specialized court.}

\textsuperscript{144} See S. 645 and H.R. 1970, supra note 5.

\textsuperscript{145} See Hruska Commission Hearings, supra note 7, at 180-81 (testimony of K. Martin Worthy).

\textsuperscript{146} See, e.g., Wallace, supra note 3, at 932; Handler, supra note 3, at 19-20.

\textsuperscript{147} 1979 Tax Court Hearings, supra note 21, at 314 (conclusion of New York State Bar Association Tax Section Report regarding the need for a court of tax appeals).
