Arthur J. Goldberg

The Case Against a National Court of Appeals

Dec 1/6/73

THE STUDY GROUP on the Caseload of the Supreme Court, chaired by Paul A. Freund, professor at Harvard Law School, is an eminent one. Its members are professors of law and practicing lawyers of great distinction. Their recommendations are justly entitled to weighty and thoughtful consideration.

I have read and considered the report in this spirit. Notwithstanding my great respect and regard for the mem-

The writer is a former Associate Justice of the Supreme Court of the United States.

bers of the study group, I find myself in disagreement with the group's most important recommendation — the establishment by statute of a National Court of Appeals.

Before stating my points of disagreement, I should like to make clear that I fully recognize the magnitude of the court's caseload and the fact that it has increased significantly since I left the court in 1965. Further, there are clear indications that it will substantially increase in the foreseeable future.

Since the report deals with the regulationships between justices and their law clerks, I also want to emphasize that, on the basis of my experience, every justice does his own work and makes his own decisions, whether in passing on applications for certiorari or in deciding argued cases. Law clerks are helpful and, indeed, indispensable aides to justices, but law clerks do not make decisions for a justice.

I agree, of course, that the responsibilities of justices of the court must not be delegated. In my experience it was not, and I am supremely confident that it is not being delegated today. The dedication and sense of duty of justices of the Supreme Court precludes such delegation. Nor does the increase in the court's workload require a delegation of authority, either within the existing court or to a newly created court.

My reasons for opposing the principal recommendation of Freund's group are as follows:

1. Creating a National Court of Appeals with power to screen certiorari applications to the Supreme Court and the right to decide certain types of cases raises substantial constitutional questions. Article Three of the Constitution provides for "one Supreme Court." Whatever the power of Congress may be to alter the specific substantive areas that fall within the appellate jurisdiction of the court, it would seem to me that when jurisdiction has been vested in the Supreme Court, it is inconsistent with the constitutional requirement that there be "one Supreme Court" to delegate to another court the responsibility of determining which cases the Supreme Court shall hear. The power to decide cases presupposes the power to determine what cases will be decided.

2. But, even if my constitutional doubts are not well founded, the spirit, if not the letter, of the Constitution commands that the Supreme Court shall have plenary power to deal and dispose of cases involving basic constitutional rights. What the Constitution does not command, it may still inspire. Every person should have the opportunity to take his claim to basic rights and liberties to the Supreme Court.

3. Imposing additional barriers against access by a citizen asserting a constitutional claim to the Supreme Court militates against its great function as a "palladium of liberty" and a 'citadel of justice," as the Supreme Court recently described our court system. It is perhaps the greatest virtue of the Supreme Court as it now functions that it serves as a guarantee to all citizens of whatever estate, race or color, that our highest court is open for consideration of their claim that equal and relevant justice under the Constitution is being denied them.

4. Further, it seems to me that alternative devices to handle the caseload of the Supreme Court can more easily and less dangerously be created within the existing structure of the court rather than by creating a new court. In my view, additional personnel to assist the court in the handling of its caseload would obviate the need for drastic change in our fundamental system of Supreme Court review, such as that proposed by the Freund group.

5. There are additional practical reasons why this recommendation of the study group should not be followed. Judges of the Court of Appeals perform a different function from that performed by the Supreme Court in certiorari determinations. A rotating panel of judges of the Court of Appeals, with limited tenure on the proposed National Court of Appeals, would scarcely substitute for the feel of what the Justices of the Supreme Court would want to review. Moreover, the enlistment of judges from the present Courts of Appeals, which are already overburdened, for service on a National Court of Appeals would interfere with the proper disposition of cases at the circuit level.

These considerations and others that might be advanced of a practical character, however, are subordinate to my principal objection to the report of the study group. The committee's proposal would deny to Americans their historic right to take every case raising substantial constitutional questions to the highest court in the land.

I profoundly believe that the Supreme Court as it now functions in discharging its great responsibilities under the Constitution is the ultimate guardian of our liberties. Let us leave it so.