

CERTIORARI—WHAT IS A CONFLICT BETWEEN CIRCUITS?

EDWARD T. ROEHNER AND SHEILA M. ROEHNER†

CERTIORARI ON CONFLICTS BETWEEN CIRCUITS is granted as of course only on narrow issues—on what Mr. Justice Frankfurter terms a “head-on collision.”¹ But the tax bar generally² and at least one leading commentator³ seem not to be so aware as common lawyers were of the meaning of a narrow issue.

Chief Justice Vinson, in an address delivered in 1949 before the American Bar Association, said that the Supreme Court has never been primarily concerned with the correction of errors in lower court decisions.⁴ In almost all cases within the Court’s appellate jurisdiction, he observed, the petitioner has already received one appellate review of his case. The debates in the Constitutional Convention make clear, he said, that the purpose of the establishment of one supreme national tribunal was, in the words of John Rutledge, of South Carolina, “to secure the national rights & Uniformity of Judgments.” One of the functions of the Supreme Court is, therefore, said the Chief Justice, to resolve conflicts of opinion on federal questions that have arisen.⁵

† Members of the New York Bar.

¹ Cf. “[C]onsiderations of ultimate juristic philosophy are involved when the Court is asked to resolve a conflict of decisions between two circuit courts of appeals where the conflict is not such a head-on collision as a difference by two circuits regarding the validity of a patent. Here, facts relevant to judicial administration . . . undoubtedly influence the Court in deciding whether to adjust the conflict or to stay its hand, at least for the moment. All these more subtle cases of conflict present precisely the kind of situation for which the Court’s discretion is properly invoked. And concordance between the Court’s conception of conflict and that of the litigants is not always to be expected.” Frankfurter, *The Business of the Supreme Court at the October Terms, 1935 and 1936*, 51 *Harv. L. Rev.* 577, 596–97 (1938).

² See note 6 *infra*.

³ Stern, *Denial of Certiorari Despite a Conflict*, 66 *Harv. L. Rev.* 465 (1953).

⁴ Vinson, *Work of the U.S. Supreme Court*, 12 *Tex. Bar J.* 551–52 (1949). Cf. “That function [certiorari] is not simply to do justice between parties. Everyone who comes before it by the certiorari route has had one trial and one appeal already. For justice simply, two courts are enough. The Supreme Court exists primarily to give a uniform and National interpretation to the Constitution and the National laws. Discretion in the selection of its cases preserves its time and energy to do the job.” Bunn, *Jurisdiction and Practice of the Courts of the United States* 261 (5th ed., 1949).

⁵ He remarked also that if the Court took every case in which an interesting legal question was raised or its *prima facie* impression was that the decision below was erroneous, it could not fulfill the constitutional and statutory responsibilities placed upon it. Vinson, *op. cit. supra* note 4, at 552.

However, the tax bar has written⁶ that in *Bear Gulch Water Company v. Commissioner*,⁷ the Supreme Court denied certiorari despite the fact that there was a direct conflict between that case and *Roche's Beach, Inc. v. Commissioner*⁸ in that both decisions turned on Section 101(6) of the Internal Revenue Code. In addition, the Acting Solicitor General of the United States, Mr. Robert L. Stern, has written quite recently, under the title, "Denial of Certiorari Despite a Conflict,"⁹ that the Supreme Court no longer grants certiorari as of course in conflicts between circuits.¹⁰

When we examined the Ninth Circuit opinion in the *Bear Gulch* case,¹¹ we found that the court discussed Section 101(6), which had never been advanced before the Tax Court,¹² but decided the case solely on Section 116(d), the ground advanced by the taxpayer before the Tax Court.¹³ The Second Circuit decision in *Roche's Beach*,¹⁴ on the other hand, turned on Section 101(6). Clearly, no matter what the textwriters might announce, there was no conflict of circuits because of the *Bear Gulch* and *Roche's Beach* decisions.

When we examined the basis for Mr. Stern's assertion, we found it equally lacking in support. Mr. Stern begins his discussion by saying that the 1951 edition of Robertson and Kirkham, "Jurisdiction of the Supreme Court of the United States,"¹⁵ had said:

Where the decision of the Court of Appeals sought to be reviewed by certiorari *directly conflicts*, upon a question of federal law, with the decision of another Court of Appeals *on the same question*, the Supreme Court grants certiorari *as of course*, and *irrespective of the importance of the question of law involved*. The importance in such cases

⁶ E.g., Blodgett, *Taxation of Businesses Conducted by Charitable Corporations*, New York University Fourth Annual Institute on Federal Taxation 421 (1946); Lowndes, *Review of Polisher, Estate Planning and Estate Tax Saving*, 2 *Vanderbilt L. Rev.* 335, 337 (1949); *Colleges, Charities, and the Revenue Act of 1950*, 60 *Yale L.J.* 851, 862 (1951).

⁷ 116 F. 2d 975 (C.A. 9th, 1941), cert. denied, 314 U.S. 652 (1941).

⁸ 96 F. 2d 776 (C.A. 2d, 1938).

⁹ 66 *Harv. L. Rev.* 465 (1953).

¹⁰ To tax lawyers, this statement was disturbing. If Mr. Stern was correct, they would have to tell their clients that whether or not they were subject to federal tax on a question unaffected by state law depended upon the particular circuit in which they were living. Instead of a migration to avoid the impact of state estate taxes, we should have a migration to avoid the impact of federal estate and income taxes. We wondered whether, if a businessman worked in a circuit which was unfavorable to him taxwise, he could move his home to a circuit hundreds of miles away which was favorable and commute by jet plane.

¹¹ *Bear Gulch Water Co. v. Comm'r*, 116 F. 2d 975 (C.A. 9th, 1941), cert. denied, 314 U.S. 652 (1941).

¹² Then the Board of Tax Appeals.

¹³ The circuit court headnote, which is unofficial, did say that the 101(6) issue was also decided. Cf. "The head-note frequently is misleading if you read it alone and do not take the trouble to read the case." Lord Fitz-Gerald, in *Cooke v. Eshelby*, [1887] 12 A.C. 271, 282.

¹⁴ *Roche's Beach, Inc. v. Comm'r*, 96 F. 2d 776 (C.A. 2d, 1938).

¹⁵ Wolfson and Kurland ed.

lies in the preservation of uniformity of decision in the federal courts upon points solvable by federal law—a basic purpose of the certiorari jurisdiction since its inception in 1891.¹⁶

He says that the work cited two tax cases, *Helvering v. New York Trust Company*¹⁷ and *Cahn v. United States*,¹⁸ in support of its statement that “the Court has granted certiorari upon demonstration of a conflict even though the statute involved had been changed and the issue could hardly arise again.”¹⁹ Mr. Stern believes, however, that the action of the Supreme Court in some recent cases in denying certiorari indicates either that the Court has modified its prior policy or that he and the other authors quoted were unaware of what the Court had been doing in the past. It could well be, he says, that these denials represent nothing new, but he adds that whether or not the recent decisions represent a departure from previous practice, the denials of certiorari despite conflicting decisions in courts of appeals is probably as unfamiliar to the bar generally as it was “to those bold enough to write books upon the subject.” He therefore thinks that the summary and analysis which he presents of what the Court had done in this connection in several recent cases may be helpful both to lawyers who are trying to decide whether to file a petition for certiorari in a particular case and to those who are searching for grounds upon which to oppose a petition already filed.

Mr. Stern indicates that the cases he discusses are those which he happened to run across in his own work, by accident, or by inquiry among those associated with him. He says also: “In each case the conflict between the circuits was acknowledged by the court of appeals or the respondent. There is no consideration here of any case in which the existence of a conflict was in dispute. . . .” After devoting a paragraph apiece to seven instances of alleged conflicts between circuits, two of which are in the federal tax field, he adds that the first and obvious conclusion to be drawn from the cases is that a conflict will not necessarily result in the granting of certiorari if the issue is no longer a live one. He says that in the first four conflicts, which included the two tax conflicts, the statute upon which the controversy rested had expired or had been amended in a man-

¹⁶ Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States* 629–31 (Wolfson and Kurland ed., 1951) (emphasis added). He also quoted to the same effect from Stern and Gressman, *Supreme Court Practice* 101 (1950), of which he was coauthor.

¹⁷ 292 U.S. 455 (1934).

¹⁸ 297 U.S. 691 (1936).

¹⁹ He says that the 1936 edition of Robertson and Kirkham follows its general statement that, in the event of conflict, certiorari is granted as “of course,” with a discussion of these two cases “in which certiorari was unsuccessfully opposed on the ground that changes in the applicable statute deprived the issue of future importance.”

ner which would prevent the problem from arising in the future. But he adds that in each case it was nevertheless true that a substantial number of pending or potential cases would still be controlled by a resolution of the conflict. However, this, he contends, did not convince the Court that review of the decisions of the courts of appeals was warranted.

Our discussion will show that, judged by the standards of the *New York Trust Company* and *Cahn* cases, the Supreme Court still grants certiorari as of course in the event of a conflict between circuits, even if the conflict, because of amendment of the statutes, lacks vitality for future cases. Let us examine the standards by which certiorari was measured in those two cases. If, tested by those standards, there was no conflict between the circuits in the two tax cases in the 1951 Term, *United States v. Community Service, Inc.*,²⁰ and *Sokol Brothers Furniture Company v. Commissioner*,²¹ in which Mr. Stern declares the Supreme Court denied certiorari despite the existence of a conflict between courts of appeals, we shall be justified in assuming that the rule remains in full vigor. This is so, for Mr. Stern has said that there was no consideration of any case in which the existence of a conflict was in dispute. We believe also that an examination of the petitions for certiorari in the other cases advanced by Mr. Stern will show that they too failed to meet the test of a direct conflict between circuits.

In the *New York Trust Company* case, the Supreme Court decided a conflict between the Second Circuit²² and the Third Circuit²³ and the Court of Appeals for the District of Columbia.²⁴ The conflict was over the question of whether the length of time that the donor held stock may be considered in determining whether the gain on a sale by the donee was taxable to the donee as capital gain within the meaning of Section 206(a)(6) of the Revenue Act of 1921, which defined capital assets as property "held by the taxpayer . . . for more than two years."

We see that the issue on which certiorari was granted was a very narrow one; in fact, it is difficult to see how an issue could be narrower.

In the *Cahn* case, the Supreme Court decided a conflict between the Court of Claims²⁵ and the Seventh Circuit²⁶ and the Fourth Circuit.²⁷ The

²⁰ 189 F. 2d 421 (C.A. 4th, 1951), cert. denied, 342 U.S. 932 (1952).

²¹ 185 F. 2d 222 (C.A. 5th, 1950), cert. denied, 340 U.S. 952 (1951).

²² *New York Trust Co. v. Comm'r*, 68 F. 2d 19 (C.A. 2d, 1933).

²³ *Johnson v. Comm'r*, 52 F. 2d 726 (C.A. 3d, 1931).

²⁴ *Shoenberg v. Burnet*, 55 F. 2d 543 (App. D.C., 1931).

²⁵ *Cahn v. United States*, 10 F. Supp. 577 (Ct. Cl., 1935).

²⁶ *Kaufman v. Reinecke*, 68 F. 2d 642 (C.A. 7th, 1934).

²⁷ *Tait v. Safe Deposit & Trust Co.*, 70 F. 2d 79 (C.A. 4th, 1934).

conflict was over whether all or half of the value of the property held by husband and wife in joint tenancy or tenancy by the entireties was, under Section 402(d) of the Revenue Acts of 1918 and 1921, to be included in the gross estate of the one first to die, if the tenancy was created prior to the enactment of the first estate tax law on September 8, 1916. The Revenue Act of 1924 was the first to provide for a retroactive application of the estate tax law.

As in the *New York Trust Company* case, it is difficult to see how an issue could be narrower.²⁸

Tax Conflicts in the 1951 Term

In Mr. Stern's opinion, there were conflicts (1) between *United States v. Community Services, Inc.*,²⁹ and certain unnamed cases "under another section of the Internal Revenue Code containing substantially the same language," and (2) between *Basalt Rock Company v. Commissioner*³⁰ and *Sokol Brothers Furniture Company v. Commissioner*.³¹

In the *Community* case, Mr. Stern says that there was involved the question whether a corporation was exempt from employment taxes by reason of the fact that its profits were paid to exempt charitable or educational organizations. He relates that the taxpayer asserted that the decision of the Court of Appeals conflicted with other cases under another section of the Internal Revenue Code containing substantially the same language. He continues that the government's memorandum, while admitting the existence of the conflict, stated that recent legislation had rendered the conflict academic with respect to taxable years after 1950 and partially academic as to prior years. The government's memorandum, he says, further pointed out, however, that the Commissioner had advised the Department of Justice that "there are a number of open cases presenting the issue" and that, in the Commissioner's view, the matter remained of sufficient importance to make "a decision of the Supreme Court desirable." Mr. Stern says that the government accordingly did not oppose the issuance of the writ, but the Court denied certiorari.

It is difficult to see how the alleged conflict between Section 101(6) of

²⁸ The per curiam opinion in *Cahn v. United States*, 297 U.S. 691 (1936), read simply: "The judgment is reversed upon the authority of *Knox v. McElligott*, 258 U.S. 546 [(1922)]." The reason the decision so reads is that in its petition for certiorari, the taxpayer argued that the conflict was caused because the Court of Claims, which had decided adversely to the taxpayer, was in direct conflict with *Knox v. McElligott*.

²⁹ 189 F. 2d 421 (C.A. 4th, 1951), cert. denied, 342 U.S. 932 (1951).

³⁰ 180 F. 2d 281 (C.A. 9th, 1950), cert. denied, 339 U.S. 966 (1950).

³¹ 185 F. 2d 222 (C.A. 5th, 1950), cert. denied, 340 U.S. 952 (1951).

the income tax statute and section 1426(b)(8) of the Federal Insurance Contributions Act can be considered the sharp conflict between circuits that was present in the *New York Trust Company* and *Cahn* cases, where the conflicts were on the same subsection of the income tax statute.

Mr. Stern says that in the *Basalt* case the government petitioned unsuccessfully from a decision of the Court of Appeals for the Ninth Circuit with respect to the method of computation for purpose of the excess profits tax. He indicates that after certiorari was denied in the *Basalt* case, the Court of Appeals for the Fifth Circuit in the *Sokol* case stated explicitly that it was unable to follow the Ninth Circuit decision in the *Basalt* case. Mr. Stern also says that upon the taxpayer's petition for certiorari, the government admitted that the Fifth and Ninth Circuits were in disagreement and did not oppose certiorari. The government's memorandum did, however, he says, point out that the problem could no longer arise under the Excess Profits Tax Act of 1950, which had changed the controlling statutory provisions. Certiorari was denied.

But our examination of the opinions shows that in the *Basalt* case the taxpayer elected under Section 736(b) of the Internal Revenue Code to compute income on contracts the performance of which required more than twelve months on the percentage of completion method for excess profits tax purposes. The question was whether it had thereby elected to compute corporation surtax net income under Section 710(a)(1)(B) by the same method. The Ninth Circuit said that Section 736(b) did not authorize the election, nor did the taxpayer make the election.

In the *Sokol* case, the taxpayer elected under Section 736(a) of the Internal Revenue Code to compute income on installment sales on the accrual basis for excess profits tax purposes. The question was whether it had thereby elected to compute corporation surtax net income under section 710(a)(1)(B) by the same method. The Fifth Circuit held that it had.

In the *Basalt* case, 736(b) was in question, while the *Sokol* case involved 736(a). There is certainly not a conflict here in the sense of the one in the *New York Trust Company* and *Cahn* cases with the dispute limited to the same subsection of the statute. A mere examination of the long and involved language of subsections 736(a) and 736(b) would be enough to convince most lawyers that the Supreme Court would seize the opportunity to call a conflict between the two subsections not a conflict between circuits on "the same matter,"³² under which certiorari issues as of

³² U.S. S. Ct. Rule 38(5)(b).

course.³³ Of course, there is a disturbing conflict in principle between the two cases at which the tax practitioner cannot blink.³⁴

Mr. Stern tells us, however, that it would be unsafe to generalize from the few instances he relates that the Court will never grant a petition for certiorari because of conflict when the controversy can no longer occur. He illustrates this point by saying that in *Watson v. Commissioner*,³⁵ another tax case, the Court recently granted certiorari despite a change in the law, upon being advised of a conflict and the pendency of fifty-five cases totaling \$2,300,000.³⁶

The *Watson* case, instead of substantiating Mr. Stern's point, substantiates ours.³⁷ The Ninth Circuit in the *Watson* case disagreed with the Tenth Circuit decision in *McCoy v. Commissioner*³⁸ and the Fifth Circuit decision in *Owen v. Commissioner*³⁹ on whether under section 117(j) of the Internal Revenue Code the gain on the sale of an immature crop sold with the land is capital gain. As in the *New York Trust Company* and *Cahn* cases, the circuits were in conflict on the same subsection of the statute, and, as in those cases, the statute had been amended.

Mr. Stern says that *Tinder v. United States*⁴⁰ presents the same problem as *Watson v. Commissioner*, but in a different setting. Defendant had been convicted of stealing from the mails. The Fourth Circuit, noting its dis-

³³ Cf. Frankfurter, op. cit. supra note 1.

³⁴ Cf. "It [the Tax Court] deals with a subject that is highly specialized and so complex as to be the despair of judges. . . ." *Dobson v. Comm'r*, 320 U.S. 489, 498 (1943).

³⁵ 197 F. 2d 56 (C.A. 9th, 1952), cert. granted, 344 U.S. 895 (1952).

³⁶ All that can be said, he believes, is that in such cases, the Court may not grant certiorari even though there is a conflict. The cases discussed demonstrate, he says, that reference to a substantial number of similar cases pending may or may not be regarded as a strong enough showing. We believe, on the other hand, that the important issue is the conflict, and that reference to a substantial number of similar cases pending will not help. The shorter the petition the better. As Mr. John W. Davis has said, a lawyer must have the courage of exclusion. Cf. "Not long since, I am told, a brief was filed in the Supreme Court of the United States, in the closing hours of a busy term, supporting a petition for a *certiorari*, which cited by name no less than 432 cases. . . ." Davis, *The Case for the Case Lawyer*, 3 Mass. L.Q. 99, 108 (1918). Cf. also: "The problem-solver may fail to confine himself to cases and rules which deal with the kind of . . . problem he has, and go galloping over the entire diverse field—he may fail to narrow his thinking sufficiently, and muddle his solution with a lot of authorities which are not in point." Morris, *How Lawyers Think* 101 (1937).

³⁷ Cf. "[J]udges however blind they may be to their own imperfections are, as Lord Bowen put it, deeply conscious of each other's deficiencies. Lord Justice Christian, when he was Chief of the Irish Court of Appeal, used to display this consciousness in his own way. When his two colleagues differed in opinion, each of them stated his decision and his reasons for it before his Chief, and, when the Chief gave his, it sometimes took this laconic but not flattering form: 'I agree with the decision of my brother on the right for the reasons so admirably stated by my brother on the left.'" Strahan, *The Bench and Bar of England* 9 (1919).

³⁸ 192 F. 2d 486 (C.A. 10th, 1950).

³⁹ 192 F. 2d 1006 (C.A. 5th, 1950).

⁴⁰ 193 F. 2d 720 (C.A. 4th, 1951), cert. granted, 343 U.S. 976 (1952).

agreement with the prior decision of the Ninth Circuit in *Armstrong v. United States*,⁴¹ construed the statute as making the felony rather than the misdemeanor penalty applicable, despite absence of proof that the value of what had been stolen exceeded \$100. Mr. Stern says that in view of this conflict, the government did not formally oppose certiorari, although it called the Court's attention to the fact that corrective legislation had been passed by the Senate and had been reported favorably by the House Judiciary Committee. Certiorari was granted June 9, 1952. On July 1, 1952, Congress amended the statute so as to delete the provision for a lesser penalty for theft involving less than \$100, thereby making it impossible for the issue to arise in the future. Mr. Stern suggests that perhaps certiorari would have been denied if the amendment to the statute had been enacted before the Court first acted upon the petition.

The *Tinder* case, as outlined by Mr. Stern, like the *Watson* case, shows that the Supreme Court is following the rule of the *New York Trust Company* and *Cahn* cases. In the *Tinder* case, a criminal case, there was, as in the *Watson* case, a head-on collision between circuits. Mr. Stern's statement notwithstanding, enactment of the amendment to the statute while the petition was before the Court would not, judging by Chief Justice Vinson's statement that one of the Court's duties is to resolve conflicts of opinion between the circuits on federal questions, have affected the granting of certiorari. It can be assumed that the Court knew when it granted certiorari that since the bill had passed the Senate and been favorably reported by the House Judiciary Committee it would almost certainly become law. If there had been any doubts in the minds of the Justices about the bill's becoming law, they could have held the case until the bill had become law.⁴² Moreover, after the bill became law the Government filed a supplemental memorandum calling this fact to the Court's attention and suggesting that the case had lost all importance and that the Court "may deem it appropriate to dismiss the writ." The Court, nevertheless, retained the case on the argument calendar.

Mr. Stern ends his discussion of when the Supreme Court will grant certiorari if the circuits are in conflict by saying:

That there can no longer be certainty that the Court will automatically grant certiorari where there is a conflict among the circuits does not mean that a conflict will not usually be sufficient. But counsel should be aware that in conflict cases as in others the Court takes other factors into account and should frame their litigation

⁴¹ 187 F. 2d 954 (C.A. 9th, 1951).

⁴² See Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States* § 319 (Wolfson and Kurland ed., 1951).

policies as well as their petitions for certiorari and briefs in opposition with this in mind.⁴³

We disagree with Mr. Stern. We believe that the Court grants certiorari as of course in conflicts between the circuits, provided the petition for certiorari clearly frames the head-on collision for the Court to see.

Addendum: Issue Pleading and Certiorari

Chief Judge Harold M. Stephens of the Court of Appeals for the District of Columbia, in an address before the American Bar Association in 1949, introduced a discussion of notice and issue pleading by the statement: "We may have some concern, I think, as would the lawyers and judges of an earlier day, over the diminution in the sense of craftsmanship in the law."⁴⁴ Recalling his article, we wondered whether the mental habits induced by the change from issue pleading to notice have anything to do with the fallacious belief that the Court no longer grants certiorari as of course in conflicts between circuits. We wonder, because he says that, while notice as distinguished from issue pleading has resulted in many benefits through simplification, a dear price has been paid for this in a consequent lack of precision in definition of the field of controversy in cases litigated in the courts. He has often found that not until a case reached a court of appeals has there been an exact focus of attention upon what are the issues of fact and law. He deprecates the present-day tendency of both courts and commissions to admit evidence largely upon the grounds of relevancy, i.e., with little reference to the rules of competency.⁴⁵

Chief Judge Stephens observes that there is a seemingly prevalent notion today that the adjective law is but a congeries of dispensable technicalities, whereas in an art which assumes to apply its substantive principles in an efficient, orderly, and impersonal manner it is indispensable. Every art, he points out, has, in addition to a substantive aspect embracing organized information and principles, a technique through which they are carried into effect. He likens the substantive law to water in a reservoir. Unless the water passes out through canals, laterals, and still smaller channels, it never with precision reaches a particular tract of land to make it fruitful. True, says the judge, the channels may be made too many, too

⁴³ Stern, *op. cit. supra* note 3, at 472.

⁴⁴ Stephens, *Fifty Years of Legal Change: The Lawyer of 1949 and the Lawyer of 1900*, 35 A.B.A.J. 897, 970 (1949).

⁴⁵ Cf. "As someone said to David Dudley Field: 'I understand, Mr. Field, that under your Code the plaintiff comes in and tells his story like an old woman and the defendant comes in and tells his story like another old woman.'" Seagle, *Law: The Science of Inefficiency* 52 (1952).

long, or too tortuous, and the water thus seep or evaporate before it reaches the land toward which it has been directed. But, he points out, it is equally true that, if there are no channels through which it may flow, it will never reach that land. He believes that the substantive law must likewise pass through the channels of pleading, procedure, and evidence, so that it may precisely apply itself to the solution of a particular controversy in respect of which it is apt.

If issue pleading were still the rule, would the sharpness of thinking it required have made our discussion of Mr. Stern's viewpoint unnecessary?