grossly excessive fee to an investment adviser, and under section 15 of the act in its existing form, for failure to exercise proper case with respect to the continuance of a contract with an adviser. Then there is section 36 empowering the Commission to bring suit for gross misconduct or gross abuse of trust. When directors are claimed to have violated those sections in the payment of fees, the court is obliged to make some judgment on the size of the fee, although in order to impose liability, it would have to find the fee not merely excessive but perhaps excessively excessive.

One objection that I understand has been made to judicial enforcement of a standard of reasonableness of the charges of investment advisers is the likelihood of their reaching divergent results, with consequent unfairness to advisers in some cases and to investors in others, although as I have said, that possibility exists in a very marked degree under existing law.

It can be said that the need for uniformity is a reason and surely it is an important reason why once an administrative agency has been given power over a particular subject, the courts should require resort to it in the first instance. But the point in answer to that is that the primary-jurisdiction doctrine applies only when there already is jurisdiction in an administrative agency. It does not rest upon a concept of inherent capacity of the courts to deal with the problem, but as a leading scholar has said, upon recognition of the need for orderly and sensible coordination of the work of the agencies and the courts.

Still I would have to agree that if uniformity in standards as to the fees of advisers of investment companies was the controlling consideration, that would be better accomplished by requiring any complaint to be presented to the SEC for action, subject only to the usual limited judicial review.

However, Congress could well decide that the need for uniformity in this area of the fees of investment advisers was less compelling than as to railroad or other utility rates, and that, accordingly, the court should have a larger and the agency a smaller role. Congress has a considerable variety of choices available to it. Exclusive resort to the SEC would lie at one end of the spectrum. Next would come a direction that except perhaps in cases where the lack of merit of the claim was apparent, there should be an initial reference to the SEC for determination by it, even though ultimate decision would rest in the courts. Further along would be the possiblity of a report by the agency, which was merely advisory, and which the court was free to disregard, such as the report the SEC commonly makes as to allowances in reorganization proceedings under chapter 10 of the Bankruptcy Act.

And still further along would be a plan like that of the pending bill, where the agency, in addition to having the right to sue on its own, may but need not intervene in private suits, and the decision rests with the courts.

It is for Congress to decide in each case just what mix of administrative and judicial participation is best adapted to the problem at hand. One end of the spectrum gives more in administrative expertise and unformity; the other more in those qualities of restraint, freedom from supposed bureaucratic rigidity, open mindedness and good sense that judges at least like to believe are attributes of courts.