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THE FOLLOWING IS A TRANSCRIPT OF THE PRESS CONFERENCE HELD AT THE FEDERAL JUDICIAL CENTER ON DECEMBER 19, 1972. PARTICIPANTS WERE PROFESSOR PAUL A. FREUND AND MR. BERNARD G. SEGAL AND APPROXIMATELY FORTY-FIVE MEMBERS OF THE PRESS.

PROFESSOR FREUND'S OPENING REMARKS

Ladies and gentlemen, thank you very much for coming. I should say at the outset that while all the members of our study group were invited to participate, I was especially anxious to have someone here representing the practitioner side of our panel, and so I am particularly glad that Bernard Segal was able to come from Philadelphia and join me in this presentation. I thought that I would say something at the outset, if I may, about our approach to our mission - how we arrived at our proposals, and then throw the meeting open for questions. Our group was appointed, as you know, a little more than a year ago. Although we are called a study group on the caseload of the Supreme Court, we did not conceive our function to be primarily that of making the work of the Supreme Court Justices easier. That position I think will never be a "pipe and slippers" job. It cannot be while issues of great moment and intensity engage the members of the court. Rather, we conceived our function to be to try to examine the conditions under which the Court is now working and to try to arrive at some suggestions for conditions that would be most conducive to their best performance of their functions. Now what are these functions? They are essentially three: one to vindicate individual rights guaranteed under the constitution; another to assure the uniformity of federal law; and third, to maintain a balance among the various branches of government and the states with respect to the Union. We tried to keep steadily in view not only the interests of the Court, but, as well, the interest of those who look to the Court, including litigants, lawyers and the public who look to the Court for intellectual and moral leadership in the pursuit of justice.

Our first task was to try to assess the dimensions of the problem. The report will have to speak for itself on this as on other issues, but let me simply refresh your recollection with a few figures. In the last twenty years, the docket of the Court has increased three-fold. The new filings most recently have been over 3500 cases in one term. Almost exactly seventy new filings every week of the year. The carry-over from the past to the present term has risen from 136 in 1951 to 888 in 1971. I've heard it said sometimes that this increase is due wholly to the increase in the number of "in forma Pauperis" cases, in which the chaff is perhaps 95% of the number. That, of course, is not true as our figures show. The paid cases in the last twenty years grew 2 1/2 times only slightly less explosively than the "in forma pauperis" cases from 707 in 1951 to 1708 in 1971. We saw no reason to expect any siginificant change in this trend, given the marked increase in the number of lawyers entering the profession, the persistence and agressiveness, properly so, of the legal profession, the proliferation of legislation in the field of welfare and economic and social regulation, the provision only very recently of counsel in misdemeanor cases where jail sentence might be imposed. All of this is reflected in the Court of Appeals dockets around the country, and, of course, the Supreme Court docket reflects quite directly and proportionately the swollen tide of the dockets of the intermediate federal courts. During all this period, the number of cases where review has been granted by the Supreme Court, has remained relatively stable. This means that the percentage of the cases granted has sharply declined. The figures are given at the bottom of Page 3 and the top of Page 4 of the report. In 1971, 5.8% of the petitions for certiorari were granted in contrast to 17.5% in 1941, 11% in 1951, and 7.4% in 1961 - a steady decline

in percentages. Of course, one must not stop at figures, one must consider the nature of the cases, the quality of the cases. In our judgment, the cases are no less difficult, no less demanding than they were a generation ago. It's true that the nature of the docket has changed. It's true that there are fewer patent cases, fewer utility rate cases, fewer corporate reorganization cases, all of which generally had long and complex records. At the same time, I think it would be a bold assertion to state that those cases were more difficult than cases involving plans for school desegregation, reapportionment plans, problems involving the constitutionality of the death penalty, of the less than unanimous jury, of abortion, of obscenity controls. These cases are difficult in, perhaps, a different way. Some cases are difficult, as calculus is difficult; some cases are difficult as bringing up a family is difficult - and I think today the difficulty tends to be of the latter sort and none the easier for it. That the problem is a real one seems to me unmistakable, and indeed, indicated by a series of moves in recent years. In 1969, a third law clerk was provided for each member of the Court. There has been a reduction in the time of argument in most cases from one hour a side, to one half-hour a side. Records are no longer circulated when petitions for certiorari are considered by the Court, and for years, members of the Court have been exhorting the bar to exercise more self-restraint in the filing of petitions - exhortations which have never apparently been effective and which, I think, it is futile to expect will be effective so long as the granting of certiorari is not a perfectly predictable phenomenom, as it is not. Now we don't deny that the Court could cope with an ever-increasing docket. It could process assembly-line fashion a mounting caseload through ever increasing augmentation of

of staff and delegation of functions within the Court. In our judgment, and I would think within the judgment of the bar and the public generally, these would be wrong directions to take. If I may be personal, Justice Brandeis, for whom I had the privilege of clerking, when asked how he explained the great prestige of the Court, would say, "Because we do our own work." We concluded then, that the time has come for some measures of change, that this time is like those historic watersheds of 1891 and 1925 when the two great judiciary acts of modern times were enacted. Each of these acts met with bitter opposition. The 1891 Act created, as you know, nine Circuit Courts of Appeal. This idea had been in the air for at least 10 years. It was stoutly opposed. I happened to see recently the majority and minority reports of an American Bar Association Committee dealing with these proposals in 1882, reported in the reports of the American Bar Association for that year. The majority of the committee came out in favor of the Courts of Appeal. The minority, of whom Senator Everts was a powerful member, came out in favor of panels of three. There's nothing new under the sun. We hear that proposal advanced today, that the Court might act through panels. Senator Everts, incidentally was converted later and became the chief spokesman for the Courts of Appeal Bill as it was passed in 1891. Chief Justice Fuller, back in Illinois when he was President of the Illinois Bar Association, before he went on the Court in 1888, urged the creation of the Courts of Appeal to relieve the burden on the Supreme Court. In 1925, a committee of the Court, consisting of Chief Justice Taft, Justices Van Devanter and Brandeis, proposed a measure called "The Judge's Bill", which is the Judiciary Act of 1925, because while there were too many obligatory cases on the calendar, and the solution in the 1925 Act was, as you know, to

convert most review into review by certiorari that is in the discretion of the Court rather than through mandatory review. This was bitterly attacked because it deprived litigants of their "right" to a hearing in the Supreme Court. They could be turned away on the papers without a full hearing, and it was only upon the assurances given in the Congress, that every member of the Court would examine every petition, and that four members of the Court would suffice for the grant of a petition, that this bill was passed. Well, now the question emerges, "What kind of change ought to be made?" We considered seriously a number of proposals. Many of them are in the air. It is very difficult to be "original" in this field. We thought about an increase in the number of Justices, but this, I think, we rejected most readily of all as really not a solution if all the members of the Court were going to participate in all the decisions of the Court. As Chief Justice Hughes said in 1937, "There would be more Justices to hear, more to convince, more to decide...", and alternatively, if panels were established within an enlarged Court, you would have the very unfortunate condition of making decisions turn on a lottery within the Court, which, we thought, was inappropriate at the highest level of the Federal Judiciary. Another proposal in the air - there was an article advancing it by Professor Strong - was that the jurisdiction of the Supreme Court be limited to constitutional cases. We rejected this on many grounds. For one thing, it's practically difficult to disentangle consitutional and other issues, especially statutory construction. Beyond that, we thought that it would be unfortunate that the "court of last resort" would have no jurisdiction over very important issues that might not be of a constitutional nature, that might be in the nature of statutory interpretation or procedure; and, that to limit the jurisdiction in that way, would be an invitation to counsel, and perhaps to members of the Court themselves to inflate what would otherwise be statutory construction issues into

constitutional issues for purposes of jurisdiction. We also gave a good deal of thought to suggestions advanced from time to time over a long period of years for specialized Federal Courts of Appeals. An administrative Court of Appeals or Courts of Appeal for particular specialties like labor and taxation have been proposed. We thought primarily that these proposals would not go far enough toward resolving the problem from the standpoint of the Supreme Court. Some of these proposals may be worth seriously considering on their own merits. The Tax Court of Appeals idea may be worth adopting from the standpoint of the administration of the tax laws, but from the point of view of the Supreme Court, we thought that such specialized courts would have only a minimal impac t on its input. Moreover, we somewhat feared that the more specialized the court, the more likely the members would be to polarize around a single issue, and as a corollary, the more likely the appointing power would be to become politicized around a single issue. The one field in which a specialized Court of Appeals would be very useful in relieving the docket of the Supreme Court would be the criminal field. But we felt that particularly in the criminal field the dangers of polarization of which I spoke and the politicization of the appointing power would be particularly unfortunate. Moreover, there was a dilemma. If you had a specialized Criminal Court of Appeals, would its decisions be final or would they be subject to further review in the Supreme Court? If they would be final, we were unwilling to place criminal defendants in a different, and what might appear an invidious position with respect to other litigants. If the decision of such a court were not final, then the relief to the Supreme Court would be a rather illusory one, and you would have added simply a fourth tier of courts, which we though, in principle, ought to be avoided.

We gave consideration to an idea for a new National Court of Appeals to which the Supreme Court itself might refer cases for decision. This idea was advanced in a law review article some time agao by Judge Carl McGowan of the Fourt of Appeals in the District of Columbia. We rejected this mainly on the ground that it would not do anything to resolve the screening function of the Court. The Supreme Court would still have to screen all the petitions that came to it, in order to determine which to remand, so to speak, to the new intermediate court and which to retain. We gave consideration to a rather drastic suggestion of a new National Court of Appeals with, say, 15 members sitting in panels of five each, that might decide, perhaps, 150 per panel a year, and all cases would be channeled through it. The Supreme Court then would review only those cases of the 450, say, decided by that court which the Supreme Court chose to review. We did not like the idea of a fourth tier. Morever, we thought the proposal was too drastice for this stage of development.

By a process of elimination, and also by a process of identifying what we thought were the key problems, we came to our proposal. The key problems being the problem of screening and the problem of the existence of conflicting decisions among the circuits was not in and of itself a ground at present for the granting of certiorari. There has been a good deal of regret around the country that more conflicts of circuits are not resolved in the interest of certainty of the law and because of the reflex effect which that would have on the volume of cases in the lower federal courts. That is to say, cases are filed in the federal courts because there has not yet been an authoritative resolution of conflicting decisions. It is particularly true of government litigation where to protect itself the government keeps filing cases in the various circuits not knowing what

the final resolution will be. So, coming at the problem from these two directions, the screening function and the conflict of circuit resolving function, we have proposed a new National Court of Appeals with those two functions. Though other methods of manning it can be imagined, the members of the court, (seven in number), under our suggestion, would be chosen on a rotating basis from the existing circuit judges with a balance between seniority and juniority with no circuit represented by more than one justice. We did our best to suggest a method of selection which would be as neutral as possible from any ideological standpoint. It would screen all the cases that now are brought to the Supreme Court and would certify to the Supreme Court those that perhaps three of the seven justices regarded as worthy or arguably worthy of review. A number which it would be made plain should be several times the number that the Supreme Court would be expected to grant, say 400 to 500 per term of which the Court would accept as now perhaps 140 or 150; thus, five members of the new Court would be required - five out of seven - to keep a case from reaching the Supreme Court. The Supreme Court could grant certiorari before decision in the new Court of Appeals as it can at present before decision in the Courts of Appeal, though our hope would be that procedure would be sparingly used in the future as it has been in the past. The Supreme Court could also remand to the Court of Appeals a case of conflict of decisions which the National Court of Appeals had not taken for decision because it seemed to involve not merely a conflict, but a question of major public importance. The Supreme Court could either deny a review, grant review and decide such a case, or remand it to the Court of Appeals on the ground that, although there is a conflict of decision, the question is not of such major importance as to warrant Supreme Court review. In other words, we are distinguishing

between cases that ought to be resolved and cases that the Supreme Court ought to resolve. Well, I think I've said enough about that, and I've taken more time than I had expected.

Just a few words about our other recommendations which are independent of that of the National Court of Appeals. We have recommended the abolition of three-judge courts with their provision for direct appeal. We advocate the end of direct appeals from single-member district courts to the Supreme Court. We recommend the ending of the distinction between appeal and certiorari from state courts and federal courts of appeals. In connection with the problem of criminal cases which all too often now get only the very fleeting attention by either a law clerk of a justice, we have suggested tentatively, although it's perhaps not within our direct charge, the creation of a new agency, call it an Ombudsman Agency or whatever, which would be available both to prisoners and to district judges and a member of which could be asked to make an on the spot investigation and report to the district judge. And, in the case of prisoners' complaints, a growing category of cases in the lower courts, prisoners' complaints under the Civil Rights Act about treatment in prison, this member of the agency could mediate and attempt to settle the controversy and thus obviate a court suit. We've made some other suggestions regarding augmenting the library staff and the clerk's office, but these are of a housekeeping nature. Opinions may and will differ about the relative desirability of our proposals and of other proposals, and we hope and expect that a good deal of discussion will be generated. There is one point, however, on which I would hope there would be no disagreement, and that is, that our proposals are not of a political or ideological nature. They are as neutral as we could conceive. They will not hamper the Court. They are designed to

emancipate the court from pressures and constraints that now act to shackle it. How the court utilizes its greater freedom from these pressures will be up to the court. Whether the court wants to decide more cases on the merits; whether it wants to enhance the collegial process of decision making by fuller consultation, fuller mutual criticism of opinions, avoiding the so-called "end of term" crunch, possibly avoiding special concurring opinions through a process of accommodation would be up to the court, but whatever is done requires time and as much freedom from pressure, certainly not complete freedom from pressure, as much freedom from pressure, as is consistent with a performance of their essential tasks. I look on the Court at its best as the Court that handed down Brown v. Board 6f Education, which I think it requires no clairvoyant to say could only have been the result of a very long, painstaking and patient process within the Court. I'm sure that Brown v. Board of Education was not the last case that could profit from that kind of attention, but I wonder how many cases, given the Court's docket, can receive that kind of attention under present conditions. I'm tempted to close with something I just saw recently, namely, a sentence from Judge Shirley Hufstedler's James Madison Lecture at New York University which was given in October and is due to be published in the New York University Law Review; I haven't seen it, but it may be out, in which she touches on some of these problems. She ends with this rather striking statement, "...Federal Courts have not yet been added to the list of threatened species, but the Supreme Court is hurtling towards entry and the Federal Courts of Appeal are following closely.."

QUESTIONS AND ANSWERS

QUESTION: It now appears that at least four justices on the current Supreme Court will oppose this proposal. I don't know whether there'll be any more, but there are four who have already voiced deep concern about it. Two of them, I think, are Justice Stewart and Justice Douglas. Do you think you can possibly get this proposal enacted into law with four Justices oppoed to it?

ANSWER: Freund - Well, let me say, first of all, that in fairness to members of the Court, I would not accept a position ascribed to them as their position on a proposal which there had been no opportunity to consider, as presented, any more than I would expect good judges, fine judges, such as each of them is, to reach a conclusion on a case before reading the documents in the case. Now as to the second point, what the political prospects are I certainly don't know. I'm not a politician. We had an assignment, We've discharged ouf assignment, and the report will now go to other hands. I don't know whether Bernie Segal would like to add to that.

Segal - Well, I would really have nothing of any significance to add. I have, as some of you know for the past quarter of a century appeared before congressional committees in matters involving judicial selection, tenure, compensation and changes in court structure. I've always found both the Senate and the House Judiciary Committees to be attentive to the views of the profession, all branches of the profession, the judicial, the academic, the practicing profession. Many of you in this room know that the committees have asked for the views of the American Bar

and other professional organizations. Here is a Committee which has been selected by the Chief Justice in accordance with the processes of the Federal Judicial Center. I think it's fairly cross-sectional in previously expressed views and in the background of the members. It obviously couldn't include the Judicial; it does the academic and the practicing branches of the profession. I would be greatly surprised if the Senate and the House Committees did not give thought to this report, did not have hearings as has been the custom of each of the Committees. I don't know where it will come out, but my guess is that it will get plenty of attention.

QUESTION: I noticed a rather pecular wording in the preface of this about Peter Ehrenhaft's background, and I've understood that former Chief Justice Warren had told Mr. Ehrenhaft, had insisted to Mr. Ehrenhaft, that he not identify himself as a former Warren Law Clerk in regard to this report because he is so opposed to this report.

ANSWER: Segal - I have not heard that he made any such request, and having talked with Peter, I doubt very much whether he has made such a request.

QUESTION: Mr. Segal, do you know if Chief Justice Warren has criticized this proposal privately?

ANSWER: Segal - Well, all of you have read the stories in the press and quotations from his letters. I have heard of letters that he has written, but I am hopeful that he will have an opportunity to study the report. You see, I think you have to realize that

no one outside the committee has seen this report.

QUESTION: Has Chief Justice Burger seen the report?

ANSWER: Segal - Not to my knowledge. Let me say that the report in its present form has only been out, what, Paul, just about two weeks?

Freund - Ten days - the printing time was longer than we expected because of the charts and tables.

Segal - I think it's fair to make one thing clear. This report has not been submitted to anyone outside the Committee for comment or criticism, on or off the court.

QUESTION: I don't care to be technical, though, about whether they've seen the graphs or the little booklet that I have in my hands. What I would like sketched out for us by you or Professor Freund or both, is the involvement of the Chief Justice of the United States in this project, in these recommendations, his counselling, if any, the striking of recommendations if he opposed them, his guidance. In fact, any personal effect aside, could this very well be called, instead of "The Freund Report", as I suppose that it will be some day, "The Burger Report"? Would that be a fair reference to it?

ANSWER: Segal - Let me answer that, then I'll take my seat so that Professor Freund may resume the rostrum. We interviewed each of the Justices, that is, the entire Committee interviewed each of the Justices, in some cases together, two, and in one case, three at a time. We sought their views not on what we should propose, not on what they thought the Court needed in terms of specific proposals, but rather to get from them the problems of the

Court, to find out from them what they were finding as to time for deliberation, time for consultation. We interviewed three law clerks, two of them of deceased Justices in their last terms of Court, Mr. Justice Black and Mr. Justice Harlan, and one Chief Clerk of the Chief Justice in order to learn reasonably current facts concerning the courts. We did not discuss any of these proposals with any of the Justices. My recollection is we did not with the Chief Justice either. I say my recollection because I can't pinpoint whether some proposal was passingly referred to, but I can assure you that their views were not sought, and my recollection is that none of the specific proposals was discussed with the Chief Justice or any of the Justices.

QUESTION: Did the Chief Justice inspire, would that be a fair word, inspire the formation of this Committee or the proposals that flow therefrom?

ANSWER: Segal - Well, you'll have to separate that question. The Chief Justice appointed the Committee.

QUESTION: Alright, will he be surprised with its recommendations, do you think?

ANSWER: Segal - If he doesn't disbelieve the press, he won't be surprised, if he's read the articles I've read. None of us has given him a statement of the proposals up to now.

QUESTION: What I'm saying is, do you think these proposals are representative of the Chief Justice's thinking in this area? Will he be pleased? Is this what he would say, do you think?

ANSWER:
Segal - As to one of them, we know this is what he would say because he has said that publicly, and I refer to the three judge court. Otherwise, we have no notion whatever. I have a partial notion because I was Chairman, as you know, of the Committee on Congestion in the United States Court of Appeals. Our report was printed at a time when he was on the Courts of Appeal. He expressed a view as to a somewhat different proposal of that Committee, but I personally would have to say that this Committee is unaware of his views on any of the proposals other than the three judge court where he has publicly spoken before the Committee made its findings and as to some of the mechanical aids for the court which he has talked about, as many of you have heard in his addresses.

QUESTION: Professor, you yourself have expressed the uniqueness of the Supreme Court with that Brandeis quote, "We do our own work". Even those of us who weren't fortunate enough to go to Harvard have some understanding that we can only have one Supreme Court. Now, this junior court, could in essence, control, or at least, by what it moves from getting the Court's attention, what the Court gets to do. The Court would not entirely, any longer be doing its own work.

QUESTION: Is this proposal really constitutional?

ANSWER:
Freund - Are you referring to the constitutional provision that there shall be one Supreme Court? Is that your problem?

RESPONSE: Yes.

ANSWER: Freund - Well, I don't know how you differentiate the many, many kinds of cases where decisions of lower courts were final and not reviewable by the Supreme Court. One could say rhetorically or colloquially that they were the Supreme Court. For example, as you well know, for many years, there was a jurisdictional amount requirement to get to the Supreme Court from a lower Federal Court. Were the lower Federal Courts the Supreme Court, in all cases involving less than $5,000. For a hundred years there was no criminal appeal to the Supreme Court, except by certificate of division among the Circuit Judges. Were the Circuit Courts mini-Supreme Courts? I mean this is a rhetorical device.

QUESTION: Could we talk at a level that is a little bit less legal?

ANSWER: Freund - But it's a legal question. With all deference, you've raised a legal question, and I can only answer it as a constitutional lawyer.

QUESTION: Let's talk about the character of the Court, for a moment. People in this country have long had the faith that they have that court of last resort; they can always go to the Supreme Court, if needed. That's a birthright. That will be removed by this scheme...

ANSWER: Freund - I see, well, now you're not making a legal constitutional argument because this so-called right, as I say, for most of

our history, didn't even exist in form. But now you say it does exist, at least in principle. People can go. It's true that in 1925 there was a great deal of criticism of the new certiorari practice because it was thought to be not really getting to the Supreme Court. But the point is that it is a fine symbol. Nevertheless, when symbols become fictions, the symbol becomes eroded. The point is that where the responsibility is, there should the function be, and if it be true that every pauper in a criminal case decided by the Federal Court of Appeals has a so-called right to file in the Supreme Court, one has to ask what this really means. What attention does he get? Well, he gets the attention of either one law clerk if the petitions are funneled for preparing memoranda or individual law clerks and of the Justices, to the extent that they find it possible to look at the petition rather than at a law clerk's memorandum. Now, under our suggestion, say, some 500 cases a year would get to the Supreme Court with the imprimatur of a National Court of Appeals. There would be a certain weight attached to them by reason of that preliminary screening. Moreover, it has the virtue of putting the function where the responsibility is. If you're talking in the realm of symbols, I think it's important to ask whether the symbols comport with reality. If the caseload increases, as the Chief Justice has predicted publicly to

7,000 by 1980, what does this right consist in? It is a fine symbol and a fine ideal, but I'm afraid that so far from adding to the prestige of the court, it will, if it gets further out of hand, become a ground for disillusionment and cynicism.

QUESTION: Professor Freund, could I ask a question, sir? This whole report as I understand it is motivated by the feeling that the Court, the Supreme Court is overburdened, at least carrying more of a burden than it can efficiently discharge. Now Justice Douglas very recently and publicly stated this point of view, "...that far from being overworked, the court is under-worked.." Now it's true this may be a minority point of view, but this is a view of the Senior Justice from age and point of service on the Court. In view of that, I wonder if you could find it within the bounds of propriety to comment on his observation?

ANSWER:
Freund - Well, his observation, of course, is no news. He has said this publicly in an address in 1970 to the Association of Bar of the City of New York, and our Committee had seven copies of this report to consider, so it's not a new or surprising statement on his part, and the role of disagreement on his part is also not a new one. Now how to explain it (?). There are differences in temperament; he has served over 30 years; he has great facility; he has great quickness; he has views,

firm views on a great many questions that recurringly come to the Court; but the structure of the system obviously cannot be designed for an exceptional member of the Court.

QUESTION: But, if he is....., can we be sure that he is, in fact, an exception. Are you persuaded, sir, that the majority of the Justices of this present Court, once they had an opportunity to read this report and joined in the recommendations and if they did not, would you concede that there might .....

ANSWER: Freund - Well, there are two points here. They might not join in the recommendations, but they might still concede that there was a problem, but that our suggestions were not the best way of going at the problem. They have already, as I said, in a number of moves, acted in a way that can only be interpreted as an effort to cope with the problem such as; cutting down on argument time, increasing the number of law clerks. Now we're told that five members of the Court are using a pooled law clerk system rather than having individual law clerks read petitions for certiorari. These are all significant. I can only say that after talking with each member of the Court, as Mr. Segal said, sometimes two at a time, once, I think, three at a time, we had to use our best judgment to get the sense of the situation, and I'm not in any position to quote phrases that were uttered to us, but it was our unanimous judgment that there was a serious problem, after hearing the Justices, after looking at the figures, after

reading the observations of others, we concluded there was a real, a genuine problem. Whether our proposals will meet with the favor of the Chief Justice or any member of the Court, I honestly do not know.

QUESTION: Did you say you were free to quote...

ANSWER: I said I was not. I don't feel free. We didn't enter into any stipulation, but, as a reporter, you understand my position.

QUESTION: Did you say you were free to quote...

ANSWER: Freund - I said I was not. I don't feel free. We didn't enter into any stipulation, but, as a reporter, you understand my position.

QUESTION: That is, you can't give information without some understanding of confidentiality?

ANSWER: Freund - Well, I understood that when the Justices talked to us, they talked to us and not to the press.

QUESTION: If we can get with you without concentrating on the number of cases, and the various ways to look at the Court, and could come down from the mountain, as some of us look at the Court, there is still an uphill struggle, a monumental struggle, from people like Escobeda and Miranda and Gideon to get into the Court, and in fact, you blame or credit Gideon for the numbers problem. Of course, you could hav e eliminated the problem by never letting them get there in the first place.

ANSWER: Freund - I hope you don't find any such suggestion in our report...

QUESTION: Well, let me not argue the report with you, but let me ask you,

if I understand you correctly...

ANSWER:
Freund - It is a fact, yes, but a happy fact, yes.

QUESTION: Gideon now, ..., not only for the miracle of Gideon to recur, but for Gideon II to happen some day, it will have to clear three of the seven junior judges, junior Supreme Court judges, and then win a five-to-four decision. He'll need eight instead of five, won't he, to get the decision that Gideon got.

ANSWER:
Freund - No. well you're saying...He has another gauntlet to run. You're talking about two different decisions - the new Court of Appeals won't decide the merits...

QUESTION: But he'll never get to the Supreme Court unless he gets the approval of three of the seven..

ANSWER:
Freund - Or unless the Supreme Court takes the case before decision in that court.

QUESTION: You mean in that exceptional case?

ANSWER:
Freund - Yes.

QUESTION: How many of those do you...

ANSWER:
Freund - That will be up to the Supreme Court. But let me answer you more directly. The Gideon problem wasn't something out of the blue; the Court had been wrestling with the right of counsel cases for years after Betts and Brady; they had been taking them up, on a case-by-case basis, factor-by-factor basis and it became weariness of flesh and spirit. Now, if the judges

of the new Court of Appeals didn't sense that, there are ways in which the Supreme Court can indicate it, either by statements in opinions or in the grant or denial of certiorari, on review of cases from the intermediate court, and we believe that a group of professionals such as we envisage will be astute enough to sense where the concerns of the Supreme Court are. Of course, at any given time, if you are talking liberalism and conservativism, it could be, you know, that a Court of Appeals panel will be more activist than a given Supreme Court majority.

QUESTION: But, Professor Freund, how can the Supreme Court know what's down there, what they are being denied from seeing before there is an accomplished fact about it, unless they review all those same cases themselves.

ANSWER: Freund - Well, of course, that would undercut the whole proposal. So you have to make a choice. We think that, say, 500 cases would give a pretty good cross-section of what's going on. In fact, the Justices themselves speak of the great preponderance of chaff in the cases that are filed.

QUESTION: Professor Freund, you talked about liberalism and conservativism...

ANSWER: Freund - In response to the suggestion that the momentum of Escobeda and Miranda might be halted..

QUESTION: I would like to carry out the previous question, as you know, the last twenty years there has been tremendous hostility by

the conservatives over the Supreme Court exercising its jurisdiction beside these cases. Mr. Bickel is probably the foremost opponent of Brown v. Board of Education ever under these grounds.

ANSWER: Freund - Oh, I beg your pardon; excuse me, Mr. Bickel happened to be law clerk to Justice Frankfurter at the time of Brown v. Board of Education, and to say that he is critical of Brown v. Board of Education...

QUESTION: His Law Review articles reflected they moved too fast in school desegregation.

ANSWER: Freund - You mean in Brown v. the Board?

RESPONSE: No, in subsequent decisions. It was a self-inflicted wound.

ANSWER: Freund - You'd better get his views directly from him, but I do know how he feels about Brown v. the Board, having been privy to it himself.

QUESTION: Considering this controversy over where the conservatives have at many times criticized the liberal party for exercising jurisdiction for taking cases which shouldn't be taken, isn't this proposal really in terms of literature a conservative proposal?

RESPONSE: Freund - Isn't it what?

QUESTION: Isn't this proposal really a conservative proposal; doesn't this fall within the type of criticism and solve much of the criticism for the last fifteen years that the conservative

law professors and lawyers have been issuing against the Court. Isn't this an attempt really to limit the Court...

ANSWER: Freund - No, we think it will free the Court. The Court may be able to take more cases and more cases that those sympathetic with the trend you describe, I mean, the liberal trend, so-called, would welcome. I think it's no accident that the level of cases taken has been relatively stable. Does this mean that despite a threefold increase in numbers filed, there is never an increase in review-worthy cases? I think there is consciously or subconsciously a kind of gyroscope operating here to keep the Court on an even keel in the actual hearing and decision of cases. Now, if some of their labors were removed, they would be freer to decide, if they cared to, more cases, and, as I say, it seems to me that, given about 500 a year, with the advantage of their own suggestions in rules, formal rules, as to what is review-worthy and in comments they can make, either in opinions of in the grant or denial of certiorari, given the scrutiny that such a new court would receive from the Bar and the press, I think that to conjure up this spector of reaction is really to misidentify this proposal with some others that you and I would, and did, bitterly oppose.

QUESTION: Mr. Segal mentioned earlier that he does understand that Chief Justice Earl Warren has written some letters critical of this proposal. Do you understand what Chief Justice Warren's reservations are?

ANSWER: Freund - All I know, as Will Rogers said, is what I read in the paper.. on that subject. I just do not know, and I assume that he never had an opportunity to read the report. As far as I know, he didn't receive a copy .. there was no final copy until very recently; as far as I know, he didn't see a preliminary draft or unrevised early draft. In fact, I think he referred to news items, did he not, rather than to the report? And he reacted quickly. But just as Senator Everts changed his mind in the 1880's, I think any first-rate lawyer or judge is open-minded enough to give a subject fuller consideration when he sees the considerations advanced. I don't know what his ultimate judgment will be; it may be the same, but I don't really want to engage in any discussion of it, in fairness to him, until the report is out and pondered.

RESPONSE: Mr. Segal - I would like to address myself to this last question. I think it is only fair to say that Professor Freund is one of the great academic liberal leaders in the country, as "liberal" is here being used. My views of the Warren court and of the so-called activism of the court are well known to many of you. They have been written; they've been spoken; they've been on the air. If what you imply in the question were the fact, I have no doubt whatever that Professor Freund would have voted against the proposal; I have no doubt whatever that I would have voted against the proposal; and since you mention Mr. Ehrenhaft (who is a worshipper of Chief Justice Warren), he would have voted

against the proposal.

QUESTION: Was it a unanimous vote?

ANSWER: Yes, it was unanimous on every point.

QUESTION: Without reservation?

ANSWER: Segal - Without reservation. Well, I can't say that - without reservations on my part.

QUESTION: Mr. Segal, another question I was going to ask you - with reference to Justices' time and the time spent, and the time spent in the conferences - I'm referring to pages 4 and 5 of this report of this discussion (A) A Conference.

ANSWER: Segal - We got one schedule, I believe, of just one conference. Isn't that correct?

Freund - Yes.

QUESTION: I'd like to find out about that. You had the conference list, did you?

ANSWER: Segal - Yes. Following the conference and without any confidential specification, we had a list of the number and kinds of items on the conference list for that day.

QUESTION: And on that, you listed the number of cases, did you?

ANSWER: Yes.

QUESTION: How many of those were discussed in that conference?

ANSWER: Segal - We mentioned in the report, I believe, how many were discussed.

RESPONSE: No, I don't think you mentioned how many were discussed; you do say...

ANSWER: No, I don't think we were vouchsafed that information; that is, how many were on the discussed list and how many were not. We do say that obviously they could not all

have been discussed and we mention the fact that there is a discussed list, but what the percentage is I don't know; we didn't press for that because it was of a more obviously confidential nature than the mere numbers of cases to be acted on.

ANSWER: Segal - You could apply your averages pretty well, though.

RESPONSE: But we don't have a percentage to apply.

ANSWER: Sure, you know that with the number of filings having gone up three times, the Justices are now hearing one third, the proportion is one third as many with three times as many cases; apply that proportion and you'll get a pretty good indication of my guess.

ANSWER: Well, Jack is asking about the discussed list and what percentage of cases are on it. I don't know, and I think it's a minor point. The fact is that every Justice has to make up his mind on every petition, whether it's discussed or not at the conference. Suppose you cut whatever the figure was (263, I believe, total items), and this does not include any argued cases. Suppose you cut 263 in half and say 130, in each of which there were two documents at least and in some as many as six documents, appeals, petitions, motions, and motions can be pretty sensitive, motions for stays and that sort of thing. I don't think that it's the picture of an underworked, underemployed group. And the discussed list is only an expedient, a necessary expedient, yes; but it's another cutback, I think, from what was anticipated in 1925.

RESPONSE: I wasn't trying to deliver a point..

ANSWER: The short answer is we didn't have that; we didn't get that figure.

QUESTION: The current Chief Justice enumerated that subject on a daily basis; there were so and so many items on the conference list for the upcoming Friday. I'm trying to ascertain the significance of that list.

QUESTION: Professor Freund, are you absolutely confident that every case the Supreme Court got last term for review would have been passed to them through a new court?

ANSWER: Freund - Obviously I can't say "yes". On the other hand, I might say that there are some the Supreme Court missed that would come up, and with their attention flagged, they might have granted the case. You know there have been studies - it's a terribly tedious thing - but there have been studies by graduate students from time to time on what the Supreme Court did not decide at a given term. And you come up with some very interesting disclosures. I don't think it's really a fair question to say, "Would the list be precisely the same as it was?"

QUESTION: Would they have a chance to pick every one they in fact decided they wanted to pick?

ANSWER: I would say substantially so. Obviously, again, I can't vouch for every item, but I think the Supreme Court has at its command methods to assure this. Not least, as I've said more than once, and as we say in the report, the device of both elaborating its own rules and also of engaging more often in the practice which it uses sometimes of explaining why it takes a case or why it doesn't take a case and where five of seven Court of Appeals Justices are required to insulate a case from Supreme Court review leaving aside certiorari before judgment, I think the safeguards are quite good.

QUESTION: Professor Freund, isn't it proper to say that there seem to be some problems with the first panels that are to be set up. O.K., you don't have the presidential appointing power here, which obviously is a political powder keg, so you've got the most junior and the most senior of the qualified ones, and that way it would seem at least in the beginning to have the least experienced and most likely to be senile.

ANSWER: Freund - I don't quite follow you. They would be drawn from both the most junior and the most senior, but we would leave out so-called senior judges; that is, retired judges who are still active.

RESPONSE: But it seems that Federal Judges retire of their own will.

ANSWER Freund - We would also leave out judges who would reach that age within three years. What is that age now?

RESPONSE: Segal - 65 after 15 years; 70, otherwise.

ANSWER: Freund - So I don't picture a senile group at all. I think the criticism might more be fairly leveled that the judges would be too junior, not experienced enough.

QUESTION: Can you tell us what happens next mechanically. Does this go now to the Commission that Congress instituted on the Appellate Courts; what happens to this; where does it go?

ANSWER: Freund - Whether this falls within the jurisdiction of the Commission of 16 that you are referring to?

RESPONSE: I don't know if that's the number.

ANSWER: Segal - Yes, it's the Commission on Jurisdiction. Congress passed the law in October.

RESPONSE: Freund - Whether it does, I am not at all sure. This is a matter of interpretation of that resolution which speaks about the structure of the Courts of Appeals. Whether proposals relating to the

Supreme Court could be linked to that is something for the appropriate authorities in Congress to decide. Ultimately, I assume that this would go to the Judiciary Committees; indeed, under the governing statute of this Federal Judicial Center all such proposals are required to be transmitted to Congress.

QUESTION: Professor, a couple of quick questions on the way this would work; would the decisions that this new court reach be reviewed by the Supreme Court, and secondly, did you consider, maybe, a constitutional problem that Carl has in mind subjecting these judges to reconfirmation by the Senate since they would now have an expanded and larger role than contemplated when confirmed in the first place.

So number one, when they resolve this minor teeny-weeny conflicts of circuit beneath the Supreme Court...

ANSWER: Freund - They're not so teeny-weeny, but when a large volume of cases are backed up behind them clogging the federal court, take labor relations act cases, tax cases, and the like, I wouldn't be too snide about them, but they may not call for decision by the highest tribunal in the land.

QUESTION: Is that the end, that's what I am asking you?

ANSWER: Freund - Yes.

QUESTION: When they reach a decision, is that the end of the conflict, is that the final rule?

ANSWER: Freund - It is, under our plan. Now if you, or someone else, and I say this quite seriously, could come up with an alternative that would give the Supreme Court a string on those cases without, at the same

time, opening the flood gates, of course, that would be an ideal accommodation, but we were, naturally enough, not inclined to give the Supreme Court a reviewing power that would encourage lawyers to regard the new court as simply an intermediate stage on the way to the Supreme Court and thus not relieve the Supreme Court but only add a fourth layer of review. Now, if there were some procedure, and we thought a lot about this, to accommodate both interests, the interest of protecting a court against the deluge and at the same time giving it a string, as I say, to take an occasional case that appealed to it for review, such a modification, speaking for myself, would be very welcome. But we didn't during our discussions conceive of such a procedure.

QUESTION: The second point - reconfirmation. Did that come up? The idea of giving the Senate another crack at a man who now has a role that wasn't contemplated when he was confirmed in the first place - a larger role.

ANSWER: Freund - Actually, we did not think of that variation; that is, confirmation without Presidential appointment.

RESPONSE: Well, he's not going to be appointed by the President; he'll be appointed through some lottery, but certainly he'll...

ANSWER: He'll be on what might be called "detached service" or "special service."

RESPONSE: But it's a higher service..

ANSWER: Freund - I hope it will be regarded as such.

QUESTION: I guess I should rephrase my question. Did you consider whether the other branches should be consulted about the new and larger function of people who were nominated and confirmed when they were thought to have a lesser function. They were named on one

proposition and now they have a larger role. Is it only the judiciary function to give them this larger role? Or does it need the consent of the Senate?

ANSWER: Freund - Well, it's not only the judiciary; Congress, of course, would have to set this up.

QUESTION: Initially?

ANSWER: Freund - Yes, This is a possibility, but frankly I would, myself, be opposed to a system which subjected sitting Judges to that kind of over-the-shoulder scrutiny. That's why I think recess appointments to the Supreme Court are very bad.

RESPONSE: Segal - The other committee... did consider that. We concluded that the enactment of the legislation, the role of Congress that would be required, in effect, would be a confirmation of the system which would automatically produce the judges who would serve on the Court.

QUESTION: I suppose this is a question of whether a statute or amendment is necessary.

ANSWER: You need a statute to do the whole thing without doubt.

QUESTION: You don't need an amendment?

ANSWER: No, and that statute would, in effect, be a confirmation of the automatic system whereby these judges would work their way in.

ANSWER: Freund - Actually, the method of selection is one we advanced tentatively. We don't say this is the one and only; we say a number of methods can be imagined; we suggest, and so on. But this is one of the areas where there may be later inspiration on the part of others. One, I think, virtue of the proposal is that it is experimental; it does not create a permanent new tier of judges. If for any reason the problem is no longer an acute one, if there is a sudden unexpected drop in the case load, these judges could go back to their own courts; they wouldn't be displaced persons,

as in the case of the old Commerce Court when it was abolished and the question was what to do with the judges of the Commerce Court. These judges will be on detached service, special service, from their circuits.

QUESTION: In your interviews with the justices, do you find that any of them agree with Justice Douglas that the Supreme Court is not over-burdened, or was he the only one who maintained that.

ANSWER: Freund - Well, it's hard for me to answer. I don't want to be evasive without revealing more than I should of what was said to us. All I can say is that the net impression left with each member of our group was that the Court is, as we say in the report, at the saturation point, if not beyond, - at the saturation point, if not beyond.

QUESTION: Was this an eight-to-one impression, or ...

ANSWER: Freund - We did not take a vote. We had a free-ranging conversation.

RESPONSE: Segal - I would think the impression eight to zero.

ANSWER: It was up to our committee to form a judgment. Now, you know, sometimes the court reaches five-to-four decisions on internal matters that in retrospect, I think, would be abandoned. I'm thinking, for example, of the building of the new courthouse which was pushed by Chief Justice Taft, as you know. It is reported that the vote in the court, informally, was five to four for it. I do know that Justice Brandeis was bitterly opposed to it and never set foot inside his chambers in the new building. They remained as an exhibit place to which visitors were taken and when once his wife, in a moment of weakness, was allowed to be shown through, she came back to the apartment and said, "They

showed me the ice water and the shower bath - two things my husband never uses." And so she was back in good standing, Now, much as I'm an idolater of Justice Brandeis, and he is an idol beyond all others to me, I think he was wrong about a new building - perhaps not exactly that one...but he wanted to work at home and he said the prestige of the Court depends on the quality of our work and not on external trappings. It was a matter of principle with him. But it was needed. One can only admire justices who want to go on in the old way and who are willing to make great sacrifices to do so. One can admire it in a way. But that doesn't mean that in the larger perspective it's the right outlook.

QUESTION: Professor Freund, do you believe, assuming as you said, that there is a consensus that agrees with saturation? Would you agree, sir, that the majority of the present justices would be the best judges as to whether this is an effective and desirable solution? In other words, if the majority of them felt this was lacking sufficient merit, would you be prepared to discard it?

ANSWER: Freund - The idea that there is a serious problem?

RESPONSE: No, the National Court of Appeals.

ANSWER: Freund - But you're mixing up two questions.

QUESTION: Let me clarify it. If a majority of the present Justices felt that that proposal for a National Court of Appeals had created more problems than solutions, would you agree that they were the best judges on that.

ANSWER: Freund - I certainly would give their judgment great respect, but I would have to compare it with alternatives.

QUESTION: Do you think maybe these comparisons that your report is based on their attitudes and feelings on problems..

ANSWER: You're confusing two things. One is the seriousness of the problem, and the second, what ought to be done about it. Now, I can conceive of a judge or justice saying, "Yes, the problem now is terribly serious; it's getting worse and I doubt if I'd be able to cope with it after a similar increase in the next two or three years, but I think we can handle it by sitting in panels." I would have to consider, as a devoted student of the Court, whether the sitting in panels was preferable to the proposal in our report or in various other documents that are in the public domain. On that question, what is the best procedure for coping with the problem, certainly the justices' views are entitled to very, very weighty attention, but in the end, each person has to make up his own mind because there are factors here regarding public confidence, there are factors here regarding symbolism, on which judges themselves may not be more expert. They are most expert on their own psychological state, if you will; that is, how harrassed are they or are they not. But when you go beyond that and ask, "Really, how ought our highest court to be occupied and what are the advantages and disadvantages of one or another course of action?" I respectfully suggest that the views of individual justices would not be conclusive. That's all I'm saying. I would hope that we would get considerable agreement.

QUESTION: Considering the enormous amount of power that this new National Court of Appeals would have, is there any consideration given to giving them some special attention the way we did the Supreme Court Justices in our legal process.

QUESTION: This seems a kind of divergence. In the Supreme Court we give enormous attention to the Chief Justice and now you're just going to take those who have relatively almost the same power and just pick them out of the hat?

ANSWER: Well, I think perhaps someone is going to say, "Thank you". I don't know. This could have some effect on the process of nominating and appointing judges for the Courts of Appeals. In other words, it might make those appointments less parochial. You know in the 19th century when the Justices of the Supreme Court rode on circuit, the nominations to the Supreme Court were largely centered in a particular state or group of states and it was then Senators who controlled the nomination because a Justice rode circuit in that part of the country. We have emancipated ourselves from that with the end of circuit-riding and that's all to the good. We recognize it's a national office and not a local or provincial office. In the case of the Courts of Appeals judges, there is good reason for them to come from the area involved because they deal with the law of those states in many cases. But, there is also good reason for the entire Senate to be concerned with each nomination to the Court of Appeals. And if this plan advanced the cause of more general concern with such nominations, that in my judgment would be a plus, though it didn't enter into the thinking of the committee.

MR. SEGAL: One more question.

QUESTION: What did you discover as to the closeness of the vote on certiorari and what implications does that have for the way the Court wanted to treat this National Court of Appeals.

ANSWER: Freund - I don't understand about closeness of vote on certiorari.

QUESTION: Somewhere I got the impression that the justices polled collectively last night without violating individual confidences, that most of the grants were more or less unamimous, not a bare four, but had larger support. Maybe that's not true, and if that's not true...

ANSWER: Freund - I honestly don't remember what was said on that subject, if anything.

Segal - I have no recollection that anything was said.

RESPONSE: Well, thank you.

FREUND: Thank you.