

UNITED STATES APPEALS IN CIVIL CASES: A FIELD AND STATISTICAL STUDY

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I. THE DECISION OF THE UNITED STATES TO APPEAL

Appellate litigation by the United States is subject to the control of the Solicitor General.¹ No appeal or certiorari petition is filed on behalf of the United States in any appellate court without his authorization. The Office of the Solicitor General now handles about 3,000 matters a year in which appeal decisions are to be made.²

In general, appeal decisions are made by means of a deliberative institutional process that engages the attention of a number of government lawyers at several levels within and outside the Justice Department. The Solicitor General depends not only on staff work performed within his office, but also on the recommendations of the appellate sections of the various divisions of the Justice Department, and, in some instances, on the recommendations of staffs of administrative agencies. Divisional and agency recommendations are themselves prepared by a deliberative, institutional process. More than 900 of these recommendations were examined in preparing this report; most of these were the work of more than one appellate attorney.

With respect to appeals taken at the intermediate court level, the Solicitor General seems to depend heavily on divisional recommendations. While many of the matters are thoroughly reconsidered in the Office of the Solicitor General, it is rare that a divisional recommendation is rejected with respect to an appeal to a court of appeals. In contrast, the divisional recommendation seems to carry much less weight with respect to prospective action in the Supreme Court of the United States. Of the 30 recent recommendations for the filing of certiorari petitions examined, only 19 were accepted; in addition, the Solicitor General filed a certiorari petition in one of the 125 cases in which such action was not recommended by the division.

In the great bulk of cases, the decision whether to appeal is made on the basis of an assessment of the probable outcome in the higher court. Because of the institutional nature of the process, personal motives are largely eliminated, and the possibility of a frivolous or hopeless appeal is greatly reduced. Rarely, a recommendation to the Solicitor General may

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1. 28 U.S.C. § 516 (1970).

2. 1971 ATT'Y GEN. ANN. REP. 23.

reflect consideration of a factor not bearing on the merits of the appeal: in one case, some deference was paid to the strong feelings of a cabinet officer who was incensed by a judicial opinion published by the trial court; in another, the sheer size of the amount in controversy seemed to be a factor motivating the appeal. But almost without exception, the Justice Department appears to approach the decisions as rational ones, to be made on the basis of a careful analysis of the principles likely to control the outcome, with due regard for judicial sentiments likely to be evoked by the particular circumstances in dispute.

At all levels, the United States is a cautious and successful litigant. Of the 10,800 civil judgments rendered in government litigation in the district courts in 1972,³ about 1,000 were deemed adverse to the United States. At this level, the comparable figures for criminal cases are 37,000 convictions and 2,000 acquittals.⁴

In civil matters, the United States appealed approximately one adverse decision in three, or about 330 appeals from civil district court judgments in 1972. Meanwhile, the 9,800 civil judgments not adverse to the United States yielded about 1,400 adversary civil appeals, since private adversaries challenged the district court less frequently than the United States. But the United States was much more successful in the courts of appeals. The overall success rate of civil appellants is about 20%. But the United States prevails on 50% of its appeals, while its adversaries succeed in only 10% of theirs. The latter figure again confirms the conservatism of the United States as a district court litigant; its victories are less subject to successful appellate attack. Complete current data on success rates is not available, but older data, current impressions, and fragments confirm that the results of the Tax Division⁵ are fairly typical.

TABLE 1
SUCCESS RATES IN TAX APPEALS

Fiscal Year	Govt. Appeals	Success Rate	Payer Appeals	Success Rate	Total Appeals	Govt. Wins
1960	77	56%	196	24%	273	70%
1961	83	64	209	25	292	72
1962	61	64	267	25	328	73
1963	88	60	230	20	318	74
1964	100	47	272	19	372	73
1965	82	53	233	13	315	78
1966	71	58	216	17	287	76
1967	71	60	225	15	296	78
1968	51	57	178	18	229	76
1969	73	55	192	14	265	78
1970	64	54	191	9	255	82
1971	101	47	209	10	310	75
1972	103	45	249	13	352	76

3. 1972 ADMINISTRATIVE OFFICE OF THE U.S. COURTS ANN. REP. 320.

4. *Id.* at 381. The prison petitions were subtracted.

5. Data supplied by Meyer Rothwacks, Esq., Chief of the Appellate Section of the Tax Division.

It is somewhat surprising that taxpayer appellants are less successful than criminal appellants.

The caution and success of the United States is also marked at the highest level. The United States was involved in almost 9,000 final decisions of courts of appeals in the fiscal year 1971; of these, about two-thirds were criminal matters, and the balance were divided between administrative and civil.⁶ Confirming the foregoing analysis of success rates, about 600 of these decisions were deemed to be adverse to the United States. Of these adverse decisions, about 40 were deemed "certworthy" by the Solicitor General; a majority of his petitions were, as usual, granted.⁷ In contrast, the 7,400 decisions that were not adverse to the United States yielded about 2,000 certiorari petitions of which only 61 were granted.⁸ To put these data in another form, the United States sought review in about 6% of its defeats and obtained it in 3%, while its adversaries sought review of over 25% of their victories and obtained it in less than 1%. For comparison, it may be helpful to note that about 25% of all decisions of the courts of appeals are challenged by the filing of a certiorari petition, and that about 10% of all petitions are successful.

The success of the United States in the Supreme Court is largely attributable to the special role played by the Office of the Solicitor General. Having a stable relationship with the Court, the Office is much more attuned to the screening process and more obligated to assist in it than private counsel. This is dramatically demonstrated by the fact that the number of certiorari petitions filed by the United States has not increased over the years, despite the increase in volume at the lower levels and the corresponding increase in the number of private petitions. Indeed, as recently as the mid-sixties, it was customary for the Solicitor General to seek review of about 10% of the court of appeals decisions adverse to the United States.⁹

This caution reflects, at least in part, a sense of responsibility for the congested condition of the Supreme Court docket. That sense is clearly articulated in some memoranda, most notably among those of the Antitrust Division. That division is responsible for making recommendations with respect to Interstate Commerce Commission and antitrust appeals that are routed directly to the Supreme Court under the Urgent Deficiencies Act procedure. It is clear that some appeals are not sought in such cases, although they would be sought if the appellate jurisdiction were routed to the courts of appeals rather than the Supreme Court;¹⁰ this results from

6. 1972 ADMINISTRATIVE OFFICE OF THE U.S. COURTS ANN. REP. 263. The prison petitions were subtracted.

7. 1971 ATT'Y GEN. ANN. REP. 23.

8. STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT, REPORT A3 (1972).

9. 1965 ATT'Y GEN. ANN. REP. 43.

10. See STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT, REPORT A3, at 26-34 & n.8 (1972).

the fact that some Urgent Deficiencies Act cases are not seen to be sufficiently important to merit the Supreme Court's attention. Such restraint is not likely to be found among private litigants.

II. ISSUES IN UNITED STATES CIVIL APPEALS

The primary purpose of this study is to examine the behavior of the federal appellate courts in cases where the Justice Department is an appellant. In particular, it is hoped that some gauge might be placed on the capacity of the intermediate courts to resolve questions that have proved troublesome in the administration of the national law. Despite the substantial number of memoranda examined, the data is not very conclusive. The data can, however, be said to support, if not confirm, the following observations:

1. The bulk of government civil litigation is more prosaic than many experienced observers imagine; the substantive issues presented are most often fairly narrow questions of statutory interpretation involving only a modicum of social policymaking and affecting only a small number of citizens.
2. The proportions vary greatly among categories of cases and among the division, but at the present time, United States civil appeals at the intermediate level can generally be divided into three classes roughly equal in number:
 - (a) appeals presenting novel substantive issues;
 - (b) appeals presenting substantive issues that the United States has previously litigated;
 - (c) appeals presenting issues that have little or no prospective significance.
3. The United States does not regard a decision of the United States Court of Appeals as authoritative in the traditional common law sense. It is quite prepared to continue to litigate in other circuits a question that has been resolved in only one; even in the same circuit, the United States may be willing to relitigate an issue if minor factual distinctions can be made between the pending matter and the preceding decision. It appears to be the house rule of the Justice Department that three unanimous Courts of Appeals decisions are sufficient to establish authoritatively that a government position is wrong.
4. Many of the issues that are troublesome in the administration of the national law and that are litigated in the lower federal courts do not reach the Supreme Court; those that do reach the Court usually

do so only after a substantial period of gestation leading to a conflict in circuit decisions.

5. Direct and unresolved conflict is a rare phenomenon.

For the most part, the support for these assertions is derived from an analysis of 693 memoranda sent to the Solicitor General in 1971 and 1972. The sample includes all the memoranda prepared by the Civil Division in 1971, all prepared by the Lands and Natural Resources Division in 1972; a random sample of the 1971 and 1972 products of the Tax Division approximating in size about half a year's production; all the memoranda prepared by the Antitrust Division for both years; a random sample of about one-half of the memoranda prepared by the Internal Security Division in 1972 in selective service litigation; and all of the memoranda submitted by the General Counsel of the National Labor Relations Board.

Table 2 represents a taxonomy of issues presented by challenged

TABLE 2
TYPES OF CIVIL APPELLATE ISSUES: 448 DECISIONS OF
DISTRICT COURTS AND TAX COURT ADVERSE TO UNITED STATES

	Anti-Trust Div.	Taking Cases	Other Lands Div.	Sel. Serv. Cases	Soc. Sec. Cases	Other Civil Div.	Tax Div.	Total
Novel Issues:								
Appealable to Supreme Court	8	0	0	0	1	0	0	9
Appealable to Courts of Appeals	4	2	2	2	4	16	14	44
Total Novel	12	2	2	2	5	16	14	53
Recurring Issues:								
Existing Conflict	0	0	0	1	0	0	3	4
Precedent for U.S.	1	0	0	0	5	10	7	23
Precedent v. U.S.	1	0	0	1	0	5	7	14
Pending Elsewhere	0	0	0	0	0	3	6	9
Total Recurring	2	0	0	2	5	18	23	50
Issues Lacking Prospective Significance:								
Factual Disputes	0	0	4	1	6	8	7	26
Procedural Disputes	3	1	4	0	1	6	5	20
State Law Issues	1	0	4	0	0	1	2	8
Issues of Law Repealed or Expired	0	0	1	0	0	1	3	5
Total Lacking Prospective Significance	4	1	13	1	7	16	17	59
Total Appeals	18	3	15	5	17	50	54	162
Total No Appeal	21	35	6	35	54	65	70	286
Total Cases	39	38	21	40	71	115	124	448

rulings of district courts. Tables 3 and 4 list some of the specific issues summarized in table 2. Table 5 classifies the issues presented by intermediate decisions as they are analyzed in the certiorari memoranda. Tables 6 and 7 list the specific issues summarized in table 5. The specific lists in tables 3, 4, 6, and 7 are not complete, particularly with regard to tax cases; the omissions are more or less random, reflecting the completeness of the author's notes and the ease with which a case can be succinctly and fairly summarized in a sentence. The lists should suffice to give the reader a feel for the kinds of questions under discussion, if not a complete documentation of the tables.

TABLE 3

CIVIL APPELLATE ISSUES SPECIFIED: NOVEL ISSUES ARISING IN TRIAL COURT LITIGATIONS

A. Issues Appealable to Supreme Court

1. The constitutionality of a provision of the social security legislation that requires an offset against benefits of payments received as workmen's compensation.
2. The illegality per se of assignment of marketing territories among potential competitors with agreement not to resell at wholesale.
3. The validity of ICC rules governing rolling stock service.
4. The right of carrier to ICC hearing prior to fixing per diem charge for rolling stock.
5. The standing of the United States in an antitrust suit to challenge a patent on grounds of erroneous issuance.
6. The applicability of the Sherman Act to Samoa.
7. Whether intent not to compete overcomes antitrust objections to a merger of potential competitors.
8. The validity of ICC rules on authority of heavy haulers.
9. The definition of the market to be considered in appraising the legality of a merger of coal producers.

B. Issues Appealable to Courts of Appeals

1. Whether an impact statement is deficient in failing to appraise alternatives that would require either congressional action or international agreement.
2. Whether one tract can be converted into two tracts by means

of intrafamily conveyance for the purpose of avoiding the setoff of benefits rule.

3. The right of a mortgagee to enforce a mortgage on land patented to the mortgagor by a mistake of the United States.
4. The propriety of a judgment against the United States for the amount of its deposit, plus interest, in an eminent domain case where the United States denied any liability for the value of the property taken on the basis of a title dispute.
5. The deductibility to an employer of the cost of payments to a contingency fund for layoff payments that the employer is required to make pursuant to a union agreement.
6. Whether an estate is entitled to treat the expenses of selling securities as a deduction against taxable income and also as a charge against the net taxable estate.
7. Whether the cost of initial dredging of a boat slip can be recovered through depreciation deductions and considered in computing the investment credit.
8. Whether a nonprofit corporation organized to provide parking for the employees of the organizers is exempt from income taxation.
9. The eligibility of claimants for additional Medicare benefits to cover a new "spell of illness" beginning while they remain in a nursing home convalescing from a previous, insured illness.
10. Whether proof of blindness constitutes proof of total disability.
11. The right to insurance benefits for illegitimate children born after the retirement of the worker.
12. The right of after-adopted children to insurance benefits where the adoption was not supervised by an agency and there is no agency available to supervise adoptions.
13. The reviewability of a military transfer order alleged by the transferee to be motivated by a desire to punish him for activity protected by the first amendment.
14. The right of officers, who are plaintiffs in suits to compel their own promotions, to obtain statistical data and internal military memoranda bearing on the evaluation of the Officer Efficiency Report system.
15. The right of an enlistee to specific performance of a standard form

enlistment contract requiring multiple and overlapping training programs.

16. The constitutional validity, under the first amendment, of the statutory provisions for ministerial exemptions.
17. The propriety of an injunction against the exercise of the contractual right of the United States to cancel purchase of future helium production based on the contracting seller's contention that the failure to purchase helium is a violation of NEPA.
18. The right of a plaintiff aspiring to a government contract to an injunction against the opening of bids based on the contention that plaintiff is the only qualified bidder and therefore entitled to direct negotiation.
19. The right of the United States to obtain a deficiency judgment on notes secured by mortgages on property that has lost its value as a result of the reduction of the space program.
20. The right of a civil servant to insist on an open discharge hearing.
21. The right of a partisan organization of civil servants to use public facilities for a political meeting.
22. The propriety of a preliminary injunction reinstating a probationary employee pending an official explanation of the reasons for his nonretention.
23. Whether the timeliness of a union member's challenge to a union election is saved while he pursues internal union remedies prior to complaint to the Department of Labor.
24. The authority of the Department of Transportation to grant an exception to a single manufacturer unable to comply with an automobile safety standard.
25. The eligibility of fast foods outlets to participate in the food stamp program.
26. The liability of a business firm for statutory forfeitures as well as civil penalties for refusing to provide information to the Federal Trade Commission.
27. The right of the Interstate Commerce Commission to discover corporate records for use in ratemaking.
28. The deductibility of the expense of moving overseas to a job yielding tax-exempt income.
29. The power of Treasury to limit labeling regulations to a prospec-

tive application exempting whiskey laid down prior to the effective date.

30. The power of a district judge to grant acquittal contrary to the verdict, and the effect of such order with regard to double jeopardy.
31. The right of a carrier to exercise a statutory right of independent action in ratemaking despite a power of attorney to the association.
32. The validity of the Federal Drug Administration's rule requiring warning of cardiovascular hazard on certain antibiotic drugs.
33. The right of a registrant to obtain access to all adverse information in his selective service file.
34. The vulnerability of an induction order to attack based on delay that had the effect of extending the jeopardy of a registrant to random number selection.

TABLE 4

CIVIL APPELLATE ISSUES SPECIFIED: TRIAL COURT ISSUES RECURRING IN COURTS OF APPEALS¹¹

1. The deductibility as a loss of the cost of taxpayer's building destroyed by the tenant as authorized by the lease.
2. The deductibility as a loss of the cost of taxpayer's building destroyed by the tenant as authorized by the lease, when the tenant was required to rebuild with improvements of greater value.
3. Whether lessees' payments of ad valorem taxes on minerals in place are to be treated as constructive royalties included in the computation of depletable gross income.
4. Whether absorption is a production process or a conversion process for the purpose of determining whether the depletable mineral is the gas before or after it has been through that process.
5. Whether income tax liability for taxes assessed after bankruptcy, but payable before bankruptcy, may be discharged.
6. The jurisdiction of a bankruptcy court to enjoin the United States from collecting postpetition interest on the tax obligations of a discharged debtor.
7. The conclusive effect of an uncontested state court decision declaring the marital status of a social security claimant.
8. The validity and effect of legislation authorizing HEW to suspend disability benefits pending a hearing.

11. There were six recurrences within the sample.

9. The propriety of HEW reliance on *res judicata* when it is asked to reconsider a decision denying benefits to a claimant not previously represented by counsel.
10. The reviewability of VA action terminating on grounds of remarriage benefits payable to a widow.
11. The pre-induction reviewability of a local board decision denying a fatherhood exemption.
12. The pre-induction review of a local board decision denying a medical classification.
13. The right of a soldier to a discharge on the basis of "good time" accumulated while he was at home awaiting orders for many months.
14. The propriety of a court order requiring an agency to produce documents for in camera inspection where it has explicitly found that it is not in the public interest to disclose them.
15. The right of a disgruntled bidder to a preliminary injunction against performance of a government contract pending judicial review of compliance with various statutory standards of government contracting.
16. The liability of the United States on the contracts of nonappropriated fund activities.
17. The right of the United States to set off its debts against its claims in a bankruptcy proceeding.
18. The constitutionality of the requirement of a filing fee for voluntary bankrupts.
19. The propriety of a preliminary injunction staying the issuance of a certificate of authority by the comptroller to a branch bank pending judicial review of the comptroller's decision.
20. The right of the United States to priority for obligations owing to the Small Business Administration.
21. The right to a hearing and decision on the record prior to a "general discharge for honorable reasons."
22. Whether the sixty-day limitation on suits to set aside union elections can be waived by agreement of the union and the Department of Labor.
23. The deductibility of that portion of the price attributable to the stock conversion feature to a corporation redeeming its convertible bonds.
24. The civil liability of offenders against Federal Trade Commission

orders.

25. The effect of Federal Maritime Commission approval of the merger of ocean carriers as immunization against an antitrust attack.
26. The vulnerability to attack of an induction order based on the misleading character of advice received by the registrant from a board employee.
27. The length of the academic year for purposes of a student deferment.

TABLE 5

TYPES OF CIVIL APPELLATE ISSUES: 203 COURT OF APPEALS
DECISIONS ADVERSE TO UNITED STATES

	Anti-Trust Div.	Taking Cases	Other Lands Div.	Sel. Serv. Cases ¹²	Soc. Sec. Cases	Other Civil Div.	Tax Div.	NLRB (71 only)	Total
Novel Issues:									
Reviewed by Supreme Court	2	1	0	0	0	0	0	1	4
Deemed Certworthy by SG: Cert. Den.	0	0	1	0	0	0	0	0	1
Not Deemed Certworthy by SG	7	1	4	4	3	6	7	3	35
Total Novel	9	2	5	4	3	6	7	4	40
Recurring Issues:									
Reviewed by Supreme Court	2	1	1	0	0	4	5	2	15
Deemed Certworthy by SG: Cert. Den.	0	0	0	0	0	1	2	1	4
Not Deemed Certworthy by SG	1	0	3	4	4	1	11	6	30
Total Recurring	3	1	4	4	4	6	18	9	49
Issues Lacking Prospective Significance:									
Factual Disputes	2	2	0	14	4	5	11	24	62
Procedural Disputes	10	2	1	9	2	5	0	5	34
State Law Issues	0	1	1	0	1	0	3	0	6
Issues of Laws Repealed or Expired	0	0	0	2	0	1	2	0	5
Issues Unripe	0	0	0	0	0	3	0	4	7
Total Lacking Prospective Significance	12	5	2	25	7	14	16	33	114
Total Reviewed	4	2	1	0	0	4	5	3	19
Total No Review	20	6	10	33	14	22	36	43	184
Total Cases	24	8	11	33	14	26	41	46	203

12. About half of these cases are reversals of criminal convictions.

TABLE 6

CIVIL APPELLATE ISSUES SPECIFIED: NOVEL ISSUES
DECIDED BY COURTS OF APPEALS

- A. Reviewed by the Supreme Court
1. The applicability of state law to determine the effect of a prior taking on severed mineral rights.
 2. The constitutionality of the practice by Federal Communications Commission licensees of accepting commercial advertising, but excluding all editorial advertising.
 3. The jurisdiction of the Federal Communications Commission to regulate and require cablecasting.
 4. The duty of employers to bargain with respect to rights of retired former employees.
- B. Not Reviewed
1. The effect of a provision of the Wilderness Act as a limitation on the power of the Department of Agriculture to sell timber pending a determination by Congress as to whether the land should be included in a wilderness area.
 2. Whether the Law Enforcement Assistance Agency must make an impact statement before granting funds to states for law enforcement assistance.
 3. The right of a landowner to a hearing on his complaint that proposed government timber sale would impair the productivity of his adjacent property.
 4. The reviewability of a decision of the Commissioner of Indian Affairs not to regulate trading on a reservation.
 5. The validity of a rule of court limiting expert witnesses in an eminent domain proceeding to the use of three comparable sales to support each expert valuation.
 6. The reviewability of a Department of Interior decision to deny counsel fees to tribal counsel on the grounds of breach of fiduciary duty.
 7. Whether the cost of shearing Christmas trees on a farm is to be treated as an expense or a capital investment for tax purposes.
 8. The deductibility to a surgeon of the cost of buying lunches for

interns, including the cost of his own meals.

9. The deductibility of the costs of travel to receive medical care.
10. The deductibility to a trust of the cost of applying the debts of the settlor against income received from a closely held corporation for the purpose of funding such payments.
11. The liability of a corporate officer for a penalty for failure to pay withholding taxes where the United States made no effort to collect the penalty from the corporation.
12. The applicability of a tax priority in an admiralty mortgage foreclosure, where the seamen's union settled the wage claims for payment of the net wages after taxes, and the United States seeks a priority for the difference between the gross and net wages.
13. The standard of review applicable in social security benefit cases where no administrative expertise is involved, as in a case in which the Department of Health, Education, and Welfare found the claimant to be younger than he asserted.
14. Whether the Department of Health, Education, and Welfare is bound by its own computational error in determining the benefits payable to a claimant.
15. The right of children who are "equitably adopted" to participate in insurance benefits.
16. The propriety of a court order enjoining an assignment to duty in Viet Nam pending formal, reasoned rulings by each officer in the chain of command to whom a hardship request was addressed.
17. The pre-induction reviewability of a local board decision denying conscientious objector status on factual grounds.
18. The validity of a Department of Agriculture order limiting the sizes of imported tomatoes.
19. The authority of the Federal Bureau of Investigation to maintain a file of fingerprints of persons not suspected of crimes.
20. Whether a carrier is liable for a rebate for selling land to a shipper at half price where the shipper establishes that the transaction was not profitable despite the break in price.
21. Whether the fairness doctrine requires the Federal Communications Commission to adhere to its precedent and limit "unresponsiveness" as reason for further rebuttal to free time presentation.
22. The necessity of a Civil Aeronautics Board hearing to determine

whether conditions for exemption from certification continue to exist when the board authorizes an exempt carrier to take over route of certificated carrier.

23. The necessity of a Federal Drug Administration hearing to determine whether imported drugs are adulterated.
24. The power of the Federal Maritime Commission to require a carrier to justify a rate increase even though the rate is not suspended pending review.
25. The applicability of the fairness doctrine to require free time for anticommercials by ecology groups.
26. The patentability of computer programs.
27. The right of a corporation convicted of criminal contempt without jury trial to have its fine limited to \$500.
28. The applicability of rulemaking procedural requirements to the Department of Agriculture decisions to disseminate information.
29. The adjudicatory effect of a post-trial dismissal of an indictment as double jeopardy.
30. The jurisdiction of a local draft board to reclassify a registrant before receiving notice of a change of address.
31. The duty of employers to bargain with respect to prices charged in employees' cafeterias.

TABLE 7

CIVIL APPELLATE ISSUES SPECIFIED: ISSUES RECURRING IN COURTS OF APPEALS

- A. Reviewed by the Supreme Court¹³
 1. The compensability at taking of the value of the landowner's revocable license to graze his livestock on adjoining federal land.
 2. The deductibility as interest of payments made to purchase Class C stock in a federal farm cooperative bank, when the purchase is required in order to establish loan eligibility.
 3. The liability of the wife for the tax on community income where she has exercised a right of exoneration conferred by state legislation.

13. There were two recurrences within this sample.

4. The pre-induction reviewability of a local board action denying conscientious objector status on grounds of untimely assertion.
5. The pre-induction reviewability of a local board action denying an inductee's challenge to the board's compliance with the statutory lottery requirement.
6. The propriety of an order setting aside a union election on the basis of defects and violations other than those complained of by the aggrieved candidate.
7. The power of the Federal Drug Administration to order a New Drug Application filed and marketing terminated on the basis of summary determinations that the product affected is a "new drug."
8. Whether a utility district is exempt from the National Labor Relations Act as a political subdivision.
9. The effect of arbitration between competing unions when the employer is not a party to the proceeding.

B. Not Reviewed¹⁴

1. The standing of packers to challenge the validity of a Department of Agriculture order limiting the importation of tomatoes.
2. Whether the Corps of Engineers is required to make an impact statement before issuing a permit to discharge into navigable waters.
3. Whether bridge construction may be enjoined pending an appraisal by the Department of Transportation of all possible variations in design as part of the "continuing comprehensive transportation planning process."
4. Whether one agency can rely on factual determinations made by another as a basis for its own impact statement.
5. Whether the cost of caring for young orange trees is to be treated as an expense or a capital investment by the taxpayer who operates the grove.
6. The applicability of net loss carryback provisions to a consolidation of operating subsidiaries that could be characterized as an F reorganization.
7. The deductibility of that portion of the amortized cost of a purchased life estate that is allocable to a tax-exempt interest.

14. There were two recurrences within this sample.

8. Whether movable building partitions are structural components or tangible personalty for purposes of calculating the investment credit.
9. The applicability of the tax lien to assets acquired after the filing of the taxpayer's bankruptcy petition.
10. The eligibility of widows of doctors dying in 1965 for benefits pursuant to social security amendments of that year which were of questionable retroactivity.
11. The propriety of invoking a presumption of death to establish the right to death benefits of the children of a wage earner who has disappeared.
12. The propriety of the Department of Health, Education, and Welfare reliance on *res judicata* when it is asked to reconsider a decision denying benefits to a claimant not earlier represented by counsel.
13. The reviewability of a Department of Health, Education, and Welfare decision cutting off payments to a nursing home for violation of the terms of an agreement.
14. The right of a soldier to a discharge on the basis of "good time" accumulated while he was at home awaiting orders for many months.
15. The taxability as income of employee death benefits voted by corporate directors as an act of grace.
16. Whether payments received by a taxpayer from a former husband are taxable income where they are made pursuant to an agreement that does not specify whether the payments are in lieu of alimony or for support of minor children.
17. The effect of tax loss carrybacks on recapture of excessive airline subsidies.
18. The vulnerability of an induction order to attack on grounds of premature notification.
19. The allocation of the burden of proof of intent where a selective service registrant is charged with failure to notify his local board of a change of marital status.
20. The allocation of the burden of proof of actual receipt of notice of induction.
21. The validity of a requirement that a conscientious objector manifest "depth of conviction" as well as sincerity.

22. Whether lapse of time and employee turnover justifies an employer's failure to abide by a union election result.

Several observations should be made about the foregoing data. One necessary comment bears on the problem of identifying conflicts in decisions. Table 2 itemizes four such conflicts; these were all situations in which no distinction whatever could be made between the conflicting decisions by the memorandum writers. In other words, there was conflict on the basis of the narrowest possible interpretation of the precedents. It is, however, a standard dogma of common law theory that such narrow interpretations are not always required nor always appropriate. If prior decisions were interpreted more broadly, on the basis of the value judgments apparently underlying them, the amount of conflict among federal decisions would be much greater. The memorandum writers seldom attempted such broader gauge analysis of court of appeals decisions, although they often made such analyses of Supreme Court decisions. This difference in treatment not only marks the lesser degree of attention paid to court of appeals opinions, but it also makes the task of counting the more profound conflicts insurmountable.

A related observation is that the sample may understate the frequency of conflict. Thus, the Tax Division has identified in the two sample years 28 cases in which it petitioned for rehearings en banc on the basis of intra-circuit conflict.¹⁵ Although the sample included more than a fourth of the total, it included only 2 of these 28 cases. The sample also lacks any of the more spectacular examples of multi-circuit litigation of the type that is most productive of inter-circuit conflict. One such example was offered by the Lands Division; it has been litigating the same venue question, one arising under the Clean Air Act of 1970,¹⁶ in all eleven circuits simultaneously.

The sample probably overstates the impact of the Supreme Court. The Solicitor General was substantially more successful with the certiorari petitions included within the sample than he is generally. (Sixteen of 20 were granted.) Moreover, because private petitioners are so much less successful than the United States, it is likely that a larger portion of the recurring issues presented in cases won by the United States at trial are left at large by the denial of certiorari. Taking these factors into account, it seems reasonable to estimate that about one out of four issues recurring in the United States civil appellate litigation reaches the Supreme Court. But, as indicated by the specific tables, the issues not reaching the Supreme Court are never cosmic in importance, nor even particularly interesting, unless perhaps to a few administrators and citizens directly

15. Data supplied by Meyer Rothwacks, Esq., Chief of the Appellate Section of the Tax Division.

16. 42 U.S.C.A. § 1857h-5 (Supp. 1974).

affected by the actions.

Another observation derives from the contrast of tables 2 and 5. Table 2 reflects 162 cases going into the courts of appeals, and table 5 describes 203 cases that are coming out of those courts. The latter involve a somewhat lower percentage of cases presenting substantive issues. The explanation for this figure lies in the fact that these are all cases lost by the Government. Thus, most notably, the United States rarely appeals from an adverse decision in a selective service case, but its adversaries often do. Most typically, these adversary appeals challenge the fact finding results in the trial court and yield a very low success rate; but, in gross, the number of selective service cases lost on appeal by the United States is substantial as a portion of its appellate losses, and it is dominated by less significant factual issues.

There is, however, one trend revealed by the study that bears further analysis. The trend is described in table 8.

TABLE 8

RATE OF APPEAL BY THE UNITED STATES IN CIVIL CASES

	FY 1962	FY 1964	FY 1966	FY 1968	FY 1970	FY 1972
Total District Court Judgments in U.S. Civil Cases (Prison Matters Excluded)	4838	5385	5711	6321	9706	10812
Appeals in U.S. Civil Cases (Prison Matters Excluded)	836	969	966	1015	1349	1714
Appeals Authorized by Solicitor General (less Tax Court and Crim. Div. Matters) (est.)	260	280	190	210	310	330
U.S. Appeals as Pct. of Civil Judgments	5.4%	5.2%	3.3%	3.3%	3.2%	3.0%
Private Adversary Appeals (est.)	576	689	776	805	1029	1384
Adversary Appeals as Pct. of Civil Judgments	12%	13%	14%	13%	11%	13%

The exclusions of Tax Court and Criminal Division appeals are only estimates, but there seems to be no doubt that the number of government appeals is diminishing in relation to the number of civil judgments to which the United States is a party. The trend would be even more pronounced if fiscal year 1963, an extraordinary year for government appeals, were included in the table. Unfortunately, data is not available for 1969 or 1971.

There are three possible explanations for the observed phenomenon.

One is that the United States is winning a higher percentage of its cases in the trial courts and thus has less frequent reason to appeal. This hypothesis is supported by the court of appeals memoranda sent to the Solicitor General in the years in question. In general, such memoranda are prepared for each trial court disposition deemed adverse. It appears that there were about 900 memoranda regarding civil dispositions in district courts in 1962, 1,200 in 1963, 1,000 in 1965, 950 in 1970, and 900 in 1972. On the other hand, it is improbable that the victory rate of the Justice Department has improved so dramatically. Such a conclusion does not accord with the impressions of appellate lawyers in the department, and there is no known cause for such an improvement. It seems more likely that time pressure caused by congestion in both the courts and the department have resulted in a gradual tightening of standards respecting the degree of adversity needed to trigger a memorandum to the Solicitor General. A second possible explanation is that there has been some change in the substantive character of the issues litigated that might reduce the frequency of government appeal. No such change has been identified, and the possibility is somewhat negated by the relatively steady rate of adversary appeals.

A third possible explanation for the trend, at least a possible contributing cause, is that there are some cases that are not being appealed in 1972 that would have been appealed in 1962. Moreover, it seems likely that some of the cases not being appealed are cases that might have been won in 1962; this assumption can be inferred from the probability that the success rate of the United States has improved significantly in the last decade. Full data supporting this observation is available only in the Tax Division, but it is also supported by fragments and impressions from other divisions. There is some independent data supporting the third possibility which may illuminate its cause, and which may suggest a problem. The other data is skimpy, but it tends to suggest that the United States is significantly less likely today than formerly to take an appeal that challenges the sufficiency of evidence supporting an adverse decision.

Thus the Lands Division memoranda reveal that, in fiscal year 1966, 7 of 43 adverse decisions in taking cases were appealed, 4 on grounds of insufficiency of the evidence to support the valuation. In 1972 no appeals were authorized on that ground in any of the 38 taking cases reviewed. Similarly, challenges to the factual sufficiency of the trial court decisions were mounted in 6 of 17 tax appeals in 1961 and in 6 of 22 tax appeals in 1966. But there was not a single appeal of this sort included among 27 tax appeals filed in 1972.

At least as an initial reaction, it would seem a plausible explanation that the change could result from time pressure on the appellate sections which might thus be husbanding their energies for cases that have greater prospective significance, and foregoing appeals that can produce at most only a few more dollars of revenue or a few less dollars of compensation

in particular cases. In support of this explanation, it may be noted that the increase in the number of appellate lawyers in the Justice Department has not kept pace with the growth in caseload.

On the other hand, interviews with appellate lawyers in the Justice Department provided little confirmation for this inference. And, indeed, one memorandum writer put the matter in quite a different light. It was suggested in one case that, although the fact finding in the trial court was clearly erroneous and unfair to the government, no appeal should be taken because *the court* would be too time-pressed to give serious consideration to the trial record and to the contention of the United States. It was predicted that such an appeal would be assigned to a summary docket and decided without argument or opinion, and perhaps without a reading of the government's brief. Some other Justice Department lawyers shared the view that such was a more plausible explanation for the shift away from record-based appeals challenging the sufficiency of the evidence to support an adverse result.

The report of this apparent trend should be qualified with the reservation that it does not seem to apply to some special situations. These special situations involve the known propensities of particular judges to distort the fact-finding process in particular classes of cases. Some judges are known to be inclined to convert the Social Security Act into an unemployment compensation scheme by finding all workers to be disabled; other judges are known to be inclined to credit every claim of conscientious objection to military service, however thin the evidence supporting the claim; one judge seems to be known throughout the department as generally hostile to the Government. In such special situations, the factual records are more thoroughly considered, and there is a manifest inclination to challenge findings that may be reversed on appeal as clearly erroneous. Moreover, there is no evidence that the courts are more deferential to Labor Board findings. No historical data is available for comparison, but the fact that 24 board decisions favorable to enforcement were reversed in one year as factually unjustified suggests that the courts are still actively reviewing board fact finding.¹⁷

III. APPRAISAL

The data does serve to give some tangibility to concerns about the limited ability of the federal courts to give firm answers to issues that have been fully litigated. To those who have been most concerned, the data is somewhat reassuring; it is fairly well established that there are no grave social problems immediately associated with the instability of the national law. On the other hand, the data does confirm that there are a

17. Cf. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

number of legal issues of some significance that are amenable to judicial resolution but that are not resolved with firmness and dispatch. From the perspective of this data, the problem resembles a very low grade infection; it poses no apparent threat of a crisis in the health of the system, but it would appear to impair its effectiveness.

If one were to attempt to quantify the problem on the basis of this data, it would seem reasonably conservative to say that 5 to 10% of the civil appeals by the United States are duplicate litigations that would not have occurred if earlier cases had been authoritatively decided. This figure would amount to about 15 to 25 appeals a year. If one could project the same percentage to the bulk of appeals filed by adversaries of the United States, the total would be 150 to 250 appeals a year. But, especially given the crudity of the initial calculation, this projection would seem to be too great a leap of faith. We know that the adversaries' decisions to appeal are less rational and more speculative than those made by the United States; this characteristic could magnify or nullify the effect of doctrinal instability caused by the organization of the courts. It would be even more fanciful to project the results of this data into the large bulk of wholly private federal question litigation, which includes quite different substantive areas.

The data also serves to illustrate that the problem cannot be measured wholly in the coin of appellate filings. Each appeal corresponds to as many as six dispositions in the trial courts and a larger number of trial court filings. In turn, each trial court filing corresponds to a larger bulk of matters that are handled at the administrative level. And each matter handled at the administrative level may, in some areas, represent only the surface of a still greater mass of incidents that are managed wholly by private citizens or organizations that plan their affairs to avoid the toils of the legal system. The issues specified in tables 3, 4, 6, and 7 vary greatly in the scope of their potential effect on a class of prospective litigants, but all of them involve the interests of others than those immediately involved. Any failure of the system to provide authoritative resolutions of these issues must produce, in varying degrees, some uncertainty on the part of private planners, some erratic behavior by administrators and trial courts, and some waste of both time and treasure on the part of both the government and the citizens who are its momentary adversaries.

In its attempt to respond to this problem, the recent *Report of the Study Group on the Caseload of the Supreme Court* suggested that the proposed National Court of Appeals might exercise some jurisdiction to resolve intercircuit conflicts.¹⁸ This data suggests that such conflicts are not

18. STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT, REPORT A3 (1972). See also Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 612-16 (1969).

necessarily the issues in greatest need of resolution. Some cases that present conflicts may have substantially less prospective significance than other cases not now destined to reach the Supreme Court. If a court is to exercise such jurisdiction, this data would tend to indicate that the jurisdiction should not be cast in the limiting terminology of conflict.

The data also bears on another feature of the same *Report*. In urging the abolition of the Urgent Deficiencies procedure and the routing of all federal appeals to the Supreme Court through the courts of appeals, the *Report* expresses a widely shared view of the obsolescence of that procedure.¹⁹ By eliminating it, the *Report* would enable the Supreme Court to substitute on its docket some matters in greater need of resolution than those that now reach it by direct appeal. At the same time, however, the data sheds some light on the limited cost of that desirable change. The low grade infection of uncertainty would be spread to the transportation and antitrust laws of the United States, as some issues now reaching the Court would be left to the less authoritative dispositions of the courts of appeals.

Perhaps the most significant aspect of the study is the unexpected signal that the fact-finding review function of the courts of appeals may be diminishing. By definition, the failure of that function in any individual case is almost certainly less consequential than a failure to perform the legislative function of resolving issues that have prospective significance in a class of cases. But a massive failure of the fact review function, if that is what is indicated, should be regarded as a serious matter.

It should be kept in mind that it is the fact review function for which the courts of appeals were created in 1891 to perform.²⁰ It was not until 1948, when the circuit en banc procedure was formally recognized,²¹ that any expectation of law making by the courts of appeals was articulated by Congress.²² While inadequate performance of the law making function may result in instability, uncertainty, and expense, inadequate performance of the fact review function threatens the integrity of the process and can lead to a crisis of confidence that is far more grave. This situation could occur if the expectation of the one memorandum writer that the record might remain unread became generally shared by judges and litigants with respect to all kinds of cases. If the trier of fact does

19. STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT, REPORT A3, at 26-34 & n.8 (1972).

20. F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 86-88 (1928); Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 612-16 (1969); see Carrington, *The Power of District Judges and the Responsibility of Courts of Appeals*, 3 GA. L. REV. 507 (1969). *But cf.* Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751 (1957).

21. The provision is found in 28 U.S.C. § 46(c) (1970).

22. Earlier the Supreme Court had placed its seal of approval on en banc proceedings. *Textile Mills Sec. Corp. v. Commissioner*, 314 U.S. 326, 333-35 (1941). *But see* Friendly, *The "Law of the Circuit" and All That*, 46 ST. JOHNS L. REV. 406, 411-13 (1972).

not expect the record to be reviewed, he will be tempted to insulate his entire decision from review by finding facts that suit his favored disposition. To the extent that this happens, the legislative authority of Congress can be frustrated by erratic administration. Whether or not it happens, litigants who believe that it may be expected to suffer considerable anxiety about the fact findings. The kind of crisis of confidence in the trial courts that characterized the eighth and ninth decades of the nineteenth century could be reproduced.²³

One should hasten to add that the data does not suggest that any such crisis is at hand. There is no indication in the data that the adversaries of the United States, much less litigants in private disputes, are less prone than they were to challenge fact finding. The fact that some insiders may perceive a slackening of the courts' willingness and ability to review fact finding does not necessarily indicate that any such perception is widespread.

One may, indeed, conclude that this apparent problem is still very manageable if it is attended to. To some extent, the circuit judges may be able to eliminate the threat by a conscious effort, not only to review factual records, but to be seen doing so. Screening devices that have become commonplace in the courts of appeals in the last five years should be operated with this problem in mind, in order to dispel any belief by the bar that factual challenges are not taken seriously. On the other hand, the problem may not be entirely within the grasp of circuit judges, many of whom are now virtually embattled by the caseload. It is at least possible that the courts of appeals are reluctant to take the time to review records carefully. To the extent that this is correct, it presents another problem to be considered by the Commission on Revision of the Federal Court Appellate System.

23. See F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 86-88 (1928).