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## THE CASE FOR CREATING A SPECIAL ENVIRONMENTAL COURT SYSTEM—A FURTHER COMMENT

SCOTT C. WHITNEY\*

Section 9 of the Federal Water Pollution Control Act of 1972 directs the President of the United States through the Attorney General to study the feasibility of an environmental court or court system.<sup>1</sup> Responsibility for conducting this "investigation and study" was assigned to a Justice Department Task Force composed primarily of staff attorneys from the Land and Natural Resources Division.<sup>2</sup> Under the terms of section 9, the findings and recommendations of the Task Force were to be submitted to Congress by October 18, 1973.

On April 27, 1973, the Deputy Assistant Attorney General in charge of the Land and Natural Resources Division of the Department of Justice announced that that Division "has tentatively taken a position recommending against the establishment of an environmental court."<sup>3</sup> This announcement aligns with the generally negative views expressed by

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1. Pub. L. No. 92-500, 86 Stat. 816 (1972). Section 9 provides: "The President, acting through the Attorney General, shall make a full and complete investigation and study of the feasibility of establishing a separate court or court system, having jurisdiction over environmental matters and shall report the results of such investigation and study together with his recommendations to Congress not later than one year after the date of enactment of this Act."

2. The Environmental Court Task Force was created by the Deputy Attorney General to carry out the congressional assignment. The preponderance in the Task Force of staff attorneys from the Land and Natural Resources Division of the Department of Justice arose because that Division has responsibility "for the conduct of most of what is commonly understood to be environmental litigation," that is, criminal and civil actions against private citizens who violate environmental control laws, and the defense of federal officials accused of conducting governmental programs in violation of environmental statutes, especially the National Environmental Policy Act of 1969. Kiechel, *Environmental Court Vel Non*, 3 E.L.R. 50013 (1973) [hereinafter cited as Kiechel].

3. *Id.* at 50015. It is instructive to note that the Task Force investigation was not even one-half complete when the tentative statement of position was announced. 3 E.L.R. 10058 (1973). The statement, however, made clear that the position taken therein was the preliminary conclusion of the Land and Natural Resources Division and did not necessarily represent the final view of the Department of Justice.

several commentators as to the feasibility and desirability of a special environmental court system.<sup>4</sup>

Subsequent to enactment of section 9, this author presented considerations suggesting that a special environmental court system is feasible and desirable, perhaps even necessary.<sup>5</sup> In view of the tentative recommendation of the Task Force against establishment of an environmental court, and because of the need for a complete and objective discussion of the issue, this Article will consider the validity of the arguments cited by the Task Force in support of its tentative conclusion.<sup>6</sup> Initially, however, it is important to examine the manner in which the Task Force structured its investigation.

The information presently available indicates that the Task Force made certain threshold assumptions with respect to two basic questions: the jurisdictional limits of an environmental court, and the manner in which such a court would be structured. With respect to jurisdiction, the Task Force posited that "whatever limits might be placed upon its jurisdiction, an environmental court should have exclusive jurisdiction of the subject matter falling within those limits. That is, a plaintiff should not have a choice of forums."<sup>7</sup> Moreover, it was assumed that the court "would have jurisdiction to resolve or review all related non-environmental legal issues."<sup>8</sup> Finally, the Task Force assumed that ultimate review would rest with the Supreme Court upon certiorari, that the environmental court would be created as a constitutional rather than a legislative court, and that "the scope of judicial review of agency action would remain unchanged from that now available."<sup>9</sup> Apart from the vagueness of the last statement, these assumptions are unexceptionable.

As to the organization of an environmental court, the Task Force formulated three "model" courts which, in its view, encompassed the major structural alternatives. Under the first alternative, the structure

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4. Oakes, *Developments in Environmental Law*, 3 E.L.R. 50001, 50011-12 (1973) [hereinafter cited as Oakes]; Thompson, *Courts and Water, The Role of the Judicial Process*, in NATIONAL WATER COMMISSION STUDY (1972) [hereinafter cited as Thompson].

5. Whitney, *The Case for Creating a Special Environmental Court System*, 14 WM. & MARY L. REV. 473 (1973) [hereinafter cited as Whitney].

6. The views of the commentators cited in note 4 *supra* will be considered in connection with the discussion of the views of the Task Force. These commentators raise few matters of importance not considered by the Task Force.

7. Kiechel, *supra* note 2, at 50013.

8. *Id.*

9. *Id.* at 50014.

of the court would be similar to that of the Court of Claims, with commissioners or trial judges handling trial matters on an individual basis and with a panel of judges sitting as an appellate division. Consonant with the Task Force's basic assumptions, the court would have exclusive jurisdiction over all environmental cases. The second structural alternative formulated by the Task Force was a court composed of a panel of judges whose sole function would be to review federal administrative orders affecting the environment. This court also would have exclusive jurisdiction. The final alternative was a somewhat truncated version of the second alternative "model," consisting of a panel of judges having exclusive jurisdiction to review orders by certain designated federal administrative agencies or special environmental matters handled by federal agencies.<sup>10</sup> A major difficulty in analyzing these "structural" assumptions is that the precise wording of the alternatives is not now publicly available for study; consequently, as will be seen, interpretational problems may be difficult to resolve.

The structural alternatives were circulated, together with a questionnaire,<sup>11</sup> to an unspecified number of "federal agencies and nongovernmental organizations including Bar associations known or believed to have an interest in environmental problems."<sup>12</sup> The declared intent of the Task Force was to canvass organizations representing "a broad spectrum of viewpoints on environmental matters."<sup>13</sup> Responses were received from 26 undisclosed federal agencies and nine unidentified private organizations, and comments on the structural alternatives were supplied by various unspecified divisions within the Department of Justice.<sup>14</sup> The consensus of the responses was characterized as "near un-

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10. *Id.*

11. The questionnaire solicited the following information: (1) The respondent's total litigation experience in terms of new cases since January 1, 1970; (2) The percentage of such cases having significant environmental issues; (3) The percentage of cases having minor or tangential environmental issues; (4) The respondent's opinion of the ability of courts generally to handle technical environmental issues; (5) Preference among the three model courts suggested; and (6) Suggested alternatives to the proposed models. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 50015. Neither the precise wording of the description of the three alternative "models," the questionnaire, nor the responses thereto by the various agencies and private organizations were available for public study at the time this Article was written. (An oral request by this author to the Deputy Assistant Attorney General on June 10, 1973, seeking access to these materials was declined.) Accordingly, total reliance was placed on the summary characterization of these inquiries and responses set forth by the Deputy Assistant Attorney General in Kiechel, *supra* note 2.

animity among federal agencies and environmental organizations alike in the strong opposition to the establishment of a separate environmental court.”<sup>15</sup>

Without any intent to cavil at the assumptions and methodology employed by the Task Force, two observations appear warranted. First, the report summarizing the Task Force's tentative position evidences a preconceived lack of sympathy with the study mandated by Congress:

The [Congressional] Committee apparently assumed that there is a clearly distinguishable body of “environmental matters” before the courts. In any event, Congress did not attempt to define “environmental matters.” Had it done so, the problems to which I shall refer should have been substantially reduced. Or, perhaps, an environmental court would never have been suggested.<sup>16</sup>

Second, it appears that the structural alternatives as formulated by the Task Force gave rise to misunderstanding among the respondents. For example, one respondent reportedly objected to an environmental court because of fear that such a tribunal would be less accessible to would-be litigants than the federal district courts.<sup>17</sup> It would appear from this response that the questionnaire did not permit consideration of the possibility of an environmental court system having a decentralized structure at the trial level and thus that all major available alternatives were not deployed in the questionnaire.

In light of the unavailability at this time of the exact questions and the precise descriptions of the alternative “models” submitted to the various agencies and private groups, it is impossible to evaluate reliably the re-

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15. Kiechel, *supra* note 2, at 50015.

16. *Id.* at 50013. That the Task Force has announced its opposition to environmental courts, be that position tentative or not, prior to reaching the half-way point in its investigation and study should also be considered in evaluating the objectivity of the undertaking. See note 3 *supra*.

17. Kiechel, *supra* note 2, at 50015. Similarly Judge Oakes, who appears to have had access to the text of the Task Force alternatives, clearly assumes that the proposed environmental court would be centralized in Washington, D. C.. “[I]t is best to continue to allow environmental cases to be tried locally, rather than to channel them into a centralized place as, for example, are Court of Claims cases which are all heard in Washington.” Oakes, *supra* note 4, at 50012. In fact, the Court of Claims does hear cases outside the District of Columbia. For example, “Trials for the purpose of taking testimony and receiving exhibits are conducted before the commissioners of the court who serve as its trial judges, and the trials are conducted at locations most convenient for the claimant and his witnesses.” UNITED STATES GOVERNMENT ORGANIZATION MANUAL 61 (1972-73).

sponses thereto. However, the tentative statement of position does set forth the four basic arguments relied upon by the Task Force in support of its tentative recommendation against creation of special environmental courts. The merits of these objections can be assessed independently of any critique of Task Force methods.<sup>18</sup> Congress presumably will hold hearings after receipt of the Task Force study and the presidential recommendations, at which time further evidence from sources other than those consulted by the Task Force presumably will be considered. It would, however, be misleading during the interim to leave unrebutted the Task Force's assumption that there are "no identifiable proponents of an environmental court."<sup>19</sup> Accordingly, the remainder of this Article will evaluate the four factors which the Task Force asserts support its tentative position.

I. *There Is an Identifiable Body of Environmental Cases for Purposes of Establishing the Jurisdiction of an Environmental Court.*

The Task Force does not appear to have invested any extensive effort in formulating criteria to identify environmental litigation which would be subject to the jurisdiction of an environmental court. At the outset, the Task Force noted that "little is known of the thought processes behind [section 9]," and that "Congress did not attempt to define 'environmental matters.'"<sup>20</sup> That the Task Force itself apparently did not attempt to define "environmental matters" at any point in its questionnaire is evident from its statement that the "initial response to our request was a rapid succession of inquiries as to how we defined 'environmental cases'"<sup>21</sup> Such a reaction is understandable, since responsible prospective respondents naturally would desire to provide meaningful data, and because the term "environmental matters" is no doubt susceptible to more than one definition. However, the Task Force appears to have concluded that requests for clarification of the questionnaire indicated that the term "environmental matters" is *not susceptible* of any rational definition, conceding that it had "to acknowledge frankly that [it] had no definitions going beyond the mean-

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18. Congress presumably can gain access to the basic Task Force documents to determine whether objective and accurate methods were employed to canvas agency and other opinion, whether an adequately broad cross-section of opinion was consulted, and what weight should be given to the Task Force's summary of responses.

19. Kiechel, *supra* note 2, at 50015.

20. *Id.* at 50013.

21. *Id.* at 50014.

ings which the terms themselves suggested.”<sup>22</sup> Embracing this rather solipsist view, the Task Force, without further effort to devise a definition,<sup>23</sup> summarily concluded that this alleged indefinability constitutes “a fundamental obstacle to the creation of an environmental court.”<sup>24</sup> In support of this argument, it cited the Alaska pipeline case,<sup>25</sup> in which the United States Court of Appeals for the District of Columbia Circuit held, on nonenvironmental grounds, that the Secretary of the Interior lacked authority to approve construction of the proposed pipeline.

The definitional difficulty encountered by the Task Force raises the question whether it is valid to conclude that the mixture in certain cases of environmental and nonenvironmental issues precludes the formulation of criteria which define environmental matters for jurisdictional purposes. As will be explained subsequently in detail, the fact that a given case embraces “mixed” issues presents no insuperable obstacle to identification of environmental jurisdiction. Indeed, “pure” cases, that is, cases presenting only straightforward issues arising under a single statute or controlled exclusively by the doctrine of a single area of law, are infrequent, even in the so-called specialized courts. Litigation frequently involves a multiplicity of issues implicating various types of legal questions, yet this mix has never been supposed to preclude the selection of a court with proper jurisdiction.

The United States Court of Claims is cited by the Task Force as an example of a special court which, unlike an environmental court system, has readily distinguishable special jurisdiction which can ordinarily be ascertained from the allegations of a complaint. The Task Force notes that the Court of Claims has jurisdiction where “the plaintiff is seeking money damages from the United States based upon the Constitution, an act of Congress or administrative regulation or a contractual obliga-

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22. *Id.*

23. Interestingly, Judge Oakes, who also opposes creation of special environmental courts, appears to have no difficulty in defining the prospective jurisdiction of such courts. He does, however, point out that environmental law is “diffuse” “It comes, among other things, from international law, constitutional law, administrative law, public health law, nuisance law, natural resources and property law, conservation law, and a myriad of statutes, federal and state.” Oakes, *supra* note 4, at 50001. Judge Oakes notes that because “environmental law, unlike Customs law, Court of Claims work, or Tax Court cases, is a sort of hodgepodge of international law, administrative law, tort, procedure, statutory construction etc. . . [i]t is crucial that judges who are passing upon environmental cases have more than a nodding acquaintance with these other legal areas.” *Id.* at 50011.

24. Kiechel, *supra* note 2, at 50014.

25. *Wilderness Society v. Morton*, 479 F.2d 842 (D.C. Cir. 1973).

tion. " <sup>26</sup> Although it cannot be gainsaid that all cases reaching the Court of Claims are grounded on the Constitution, a federal statute, an administrative ruling, or a contractual obligation, to infer that all Court of Claims cases are "pure" single-issue cases is to ignore the multifarious matters which reach that court. Cases heard in the Court of Claims include Indian claims, refund of federal income and excise taxes, certain patent matters, back pay and retirement questions by civilian and military personnel, and implied contracts not sounding in tort.<sup>27</sup>

It is true, as Judge Oakes has noted,<sup>28</sup> that environmental law embraces a number of legal disciplines. Nevertheless, it is equally clear that judges on such specialized courts as the Court of Claims or the Tax Court also must have more than a "nodding acquaintance" with other fields of law, such as contracts, negotiable instruments, real and personal property, trusts, corporations, and legal accounting. There is simply no valid basis for assuming that environmental courts would be staffed by judges not competent to cope either with so-called "mixed" cases or with concepts derived from other branches of the law. Indeed, it is conceivable that Congress might decide to alleviate the present workload problem in the federal district courts by authorizing, depending upon local need, one or more new judges for each federal judicial district to hear all environmental cases and all "mixed" cases involving important environmental issues. Although such judges would be recruited on the basis of merit from the members of the practicing bar and academic ranks in the same manner as federal district court judges presently are selected, they would specialize in environmental litigation,<sup>29</sup> and appeals from their decisions would proceed to a single environmental appellate court.<sup>30</sup>

As noted earlier, the Alaska pipeline case, despite widely recognized environmental implications, was decided on the basis of nonenvironmental grounds. It does not follow, however, that such a case should be excluded from the jurisdiction of an environmental court. Mixed cases involving both environmental and nonenvironmental issues will no doubt continue to be prevalent. Why the presence of nonenvironmental issues in a case involving one or more significant environmental issues should preclude determination of the case by an environmental court has never

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26. Kiechel, *supra* note 2, at 50014.

27. UNITED STATES GOVERNMENT ORGANIZATION MANUAL 60 (1972-73).

28. See note 23 *supra*.

29. See notes 42-60 *infra* & accompanying text.

30. See notes 87-89 *infra* & accompanying text.



been explained.<sup>31</sup> Apparently, opponents of an environmental court system assume that judges in such courts would be competent *only* as to environmental matters and thus incompetent to handle "mixed" cases. However, as previously noted, there is no basis in the history of existing specialized courts to support such an assumption; furthermore, nothing in the nature of the options available to Congress precludes creation of environmental courts fully capable of handling such "mixed" cases.

Just as there is a common identifying thread permeating the diverse litigation before the Court of Claims, there similarly is a common thread permeating environmental litigation. The environmental aspect in most cases involving "mixed" issues generally may be discerned from the allegations of a competently drafted complaint. Cases arising under the provisions of statutes such as the National Environmental Policy Act (NEPA),<sup>32</sup> the Clean Air Act,<sup>33</sup> the Federal Water Pollution Control Act,<sup>34</sup> the Noise Control Act,<sup>35</sup> the Resource Recovery Act,<sup>36</sup> the Federal Environmental Pesticide Control Act,<sup>37</sup> and the Coastal Zone Management Act<sup>38</sup> are readily identifiable as environmental litigation. In the case of citizens' suits commenced pursuant to federal environmental statutes providing for them,<sup>39</sup> the environmental aspect similarly is apparent.

It is submitted that it would be no more difficult to identify cases appropriate for adjudication in an environmental court than it is to determine which agency actions constitute major federal actions significantly affecting the quality of the human environment and thus

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31. That the case may be decided on a nonenvironmental ground, or even a procedural ground, is not necessarily relevant to the question of jurisdiction. The crucial issue is one of prudent allocation of judicial workload. See notes 61-81 *infra* & accompanying text.

32. 72 U.S.C. §§ 4321-47 (1970).

33. 42 U.S.C. § 1857 (1970).

34. Pub. L. No. 92-500, 86 Stat. 816 (1972).

35. Pub. L. No. 92-574, 86 Stat. 1234 (1972).

36. 42 U.S.C. §§ 3251-59 (1970).

37. 7 U.S.C.A. § 135 et seq. (Cum. Supp. 1973).

38. Pub. L. No. 92-583, 86 Stat. 1280 (1972).

39. The so-called "federal common law" of the environment is another readily identifiable line of environmental cases. See *Washington v. General Motors Corp.*, 406 U.S. 109 (1972); *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972); *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 393 (1959) (dissenting opinion); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457 (1957); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907); *Missouri v. Illinois*, 180 U.S. 208, 241 (1901); *Texas v. Pankey*, 441 F.2d 237 (10th Cir. 1971); *Ivy Broadcasting Co. v. American Tel. & Tel. Co.*, 391 F.2d 486, 492 (2d Cir. 1968).

within the purview of NEPA. To be sure, a significant number of NEPA cases have involved disputes as to the applicability of that Act, but such cases have been clearly environmental in nature and readily recognizable as such.

Environmental litigation also may arise in the context of statutes which involve environmental matters only indirectly. Thus, for example, federal highway legislation requires that federal parklands be used for the construction of highways only if no feasible or prudent alternative routing exists.<sup>40</sup> The environmental aspect of cases arising under such a statute would be readily identifiable for jurisdictional purposes. Moreover, since virtually all projects involving federal decision-making, whether affecting national forests, grazing rights, or mineral extraction on public lands, would constitute a major federal action significantly affecting the quality of the human environment, litigation relating to such projects would involve the impact statement requirements of NEPA, and the question of jurisdiction of an environmental court would be easily resolved.

The purported threshold difficulty encountered by the Task Force of identifying environmental cases for the purpose of formulating jurisdictional limitations would appear to be more a matter of disinclination than any intrinsic inability to conceive workable methods of identification of environmental jurisdiction. The success of the Environmental Protection Agency, the Council on Environmental Quality and, indeed, the Land and Natural Resources Division of the Department of Justice<sup>41</sup> in delineating their respective jurisdictions without difficulty indicates that identification of environmental issues is not so troublesome as the Task Force would have it appear.

## II. *Special Expertise Is Desirable and Necessary in Deciding Environmental Cases.*

Opponents of special environmental courts challenge the need for specialized judicial expertise in adjudicating environmental cases. In discussing this question, the Task Force reports two somewhat conflicting positions expressed by respondents to the questionnaire. The opinions of a number of respondents were summarized as follows:

The supposition that an environmental court would be better equipped to understand complex environmental legal issues and

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40. 49 U.S.C. § 1653(f) (1970); 23 U.S.C. § 138 (1970).

41. See note 2 *supra*.

to evaluate technological data was given little credence. The district courts, it was pointed out, are accustomed to complex issues of law and to evaluating the testimony of experts in fields with which the judges are not familiar. There is nothing unique in the legal or technological complexity of environmental cases. Although not always satisfied with the results in particular cases, responding agencies saw no difference in the ability of present courts to deal with the complexities of environmental cases and their ability to handle other complex cases.<sup>42</sup>

This view is supported by Justice Douglas' dissent in *Ohio v. Wyandotte Chemicals Corp.*,<sup>43</sup> in which he took issue with the majority view that the Supreme Court lacks the necessary expertise to adjudicate environmental cases: "The practice has been to appoint a Special Master which we certainly would do in this case. We could also appoint—or authorize the Special Master to retain—a panel of scientific advisers. The problems in this case are simple compared with those in the water cases discussed above. The problem, though clothed in chemical secrets, can be exposed by the experts."<sup>44</sup>

Elsewhere, the Task Force reports the somewhat contradictory view advanced by some respondents opposing the creation of an environmental court that the "broad range of issues involved in environmental litigation would defy the acquisition of 'expertise' in environmental matters."<sup>45</sup> Other critics of a specialized environmental court have argued that judges with a more generalized legal background can, in fact, do a better job than a specialist concentrating on the minutiae of a technical field of law.

In our society, courts are called upon to be generalists. A district court judge may one day decide a technical patent claim involving chemical bonds and the next day hear a railroad negligence claim requiring understanding of the ordinary duties of a switchman according to union rules. Many commentators feel that this broad scope of the courts is an essential protection to both parties, since it assures that a neutral outsider whose only specialty is making decisions will bring precedent and common sense to bear on a wide variety of problems.<sup>46</sup>

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42. Kiechel, *supra* note 2, at 50015.

43. 401 U.S. 493 (1971).

44. *Id.* at 511-12.

45. Kiechel, *supra* note 2, at 50015.

46. Thompson, *supra* note 4, at 9.

Another statement of this position has been supplied by Judge Oakes:

[T]he current system of review by generalist judges already allows for the consideration of the best technical expertise in the various areas of environmental concern. The adversary system, with introduction of expert testimony and careful cross-examination, allows for pretty careful examination of the most advanced technical knowledge about the costs of a given polluting activity and the alternatives to that activity.<sup>47</sup>

It also has been maintained, somewhat surprisingly, that technical expertise in environmental matters is not really necessary at all, since, it is argued, environmental litigation does not raise "technical" issues requiring mastery of the substantive scientific disciplines involved, but only issues necessitating the "weighing of public policy considerations."<sup>48</sup> Advocates of this view cite a NEPA case and a non-NEPA environmental decision in support of their thesis.

The NEPA decision was *Environmental Defense Fund, Inc. v. Corps of Engineers*,<sup>49</sup> in which the plaintiffs sought to enjoin further construction on the Gillham dam project unless and until the Corps of Engineers prepared an environmental impact statement in compliance with the provisions of NEPA. Although granting the injunction, the federal district court implied that the responsibility for considering matters pertaining to the environmental impact of the project would rest with the Corps and not the reviewing court. The non-NEPA decision, *Citizens to Preserve Overton Park v. Volpe*,<sup>50</sup> involved the scope of judicial review under federal statutes providing that the Secretary of Transportation cannot authorize construction of interstate highways through parkland unless "there is no feasible and prudent alternative to the use of such land."<sup>51</sup> The Supreme Court held that a reviewing court must simply determine whether the Secretary, in authorizing the construction in question, had conformed to the stated intent of Congress. This determination could be made "without any need whatsoever in educating

47. Oakes, *supra* note 4, at 50012. Judge Oakes also expresses the belief that the "wisdom and overview which comes from dealing with [environmental litigation] in non-environmental contexts will, I believe, lead to the development of a sounder and more consistent body of environmental law." *Id.* at 50011.

48. Thompson, *supra* note 4, at 45.

49. 325 F Supp. 749 (E.D. Ark. 1971).

50. 401 U.S. 402 (1971).

51. 49 U.S.C. § 1653(f) (1970); 23 U.S.C. § 138 (1970).

the Court in highway engineering. In fact, that expertise would have been beside the point.”<sup>52</sup>

The argument that environmental litigation does not require specialized judicial knowledge is opposed by statements of numerous courts proclaiming their lack of expertise to adjudicate technical environmental questions. For example, in *Wyandotte Chemicals* the Supreme Court refused to exercise original jurisdiction it admittedly possessed over a water pollution controversy, stating:

The notion that appellate judges, even with the assistance of a most competent Special Master, might appropriately undertake at this time to unravel these complexities is, to say the least, unrealistic.

[T]his Court has found even the simplest sort of interstate pollution case an extremely awkward vehicle to manage. And this case is an extraordinarily complex one both because of the novel scientific issues of fact inherent in it and the multiplicity of governmental agencies already involved. *We have no claim to such expertise* or reason to believe that, were we to adjudicate this case, and others like it, we would not have to reduce drastically our attention to those controversies for which this Court is a proper and necessary forum.<sup>53</sup>

Cases involving the original jurisdiction of the Supreme Court would, of course, embroil the Court in the task of trying the facts in controversy, a function in no way different from the normal trial responsibility of federal district courts. Moreover, there is no basis to assume that federal district court judges would be any more competent within their existing workload constraints to adjudicate complex and technical questions than the members of the Supreme Court. It is apparent that a key factor motivating the Supreme Court to decline to assume what it characterized as “noisome, vexatious, or unfamiliar tasks”<sup>54</sup> was their heavy workload. As will be demonstrated,<sup>55</sup> the same consideration is applicable to the federal district courts.

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52. Thompson, *supra* note 4, at 50.

53. 401 U.S. at 504-5 (emphasis supplied). The Supreme Court has subsequently declined to exercise its original jurisdiction in other pollution cases. See, e.g., *Washington v. General Motors Corp.*, 406 U.S. 109 (1972); *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972).

54. 401 U.S. at 499.

55. See notes 61-81 *infra* & accompanying text.

The Court of Appeals for the District of Columbia Circuit recently grappled with the problem of expertise. In *International Harvester Co. v. Ruckelshaus*,<sup>56</sup> the court reviewed the validity of the decision of the Administrator of the Environmental Protection Agency denying a petition filed by various automobile manufacturers, pursuant to section 202 of the Clean Air Act, for a one-year suspension of the 1975 emission standards for light duty vehicles. The question whether effective technology was available to achieve compliance with the 1975 standards involved complex and multifarious technical and scientific questions. The National Academy of Science (a statutory party), the Environmental Protection Agency, and expert witnesses for the manufacturers submitted extensive scientific data to the court for consideration. Judge Leventhal, writing for the court, observed:

It is with utmost diffidence that we approach our assignment to review the Administrator's decision on "available technology." The legal issues are intermeshed with technical matters, and as yet judges have no scientific aides. Our diffidence is rooted in the underlying technical complexities, and remains even when we take into account that ours is a judicial review, and not a technical or policy redetermination, our review is channeled by a salutary restraint, and deference to the expertise of an agency that provides reasoned analysis. Nevertheless we must proceed to the task of judicial review assigned by Congress.<sup>57</sup>

After canvassing in detail a wide range of highly technical questions, the court remanded the Administrator's decision for further hearings. In a separate opinion, Chief Judge Bazelon concurred in the result reached by the majority, but commented:

Socrates said that wisdom is the recognition of how much one does not know. I may be wise if that is wisdom, because I recognize that I do not know enough about dynamometer extrapolations, deterioration factor adjustments, and the like to decide whether or not the government's approach to these matters was statistically valid. Therein lies my disagreement with the majority.

The court's opinion today centers on a substantive evaluation of the administrator's assumptions and methodology. *I do not have*

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56. 478 F.2d 615 (D.C. Cir. 1973).

57. *Id.* at 641 (emphasis supplied).

*the technical know-how to agree or disagree with that evaluation—at least on the basis of the present record.*<sup>58</sup>

Thus, four basic views have been expressed with respect to the need for, and importance of, special environmental expertise:

- (1) The view expressed by the majority of the Supreme Court in *Wyandotte Chemicals* and Chief Judge Bazelon in *International Harvester* that environmental litigation *does* involve technical expertise that is beyond the "competence" of generalist courts and judges;
- (2) The view elicited by the Task Force from the responses to its questionnaire that environmental litigation is no more complex than many other areas presently handled by regular federal courts; the corollary to this view is that generalist judges would do a better job than specialists in adjudicating environmental litigation;
- (3) The view expressed by Thompson that special expertise is not at all necessary in environmental litigation since such cases are not decided on the basis of substantive technical data, but rather on broad public policy grounds;
- (4) The view reported by the Task Force that the range of technical issues involved in environmental litigation is so vast that no court could be expected to acquire expertise in environmental matters.

It is manifest that these divergent viewpoints derive primarily from different conceptions of the meaning of "environmental expertise." The concept of "expertise" is best understood by examining the historic evolution of the two connotations most frequently associated with the term: the expertise which is the *raison d'être* of the administrative agencies, and that which is associated with specialized courts.

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58. *Id.* at 650 (emphasis supplied). Section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 1857h-5(b)(1) (1970), provides for direct review of decisions of the Administrator of the Environmental Protection Agency concerning national primary or secondary ambient air quality standards, any emission standard under section 112, any standard of performance under section 111, any standard under section 202 (other than a standard to be prescribed under section 202(b)(1)), any determination under section 202(b)(5), any control or prohibition under section 211, or any standard under section 231.

The decision in *International Harvester*, notwithstanding Chief Judge Bazelon's strictures, indicates that in such statutory situations courts will, despite their "diffidence" to do so, inquire deeply into disputed questions of technical fact.

Administrative expertise normally develops as a body of experience and special knowledge about a given regulatory area over which the agency exercises quasi-legislative and executive power as well as quasi-judicial authority. These administrative situations arose not only by virtue of the inadequacy of judicial remedies but also because of the judiciary's inability to provide the necessary continuing surveillance of a broad range of human activity. For example, as James Landis has noted, the creation of an administrative agency to supervise the issuance and trading of securities was prompted by the lack of protection afforded the investor by judicially administered rules of law. "As in the case of the Interstate Commerce Commission, it was not long before it became evident that the mere proscription of abuses was insufficient to effect the realization of the broad objectives that lay behind the movement for securities legislation. The primary emphasis of administrative activity had to center upon the guidance and supervision of the industry as a whole."<sup>59</sup>

Because the missions assigned to administrative agencies by their organic statutory mandates generally are directed toward the regulation of a single industry or the accomplishment of specific objectives, the agencies have acquired a body of special knowledge called "expertise." This agency expertise, which is simply an accretion of experience derived from handling a wide range of practical problems, many of which are not judicial in nature, is not the type of special knowledge needed by an environmental court. Moreover, it is not necessary that environmental courts be staffed by judges who are career chemists, physicists, acoustical experts, biologists, nuclear scientists, or specialists in other scientific fields. Environmental courts, or judges specializing in environmental litigation, might well, however, make extensive use of special masters who are well versed in various relevant technical disciplines.

The second connotation frequently associated with "expertise" refers to the knowledge of special courts such as the Tax Court. Mr. Justice Jackson has aptly described the Tax Court and the nature of the "expertise" involved in its work as follows:

It deals with a subject that is highly specialized and so complex as to be the despair of judges. It is relatively better staffed for its

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59. LANDIS, *THE ADMINISTRATIVE PROCESS* 15 (1938). Landis notes that the "dominant theme in the administrative structure is thus determined not primarily by political conceptualism but rather by concern for an industry whose economic health has become a responsibility of government." *Id.* at 12.



task than is the judiciary. Its members not infrequently bring to their task long legislative or administrative experience in their subject. The volume of tax matters flowing through the Tax Court keeps its members abreast of changing statutes, regulations, and Bureau practices, informed as to the background of controversies and aware of the impact of their decisions on both Treasury and taxpayer.<sup>60</sup>

Thus, unlike administrative agency expertise, the expertise of such a specialized court is focused narrowly on litigation, as distinguished from the continuing comprehensive regulatory, quasi-judicial, and quasi-legislative missions of agencies. Like Tax Court adjudication, which presupposes an in-depth familiarity with an extensive body of special statutory provisions and voluminous regulations, environmental adjudication presupposes detailed familiarity with numerous special statutes and a rapidly growing body of specialized regulations emanating from agencies such as the Environmental Protection Agency and the Council on Environmental Quality.

The argument here advanced is not that any given federal judge or court, be it the Supreme Court or a federal district court, is not *capable*, given "world enough and time," to develop a mastery of these matters. Rather, the question is essentially one of staffing, workload, and efficient judicial allocation of functions. Thus, just as it has been determined that it is judicially more efficient and productive to provide courts to preside over such special fields as taxation, customs, patents, and claims against the government, it also would be prudent and efficient to provide a special adjudicative apparatus for environmental litigation.

Like other special fields of the law, environmental matters involve highly specialized and intricate questions which could be adjudicated more efficiently by courts with expertise acquired from continual application of environmental statutes and regulations to technically complex issues. As will be shown in the following section, although existing federal courts can intellectually grasp the subject matter, given enough time and effort, to continue to burden general courts with the increasing volume of complex and technical environmental cases would interfere with existing priorities and aggravate the pressures of overcrowded dockets. At both the trial and appellate levels, courts presently lack the time which a special court could devote to developing the detailed familiarity with the numerous statutes, voluminous regulations, and tech-

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60. *Dobson v. Commissioner*, 320 U.S. 489, 498-99 (1943)

nical subject matter which is prerequisite to prompt and efficient decision of environmental questions.

### III. *Existing and Forecast Federal Judicial Workloads Would Be Substantially Relieved by Specialized Adjudication of Environmental Cases.*

The Task Force has asserted that the "total number of environmental cases is not now sufficient, and it cannot presently be predicted that it will ever become sufficient, to justify the creation of a separate court system."<sup>61</sup> This conclusion is based upon a statistical computation which purportedly demonstrates that environmental cases constitute "less than seven tenths of one percent of the total case load" of the federal district courts and the courts of appeal.<sup>62</sup>

A threshold difficulty with this computation is that the Task Force does not disclose the method it used in calculating the number of pending environmental cases. One of the paradoxes of the Task Force study is that although announcing in one section that environmental cases are unidentifiable, it states in another section, with an apparent attempt at precision, that 860 pending environmental cases can be "identified." Apart from this apparent contradiction, such statistical computations can be misleading even if the basic numbers used in the computation are accurate. Assuming *arguendo* that the correct number of environmental cases pending in the courts is 860, the fact remains that this is more than double the workload presently pending before the Court of Customs and Patent Appeals.<sup>63</sup>

It would, of course, be possible, though not particularly meaningful, to compare the number of cases pending before the special courts with the total federal judicial workload. It is unlikely, however, that any

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61. Kiechel, *supra* note 2, at 50016.

62. The Task Force noted:

Our study also indicated that, although environmental litigation has had a dramatic impact upon the government and upon society generally, it has not had a very significant impact upon the total case load of the federal courts. As of June 30, 1972, there were 101,032 civil cases and 25,438 criminal cases pending in the United States district courts. In addition, there were 9,939 cases pending in the courts of appeals. At the same time, there were approximately 860 cases pending before those courts which could be identified as environmental. These constituted, then, less than seven tenths of one per cent of the total case load.

*Id.* at 50015.

63. As of June 30, 1972, there were only 398 cases pending before the Court of Customs and Patent Appeals. 1972 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES 422-23.

serious student of the federal judiciary would argue that special courts are not necessary or useful because they account for only a small percentage of the total number of cases in the federal courts.

It is significant to note that the Task Force report assumes that "it cannot be predicted that [environmental litigation] will ever become sufficient to justify the creation of a separate court system."<sup>64</sup> This unsupported prediction conflicts with the views of experienced judges. Judge Wright, for example, has asserted that current environmental cases represent "only the beginning of what promises to be a flood of new litigation—litigation seeking judicial assistance in protecting our natural environment."<sup>65</sup> Similarly, Judge Feinberg has stated that the peculiarly broad and general terms of NEPA invite interpretational disputes that proliferate litigation.<sup>66</sup>

Of further significance is that environmental reform still is in its infancy. Two major additional environmental statutes dealing with strip-mining<sup>67</sup> and land use planning<sup>68</sup> are likely to be enacted during the present session of Congress; numerous other environmental proposals are pending before that body. The President in a recent energy message<sup>69</sup> to the Congress has requested, *inter alia*, legislation dealing with deep water ports, unified national research and development capability, and power plant and refinery siting, as well as creation of a Department of Natural Resources and Energy. In light of the increased environmental litigation certain to result from the enactment of these and other reforms and planning proposals, there appears to be no rational basis for the conclusion of the Task Force that there would never be sufficient environmental cases to justify creation of a special environmental court.

In evaluating the demands placed upon judicial resources by environmental litigation, examination of the complexity of issues presented by such cases is perhaps more relevant than an analysis of bare statistics. The proper resolution of environmental issues often involves the application of a vast new body of statutes and regulations to complex

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64. Kiechel, *supra* note 2, at 50016.

65. *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109, 1111 (D.C. Cir. 1971).

66. *Hanley v. Mitchell*, 460 F.2d 640, 642 (2d Cir. 1972). Judge Feinberg emphasized that NEPA is "a statute whose meaning is more uncertain than most, not merely because it is relatively new, but also because of the generality of its phrasing."

67. S. 425, 93d Cong., 1st Sess. (1973).

68. S. 268, 93d Cong., 1st Sess. (1973).

69. Statement of the President on Energy, June 29, 1973.

theoretical and factual situations. Every federal agency has promulgated detailed and voluminous regulations establishing administrative procedures bringing that agency's decisionmaking into compliance with the mandates of NEPA. In addition, the Environmental Protection Agency almost daily publishes new guidelines, standards, and regulations dealing with the vast scope of matters within its jurisdiction. Similarly, the Council on Environmental Quality periodically issues detailed guidelines for environmental compliance. In short, there is a vast, growing, and ever-changing corpus of environmental regulations that must be mastered by judges charged with the responsibility of adjudicating environmental matters.

Furthermore, every agency of the federal government must prepare and publish environmental impact statements in connection with every major decision significantly affecting the human environment. Such statements are routinely voluminous and complex, and their legal sufficiency is frequently challenged by environmentalists in the courts. In view of the ever-expanding role of the federal government in environmental reform and planning, it appears certain that the volume of regulations and impact statements will continue to grow, with a concomitant increase in litigation construing or evaluating such promulgations.<sup>70</sup>

The present workload crisis of the federal courts is too well known to require extensive documentation.<sup>71</sup> Suffice it to say that the workload of the Supreme Court has trebled in the past 20 years and the workload of the courts of appeals has more than trebled in the past 10 years.<sup>72</sup> The federal district courts experienced a 13 percent increase in caseload from 1969 to 1970, "the steepest caseload jump for any year in the last decade."<sup>73</sup> A total of 125,324 civil and criminal actions were commenced in 1970, compared to 87,421 in 1960.<sup>74</sup> The case backlog at all levels has increased seriously, inevitably prolonging the lead time in reaching decisions.

Projections of future demands on the federal judiciary are even more alarming. According to Senate Judiciary Committee forecasts, a mini-

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70. As noted earlier, the parallel between contemporary environmental law and the complexity of federal tax law is striking. See note 60 *supra* & accompanying text. If anything, environmental law embraces an even broader and more comprehensive body of technical regulations and standards.

71. Whitney, *supra* note 5, at 482-86.

72. *Id.*

73. REPORT OF THE COMMITTEE ON THE JUDICIARY, S. REP. NO. 92-134, 91st Cong., 2d Sess. 24 (1971).

74. *Id.* at 29, 37.

num of 1,129 federal district judges and 273 circuit judges will be necessary to handle anticipated caseloads by 1990.<sup>75</sup> Assuming adherence to the accepted standard of nine judges per circuit, it appears inevitable that as many as 30 circuits will be required by 1990.<sup>76</sup> Furthermore, because of a greater potential for inter-circuit conflict, substantial additional burdens will be placed upon the Supreme Court. In view of these indisputable conditions, it seems clear that some special provision for handling the large and growing volume of environmental litigation is required.

It is important to reiterate that the number of pending or forecast environmental cases is only one factor to be considered in evaluating the impact of such litigation upon the federal judiciary. Environmental cases tax judicial resources by raising complex and novel issues requiring familiarity with voluminous technical regulations and statutes. They thus consume significantly more judicial time per case than most other types of actions. For example, although *Sierra Club v. Morton*<sup>77</sup> has been before the courts since June 1969, it has yet to be resolved on the merits. *Scenic Hudson Preservation Conference v. FPC*<sup>78</sup> required more than seven years to adjudicate, and *Wilderness Society v. Morton*,<sup>79</sup> involving the Alaska pipeline issue, consumed some three years before the delay became intolerable and special legislative intercession became necessary to break the judicial log-jam.<sup>80</sup> It is obvious from these and other examples that delay in adjudication of environmental matters consistently exceeds that experienced with general federal litigation.<sup>81</sup>

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75. Whitney, *supra* note 5, at 485.

76. *Id.*

77. 433 F.2d 24 (9th Cir. 1970).

78. 453 F.2d 463 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972).

79. 479 F.2d 842 (D.C. Cir. 1973).

80. Pub. L. No. 93-153 (Nov. 16, 1973). Interestingly, as noted in the Task Force report, at the point Congress interceded, the Court of Appeals for the District of Columbia Circuit had not yet addressed itself to the NEPA issues. The Task Force report notes that "it is pure conjecture to try to guess what an environmental court would have done with the pipeline case. But it is reasonable to suppose that, by this time, that is, within three years, an environmental court would have decided the environmental issues." Kiechel, *supra* note 2, at 50014.

81. In the federal district courts, as of June 30, 1970, over 52,000 cases had been disposed of within one year, 21,012 cases had required between one and two years, 9,613 cases had required between two and three years, and 8,004 cases, or only eight percent of the total, had been pending three years or longer. REPORT OF THE COMMITTEE ON THE JUDICIARY, S. REP. No. 92-134, 91st Cong., 2d Sess. 29, 37 (1971).

In evaluating the Task Force study, Congress should consider carefully the significant extent to which a special environmental court system could contribute to relieving the workload crisis in the federal courts. As the foregoing evidence indicates, the existing federal court system is ill suited to the efficient and expeditious disposition of complex environmental litigation, especially in light of forecasted future demands upon judicial resources.

*IV Environmental Courts Can Be Structured to Possess Adequate "Institutional Strength" and Can Resolve Serious Substantive Conflicts Which Have Arisen in Various Circuit Courts.*

The Task Force report asserts:

There is virtually no evidence of support for a separate environmental court among those most directly affected by the manner in which environmental controversies are handled. Experience suggests that a court lacking active support from any of the influential interests to be affected by its operations does not have a bright future.<sup>82</sup>

Elsewhere, the report notes that various respondents to its questionnaire expressed "fear that an environmental court would lack institutional strength to withstand the pressures likely to be focused upon it by special interest groups."<sup>83</sup> Similar misgivings about the institutional strength of special environmental courts have been expressed by Judge Oakes:

[I]t is quite possible that the appointment of Environmental Court judges would be much more subject to influence by lobby than are appointments of district or court of appeals judges. This is true simply because those whose aims are not supportive of environmental protection would be likely to concentrate their very substantial resources on influencing the appointments to these specialized positions.<sup>84</sup>

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82. Kiechel, *supra* note 2, at 50016.

83. *Id.* at 50015.

84. Oakes, *supra* note 4, at 50012. The same pessimistic assumptions could have been made with respect to establishment of the Environmental Protection Agency or, for that matter, the Tax Court, which frequently adjudicates cases involving large and influential corporations and monetary liability comparable to the stakes at issue in environmental litigation.

It is, of course, possible to postulate a priori that any proposed institution will be weak and venal. Absent any corroborative evidence, however, such speculation is unpersuasive. Moreover, in the case of an environmental court, there are several constraints which indicate such pessimistic assumptions are without basis. Since one of the postulates of the Task Force study is that "the court would be created as a constitutional, rather than a legislative court,"<sup>85</sup> all of the existing civil and criminal laws and regulations and the canons of ethics that assure proper conduct by federal judges and parties participating in litigation before existing federal courts would apply in an environmental court.

Furthermore, judges designated to handle environmental litigation can be selected in the same manner as judges in existing federal courts. Such appointments are subject to confirmation by Congress, a body which repeatedly has demonstrated its disposition to enact effective environmental reform legislation regardless of the impact on powerful interest groups. In addition, Congress has on occasion refused to confirm appointments, especially those to quasi-judicial agencies, when there is evidence that a prospective appointee might be unduly industry oriented.<sup>86</sup> There is thus no basis to assume that even if the President appointed judges with backgrounds suggesting a possible bias against environmental reform, Congress would confirm them. Finally, in light of the high quality of appointments to top positions in agencies such as the Environmental Protection Agency, the Council on Environmental Quality, and the National Oceanic and Atmospheric Administration, there is no indication that the President would not continue to appoint candidates possessing the highest order of competence, integrity, and objectivity.

In an abundance of caution, Congress may well see fit to assure both institutional strength and high integrity by creating special judicial machinery as an adjunct to existing federal district courts to try environmental litigation. A special panel of the trial level judges could

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85. Kiechel, *supra* note 2, at 50014.

86. Recently the Senate by a 49 to 44 vote rejected President Nixon's nomination of Robert H. Morris to serve on the Federal Power Commission. Mr. Morris is an attorney who had represented Standard Oil Co. at one time and also represented certain natural gas interests before the FPC. Senator Warren G. Magnuson (D. Wash.), chairman of the Commerce Committee, commented: "[T]he Senate again is asked to accept for an independent regulatory agency with vast powers over an industry which affects vital national interests, yet one more nominee whose professional career has been dedicated to the furtherance of the private interests of that industry" 5 NATIONAL JOURNAL REPORTS 925 (1973).

constitute a single environmental court of appeals to review environmental decisions. Implementation of such a system would remove the serious threat to the credibility and effectiveness of adjudication of environmental cases presently resulting from conflicts among circuits on interpretation of NEPA.<sup>87</sup> Such conflicts not only significantly obstruct uniform and consistent enforcement of important environmental laws, but also render compliance by the many important affected industries more difficult. As a result, such industries have incurred significant unnecessary economic costs.<sup>88</sup> Moreover, uncertainties regarding statutory requirements have resulted in delays in bringing on-line many industrial activities required by the public interest.

Certainty, or at least predictability, in environmental law would enhance appreciably industry's ability to plan complex and costly facilities, some of which require a decade's lead time to complete. This certainty in the environmental area is at least as important to the orderly growth of an industrialized, populous society as is certainty in the area of tax law.<sup>89</sup> Faced as it is with the need greatly to expand industrial capacity to keep pace with public demand and to assure attainment of the high standard of living that is one of the society's stated goals, the United States can ill afford a "trial and error" jurisprudence that unnecessarily renders environmental planning unpredictable and costly. It is submitted that uncertainty as to the substance of environmental legal requirements, not the possibility of excessive industry-oriented pressures, is the major present threat to the institutional strength of federal courts adjudicating environmental cases.

The so-called "energy crisis" is only the first of a series of resource crises this nation will experience unless the present large and growing body of environmental constraints on productivity are skillfully, promptly, and consistently articulated. Thus, in evaluating the final conclusions of the Task Force on the need for creation of a special environmental court, Congress should give careful attention to the importance of achiev-

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87. Whitney, *supra* note 5, at 486-501.

88. It is not a little disquieting to learn that at least one judge appears to *approve* of inter-circuit conflicts. Judge Oakes notes: "Although the Supreme Court *may eventually* bring into line conflicting doctrine in the different circuits and states, there is a healthy cross-fertilization which occurs from having different courts rule on given environmental questions and then living with those decisions for a time." Oakes, *supra* note 4, at 50011 (emphasis supplied).

89. The long experience with conflicting circuit court decisions on tax questions has been universally criticized as one of the chief defects of the United States Tax Court. Whitney, *supra* note 5, at 486-88.



ing uniformity and consistency in adjudication of environmental questions. It is manifest that the present judicial system fails to produce the requisite uniformity and consistency. It is equally clear that a special environmental adjudicatory system such as that here discussed would produce uniformity and consistency as well as other significant advantages, not the least of which would be noticeable workload relief at all levels of the federal court system.

A final matter reported by the Task Force deserving comment is the "concern over the possibility that creation of an environmental court would lead to additional specialized courts and the fragmentation of our judicial system."<sup>90</sup> It is not clear why the possibility that Congress might enact additional techniques for special adjudication of identifiable bodies of specialized litigation should be a matter for concern. Additional special courts may or may not be required to cope with future workload crises facing the federal judiciary. Specific proposals for other special adjudicatory mechanisms may well be advanced and should be considered on their merits. However, Congress retains the power to determine whether any given proposal will be implemented. Its decision to provide the institutional machinery for special environmental adjudication would in no way irreversibly commit it to a course of action that would result in an unduly balkanized judiciary. The simple fact is that the judiciary has functioned acceptably for decades with a system embracing both general and specialized courts, and there is nothing in the experience of existing special courts which supports the contention that the effectiveness of our judicial system would be impaired by providing for specialized adjudication of environmental litigation.

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90. Kiechel, *supra* note 2, at 50015.