LITIGATION FLOW IN THREE UNITED STATES COURTS OF APPEALS

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United States courts of appeals were created over four decades ago to help the Supreme Court enforce the supremacy and uniformity of federal law. Until recently, however, their actual operations and functions in the American polity have received scant description and analysis (Carington, 1969: 542; Dolbeare, 1969: 373-404; Goldman and Jahnige, 1971; Richardson and Vines, 1970; Schick, 1970). This paper is a preliminary report of data gathered to assess the roles of the U.S. Courts of Appeals for the District of Columbia, Second, and Fifth Circuits in the federal legal system.[1] The report will: (1) describe the business of the three tribunals, (2) compare decisional patterns among them and the Supreme Court in the same cases, and (3) explore relationships among trial courts, intermediate courts, and the Supreme Court in the flow of federal litigation.

The basic goal of the research is to determine, at least formally, what the three courts of appeals decided in the federal judicial system. From the time a case is initially filed in a federal district court or agency to possible Supreme Court review and response, we shall assume that federal litigation flows through a decisional system containing multiple points of potential termination. A case may terminate for myriad reasons in or out of any court. A case also may pass through successive cycles of decision and appeal before completion. But we shall make the simplifying assumption that each case in this sample is an independent unit in one cycle of litigation from district courts or agencies to the Supreme Court in order to estimate the

extent to which the three intermediate tribunals became courts of last resort in the litigation. A short-hand expression for that is finality, which is the stage at which a judicial decision becomes officially binding on the parties because it either is not appealed or is upheld.

This procedure, to be sure, offers no escape from subjectivity in classification or from the vagaries of analyzing influence. No commonly accepted definition of finality exists; nor does the concept differentiate the indeterminate causes that may explain it. Moreover, rates of appeal and reversal are inevitably static and partial estimates of finality, because analysts lack resources to track large samples of decisions through every stage of continuing adjudication, not to mention less formal chains of causation or compliance. Danger also lurks in interpreting results. To assume that the legal system is a democracy of numbers in which all cases are equal is to invite exaggeration of both the discretion and the workloads of lower courts.

Nevertheless, as the work of Richardson, Vines, and others suggests, establishing patterns of formal decisions in the stream of litigation is a useful way to analyze the functions of intermediate appellate courts (Richardson and Vines, 1970: 126-41, 150-56; Dolbeare, 1969: 390-95). Clarifying what happens in the same cases at different judicial levels provides more precise descriptions of the business of federal courts than usually prevail in the literature. It also permits comparison of judicial behavior at different levels as well as analysis of intercourt relationships in the same litigation. The object of this effort was to obtain hard data against which to compare role perceptions of circuit judges.

Most studies of litigation flow in federal courts have analyzed selected labor, civil liberties, or urban policy decisions with district court antecedents. This study examines a sample consisting of all non-consolidated cases, including administrative appeals, reported as having been decided by the three circuit courts during fiscal years 1965, 1966, and 1967. That means 4,135 cases published in the *Federal Reporter* plus 806 unpublished cases obtained from the Administrative Office of U.S. Courts (AO) — a total of 4,941 cases.[2]

To determine what litigation the three courts of appeals controlled, it is necessary to know: (1) the decisions appealed to and reversed by each circuit court, and (2) the decisions appealed to and reversed by the Supreme Court *in the same cases.*

I stress *in the same cases,* because it came as a jolt to discover that current reporting systems do not yield ready answers to the question of who decides what cases as they flow through the system. No compilation exists of the number of original agency adjudications necessary to infer rates of appeal to the circuits. Rates of reversal also present problems. Over 16% of these circuit decisions, including 40% of the D.C. Circuit's cases, were not published in the *Federal Reporter* (*see* Mendelsohn, 1969: 86). The AO *Annual Reports,* while well designed to show the caseloads of federal courts, do not emphasize judicial behavior. The agency neither reports reversal rates by the Supreme Court nor connects circuit reversals to tribunals below. It is virtually impossible to tell from AO reports who supports whom in what fields. Since each level has a separate docketing system, analysis of workflow usually rests on the convention that all cases decided by federal courts in any fiscal year are the same cases, which ignores delay and variegated growth in caseloads of up to 20% annually (*see* Brown, J., *N.L.R.B. v. Local* 990, *Amalgamated Clothing Workers,* 1970). Though this convention turns out to have produced less distortion than originally feared, the AO also does not publish information concerning specific subjects disposed of by appellate courts or the judges involved, which were essential to link judicial perceptions and behavior. To meet these research objectives, as well as to make an independent investigation of litigation flow freed from the convention of simultaneity, it became necessary to trace the disposition of each case in both the courts of appeals and the Supreme Court and to match them on a computer. No attempt was made to discover who had the final word after one cycle of appeal.

I.

The first task is to describe briefly the business of the three courts of appeals. Table 1 provides the gross caseloads and the criminal portion of each circuit court during fiscal years 1965-67. Habeas corpus petitions, following AO practice, are considered civil actions. Note that the Fifth Circuit had almost as much volume as the other two circuits combined. Together, the three circuits handled approximately 40% of all cases disposed of by the eleven courts of appeals after hearing or submission of briefs. By 1970, in fact, the 15 judges of the Fifth Circuit alone decided almost one-fourth of the cases disposed of after hearing or submission in U.S. circuit courts.[3]

TABLE 1: CASELOAD BY CIRCUIT

Circuit	1965	1966	1967	Total	% Criminal
D.C.	457	468	411	1,336	39.0
Second	430	445	482	1,357	21 7
Fifth	669	727	852	2,248	16.1
Sums	1,556	1,640	1,745	4,941	23.8

Three things become noteworthy when these data are considered in conjunction with AO reports on the nature of circuit cases disposed of after hearing since 1950. First, civil litigation, which constituted three-fourths of this sample, dominated the dockets of the three circuits and of courts of appeals generally. But, second, there have been major shifts in appellate business over time. For example, criminal appeals for all circuits rose from 10.6% of total volume in 1950 to 28.9% in 1970, while "private civil" remained substantially unchanged (42.1% to 40.7%). Criminal justice is no longer a minor courts of appeals function. If prisoner petitions are taken into account, 35.8% of this sample dealt with criminal disputes. Third, although the rising criminal trend is reflected in all three circuits, there are significant variations among them. In our data the D.C. Circuit's 1967 rate of criminal appeals (39.0%) was far higher, and the Fifth Circuit's rate of 16.2% was lower, than the AO's rate of criminal appeals for all circuits (22%). Indeed, AO data shows that the D.C. Circuit's rate of criminal appeals jumped dramatically in one generation — from only 7.1% of its total volume in 1950 to 56.2% in 1970 — while its "private civil" rate fell from 47.1% to 16.3% (Administrative Office of the U.S. Courts, Annual Report of the Director, 1950: 128; 1970: 210).[4] It goes too far to suggest a displacement of roles for any circuit court. Comparisons among circuits and over time nonetheless suggest that federal appellate courts are better reflexes of society than is sometimes supposed (*cf.* Frankfurter, J., in *Dennis v. United States,* 1951).

A related comparison concerns who uses the courts of appeals. Table 2 distinguishes the appeals according to governmental, nongovernmental, and other (usually missing information) categories of litigants which appeared in the case citations. These data underscore the theme that the three courts of appeals, though forums for private litigation, serve primarily to enforce federal law. The U.S. government, both as appellant and appellee, was their prime consumer. The federal law enforced, moreover, was largely statutory in character. Classified by subject-matter, only 9.3% of this litigation involved con-

stitutional questions while 62.5% involved statutory or federal rules questions. Appeals from administrative agencies, half of them from the N.L.R.B. and U.S. Tax Courts, constituted only 12.8% of the total sample. However important administrative review may be politically, that function rests on a select sampling of administrative disputes.

TABLE 2: GOVERNMENTS AS PARTIES TO LITIGATION (APPELLANT OR APPELLEE, N = 4,941)

Circuit	None %	U.S. %	State %	Other %	Total N	Total %
D.C.	28.2	70.5	1.0	0.2	1,336	100.0
Second	39.9	51.7	8.0	0.4	1,357	100.0
Fifth	36.2	48.5	14.4	0.9	2,248	100.0
Sums	35.1	55.3	9.0	0.6	4,941	100.0

These characteristics of federal appeals have basic implications for analysis of judicial policy functions. One is that recognition of the resistance-potential of lower federal courts should not obscure the underlying premise that *both* Congress and the Supreme Court depend on these tribunals for enforcement of federal policy. Innovation by either is difficult to imagine without their support (*cf.* Murphy, 1959: 1017-31; McGowan, 1969: 11-18). Another implication is that intermediate federal courts have acquired new roles in national law enforcement without discarding old, private-law responsibilities. For chronically overloaded circuits, one or the other may have to give.

Table 2 also reveals variations among the three circuits which tend to confirm traditional functional descriptions. That is, the D.C. Circuit is primarily a U.S. government tribunal having little to do with states, though in one-fourth of its business in this period it served uniquely as the equivalent of a state supreme court for the District of Columbia. The Second Circuit tended to have a larger share of private litigation. The Fifth Circuit had the largest share of cases involving states or state agents as parties. To determine whether the three circuits concentrated on different subjects, Table 3 classifies the litigation according to 12 broad fields which summarize 62 subjects in the original data.

At first glance, the spread of business within the three circuits appears remarkably even; but closer analysis supports conventional wisdom about their differences. There are some surprises, too. As expected, the Fifth Circuit had the largest share of personal status cases while the D.C. Circuit had relatively little tax litigation and the heaviest concentration of

TABLE 3: THE BUSINESS OF THREE CIRCUIT COURTS

	D.C. N = 1,336 %	Second N = 1,357 %	Fifth N = 2,248 %
Contracts	10.3	9.3	12.9
Torts	7.1	13.8	14.8
Commerce	13.8	16.3	9.1
Labor	7.3	11.5	10.8
Taxation	2.5	10.8	12.4
Personal Status*	9.1	12 9	23.0
Crimes against Persons	8.8	0.3	0.2
Crimes against Property	18.7	5.5	6.8
Morals Offenses	6.9	9.4	1.8
Miscellaneous Crimes	1.4	2.7	1.1
Local	4.0	0.0	0.0
Other	10.2	7.6	6 9
Sums	100.0	100.0	100.0

* "Personal Status" includes civil rights, immigration, and suffrage cases, plus prisoner petitions.

crimes against persons and property. Yet the Second Circuit heard relatively more morals offenses (mainly narcotics) than the others and concentrated less on tort and contract cases than anticipated from its reputation as the nation's "top commercial court" (*see* Frank, 1951: 92; Schubert, 1965: 62). Despite the Fifth Circuit's disproportionate share of civil liberties claims, that court as well as the Second Circuit had more cases concerning economic issues than personal status and crimes. Similarly, the D.C. Circuit dominated appeals from the FCC (60 of 61), CAB (24 of 25), and other regulatory agencies while the Second Circuit and Fifth Circuit carried a larger burden of appeals from the NLRB, Tax Courts, and Immigration and Naturalization Service.

Location and social conditions probably account for these differences, just as the D.C. Circuit's monopoly of rape and FCC licensing cases can be attributed to its special jurisdiction. Still, more than location and jurisdiction are required to explain intriguing variations which appear within specific subjects. Why, for instance, did the D.C. Circuit have no bankruptcy or selective service appeals? Why did the Fifth Circuit have such a large workload in the fields of insurance, social security, and workmen's compensation? Why did the Second Circuit have the smallest share of patents? Interview data suggest ideological explanations, such as the hospitality of Texas courts to workmen's compensation awards and the relative inhospitality of the Second Circuit to patents.[5] Our space and sampling are too brief to confirm such answers, but they sustain one warning: Beware of generalization about *the* policy role of courts of appeals. Regionalization of appellate structures, for some sub-

jects at least, may well mean regional specialization and regionalized national law.

II.

The authority of courts of appeals depends at the threshold on their opportunity to exercise control over federal adjudication and the extent to which they become courts of last resort. What proportions of federal litigation were appealed to them, and how were these appeals decided by the three circuits and the Supreme Court? Incomplete reporting of original agency adjudications makes impossible accurate estimates of the rates of appeal to circuit courts. If we apply the usual convention to AO data for district courts only, however, we find that of 13,406 trials completed in the three circuits during this period, litigants appealed 48.7% (N = 6,525) to the circuit courts. Thirty percent (N = 4,039) reached disposition after hearing by the circuit courts, which reversed 6.6% (N = 881) of trials completed or 21.8% of appeals disposed of after hearing or submission (Shapiro, 1968: 262).[6]

Table 4 reports how the circuit courts decided all appeals in our sample. The "Mixed" category includes decisions affirmed in part and reversed in part. "Avoid" means the issue on appeal was avoided, usually by procedural techniques. "Other" is a residual category for appeals that were dismissed or had missing information. Although Table 4 includes appeals from administrative agencies as well as from district courts, the reversal rate 21.1% is similar to the estimate for district courts only. Together these estimates of appeal to and reversal by the circuit courts show that district courts and agencies formally decide a large majority of federal adjudications.

TABLE 4: CIRCUIT COURT DECISIONS

Circuit	Affirm %	Mixed %	Reverse %	Avoid %	Other %	Total N	Total %
D.C.	68.9	2.9	19.6	3.6	4.9	1,336	100.0
Second	73.6	5 8	17.2	1.7	1.6	1,357	100.0
Fifth	63.9	6.0	24.4	1.5	4.3	2,248	100.0
Sums	67.9	5.1	21.1	2.1	3.7	4,941	100.0

Though litigants appealed up to half of the district court decisions in this period, the courts of appeals reviewed less than a third of them after hearing and disturbed only about one-fourth of those they heard.

The opportunity of circuit courts to interpret national law, while substantial, is therefore limited to a select group of cases whose character largely depends on the strategic choices of liti-

gants and tribunals below. To enforce uniformity of law within the circuits, moreover, circuit judges appear to rely heavily on informal controls such as precedent, professional socialization, anticipated reactions, and ideological unity as distinct from the formal hierarchial control of reversal. That circuit courts heard less than one in every three cases and affirmed three appeals for every one they disturbed suggest that these mechanisms do produce considerable policy cohesion within circuits. At the same time, the Fifth Circuit was more likely to reverse than the other two.

Gross affirmance and reversal rates thus tell us something about the range of appellate opportunity, the cohesion within circuits, and the frequency of formal decisional controls. Even so, a simple reversal rate is a fairly crude measure of appellate-lower court relationships. For one thing, it reveals nothing about the *form* of decision. Only one-half of these decisions received full opinions; one-third were disposed of per curiam and the remainder without published opinions. One percent were in forma pauperis. Only 1.4% had amicus briefs. Less than one percent ($N = 42$) were en bancs. Even formally, all cases are not equals. Nor are circuit courts, to whom appeal is by right, devoid of means of docket control. Their ability to consolidate cases, to define issues, and to reduce the number of cases having doctrinal potential gives them significant roles in "gatekeeping" and filtering federal appeals.

Second, a simple reversal rate obscures *other dimensions of disagreement* among adjudicators. The overall rate of nonunanimous decisions in the three courts was 8.3%, with the D.C. Circuit leading the pack (15.5%), the Second Circuit in the center (8.5%), and the Fifth Circuit trailing far behind (3.9%). The average dissent rate for judges was 3.1% (*cf.* Goldman, 1968: 461).[7] Among high dissenters were Miller (23.4%), Bazelon (14.2%), Wright (11.5%), and Burger (9.4%) in the D.C. Circuit. Among the lowest were Coleman (1.0%), Tuttle (0.5%), and Wisdom (0.4%) in the Fifth Circuit. It is remarkable that during three years of the turbulent 1960's, Judge Elbert P. Tuttle dissented only three times in 611 cases while Judge John Minor Wisdom dissented only twice in 527. Further, in contrast to the conclusion of Richardson and Vines that transformation of issues is a prime function of the intermediate appellate courts, only 6.5% of these circuit opinions offered any evidence that trial and circuit judges defined the issues differently (Richardson and Vines, 1970: 127-129).

Third, a simple reversal rate tells little about the *source* of appeals. We expected and found broad variations in appeals from and reversal of district courts, such as those publicized in the Carswell nomination fight (*see e.g., Cong. Rec.-Senate,* 1970, S4361-34). Agency decisions also were affirmed at a lower rate (56.4%) than district court (69.3%) decisions.

Fourth, a simple reversal rate tells little about *subject matter.* Labor decisions in this sample were affirmed the least (58.4%); morals offenses and crimes against property were affirmed the most (84.3% and 81.1% respectively). Contrary to popular expectations, there was a lower reversal rate for criminal (14.5%) than for civil (23.3%) appeals. This was no less true for the District of Columbia Circuit where so much controversy developed over criminal appeals.[8]

Finally, a simple reverse rate does not reveal the *degree of finality* of appellate decisions. It fails to distinguish flat reversals, which officially preclude further lower court discretion, from remands, which often leave some degree of lower court discretion intact. Given the special opportunities for resistance by lower courts after remand, we distinguished remands from flat affirmances, reversals, and other disposition of the caseload in Table 5.

TABLE 5: CIRCUIT COURT FINALITY

Circuit	Affirm %	Reverse %	Remand %	Other %	Total N	Total %
D.C.	68.7	8.8	18.6	3.8	1,336	100.0
Second	73.1	7.4	13.6	5.9	1,357	100 0
Fifth	63.1	7.1	24 5	5.3	2,248	100.0
Sums	67.4	7.7	19.9	5.1	4,941	100.0

Since most remands are reversals, and vice versa, the primary result of distinguishing flat decisions from remands is a sharp drop in the reversal rate from 21.1% to 7.7%. Admittedly, this estimate of finality rests on the not-always-valid assumption that remand preserves some discretion in lower courts. Yet the use of remands was higher in civil (21.9%) than in criminal cases (13.5%), higher also in cases from district courts (20.8%) than from federal agencies (16.3%), and higher in the Fifth Circuit (24.5%) than in the D.C. (18.6%) or Second Circuits (13.6%), all of which may signify appellate tactics at work. By reminding us of the opportunity that often does pass to lower courts after appeal, the estimate alters the picture of appellate power implicit in flat reversal rates within hierarchical models. When we recall that the great majority of

cases are never litigated or appealed in the first place, the finding that 87.3% of the appeals in this sample were either affirmed or returned for further consideration reinforces a "bottom-up" view of decision-making in the federal legal system (Dolbeare, 1969: 391). It also highlights the use of remands as an appellate technique. Tribunals below are seldom flatly overruled.

Now let us contrast these circuit decisions with their fate in the Supreme Court. Table 6 distinguishes circuit decisions which were not appealed from those which were appealed and declined or accepted by the Justices. (To account for two circuit cases that were unconsolidated by the Justices and two that were consolidated but treated separately with appeals from other circuits, the total number of circuit decisions becomes 4,945.)

TABLE 6: SUPREME COURT REVIEW OF CIRCUIT DECISIONS (N = 4,945)

	Total		Declined			
			No Appeal or	Dismissed	Granted	
Circuit	N	%	%	%	%	(N)
D.C.	1,337	100.0	88.3	10.5	1.3	(17)
Second	1,359	100.0	70.3	26.7	2.9	(40)
Fifth	2,249	100.0	80.3	18.2	1 6	(35)
Sums	4,945	100.0	79.7	18.4	1.9	(92)

The most striking pattern is how little direct supervision the Justices exercised over the three courts of appeals. Litigants appealed 1,004 or 1-in-5 of these circuit decisions to the Supreme Court, which granted certiorari in 9.2% of those appealed. Discounting 11 dismissals, the court intervened in 92 cases or 1.9% of the entire sample of 4,945 cases.

This tiny portion, it should be noted, is close to the result reached by using AO reports.[9] The rate of appeal to the high court (20.3% of the sample or 30.4% if we adjust for consolidation and certiorari petitions without circuit citations) was far higher than the classic hunch estimate of 10%. The Court's decisions also confirm the expectation that Justices grant certiorari primarily to reverse decisions below. Table 7, which presents the Supreme Court's decisions according to the same categories as in Table 4 for the circuits, including "Other" cases, shows that the Supreme Court disturbed more than two out of three decisions it heard. This disturbance rate was triple that of the three circuits.

Similar contrasts prevail across a wide spectrum of decisional characteristics. Including "Other" cases for consistent

TABLE 7: SUPREME COURT DECISION IN CIRCUIT CASES REVIEWED (N = 103)

Circuit	Affirm N	Mixed N	Reverse N	Avoid N	Other* N	Total N
D.C.	3	1	13	0	1	18
Second	11	0	28	1	8	48
Fifth	11	4	20	0	2	37
Sums	25	5	61	1	11	103

* Assorted dismissals

comparison (N = 103), the rate of decision by full opinion (60%) was slightly larger than in the circuits (50%). The in forma pauperis rate was 12.6% compared to 1.0% for the circuits. Amicus briefs appeared in 27.2% as compared to 1.4% for the circuits. Dissents occurred in two-thirds of the cases as compared to 8.3% for the three circuits. Unexpectedly, the Second Circuit had a disproportionate share of its original decisions appealed, accepted, and reversed. The D.C. Circuit, however, fared worse after certiorari was granted. That court had four reversals for every affirmance as compared to over 2-to-1 for the Second Circuit and almost 2-to-1 for the Fifth Circuit. As expected, the Supreme Court had a higher mix of constitutional questions (32%) than the three circuits (9.3%), relatively more criminal cases (30%) than the circuits (23.8%), and a larger share of administrative appeals (22.3%) than the circuits (12.8%). Of the 33 constitutional cases, 25 concerned criminal procedure, only four involved the first amendment, and not one involved elections or civil rights. In cases rising through the three federal circuit courts during this period, the Warren Court clearly concentrated on economic regulation and criminal law.[10] And unlike circuit practices, the Justices affirmed only one criminal case.

These contrasts among circuit and Supreme Court decisions run counter to casual assumptions that intermediate appellate courts are mirror images of Mt. Everest. A comparison of the business of the Supreme Court and the three circuits combined in Table 8 is also at odds with the popular notion that the Warren Court in this period was essentially a civil liberties tribunal. Over half of the Court's cases from these circuits were economic in character, not counting ten criminal cases in taxation and commerce. Though that distribution resembled the circuits', the Court came closer to mirroring their business within personal status and criminal categories than within the economic sector. The Justices decided both a lower rate of contract and tort cases than the circuits and a surprisingly higher portion of commerce and tax cases.

TABLE 8: COMPARISON OF APPELLATE COURT BUSINESS

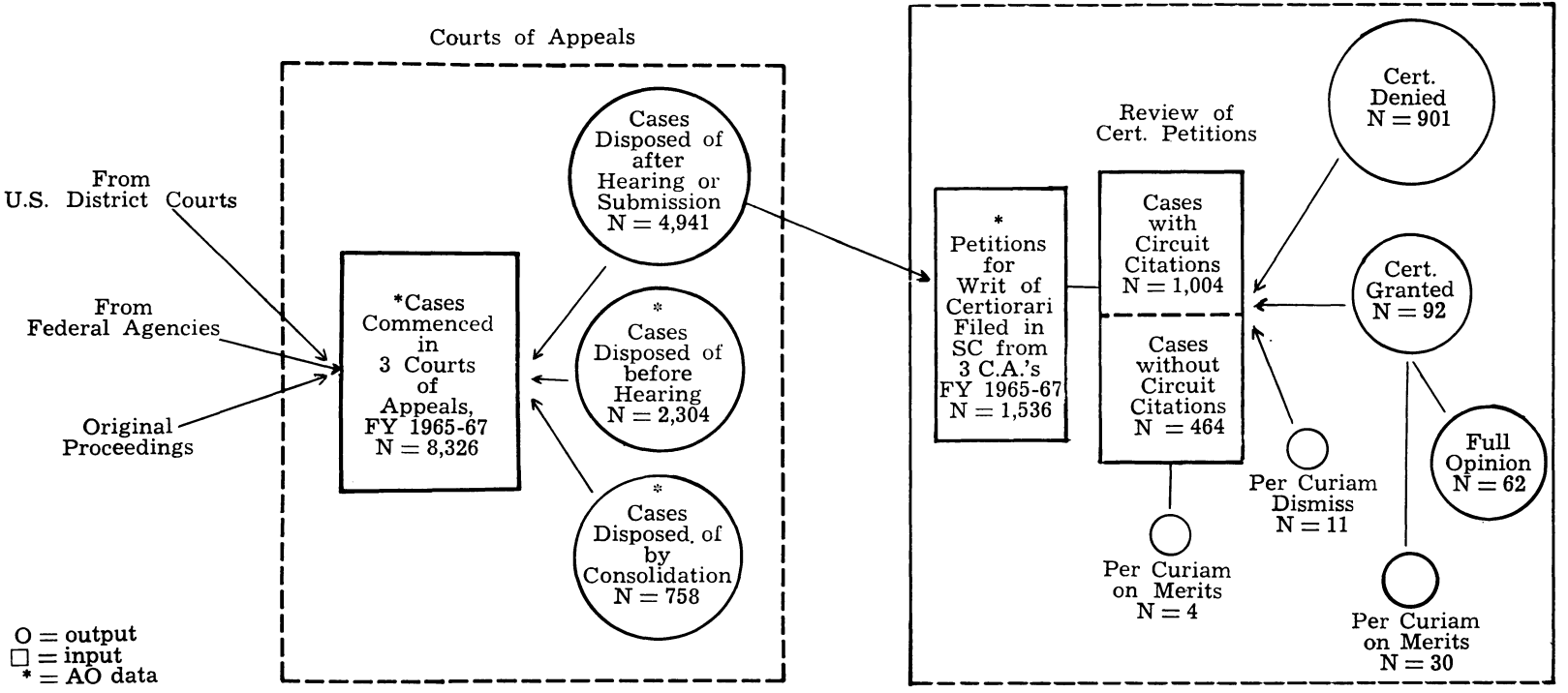
	Three Circuits		Supreme Court	
	N	%	%	N
Contracts	554	11.2	3 9	4
Torts	615	12.4	8.7	9
Commerce	613	12.4	27.2	28
Labor	497	10.0	6.8	7
Taxation	459	9.3	14.6	15
Personal Status	814	16.5	15.5	16
Crimes against Persons	125	2.5	0.0	0
Crimes against Property	477	9.7	8.7	9
Morals Offenses	261	5.3	2.9	3
Miscellaneous Crimes	81	1.6	5.8	6
Local	54	1.1	0.0	0
Other	395	8.0	5.8	6
Sums	4,945	100.0	100.0	103

The upshot is uneven supervision of circuit courts by the Justices, which suggests a division of labor among appellate tribunals that needs to be explored (*see* Shapiro, 1964). For three years, these courts of appeals were left to their own devices in broad ranges of litigation. The Justices exercised no review at all over their treatment of insurance and marine contracts, workmen's compensation, fair labor standards, parole, social security, suffrage, and school desegregation. The Justices heard only one appeal in negotiable instruments, patents, and copyrights. Their remand rate (34%) was also twice as high as the circuits'. Notwithstanding the high court's propensity to reverse, the Justices intervened so rarely and selectively in these federal appeals that controls on the discretion of circuit judges would appear to depend less on fear of formal reversal than on the informal constraints embodied in the notion of "judicial role." Interviews with 35 judges from the three circuits support that inference; Supreme Court review looms as too irregular for rotating circuit judges to worry greatly about reversal or second-guessing Justices.

These conclusions are bolstered by the flowchart in Figure 1, which summarizes the formal finality of circuit decisions in this cycle of federal appeals. We have found that the three courts of appeals affirmed 67.9% and disturbed 26.2% of 4,941 decisions in three fiscal years. Over one-fifth of the sample was appealed to the Supreme Court, which accepted one-in-ten of those appealed and disturbed two-in-three of those granted certiorari. Of 4,945 circuit decisions, the Supreme Court exercised direct control over 1.9%, affirming 0.5%, and disturbing 1.4%. In effect, the three tribunals became courts of last resort in 98.1% of the cases and made decisions that formally prevailed in 98.6%.

These frequencies, of course, do not mean that circuit

Figure 1: FEDERAL APPEALS FLOW CHART: D.C., SECOND & FIFTH CIRCUITS



judges were 49 times more influential over federal appeals than the Supreme Court. Just as intermediate appellate courts are highly dependent on litigants and tribunals below, so are they theoretically bound by other Supreme Court decisions in like circumstances and influenced by the decisions of other circuits, too. One Supreme Court decision may control dozens of similar circuit cases, and in a case-law system we cannot assume that a lower court must be reversed in order to follow a higher one.[11] Nor is each appeal in the circuit component of equal significance to those, *e.g., Butts, Wade, Gojack, Afroyim,* and *Red Lion,* which the Justices heard (*Curtis Publishing Co. v. Butts,* 1967; *United States v. Wade,* 1967; *Gojack v. United States,* 1966; *Afroyim v. Rusk,* 1967; *Red Lion Broadcasting Co. v. FCC,* 1969). Yet those frequencies do help to establish the opportunities of circuit courts to affect national law and further understanding of their appellate roles.

In the first place, these findings speak volumes about the dependency of the Supreme Court on the courts of appeals *to enforce* the supremacy and uniformity of national law. The Justices exert direct control over so little federal litigation that those concerned with the distribution of individual justice or the administration of national policy through law should look not only up but down and around.

This lesson, of course, is implicit in the Judiciary Act of 1925, which gave Justices discretionary docket control and circuit judges the main job of adjudicating federal appeals. But that job, secondly, entails significant *policy-making* functions. It is an old adage that those who administer a policy help to make it. Unless we assume that 92 cases screened into the Supreme Court exhausted all important policy issues embedded in almost 5,000 federal appeals, this sampling indicates that the adage applies forcefully to U.S. Courts of Appeals. Circuit judges filter issues on their way to the Supreme Court; they have substantial opportunity to create and to resist judicial policy when the Justices cannot or will not intervene, which is nearly all the time. Despite the constraints that may prevent circuit judges from fashioning changes whole-cloth, several examples come to mind when these circuits did make groundbreaking final decisions (*see, e.g., Pearson v. Northeast Airlines,* 1962; *Durham v. United States,* 1954; *Easter v. District of Columbia,* 1966; *United States v. Jefferson County Board of Education,* 1967; *Office of Communication, United Church of Christ v. FCC,* 1966; *Environmental Defense Fund v. Ruckels-*

haus, 1971; *watch for Hawkins v. Town of Shaw,* 1971). From either a functional or a policy standpoint, key relationships among the Supreme Court and the two levels below thus turn on the screening processes by which litigants and the Justices select what cases the Supreme Court will hear.

III.

In a leading study of the Supreme Court's certiorari jurisdiction, Joseph Tanenhaus and his students developed the theory that certain "cues" in certiorari petitions guide the Justices in narrowing their grants of certiorari to a select few. The cues found were dissension within lower courts, civil liberties issues, and the federal government's seeking review. No attempt was made in this sample to replicate Tanenhaus' method or to isolate the same variables. But certain characteristics of these appeals bearing on the Supreme Court's responsibility to control dissension among lower courts were compared to explore the screening process (*see* Tanenhaus, *et al.,* 1963: 111-32; *cf.* Richardson and Vines, 1970: 150-156). The hypotheses are that the Justices were inclined to hear reversed decisions more than affirmed decisions, non-unanimous decisions more than unanimous decisions, and en banc decisions more than panel decisions. The comparative rates of certiorari petitions granted in these situations, reported for the 92 writs granted in Table 9, support each hypothesis.

TABLE 9: SUPREME COURT CERTIORARI

Type of Circuit Decision	Circuit Decisions Appealed		Certiorari Petitions Granted	
	Total Decisions N	Rate Appealed % of N	Total Certiorari Petitions n	Rate Granted % of n
Affirmance	3,357	23.0	772	7.9
Reversal & Mixed	1,300	16.2	211	13.7
Other & Avoid	288	7.3	21	23.8
All Cases	4,945	20.3	1,004	9.2
Unanimous	4,535	18.7	848	7.5
Split	410	38.0	156	17.9
All Cases	4,945	20 3	1,004	9.2
Panel	4,903	20.1	987	8.9
En Banc	42	40.5	17	23.5
All Cases	4,945	20.3	1,004	9.2

The hypothesis for reversed decisions received weaker support than the hypotheses for split and en banc decisions. A related reason may be that reversals were weaker "cues" to appellants than split and en banc decisions. Reversals, unexpectedly, were appealed at a lower rate than affirmances.

Disagreements between levels in a circuit may project weaker signals of relevance to the Supreme Court than disagreements within courts of appeals. Since the data in Table 9 mix the motives of appellants and Justices, it is impossible to unravel them conclusively. However, the results after certiorari was granted in these cases reinforce the significance of the screening process. There was little difference in how the Supreme Court treated circuit decisions once certiorari was granted. The Court disturbed reversals and mixed decisions at about the same rate (72.4%) as affirmances (71.9%). No difference existed between its rate of disturbing unanimous (71.9%) and split (71.4%) decisions. Thus a relationship between intracircuit disagreement and Supreme Court judgments did emerge by what the Justices decided to hear. Cue theory, on the other hand, probably should be expanded to include decisions of appellants which, after all, determine the appeals that Justices see. These litigants were surprisingly persistent. The rate of appeal from the circuits to the Supreme Court (20.3% or 30.4% adjusting for consolidated and uncited cases) did not fall as much below the estimated rate from district courts to the circuits (48.7% total or 30.2% after hearing) as one would expect from 9-1 odds against acceptance. Affirmed decisions also were appealed at a higher rate than disturbed decisions in face of a 2-1 lower chance of acceptance. Are judges right about the waste of resources on unnecessary appeals?

Additional light on intercourt relations is provided by Table 10, which juxtaposes all decisions at both appellate levels in order to discover who supported whom. The nebulous data in "Avoid" and "Other" columns are excluded from much of the following analysis. Both "disturbed" decisions and "conflicts" between levels are composed of mixed decisions and reversals.

Our conclusions are, first, that the Supreme Court disturbed more circuit affirmances (41) than it reaffirmed (16). Hence, the Supreme Court injected more court-conflict into this stream of litigation than it averted or resolved (34). Second, the Supreme Court disturbed more circuit reversals and mixed decisions (21) than it affirmed (8). Hence, when conflict already existed between district courts or agencies and the circuit courts, the Supreme Court disturbed more circuit resolution of conflict than it sustained and sided more often with original than with appellate tribunals.

But third, the Justices also disturbed more district court and

TABLE 10: INTERCOURT RELATIONS

	Circuit Decisions (N = 4,842)		Supreme Court Decisions (N = 103)			
	No Appeal	Review Declined	SC* Affirm	SC Disturb	SC Avoid/ Other	Sums
CA** Affirm	2,585	708	16	41	7	3,357
CA Disturb	1,089	177	8	21	5	1,300
CA Avoid/Other	267	16	1	4	0	288
Sums	3,941	901	25	66	12	4,945

* SC = Supreme Court
** CA = Court of Appeals

agency decisions (41) than they affirmed (37).[12] Hence, we cannot leap to the conclusion that the Supreme Court was basically supportive of original tribunals. Rather, the first two conclusions (which confirm those of Richardson and Vines) and the third resolve into a final and deceptively simple conclusion that the Justices supported whoever agreed with them in whatever interested them in appeals before them. A 100% reversal rate, the theoretical optimum use of Supreme Court resources, is unlikely for the same reasons. Hence, amending some implications of cue theory, the Supreme Court was less interested in resolving intracircuit disagreements per se than in resolving the policy disputes with which those disagreements correlated. In other words, Supreme Court review of the three courts of appeals in this period was less the resolution of lower court conflicts than "applied politics" — securing the supremacy of highly selective policy values irrespective of levels.[13]

It may be objected that resolving *intra*-circuit conflict is irrelevant, because that is not recognized among the purposes of certiorari in Supreme Court Rule 19 whereas resolving *inter*-circuit conflict and securing circuit compliance are. However, the Court's own explanation for granting ceriorari in these cases buttress the conclusion. Of the 58 cases in which reasons were offered, the Justices stated a substantial federal question in 37, intercircuit conflict in only 12, both in 7, and circuit compliance in 2. The signs from these appeals point in the same direction: The high court appears to have given priority to its law-making or supremacy functions rather than to its court conflict-resolution or uniformity functions.

IV.

Alexander Bickel (1970: 88) recently observed that political scientists often discover "what most lawyers thought they know anyway. . . ." The above conclusions may strike some as

belonging in the same class. Wise readers will also be wary of projecting these samplings beyond their own time and place. Already the D.C. Circuit has lost its local jurisdiction, the Fifth Circuit has suffered stinging reversals in school desegregation cases, all three circuits but especially the Second Circuit have undergone substantial personnel changes, and the Warren Court is no more (*see* District of Columbia Court Reform and Criminal Procedure Act of 1970; *Alexander v. Holmes County Board of Education,* 1969; *Carter v. West Feliciana Parish School Board,* 1970; *New York Times,* February 14, 1971: 25). To validate a policy-making priority also requires more extensive analysis of intercircuit conflicts than is possible here. Nevertheless, the evidence that the high court concentrated on its policy goals rather than uniformity is important for at least two reasons.

First, it highlights the roles of courts of appeals in the federal judicial system. These tribunals serve not merely to screen, filter, and apply federal law so that the Justices may innovate. As courts of last resort in the overwhelming majority of cases, they *make* national law residually and regionally. Whether courts of appeals are conceived of as political actors with distinct constituencies or as functionaries in a legal bureaucracy, the magnitude of their finality in contexts of regional recruitment and organization produces a federal judicial system that is more heterogeneous than hierarchical in practice. While circuit judges undoubtedly decide large quantities of litigation of interest only to individual litigants, in aggregate even these decisions constitute public policy. The lack of discretionary docket control probably gives circuit judges more sustained policy coverage than their superiors (*cf.* Tables 3 and 8). And unless we assume that an extremely small percentage of cases are coterminous with the policy potential of federal appeals, we must presume that significant judicial policy-making occurs in one of the oldest regional operations of federal power in existence.

Second, the high court's policy priority coincided with a remarkable explosion of federal appeals in the last decade. This growth has enlarged the capacity of circuit courts to influence public policy, because it has increased the Supreme Court's reliance on the circuits to enforce national law while decreasing the Court's ability to insure uniformity among them.[14] To enforce national law under present growth trends, in short, the Supreme Court must increasingly rely on the very courts in a position to Balkanize federal law. The same forces also tax the

ability of courts of appeals to maintain uniformity within the circuits and to adjudicate the increasing volume without resort to mass-production techniques that are the bane of American trial courts. All the more important, therefore, become: (1) the screening process by which Supreme Court Justices select their targets, and (2) the decisional relationships within and among the eleven courts of appeals. Why are these the appellate judicial processes we know least about?

FOOTNOTES

[1] The circuits were chosen on grounds of convenience, presumed influence, and broad differences. During the period analyzed, the U.S. Court of Appeals for the District of Columbia Circuit was composed of nine judges authorized to hear a mixture of federal and local appeals. The Second Circuit, also composed of nine circuit judges, heard federal appeals from Connecticut, New York, and Vermont. The Fifth Circuit, then composed of 9-13 circuit judges, heard federal appeals from Alabama, Florida, Georgia, Louisiana, Mississippi, Texas, and the Canal Zone.

[2] I am grateful to James A. McCafferty of the Administrative Office of the U.S. Courts for aid in locating unreported circuit cases. This sample, which parallels "appeals decided after hearing or submission" on briefs in Table B1 of AO *Annual Reports,* should be distinguished from AO data concerning cases commenced or terminated without hearing in the same source. Cases disposed of by consolidation with a reported appeal are excluded from the sample, in conformity with AO practice, because their characteristics are too unknown for safe projection. Consolidations constitute roughly 10% of appeals decided by the circuits after hearing or submission.

[3] The Fifth Circuit now has the highest caseload and largest number of judges of any federal circuit. For the court's responses to its mushrooming caseload, *see N.L.R.B. v. Local 990, Amalgamated Clothing Workers,* 1970; *Murphy v. Houma Well Service,* 1969; *Huth v. Southern Pacific Co.,* 1969; *Isbell Enterprises v. Citizens Casuality Co.,* 1970; and Bell, 1971.

[4] Prisoner petitions, including habeas corpus, mandamus, parole review, and motions to vacate sentences, constituted 12.0% of the sample. If prisoner petitions are added to the criminal litigation in Table 1, 47.5% of the sample in the D.C. Circuit concerned criminal matters as compared to 31.7% in the Second Circuit and 31.2% in the Fifth Circuit.

[5] For excellent analysis of circuit conflicts over patent policy, *see* Shapiro, 1968: 167-85.

[6] The district court data were derived from AO *Annual Reports,* appendices C7 (civil-criminal trials completed) and B1 (cases commenced and reversed or denied after hearing or submission), excluding administrative and original proceeding categories, for fiscal years 1965-67. Estimates based on trials completed inflate the rate of appeal to the unknown extent that appeals are taken from contested judgments before trial and collaterally, *see* Goldman, 1972.

[7] Dissent rates for judges are the number of sittings per judge divided by the number of dissents each judge wrote or joined.

[8] The D. C. reversal rate for fiscal 1965-67 was 21.6% civil and 16.5% criminal.

[9] The estimate from AO reports (2.4%) is derived from cases disposed of by the circuits after hearing in fiscal years 1965-67 (N = 4,787), Table B1, and petitions for certiorari granted to them in the same period (N = 114), Table B2. The estimates from the sample are derived from cases with circuit citations. Excluded from the sample were 35 cases consolidated at the Supreme Court plus 460 certiorari denials and 4 grants reported from these circuits in the same volumes of *U.S. Supreme Court Reports* which had no citations below. If we add consolidations and petitions without circuit citations to the sample (N = 1,503), and adjust for a 22 case increment in petitions filed that remained pending

in AO reports, the sample is 11 cases below the AO figure for certiorari petitions filed from the three circuits during this period (N = 1,536). The rates of certiorari granted do not change as a result of these adjustments, but the rate of appeal to the high court shifts from 20.3% to 30.4%. The rate of appeal based exclusively on AO data is 32.1% (*cf.* Carrington, 1969: 553; and Richardson and Vines, 1970: 114).

[10] There were three important civil rights decisions in the statutory category: *Georgia v. Rachel,* 1966; *City of Greenwood v. Peacock,* 1966; and *Pierson v. Ray,* 1967.

[11] For example, three other remands and ten consolidations from the Second and Fifth Circuits in this sample resulted from one Second Circuit reversal — *Marchetti v. United States,* 1968.

[12] The Justices upset 41 original decisions by disturbing 41 circuit affirmances. They sustained 37 original decisions by affirming 16 circuit affirmances and disturbing 21 circuit reversals and remands.

[13] Felix Frankfurter, as quoted in Bickel (1970: 20). Even the choice of a regional or local federal forum to enforce national law appears to hinge on which level is in accord with Supreme Court values (*cf. Alexander v. Holmes County Board of Education,* 1969, and *United States v. Montgomery County Board of Education,* 1969. For evidence that the Supreme Court does not automatically grant certiorari whenever intercircuit conflict exists, *see* Stern and Gressman (1969: 213-18) and sources cited.

[14] Filings of federal appeals increased 250% between 1962 and 1972, a rate of increase over four times larger than that of filings in U.S. district courts. For growth projections, *see* Shafroth, 1967; U.S. House of Representatives, 1972: 88-107, 192-227; and Brown, J., in *N.L.R.B. v. Local 990, Amalgamated Clothing Workers,* 1970.

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