

OVERVIEW of Phase I Study AND Summary of Findings

Unresolved Intercircuit Conflicts: The Nature and Scope of the Problem

Section 302 of the Judicial Improvements Act of 1990 adopted a recommendation of the Federal Courts Study Committee that the Board of the Federal Judicial Center be requested to conduct a study of unresolved intercircuit conflicts. Specifically, the study was to determine the number and frequency of conflicts among the circuits that remain unresolved because they are not heard by the Supreme Court.

The nature of the questions posed by Congress about unresolved intercircuit conflicts and the relatively short time allowed for the Center to complete its report placed major limitations on the study. In light of the limitations, a decision was made to conduct the study in two phases: the first phase was a multi-faceted effort to determine objectively the number and frequency of unresolved conflicts. As outlined in the Phase I report, this aspect of Congress's inquiry amounted to a rather substantial undertaking. The second phase of the study, expected to be completed in late 1992, examines the question of the *tolerability* of unresolved intercircuit conflicts.

Phase I of the study was conducted by Professor Arthur L. Hellman of the University of Pittsburgh School of Law under contract to the Judicial Center. During the conduct of Phase I, Professor Hellman worked closely with staff of the Center.

This document presents a summary of the major findings of the first phase of the Center's work. The analyses, conclusions, and points of view contained in the Phase I report are those of Professor Hellman. In transmitting the Phase I report, the Board of the Federal Judicial Center signifies that the report is regarded as responsible, valuable, and responsive to Congress's request. Again, it must be noted that due to time limitations and the nature of the inquiry, a comprehensive response to additional questions implicated in the Congressional interest must await completion of the second phase of the study.

Approach taken to the study. Phase I of the study was designed to generate answers to the specific question raised by Congress about the nature and frequency of unresolved inter-circuit conflicts. Professor Hellman conducted extensive analysis on three different groups of cases that the Supreme Court recently declined to hear:

- 237 cases from the three most recent terms of the Supreme Court (1988, 1989, and 1990) in which Justice White dissented from a denial of certiorari. This group of cases was selected as a starting point because Justice White has frequently dissented from denials of certiorari in cases involving a conflict among two or more circuits.
- The second group studied was a random sample of 253 *paid* cases from the 1989 Term that were denied review and in which an opposition brief was filed.
- The third group consisted of 93 *in forma pauperis* cases from the 1989 Term.

In addition to the analyses presented in Professor Hellman's report, two other components were included in the Phase I study:

- Staff of the Center joined Professor Hellman in conducting interviews focusing on the issue of unresolved inter-circuit conflicts with six of nine justices of the Supreme Court.
- Interviews were conducted with a small sample of sixty attorneys from across the country to determine the extent, if any, to which the practice of law was affected by the existence of unresolved inter-circuits.

Limitations of the Phase I study. The Phase I findings must be considered in light of the following observations:

First, prior research suggests strongly that conflicts denied review in one Term will often be resolved when presented to the Court in a subsequent Term. For that reason, Phase II of the study will analyze conflicts denied review in earlier years to determine how many have been resolved or rendered irrelevant.

Second, as Professor Hellman emphasizes, the raw number of unresolved conflicts identified in the first phase of the study, may convey an exaggerated picture of the impact or tolerability of the conflicts. The mere identification of an unresolved conflict provides no basis on which to conclude that a resolution by the Court would have changed outcomes. In this part of the study, we undertook a limited examination of that question; namely, how tolerable are unresolved disagreements among the circuits? A full exploration of the issue, however, must await completion of the next phase of study.

Third, a number of the unresolved conflicts identified in this part of the study involved what Professor Hellman refers to as "vehicle problems." Cases with "vehicle" or procedural problems may be inappropriate for Supreme Court review for various reasons including: (1) the resolution of the conflict by the Court would not have changed the result irrespective of which conflicting rule was applied; (2) the issue on which a conflict is asserted may not have been properly raised in the court below; or (3) the judgment rests on some other uncertworthy grounds.

Findings from the Phase I study. The following are the major findings from the first phase of the study:

- *The number of intercircuit conflicts that are not heard by the Supreme Court appears to be larger than heretofore indicated by previous studies.* Professor Hellman's analysis of a one in five sample of 253 paid cases denied review in the 1989 Term indicates that 41 involved acknowledged or recognized intercircuit conflicts. For the entire 1989 Term, Hellman estimates that the total number of unresolved conflicts is between 163 and 268.
- *Analysis of dissents by Justice White provide important insights on the issue of unresolved conflicts.* Analysis of the 237 cases from the 1988, 1989, and 1990 Terms in which Justice White dissented from a denial of certiorari indicated that 166 involved substantiated claims of intercircuit conflicts.

- Professor Hellman concludes that Justice White does not dissent in every case involving a conflict among the circuits.
- *The number of unresolved intercircuit conflicts presented to the Court in in forma pauperis cases appears not to be very large.* Analysis of a sample of 93 *in forma pauperis* cases from the 1989 Term indicated that 11 involved substantiated intercircuit conflicts. Due to the relatively small size of the sample, the margin of error for estimating the total number of conflicts presented in *in forma pauperis* cases was simply too great.
- *Justices of the Supreme Court we interviewed generally did not see unresolved intercircuit conflicts as a major issue facing the Court.* The general view expressed was that actual, significant, and timely intercircuit conflict is never denied review by the Court. We were told that if a conflict is ripe and important, it will be presented to the Court in a subsequent Term and will be resolved. Those that are not important will not re-appear.
- *It is the view of the justices that a conflict will be resolved if it involves more than two circuits.*
- If a conflict involves a relatively new issue such as one arising out of a new statute, many of the justices expressed the view that the conflict might not be addressed immediately but, rather, would be allowed to percolate.
- *It is clear from our discussions that improvident grants of certiorari may serve as a source of greater concern to the justices than concerns about unresolved intercircuit conflicts.*
- *Attorneys express varying and divergent views about the impact of unresolved intercircuit conflicts.* Based on our interviews with a small sample

of attorneys, it appears that most practicing attorneys believe that national uniformity of laws is lacking, although desirable and in some cases, essential. Few attorneys stated that the existence of an intercircuit conflict in any way affects their practice of law.

- *Attorneys report that their decision to file or settle a case may be affected by the existence of an unresolved conflict that is relevant to the case.* Lawyers report that they are sometimes forced to settle a case because of uncertainties resulting from disagreements among two or more circuits on a relevant point of law.
- *Attorneys in the survey were nearly equally divided in their view of whether the Supreme Court should decide more cases each term as a means of reducing the number of conflicts that go unresolved.*
- *Of the four specialized areas of practice represented by attorneys in our sample (admiralty, social security, ERISA, and labor law) those who regularly represented social security claimants expressed the strongest views about the impact of unresolved conflicts on their clients.* In social security cases payments to claimants depend on the law of the particular circuit rather than on the basis of the individual's eligibility. The view was often expressed that national uniformity would assist the preparation of benefit plans and would make it easier for clients to be advised about their rights.

Comments from the Justices of the Supreme Court we interviewed and from the attorneys in our survey may help to explain the findings of Professor Hellman's study; they also serve to emphasize the importance of the research to be pursued in Phase II. The overall impression that emerged from the conversations is that the Justices and to an extent, the attorneys, do not regard the mere existence of a conflict as manifesting a need for Supreme Court review. Rather, the Justices take into account a variety of

circumstances that bear upon the likely consequences of the conflict. Many of these circumstances will be investigated as part of the analysis of tolerability in the second phase of the project.

The focus of Phase II of the study. The significance of the number of unresolved intercircuit conflicts identified in Phase I of the study cannot be assessed without a more extensive analysis of their nature and tolerability. The next part of the study will address the following:

- **How tolerable are conflicts that go unresolved by the Supreme Court?**
- **How persistent are unresolved conflicts?**
- **What is the impact of disagreements among the circuits in cases denied review by the Supreme Court on the work of attorneys in various fields of practice?**

The Center's Phase II report is expected to be completed by October of 1992.