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Chief Justice Burger has expressed concern about the Supreme Court's caseload since he joined the Court in 1969. Perhaps the most tangible evidence of this concern was his appointment of a commission, chaired by Professor Paul Freund of Harvard Law School, to study the problem of the Court's burgeoning docket. That commission yielded the controversial recommendation for the creation of a National Court of Appeals that would screen all petitions for review filed in the Court and refer only several hundred of the most "certworthy" to the Supreme Court for its consideration; the remaining petitions would be denied without further recourse to the Supreme Court.[1] The proposal generated a barrage of criticism,[2] primarily on the grounds that it threatened to deprive the Supreme Court of control over its own docket and to disrupt its orchestration of the development of case law.

As interest in the Freund Commission's plan faded, the Hruska Commission, established by Congress to examine the workload of the courts of appeals, advanced a proposal that overcame the major objection levied against the Freund plan. The Hruska Commission proposed that the Supreme Court continue to review all petitions, but that it refer as many cases as it wished to a National Court of Appeals, instructing the new court either that it must decide the cases or that it

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1. *See* FEDERAL JUDICIAL CENTER, REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT (1972), *reprinted in* 57 F.R.D. 573, 590-91 (1972) [hereinafter cited as Freund Report].

2. *See, e.g.*, Alsup, *A Policy Assessment of the National Court of Appeals*, 25 HASTINGS L.J. 1313, 1319-21 (1974); Goldberg, *There Shall Be "One Supreme Court,"* 3 HASTINGS CONST. L.Q. 339 (1976).

could decline review at its option.[3] In this way, the Justices still would have the full panoply of issues available to them, but could rely on the National Court of Appeals to resolve "lesser" issues. In addition, the existing courts of appeals would be authorized under certain circumstances to refer issues of national importance to the new court.[4]

The Hruska Commission advanced its proposal to address two of the perceived problems facing the federal judiciary: (1) the balkanization of national law through unresolved conflicts among the circuits, and (2) inadequate supervision by the Supreme Court over the courts of appeals.[5] Numerous judges, lawyers, and teachers greeted this proposal with broad reservations.[6] Primary among the concerns were that (1) the commission had exaggerated the extent to which there was a lack of national appellate capacity; (2) the proposal itself had serious drawbacks, including adverse effects on the Supreme Court's power, prestige, and procedure; and (3) better solutions existed, such as eliminating direct appeals to the Supreme Court, eliminating diversity jurisdiction, and confining tax and patent cases to special tribunals.[7] Opposition to the proposal prevailed, and interest in the management of the Supreme Court's workload waned.

Chief Justice Burger recently has raised anew the argument that the Supreme Court is overwhelmed. In brief, the Chief Justice maintains that the Court's workload is unacceptable because it compromises the ability of the Justices to render thoughtful, wise adjudications.[8] As a remedy, the Chief Justice proposes that Congress establish a commission to study solutions to the Supreme Court's caseload management problem, and calls for the establishment of a temporary panel to hear intercircuit conflicts as an interim measure.[9] The Chief Justice's suggestion comes at a time when many other Justices are decrying the onerous workload burden on the Court.[10] This Commentary addresses

3. *See Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change* (1975), *reprinted in* 67 F.R.D. 195, 199-200 (1975) [hereinafter cited as Hruska Report].

4. *Id.*

5. *Id.* at 216-18.

6. *See generally* Alsup, *Reservations on the Proposal of the Hruska Commission to Establish a National Court of Appeals*, 7 U. TOL. L. REV. 431 (1976).

7. *Id.* at 434.

8. Burger, *Annual Report on the State of the Judiciary*, 69 A.B.A. J. 442, 443-45 (1983).

9. *Id.* at 446-47.

10. At the American Bar Association's midyear meeting in February, 1983, Justice O'Connor joined Chief Justice Burger in urging that immediate steps be taken to reduce the Supreme Court's workload. She recommended that Congress establish specialized courts of appeals with exclusive jurisdiction in areas such as taxation, and suggested that Congress eliminate the Supreme Court's mandatory jurisdiction. *See* Middleton, *Overload*, 69 A.B.A.

the limits of the Chief Justice's proposal, the efficacy of the proposed panel in reducing the Supreme Court's workload, and the impact of the panel on intercircuit conflicts.

I. The Limits of the Chief Justice's Proposal

The Chief Justice's proposal, outlined in his 1983 Annual Report on the State of the Judiciary, calls for the creation of a special, temporary panel of the new United States Court of Appeals for the Federal Circuit. Chief Justice Burger proposes that two judges from each circuit comprise the temporary panel, for a total pool of twenty-six judges. Panels of seven or nine judges drawn from this pool would sit for periods of six months, hear and decide intercircuit conflict cases, and perhaps resolve a defined category of statutory interpretation cases. The Supreme Court, however, would retain certiorari jurisdiction over all cases. The panel would have a limited five-year existence.

The Chief Justice further recommends that during the tenure of this panel, a congressionally authorized committee, appointed by the three branches of government, study remedies for what the Chief Justice characterizes as the "grave problem" of Supreme Court overload.[11]

J. 423 (1983). Justice Powell has joined in the latter recommendation and further has advocated curtailing the availability of 42 U.S.C. § 1983 and 28 U.S.C. § 2254. *See* Powell, *Are the Federal Courts Becoming Bureaucracies?*, 68 A.B.A. J. 1370, 1371-72 (1982).

Justice Stevens has generated controversy with his suggestion, reminiscent of the Freund Commission recommendation, that a new court be formed to choose cases for Supreme Court review. J. Stevens, Addressing the American Judicature Society (Aug. 6, 1982), *reprinted in* CRIM. JUST. NEWSLETTER, Aug. 16, 1982, at 6. Justice White apparently favors the creation of courts with nationwide jurisdiction over appeals from the federal district courts in particular subject areas: according to press reports, White has proposed that to reduce the number of intercircuit conflicts the Supreme Court must resolve, a circuit should be required to go en banc before disagreeing with another court of appeals, and that the first en banc decision should be the nationwide rule. CRIM. JUST. NEWSLETTER, Sept. 27, 1982, at 5. Justice Brennan finally seems to have joined those members of the Court who perceive a danger in the ever increasing workload; he recommends (1) greater care by the Court in selecting cases for review; (2) the repeal of all the Court's mandatory appeal jurisdiction; and (3) the immediate study of Justice White's proposals. Brennan, *Some Thoughts on the Supreme Court's Workload*, 66 JUDICATURE 230, 235 (1983). Justice Brennan emphatically rejects Justice Stevens' suggestion, observing that the plan "would destroy the role of the Supreme Court as the framers envisaged it." *Id.* at 234.

11. Chief Justice Burger specified four proposals that should be evaluated: first, not surprisingly, is the familiar plan for a National Court of Appeals to hear cases transferred to it by the Supreme Court; second, a proposal by the former Chief Justice of Arizona, James Duke Cameron, for an intermediate National Court of State Appeals to review state court decisions on federal constitutional law; third, a proposal to create two intermediate courts of appeals, one for criminal cases and one for civil; and fourth, that nine additional Justices be authorized as a separate panel of the Supreme Court with jurisdiction over all cases not of a criminal or constitutional nature. Burger, *supra* note 8, 69 A.B.A. J. at 446-47.

To facilitate the committee's evaluation, the temporary panel would be required to report annually to Congress, the President, and the Judiciary Conference of the United States.

Although the exact parameters of Chief Justice Burger's proposal are not clear, they appear to be quite limited. The Chief Justice's primary concern is that the Supreme Court's current workload of approximately 150 cases on the plenary docket imposes an intolerable burden on the Court, thereby undermining its ability to fulfill its duties thoughtfully and effectively. The proposal thus contemplates a reduction of thirty-five to fifty argued cases per year, thereby bringing the number of cases on the plenary docket down to around one hundred cases, a level which the Chief Justice believes is desirable.[12]

The Chief Justice proposes to effect this reduction by using the temporary panel to take over part of the Court's caseload, and has defined the cases appropriate for the panel's consideration primarily with reference to whether the case implicates an intercircuit conflict.[13] This aspect of the proposal may reawaken the debate over whether the Supreme Court fails to resolve significant intercircuit conflicts promptly, thereby undermining certainty and uniformity in our judicial system. It should be stressed, however, that Chief Justice Burger has *not* proposed the creation of a National Court of Appeals, which proponents suggest would provide sufficient appellate capacity to resolve the conflicts that currently remain unreviewed or unresolved by the Supreme Court. Rather, the Chief Justice's proposal appears to contemplate only that the temporary panel would relieve the Supreme Court of hearing the thirty-five to fifty intercircuit conflict cases that the Chief Justice apparently estimates are before the Court each Term.[14] Thus, the Chief Justice has focused on the narrow goal of re-

12. *Id.* at 447.

13. Chief Justice Burger also suggests that the panel might hear a "defined category of statutory interpretation cases." *Id.* Rather than speculate on what the Chief Justice has in mind, this Commentary will be limited to a discussion of the temporary panel's role in resolving intercircuit conflicts.

14. At least two other commentators appear to share this appraisal of the Chief Justice's proposal. *See* Hellman, *How Not to Help the Supreme Court*, 69 A.B.A. J. 750, 752 (1983); Address by Senator Howell Heflin, American Bar Association Judicial Administration Division (July 29, 1983), in Heflin, *How Do You Spell Judicial Relief?*, JUDGES J., Fall, 1983, at 16. It is possible that the Chief Justice anticipates that the Supreme Court will refer far more cases to the temporary panel than it would have heard itself, but a plan under which the new panel would hear *every* case involving an intercircuit conflict would be, in effect, a National Court of Appeals such as the Hruska Commission envisioned. Such a plan would not be in keeping with Chief Justice Burger's desire to study the advisability of a National Court of Appeals, as well as other proposals, before implementing a permanent structural change.

ducing the Supreme Court's workload and offers no proposal for immediately expanding appellate capacity; these long term solutions are left to the tri-partite committee.

In keeping with the panel's proposed function as an overflow chamber for the Supreme Court, the Chief Justice apparently intends that the panel hear cases on referral only. Presumably the Supreme Court would review petitions for certiorari in the same manner that it does now, but in addition to the alternatives presently available, the Court would have the option of referring a case to the new panel.

With the parameters of the program established, reservations about the proposal center primarily upon the efficacy of the proposed panel in either reducing the Court's workload or resolving intercircuit conflicts.

II. The Efficacy of the Proposed Panel in Reducing the Supreme Court's Workload

The Chief Justice's goal is to reduce the Supreme Court's workload to approximately 100 cases per year. There can be no guarantee, however, that the number of cases accepted each Term will fall to any particular level; rather, the Court might divert its energies to hearing the cases that are "next in line" after the cases involving intercircuit conflicts.[15] The number of argued cases has averaged about 150 for almost twenty-five years,[16] which suggests that 150 cases is neither an impossible nor, perhaps, an undesirable caseload for the members of the Court.

The operation of the temporary panel to resolve intercircuit conflicts raises more serious questions about the efficacy of the proposal. Presumably, the Chief Justice has decided that the Court should refer cases involving intercircuit conflicts to the new panel because proponents of a National Court of Appeals maintain that a structural change is essential for resolving intercircuit conflicts that the Supreme Court currently is unable to address.[17] The temporary panel thus provides a

15. The Justices might also be inclined to give plenary consideration to cases that otherwise would be subject to summary disposition. Hellman, *supra* note 14, at 752-53.

16. Freund Report, *supra* note 1, 57 F.R.D. at 619. The number of plenary decisions has hovered around 170 over the past decade. Hellman; *The Supreme Court, the National Law, and the Selection of Cases for the Plenary Docket*, 44 U. PITT. L. REV. 521, 525 (1983).

17. The Hruska Commission, for example, maintained that the Supreme Court, since it decides only about 150 cases annually, is unable to rule on numerous issues of national significance. The Commission was most concerned about the Court's failure to resolve promptly all conflicts among the circuits; the Commission concluded that many of these conflicts do not warrant the Supreme Court's time but do deserve resolution at the national

testing ground for the ability of a body other than the Supreme Court to establish and enforce uniform rules. The following additional burdens that the panel would impose on the Court, however, may outweigh any benefit to be gained by the potential caseload reduction.

First, the nine Justices will have to decide whether a case involves an intercircuit conflict so that the Court may refer it to the new panel. The existence of a conflict is not always obvious. Indeed, persons studying the existence of conflicts in cases before the Supreme Court have had to develop several classifications to account for the various ways in which a conflict may present itself. Thus, for example, a case may involve a direct conflict, a strong partial conflict, a weak partial conflict, or no genuine conflict.[18] Further, commentators have disagreed over whether specific cases actually raise intercircuit conflicts.[19] There is no reason to suspect that the Justices will have an easier time than anyone else in evaluating a case for the existence of a conflict; if anything, the process will be complicated by the Justices' attitudes toward the underlying substantive issues in each case. Thus, the determination of whether a case is a proper one for referral to the new, limited panel will be difficult, requiring significant additional time and effort.

Second, the Court will not base all referral decisions solely on a determination of whether a case raises an intercircuit conflict. Although the Chief Justice speaks of referring *all* intercircuit conflicts to

level. *See* Hruska Report, *supra* note 3, 67 F.R.D. at 221. *See also* Freund Report, *supra* note 1, 57 F.R.D. at 592. More recently, *see, e.g.*, Heflin, *supra* note 14, at 19; Olson, *Opening Statement*, 8 LITIGATION 1 (1982).

18. *See* Feeney, *Conflicts Involving Federal Law: A Review of Cases Presented to the Supreme Court*, 67 F.R.D. 301, 305-06 (1975). Professor Feeney defined a "direct conflict" case as one "in which the decision below deals with the same explicit point as some other case and reaches a contradictory result," a "strong partial conflict" case as one in which the implications of the decision below conflict with the result of another decision in the same area of law, and a "weak partial conflict" case as one in which "there is some degree of legitimacy to the claim of conflict but where the conflict is more attenuated than in the strong partial category." *Id.*

Given these classifications, it is easy to imagine that "[t]he judgment as to whether a conflict exists or not is often quite a difficult one." *Id.* at 306. Thus, to assure some degree of uniformity in classification, Professor Feeney had two to three people review most cases initially classified as direct or strong partial conflicts. *Id.*

A final category of conflict cases, "no genuine conflict," is reserved for those cases in which the parties claim that a conflict exists but closer examination reveals none. Attorneys may claim a conflict in such a case in hope that the Supreme Court will be more inclined to grant review. *Id.* at 305-06. Thus, while an intercircuit conflict appears to be the quickest and easiest way to identify cases to refer to the proposed panel, in reality it is probably the most unreliable.

19. *Compare* Stern, *Denial of Certiorari Despite a Conflict*, 66 HARV. L. REV. 465 (1953) *with* Roehner & Roehner, *Certiorari—What Is a Conflict Between Circuits?*, 20 U. CHI. L. REV. 656 (1953). *See also* Alsup, *supra* note 6, at 435-46.

the panel, he must contemplate that the Supreme Court would be able to reserve some such cases for its own review. In certain cases, for example, the Court may expect that the panel will reach a result different from that the Court would reach; if so, referral to the panel would only delay Supreme Court review, not eliminate it. This occurrence would only prolong uncertainty, undermine the authority of the new panel, and require litigants to jump through an additional appellate hoop. The careful selection of cases for the panel will impose an additional burden on the Justices and thus constitute a hidden cost of the Chief Justice's proposal.

Third, there is the distinct possibility that the Supreme Court will be obligated to review a substantial number of the cases it initially refers to the new panel. Although the Chief Justice dismisses this possibility as insignificant,[20] it is inherent in a proposal that the panel hear many cases that the Supreme Court would have heard under the old system. Certainly the losing litigant will request review, and the issue may still be sufficiently "certworthy" in light of the opinion of the panel to warrant review by the Supreme Court.

To the extent the Supreme Court did review the decisions of the panel, it would simply be duplicating the work of the new court. Moreover, the ever present hope of ultimate review by the Supreme Court would keep the litigation alive and thus would not necessarily terminate other litigants' hopes that they could win Supreme Court review on the same issue. Consequently, the panel decisions would cause some reduction, but not complete elimination of uncertainty.

Fourth, another problem associated with referral cases is the question of the propriety of Supreme Court jurisdiction itself. Since all referral cases would be channeled through the Supreme Court, the panel's referral jurisdiction would necessarily depend upon whether or not jurisdiction would have been proper in the Supreme Court. Issues of Supreme Court jurisdiction—both statutory and constitutional—are often latent, raised only at argument or after submission. Such questions inevitably would surface in cases the Supreme Court referred to the panel, which would then be required to determine the scope of the appellate or certiorari jurisdiction of the Supreme Court.

A decision in favor of jurisdiction would result in pressure on the Supreme Court to acquiesce to the jurisdictional point on review, lest the Supreme Court repudiate jurisdiction and render the earlier deci-

20. Chief Justice Burger is confident that "26 experienced judges assigned in this manner would resolve the conflicts among the circuits in such a way that the Supreme Court would not often grant further review." Burger, *supra* note 8, at 447.

sion by the panel void. Moreover, regardless of how the new court resolved the jurisdictional issue, the precedent would remain for the Supreme Court to face when the same issue later arose. Asking the Supreme Court to avoid this by not referring cases with latent jurisdictional issues would be unworkable since considerable study would be required to ferret out such problems. Since the Supreme Court would probably decide *not* to review every referral case for latent jurisdictional defects, it would occasionally feel bound to review immediately a decision of the panel ruling on the Supreme Court's jurisdiction. Not to do so would induce misplaced reliance on the decision if the Supreme Court later held jurisdiction to be improper.

Fifth, at the certiorari screening stage, the Court probably would feel obligated to study the decisions of the temporary panel in more detail than the decisions of other courts. This precaution would reduce the number of times the Supreme Court permitted a decision of the panel to stand only to be convinced it was erroneous in a subsequent case. Although such close scrutiny would be no guarantee against a later reversal, it would reduce the risk of reversal. Nevertheless, it would constitute yet another demand on the time of the Justices.

In light of (1) the significant additional burdens the new panel would impose on the Supreme Court, and (2) the probability that in many cases the panel would only delay, not replace Supreme Court review, the question arises as to whether it is worth creating a new panel merely to reduce the Supreme Court's workload by an unknown number of cases.[21] If the members of the Court insist that major structural reforms are necessary, then no one can reasonably quarrel with the Chief Justice's proposal to study permanent solutions to the problem of the ever increasing workload burdens on the Court. It seems unnecessary, however, to implement an experimental panel with the limited role of reducing the number of Supreme Court cases to a level significantly below the capacity at which the Court has managed to function for well over twenty years.

III. The Temporary Panel and the Resolution of Intercircuit Conflicts

For reasons discussed above, the Chief Justice has chosen cases involving intercircuit conflicts, however defined, as the test cases for the temporary panel. The Chief Justice's limited proposal does not implicate the entire range of issues in the controversy over whether the ap-

21. Professor Hellman has also voiced this concern. Hellman, *supra* note 14, at 752.

pellate capacity of the federal courts must be expanded to accommodate the resolution of more conflicts.[22] Even so, the new panel should not be implemented unless it can be expected to resolve conflicts at least as well as the Supreme Court can. The nature and structure of the proposed panel, however, militate against this result.

As noted above, the temporary panel would be comprised of a pool of twenty-six judges, two from each circuit. From this pool, panels of seven or nine judges would sit for periods of six months. This procedure virtually guarantees uncertainty, conflicting decisions and ultimate Supreme Court review of many cases referred to the panel.

The panel's decisions will be easily undermined by the Supreme Court, especially in the event of a divided panel. For example, the panel may render a 4-3 decision in one area of law, by employing in part general principles of statutory interpretation. Subsequently, the Supreme Court may issue a decision in which it follows a contrary rule. The panel's decision would be called into question; uncertainty would still prevail.

As a more general matter, it is easy to foresee that the panel's decisions, especially split decisions, will not satisfy litigants who view the panel as just another step toward Supreme Court review. Moreover, the lower courts are more likely to find ways around the panel's decision than around the Supreme Court's, again especially in the event of a divided panel. Nor is the prospect of conflict on the panel farfetched; indeed, such conflict would appear inevitable on a panel comprised of members from eleven circuits, whose task is to resolve *intercircuit* conflicts.

The constantly changing composition of the panel would also encourage practitioners, disappointed with one ruling, to bring a similar but arguably distinguishable case before another panel. This would occur even absent an intervening Supreme Court decision, in the hope of achieving a more favorable result. Although it is questionable that resolution of a conflict by *any* court will significantly discourage litigation,[23] a court without a significant degree of predictability and

22. These issues include whether a significant number of intercircuit conflicts go unresolved and whether the prompt resolution of all intercircuit conflicts is necessarily desirable. *See* Alsup, *supra* note 6, at 435-46.

23. The Hruska Commission suggested that disagreement between two circuits induces substantially more litigation in other circuits than when the circuits agree. *See* Hruska Report, *supra* note 3, 67 F.R.D. at 206, 207, 217-34. Neither the Commission, nor anyone since, marshalled empirical evidence in support of this conclusion; even if there may be a germ of truth in the claim, it has important qualifications. For example, the number of patent infringement actions, a conflict presented by the Commission, *id.* at 228, will not vary depend-

consistency cannot begin to impress potential litigants with the finality and uniformity of its decisions. Consistent development in the law cannot be expected when the only common link between the cases heard by a special court will be the existence of a conflict. Thus, the panel will not guide or direct the development of a coherent policy in any given area, but will hand down isolated rulings at the same time that the Supreme Court and other courts of appeals are making rules affecting other aspects of the underlying substantive law. Thus, instead of clarifying the law for the lower courts, the new court will provide yet another source of precedent for the lower courts to reconcile with other lines of authority.[24]

Finally, the structure apparently contemplated by the Chief Justice insures that Supreme Court review of the panel's decisions will be granted frequently. By the Chief Justice's estimate, thirty-five to fifty of the approximately 150 cases heard per year fall into the "intercircuit conflict" category, for it is by this number that the Chief Justice hopes the panel will reduce the Supreme Court's plenary docket. These cases are cases that the Supreme Court would otherwise hear—they are *not* the cases which would, for one reason or another, go unheard.

These intercircuit conflict cases often raise important issues that require final Supreme Court review. Thus, the Supreme Court is quick to grant certiorari in cases presenting conflicts that could affect the administration of the national government and the administration of the armed services,[25] and has been prompt to review conflicts over important substantive rights to avoid the inequity of opposite results under a

ing on disagreement or uniformity as to whether obviousness (*i.e.* invention) is a jury or judge question. The number of lawsuits will stay the same, although a conflict may admittedly encourage counsel to add another issue to an already protracted case. Similarly, the number of plaintiffs' claims against third party defendants, *id.*, does not depend upon whether or not an independent basis of jurisdiction over such claim is necessary. The answer to that question only determines when and in what court the claim will be litigated. Moreover, the imagination of lawyers never sleeps in identifying plausible grounds for distinguishing even a result reached unanimously by all other courts; once a conflict is put to rest, resourceful counsel will shift attention to new ways to distinguish his or her case. Accordingly, even a permanent National Court of Appeals would probably not reduce substantially the caseload of the lower courts, but would merely alter the composition of the issues in those cases. *See* Hruska Report, *supra* note 3, 67 F.R.D. at 227-34.

24. *See* Hellman, *supra* note 14, at 753.

25. *See, e.g.,* United States v. Morton, 104 S. Ct. 2769 (1984) (United States government liability for honoring garnishment notice served on Air Force officer "creates a substantial risk of imposing significant liabilities upon the United States . . . and . . . created a conflict in the Circuits"); Coffy v. Republic Steel Corp., 447 U.S. 191 (1980) (conflict in decisions interpreting Vietnam Era Veterans' Readjustment Assistance Act of 1974).

non-uniform law.[26] These categories of conflict are the most significant, and the Supreme Court has faithfully decided them as they arise.

The temporary panel cannot and should not be expected authoritatively to resolve conflicts in the categories described above. In those cases only a Supreme Court decision can be expected to settle the law or have a significant impact on subsequent litigation. Consequently, Supreme Court referral of the type of intercircuit conflict cases it presently hears will often only delay ultimate Supreme Court review.[27]

As litigants and lower courts insist on Supreme Court resolution of these significant issues, the frequent review of panel decisions will present distinct problems affecting the power and prestige of both the Supreme Court and the temporary panel. Assuming that the Supreme Court would be permitted to retain some cases involving intercircuit conflicts for its own resolution, referral jurisdiction would allow the Court some control over the frequency of reversals through the careful selection of referred cases. Indeed, the fear that substantial issues would be decided incorrectly, thereby resulting in a loss of prestige for both national tribunals, would pressure the Supreme Court not to refer a large number of substantial issues to the new court. The Justices, however, also would be motivated in the opposite direction by their desire to cooperate with Congress and facilitate the reduction in caseload contemplated by the proposal. Where the Justices would strike the balance between these conflicting goals is a matter of conjecture, but some risk of loss of prestige and authority is inevitable. Any hesitance by the Supreme Court in referring substantive issues to the panel reduces the efficiency of the proposal in fulfilling its primary goal—reducing the Supreme Court's workload.

It is worth pausing to observe the relationship between the frequency of review of panel decisions by the Supreme Court and the number of important decisions referred to the new court, and the degree of certainty such panel decisions would achieve. If the Supreme Court pursued a policy of infrequent review, presumably it also would be reluctant to refer more than a few cases of substantial importance.

26. *See, e.g.*, Hobby v. United States, 104 S. Ct. 3093 (1984) (discrimination in selection of grand jury foreman); Wasman v. United States, 104 S. Ct. 3217 (1984) (imposition of longer sentence after retrial following successful appeal).

27. This delay will prevent prompt elimination of uncertainty in the law. Since any holding of the panel will be subject to eventual Supreme Court review, issues decided by the panel will not produce complete certainty until put to rest by the Supreme Court. It must also be remembered that at present a holding by a circuit does achieve a modicum of certainty within its jurisdiction. Consequently, it would only be within those circuits that have not passed on an issue that a holding by the panel would more firmly, albeit not conclusively, establish the law.

Conversely, the greater the frequency of review by the Supreme Court, the more liberal the Supreme Court would be in referring important cases. The frequency of review will determine the degree of finality and certainty resulting from the decisions of the panel. If this set of relationships is valid, then it follows that the panel will not be able both to reduce uncertainty and resolve a large number of important cases. If this set of relationships is invalid, it is because the Supreme Court would be forced to share with the panel the power to decide questions of great import without any effective review of panel decisions by the Supreme Court. Naturally, this would diminish the authority and position of the Supreme Court in our political system.

Conclusion

It is, of course, the exceptional Supreme Court case that settles once and for all a recurring legal issue.[28] Why make even a temporary structural change in the appellate system, however, if there will be no improvement in either the Supreme Court's net workload or in the resolution of important intercircuit conflicts? It is far from clear that a simple reduction of the Supreme Court's caseload is worth the addition of another layer to the appellate process, another court to the list of courts generating conflicting precedent, and another burden to the already overworked courts of appeals.

Although we believe these concerns are valid, we are equally impressed by Chief Justice Burger's commitment and obvious concern over the caseload problem, a concern shared by other Justices.[29] The Justices themselves are truly in the best position to determine when their caseload becomes so heavy that it limits their power to reflect on and thoughtfully consider the cases they do decide. Consequently, we are in full agreement with the Chief Justice's call for a tripartite commission to study the problem in depth, weigh the competing considerations, and make an informed judgment and recommendation.

28. *See* Hellman, *The Proposed Intercircuit Tribunal: Do We Need It? Will It Work?* 11 HASTINGS CONST. L.Q. 375 (1984).

29. *See supra* note 10.