There Shall Be "One Supreme Court"

By ARTHUR J. GOLDBERG*

In discussing the proposal for a National Court of Appeals[1] (the Mini-Supreme Court) I start, as one must, with the Constitution of the United States. Article III, section 1 of the Constitution states: "The judicial Power of the United States, shall be vested in one supreme Court . . . ." Opponents of the proposed National Court of Appeals have argued that the creation of such a court would violate this article in that a delegation of the exercise of the Supreme Court's jurisdiction would create, in effect, two Supreme Courts.[2]

To some extent, Congress can alter the specific substantive areas that fall within the Court's appellate jurisdiction. But once Congress vests jurisdiction in the Supreme Court, can it delegate to another court responsibility for deciding cases which are properly filed in the Supreme Court? Does not the power to decide cases presuppose the power to consider them and to make a final decision with respect to them when properly filed? In other words, is delegation to another court of cases properly before the Supreme Court consistent with the Constitution's command that there be "one supreme Court"?

Even if these constitutional doubts are not well-founded, what the Constitution does not command, it may still inspire. There is the greatest value in citizens being able to believe that, as a matter of principle, every person has a right to take a claim involving basic rights and liberties to the Supreme Court of the United States for final action, without reference to any other tribunal. It is this belief that in part inspires the great popular belief of the Supreme Court as a palladium of liberty and a citadel of justice.

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1. *See* FEDERAL JUDICIAL CENTER, REPORT OF THE STUDY GROUP ON THE CASE LOAD OF THE SUPREME COURT (1972) [hereinafter cited as FREUND REPORT].

2. *See, e.g.*, Goldberg, *One Supreme Court*, THE NEW REPUBLIC, Feb. 10, 1973, at 14; Warren, *A Response to Recent Proposals to Dilute the Jurisdiction of the Supreme Court*, 20 LOYOLA L. REV. (NEW ORLEANS) 221, 229 (1974).

The controversy relating to the mini-court commenced on December 19, 1972 with the release of a Federal Judicial Center study group report, popularly known as the Freund Report.[3] Mr. Freund, a distinguished Harvard professor and constitutional scholar, and his colleagues on the study group recommended a major change in the structure of our judicial system. After examining the workload of the Supreme Court, the group concluded that the rising caseload has imposed a "staggering burden" upon the justices.[4] The group proposed that Congress create a new National Court of Appeals, made up of a rotating panel of seven presently sitting federal appellate judges. This new court would screen the 4,000 or so petitions for review that are now filed each year with the Supreme Court; the great majority would be finally denied, but about 400 petitions would be certified to the Supreme Court itself for further screening and disposition. The new court would also hear and determine on the merits cases involving conflicts among the federal courts of appeal, a function traditionally performed by the Supreme Court.[5]

There were other recommendations in the Freund Report which did not arouse the same degree of controversy: the abolition of three-judge courts in special cases with direct appeal to the Supreme Court;[6] and the establishment of an ombudsman, rather than an untutored prison lawyer to advise prisoners as to their prospects of success in seeking review by the Court.[7]

As a result of the considerable opposition to the Freund Report's recommendations, Congress created the Commission on Revision of the Federal Court Appellate System.[8] This distinguished commission heard testimony, sponsored studies, and on June 20, 1975 submitted its report and recommendations to Congress for change in the structure and internal procedures of the federal appellate system.[9] In this commentary I shall not deal with the part of the commission report regarding the internal procedures of the existing courts of appeal. I shall confine myself to the commission's recommendations affecting the Supreme Court.

3. FREUND REPORT, *supra* note 1.

4. *Id.* at 5.

5. *Id.* at 18-19.

6. *Id.* at 27.

7. *Id.* at 14.

8. Act of Oct. 13, 1972, Pub. L. No. 92-489, §§ 1-7, 86 Stat. 807, *as amended*, Pub. L. No. 93-420, 88 Stat. 1153 (1974).

9. U.S. COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE (1975) [hereinafter cited as COMMISSION REPORT].

The commission recommended that Congress establish a National Court of Appeals, consisting of seven judges appointed by the president with the advice and consent of the Senate.[10] The National Court of Appeals would have jurisdiction to screen or hear cases (a) referred to it by the Supreme Court (reference jurisdiction), or (b) transferred to it from the regional courts of appeal, the Court of Claims, and the Court of Customs and Patent Appeals (transfer jurisdiction).[11]

With respect to any case before it on petition for certiorari, the Supreme Court would be authorized:

(1) to retain the case and render a decision on the merits;

(2) to deny certiorari, thus terminating the litigation;

(3) to deny certiorari and refer the case to the National Court of Appeals for that court to decide the merits of the case; or

(4) to deny certiorari and refer the case to the National Court of Appeals, giving that court discretion either to decide the case on the merits or to deny review.[12]

If a case filed in a court of appeals, the Court of Claims, or the Court of Customs and Patent Appeals is one in which an immediate decision by the National Court of Appeals is in the public interest, it may be transferred to the National Court of Appeals provided it falls within one of the following categories:

(1) the case turns on a rule of federal law and the federal courts have reached inconsistent determinations with respect to it; or

(2) the case turns on a rule of federal law applicable to a recurring factual situation, and a showing is made that the advantages of a prompt and definitive determination of that rule by the National Court of Appeals outweigh any potential disadvantages of transfer; or

(3) the case turns on a rule of federal law which has theretofore been announced by the National Court of Appeals, and there is a substantial question about the proper interpretation or application of that rule in the pending case.[13]

The National Court of Appeals would be empowered to decline the transfer, and decisions by the National Court of Appeals accepting or rejecting cases would not be reviewable under any circumstances.[14] Any case decided by the National Court of Appeals, whether upon refer-

10. *Id.* at 30.
11. *Id.* at 32, 34.
12. *Id.* at 32-33.
13. *Id.* at 34-35.
14. *Id.* at 35.

ence or after transfer, would be subject to review by the Supreme Court upon petition for certiorari.[15]

The underlying rationale of the commission's report is that the Court is overburdened and as a consequence is unable adequately to deal with transcendent constitutional issues, to resolve conflicts between the circuits, and to determine national law authoritatively and efficiently.

The recommendations of the commission have, in the main, received the support of the Chief Justice of the United States, Mr. Justice White, Mr. Justice Blackmun, Mr. Justice Powell, and Mr. Justice Rehnquist. Mr. Justice Brennan, Mr. Justice Stewart, and Mr. Justice Marshall have, by and large, opposed the recommendations of the commission as did Mr. Justice Douglas while he was on the Court.[16] Almost everyone who has sat on the Supreme Court has agreed that three-judge courts with direct appeals to the Supreme Court should be abolished[17] and that federal diversity jurisdiction also should be terminated.

Let me first deal with the question of the "staggering burden" on Supreme Court justices. During my tenure, the Court's caseload was not as heavy as it is today; filings have increased from approximately 2,400 during the 1962 term to approximately 4,000 during the 1974 term.[18] Although the number of filed cases that the Court must screen has risen dramatically, I am of the view that certiorari petition screening, though highly important, represents one of the less time-consuming aspects of a justice's work. The vast majority of certiorari petitions raise no significant legal issue, and under existing legislation, the Court has discretion to deny petitions without a hearing or a formal opinion. Indeed, an astonishing number of filed cases present questions that a third-year law student can immediately recognize as inappropriate for the Supreme Court.

The more historically important and time-consuming aspect of a justice's work—the hearing and determination of cases on the merits—has not become correspondingly more burdensome over the years. The number of decided cases has remained relatively constant, averaging about 150 annually during recent times.[19]

15. *Id.* at 38.

16. *See id.* at 172-88.

17. Recent legislation has eliminated three-judge courts except in cases challenging the constitutionality of the apportionment of legislative districts and a few other cases. Pub. L. No. 94-381, §§ 2284, 2403, 45 U.S.L.W. 1 (Aug. 12, 1976).

18. FREUND REPORT, *supra* note 1, at A2.

19. COMMISSION REPORT, *supra* note 9, at 6.

I frankly do not see how the recommendations of the commission would diminish the workload of the Supreme Court. Rather it seems that were this procedure to be adopted, the workload of the Supreme Court would be increased. The Court would be required to undertake review of certiorari cases twice: first, on the original application for certiorari, and subsequently after the National Court of Appeals decides these cases on the merits or by denial of review.[20]

The commission apparently hopes that the Supreme Court would allocate less time and work for the second review than it did for the first. But my experience teaches that some, or even all, of the Supreme Court justices would conclude that a second review similar to the first probably would be necessary in fairness to the litigants and in discharge of the Court's responsibility. It seems to me unlikely that the Supreme Court by rule would dispense with the first review in particular cases or in groups of cases.

The commission's referral proposal seems to imply that the Supreme Court should concern itself primarily with constitutional issues, and that the National Court of Appeals should deal with other important issues of national law and conflicts between the regional circuits. Yet Supreme Court justices are interested in various areas of the law, and rightly so. Questions of statutory interpretation are illustrative of the scope of appropriate exercise of jurisdiction by the Supreme Court. I doubt very much that the proposed procedure would materially alter the Court's decision-making process with respect to certiorari application of these kinds of cases.

I further adhere to the view that resolving conflicts between the circuits and therefore necessarily overruling a particular court of appeals is a sensitive process even when performed by the Supreme Court. To vest this function in a court of lesser stature than the Supreme Court, however distinguished it may be, would inevitably create tension in the appellate system. Further, the Supreme Court often delays resolution of a conflict situation until the problem is ripe for adjudication.

In summary, it is my belief that the recommendations of the commission would not alleviate the workload of the Supreme Court, but would add to it. Despite the disclaimer of the commission, its recommendations would create a "fourth tier" in our federal judicial system, leading to greater delays and greater expense than now exist. The proposed transfer jurisdiction for the National Court of Appeals like-

20. *Id.* at 32-38.

wise seems unrealistic. The commission obviously hopes that in both reference and transfer jurisdiction the Supreme Court would refuse to review decisions and actions of the National Court of Appeals except in the most summary fashion. I do not conceive that regional courts of appeal would readily yield their jurisdiction except to the Supreme Court.[21]

It is perhaps the greatest virtue of the Supreme Court that it is designed to serve, as it now functions, as a guarantee to all citizens of whatever estate, race or color that our highest court is open for consideration of their claims that they are being denied equal and relevant justice under the Constitution. I am convinced that grave injury would be done by creation of a National Court of Appeals to the great concept engraved at the very entrance of the noble edifice which houses the Court: Equal Justice Under Law.

I believe that to create a National Court of Appeals would be a serious mistake. The commission's proposal, if implemented according to its intent, would deny to Americans their historic right to take any case raising substantial constitutional questions or significant matters of national law to the highest court in the land for final resolution by the Supreme Court and by the Supreme Court alone. I profoundly believe that the Supreme Court as it now functions is discharging its great responsibilities as the ultimate guardian of our liberties under the Constitution. Let us maintain the purpose and spirit of the institution.

21. The proposed transfer jurisdiction has been eliminated in S. 3423, 94th Cong., 2d Sess. (1976), introduced by Senator Hruska, the chairman of the commission. Senator Hruska correctly states in his explanatory statement relating to this proposal that it has aroused intense and widespread dissent. My own discussions with various judges of the courts of appeals and others confirm this statement by Senator Hruska. It is my opinion that elimination of transfer jurisdiction in S. 3423 is well advised.