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1. memo	Dennis Mullins to Jonathon Rose re Judge W. Eugene Davis, 6p	4/4/83	B6

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THE WHITE HOUSE
WASHINGTON

April 12, 1983

MEMORANDUM FOR JAMES A. BAKER, III

FROM: Aileen Anderson *aa*

SUBJECT: Back-up Material for
Address to 5th Circuit
Judicial Conference

Attached are two memos prepared by Justice Department at Cicconi's request which cover matters you might be questioned on after your address at the 5th Circuit Judicial Conference.

Also attached is a section of The Dallas Morning News, Sunday, April 10, with an article on 5th Circuit judges.

4-12-83

JAB not going

AA
file memos in
DOJ memos
① newspaper
jc



U.S. Department of Justice

Washington, D.C. 20530

April 5, 1983

MEMORANDUM

TO : Jim Cicconi
FROM : Tex Lezar
RE : Fifth Circuit Questions

Attached is some excellent back up on the questions you asked. Although Michael misunderstood the purpose -- thinking I was writing Jim Baker's remarks -- he did a thorough job of assembling the materials you asked about plus summarizing the status of the intercircuit tribunal issue at Justice.



U.S. Department of Justice

Office of Legal Policy

Washington, D.C. 20530

April 1, 1983

MEMORANDUM

TO: Tex Lezar
Special Counsel to the
Attorney General

FROM: J. Michael Shepherd *JMS*
Special Assistant to the
Assistant Attorney General

SUBJECT: Commentary on the Proposed Intercircuit
Tribunal for James A. Baker's Remarks
to the Fifth Circuit Judicial Conference

To assist in your preparation of James A. Baker's remarks to the Fifth Circuit Judicial Conference, I have assembled some materials concerning Chief Justice Burger's proposals for an Intercircuit Tribunal and a commission to study the Supreme Court's workload. The Intercircuit Tribunal would decide conflicts between the circuits and resolve questions of federal statutory interpretation. Attached are:

- (a) A memorandum from Assistant Attorney General Jonathan Rose to Deputy Attorney General Schmults commenting on the Chief Justice's proposals (tab 1);
- (b) Professor Daniel J. Meador's article from the April edition of the American Bar Association Journal (tab 2); and
- (c) "Rx for an overburdened Supreme Court: is relief in sight?", the page proofs of the edited transcript of the American Judicature Society's panel discussion on the Supreme Court's workload, which will appear in the April Judicature (tab 3).

Jonathan's memorandum summarizes the Department's criticisms of some proposals advanced on this subject in the 97th Congress and voices initial support for the Chief Justice's suggestions. He observed that the proposal avoids many of the problems of earlier court improvement plans because it contemplates a panel of sitting circuit judges. Additional support can be expected for

the plan because the "sunsetting" provision, which calls for the automatic termination of the tribunal after five years, allows for the experiment to be canceled if it proves unsuccessful. The memorandum also reports that a committee of most of the Assistant Attorneys General is studying the issue, under the direction of Deputy Solicitor General Paul Bator. I understand that the committee's report, which endorses the proposals with some reservations and recommendations, will be submitted to the Attorney General early next week.

Professor Meador's article supports the Chief Justice's observations and recommendations. Meador believes that the five year sunset provision permits "a test run that is inexpensive and free of risk." He argues that the proposed study of the workload of the Supreme Court should be broadened to include the entire federal judicial system.

The American Judicature Society's panel discussion may be of particular interest to Mr. Baker because two Fifth Circuit judges participated: Patrick E. Higginbotham and Alvin B. Rubin. Other panelists included Professor Meador and former Senator Roman L. Hruska, who served as Chairman of the Commission on Revision of the Federal Court Appellate System.

Judge Rubin expressed concern that the creation an additional appellate level would delay further the resolution of cases. He stated that "[t]he one thing we must avoid at all costs is the further fragmentation of our appellate process by injecting another decision level where cases will have to wait for attention." Judge Higginbotham questioned whether the problem of intercircuit conflicts is "so fundamental as to justify structural change." He pointed out that not all such conflicts require resolution. As Professor Arthur Hellman observed, the Court has chosen increasingly to deny petitions for certiorari despite a conflict among the circuits. Judge Higginbotham cautioned that reasoned analysis should not be sacrificed to the quest for a quick resolution of conflicts. Indeed, the development of the law in various circuits may assist the Supreme Court's consideration of complex and difficult issues.

Other options which have been considered to reduce the workload of the Supreme Court, on which Mr. Baker might wish to comment, are: the abolition of diversity jurisdiction, which would reduce the caseload of all federal courts; and the elimination mandatory appellate jurisdiction. OLP has prepared a number of papers concerning diversity jurisdiction which we would be pleased to provide for your information.



Assistant Attorney General

Washington, D.C. 20530

MEMORANDUM

TO: Edward C. Schmults
Deputy Attorney General

FROM: Jonathan C. Rose *JCR*
Assistant Attorney General

SUBJECT: The Chief Justice's Proposals Concerning the
Supreme Court's Workload

This memorandum responds to your request for an analysis of the Chief Justice's proposals for reducing the Supreme Court's workload and for suggestions concerning tentative DOJ positions on these proposals. Your reference is presumably to the proposals in the Chief Justice's recent address to the ABA (copy attached). The Chief Justice's statement contained two major recommendations:

The first was the creation of a commission composed of representatives of the three branches of government to carry out a general study of the workload of the federal courts and to recommend reforms. A proposal along these lines passed the Senate as S. 675 in the 97th Congress. While one may harbor doubts about the value of yet another study commission, a body of this sort might help focus attention on the problems of the courts, provide a useful forum for discussion and study, and improve interbranch coordination. Tentatively, our position on this type of proposal would probably be one of support or a favorable "no objection" position.

The second recommendation was the creation of an intercircuit panel or tribunal to handle some of the workload that is presently carried by the Supreme Court. The remainder of this memorandum will discuss that recommendation in greater detail. Section I discusses the general character of the proposal, its relationship to earlier proposals to create a "National Court of Appeals," and our position on earlier proposals of this type. Section II discusses questions of policy affecting the Department's position on the proposal. Section III discusses questions of design raised by the proposal.

I. THE INTERCIRCUIT TRIBUNAL PROPOSAL

Proposals along the lines suggested by the Chief Justice are now generally characterized as proposals to create an

"Intercircuit Tribunal." These have appeared in various forms, 1/ but usually with the following comment elements:

The Intercircuit Tribunal would be a pool of circuit judges, most likely including one or two judges from each circuit. The panels of the Tribunal would hear cases referred to the Tribunal by the Supreme Court and render nationally binding decisions. 2/ In some versions of the proposal the Supreme Court would have full discretion to refer cases to the Tribunal, but in others references would be limited to specified classes of cases such as those involving intercircuit conflicts or those affecting the administration of national programs. 3/ The panels of the Tribunal would be fairly large (e.g., seven judges), and their decisions would be reviewable by the Supreme Court on certiorari. The Tribunal would initially be created on a temporary basis (e.g., five years). At the end of that time Congress would review its work and decide whether it should be continued.

The Intercircuit Tribunal proposal differs from most earlier "National Court of Appeals" proposals in that (i) it would be composed of sitting judges drawn from the circuit courts, rather than new judges permanently appointed to it; and (ii) it would initially be established for a limited trial period.

In the 97th Congress I testified in opposition to a conventional type of "National Court of Appeals" proposal, which

1/ See, e.g., H.R. 4762, 97th Cong., 1st Sess. (1981); Leventhal, A Modest Proposal for a Multi-Circuit Court of Appeals, 24 Am. U. L. Rev. 881 (1975); Cutler, "Help for High Court," N.Y. Times, Nov. 1, 1982, at A-19.

2/ The particular proposal advanced by the Chief Justice does not specify how cases would get to the special panel. Reference from the Supreme Court and direct appeal to the panel from the courts of appeals would both be consistent with his remarks. See the attached statement at 9-10.

3/ The particular proposal advanced by the Chief Justice takes a restrictive approach to jurisdiction, but would apparently make reference of qualifying cases mandatory. The function of the special panel would be to "hear and decide all intercircuit conflicts and possibly, in addition, a defined category of statutory interpretation cases." See the attached statement at 9-10.

was introduced as S. 1529. 4/ We also sent an unfavorable response letter concerning S. 2035, a national court proposal introduced by Senator Heflin. 5/ S. 2035 was similar to the Intercircuit Tribunal proposal in that it contemplated a court composed of sitting circuit judges but differed in that it had no provision for a limited trial period.

Our most recent statement was in my letter to Senate Dole concerning the bankruptcy package. 6/ The Dole and Butler bankruptcy packages in the 97th Congress contained a fully developed Intercircuit Tribunal proposal which had been introduced earlier by Rep. Kastenmeier as H.R. 4762. I stated in my letter that we did not believe that a sufficient case had been made for the proposal at that time, but suggested that it might merit further study. 7/

II. QUESTIONS OF POLICY

At the direction of the Attorney General, I have convened a Committee composed of most of the Assistant Attorneys General to study and assess the Intercircuit Tribunal proposal. The Committee will be chaired by Deputy Solicitor General Paul Bator. While a final decision will have to await the completion of the Committee's work, my own views at this point are as follows:

The Intercircuit Tribunal proposal avoids many of the problems of earlier national court proposals. Since the Tribunal would be composed of sitting circuit judges, the proposal avoids the danger of downgrading the courts of appeals by creating a new separate tier above them. It also avoids the risk of creating a powerful, independent court whose general views might be out of step with those of the Supreme Court. The "sunsetting" provision -- automatic termination after five years -- reduces the likelihood of long-range harm if the Tribunal does not work out in practice.

4/ See Statement of Assistant Attorney General Jonathan C. Rose Before the Subcomm. on Courts of the Senate Comm. on the Judiciary Concerning S. 1529, S. 1531, and S. 1532 (Nov. 16, 1981).

5/ See Letter of Assistant Attorney General Robert A. McConnell to Senator Strom Thurmond Concerning S. 2035 (May 25, 1982).

6/ See Letter of Assistant Attorney General Jonathan C. Rose to Senator Robert J. Dole (Nov. 18, 1982).

7/ See id. at 4-5.

The principal benefits offered by the proposal are a reduction of the Supreme Court's workload and an enlarged capacity for resolving interjurisdictional (intercircuit and interstate) conflicts. On the workload point, we have argued in the past in opposing national court proposals that the time savings for the Court would be offset by the need to supervise the new national court closely and to review many of its decisions; by the time required for decisions concerning reference to the Tribunal; and by the increase in applications for review to the Supreme Court that would result from the reform. All of these points merit careful examination in the course of the Committee's work. I would note briefly, however, that these points strike me as exaggerated and that I do not find it very credible to suppose that such incidental effects could significantly offset the time savings to the Court resulting from the ability to delegate a large part of its caseload to another body for decision on the merits.

With respect to the value of the Tribunal as a means of resolving intercircuit conflicts, we have argued in the past that such conflicts, outside of a few narrow areas, are not very common and not particularly harmful. This is an empirical question which has been the subject of past debate, to which I would have little to add at this point.

Government litigators sometimes perceive a positive value in differences among the circuit. The government is now free to refrain from acquiescing in the decisions of particular courts of appeals, and to seek favorable decisions in other circuits, for as long as the circuits remain divided on an issue. This freedom would be reduced by the creation of an enlarged capacity for rendering nationally binding decisions. The opposition of some of the Department's litigating Divisions to the Intercircuit Tribunal proposal may rest in part on this concern.

While the proposal does have this drawback from the standpoint of the litigational self-interest of the government, this cost must be balanced against the benefit to the public of improved consistency and predictability in federal law. Opposition to the proposal reflecting a desire to preserve the government's ability to take advantage of intercircuit conflicts tends to undercut the argument that such conflicts occur infrequently or have little significance. The proposal also offers some definite advantages for government litigation -- it would reduce the need to re-litigate in different circuits issues which the Supreme Court does not have time to decide, and it would enable the Solicitor General to apply to the Supreme Court for review in connection with a larger number of decisions adverse to the government.

III. DESIGN OF THE TRIBUNAL

The various versions of the Intercircuit Tribunal proposal have differed concerning some important points: the

number of judges to serve on the Tribunal; the manner of their selection; and the types of cases to be referred to them. Some brief comments on these questions may be useful.

The Number of Judges. Some versions of the proposal would require that two judges from each circuit be assigned to the Tribunal. 8/ However, the size of the circuits varies from four active judges (the First Circuit) to twenty-three active judges (the Ninth Circuit). It makes no sense to require appointment of the same number of judges from circuit courts whose size varies by a factor of six. The better approach would be to provide for selection of at least one judge from each circuit, and beyond that to give the selecting authority discretion to assign a larger number of judges from some circuits.

The Method of Selection. The different approaches that have been suggested to selection of the Tribunal may be grouped as follows 9/:

- (i) selection by the Supreme Court, or by the Chief Justice with the concurrence of most of the Associate Justices
- (ii) selection by the Chief Justice alone or by the Judicial Conference
- (iii) selection by the individual circuit courts or their judicial councils.

As a matter of abstract design, option (i) seems the best. The utility of the Intercircuit Tribunal would depend on the willingness of the Supreme Court to refer cases to it and to let its decisions stand. This would in turn depend to some extent on the confidence of all the Justices in the judges on it. The modes of selection specified in (i) would assure that most of the Justices approved of each of its judges. Since the Justices are familiar with the capabilities of all the circuit judges in the country as a result of reviewing their decisions, they would be in a good position to choose the judges who are best-qualified to serve on the Tribunal.

One of the options under (ii) is selection by the Chief Justice alone. This would follow the normal approach to assignment of judges to special or temporary courts. Committing the selection exclusively to the Chief Justice might produce a Tribunal whose philosophic outlook would be closer to that of the

8/ This is true of the Chief Justice's proposal. See the attached statement at 9.

9/ The Chief Justice's statement does not propose any method of selection. The ensuing discussion relates to methods proposed in other versions of the proposal.

Administration than a selection process that also involved all the Associate Justices. The other option under (ii), selection by the Judicial Conference, could also effectively assign a large role to the Chief Justice, given his dominant position in the Conference.

The final option, (iii), would have the individual circuit courts or circuit councils designate judges from their circuits to serve on the Tribunal. This approach seems least satisfactory, though it is the one that is currently favored in Congress. The value of the Tribunal would depend on the Supreme Court's attitude towards it, not on the preferences of the judges of the lower courts.

Referrable Cases. It seems preferable to give the Supreme Court full discretion in deciding on what cases to refer to the Tribunal. This would maximize the value of the experiment by enabling the Supreme Court to try out reference of different kinds of cases. It would also avoid the work that would be required of the Justices in deciding whether a jurisdictional prerequisite for reference to the Tribunal (e.g., an inter-circuit conflict) was satisfied. 10/

CONCLUSION

My attitude toward the Inter-circuit Tribunal proposal is basically favorable though this view is not shared by at least some of the litigating Divisions. I would emphasize, however, that the problems addressed by the Inter-circuit Tribunal proposal are a limited part of the general problems facing the courts, and that the proposal should not be allowed to divert attention from other pressing concerns. For example, the enormous burden imposed on the district courts by diversity jurisdiction -- which now arbitrarily moves over 50,000 state law cases a year into the federal court system -- is at least as deserving of immediate Congressional response. In our future statements on the Inter-circuit Tribunal proposal -- whatever final position we may come to on it -- I think it would be well to call attention to the many other reforms needed in the federal court system.

10/ This conclusion is inconsistent with a feature of the Chief Justice's proposal, which would limit the special panel's jurisdiction to inter-circuit conflicts and perhaps certain statutory cases, and make reference of such cases mandatory. See note 3 supra.

● *The Journal requested Daniel J. Meador of the University of Virginia Law School to comment on Chief Justice Burger's state of the judiciary address, the text of which begins on page 442.*

Professor Meador was reluctant to take this assignment, fearing it might appear to be the sort of instant analysis made by television commentators within minutes of a president's state of the union address.

But he agreed to express his views "because of the importance of the subject and the commendable interest of the Journal in putting the matter before the bar of the country."

By Daniel J. Meador

THE chief justice is understandably apprehensive about "crying wolf." He need not be. Whether or not one likes the metaphor of the wolf, I believe that the evidence establishes beyond reasonable debate the existence of problems within the federal judiciary that pose a threat to the administration of justice under law.

Problems that are structural, jurisdictional, procedural, and managerial are present in varying degrees at all levels of the system. The problems concerning the Supreme Court and the appellate strata of the system are among the most pressing, and the chief justice primarily addresses those.

Trouble at the top

There are two related problems: the overload on the Supreme Court and the inability of the federal judiciary to render a sufficient number of definitive and clarifying appellate decisions having nationwide binding effect. Even if I were not independently persuaded of these difficulties, I would be content to abide

The chief justice's proposals are not radical, would involve little expense, carry no risk of harm to the system or anyone's interest, and hold potential for significant accomplishment.



Daniel J. Meador

A Comment on the Chief Justice's Proposals

the judgment of some of the best thinkers on the American legal scene since the mid-20th century. Three groups in the 1970s, consisting of able judges, lawyers, and academicians, all reached the conclusion that there are serious difficulties at the top of the federal judicial pyramid.

The nine-member study group under Prof. Paul Freund, the 30-member Advisory Council on Appellate Justice under the chairmanship of Prof. Maurice Rosenberg, and the 18-member commission under Sen. Roman Hruska gave several years of thought to the subject before reaching this conclusion.

Nothing since has significantly altered the situation. Indeed, a solid majority of the members of the Supreme Court within the last eight months has testified publicly, in one way or another, that the Court has more business than it can reasonably handle. Some cases that should be decided are not decided at all; some that are decided are not dealt with as well as they should be. The desirable remedies for the situation are debatable, but, with due respect to the skeptics, I submit that Congress, with the support of the bench and the bar, should focus attention on possible remedies and accept the

judgment that there are difficulties in the federal courts requiring more than band-aid attention.

In his address Chief Justice Burger puts forward two specific proposals for congressional action: the creation of a study commission on the federal judiciary and the creation of a special appellate panel to resolve inter-circuit conflicts. These are comparatively uncomplicated proposals involving no lengthy or intricate statutory drafting. They build on ideas that have been widely discussed. They are not radical, they would involve little expense, they carry virtually no risk of harm to the system or to anyone's interest, and they hold potential for significant accomplishment.

Settling federal law

The proposal to create a special appellate panel derives from and builds on an idea that has been discussed for more than a decade. The idea is to create an appellate forum that would increase the capacity of the federal judiciary to settle federal law questions nationwide, thereby resolving inter-circuit conflicts and clarifying uncertainties. The need and desirability of that forum now attract bipartisan recognition, although not universal agreement.

The chief justice's proposal is aimed at implementing that concept. The proposal is fresh in detail as to how this tribunal would be constituted and administered. Previous proposals have pointed in the direction of creating a new appellate court positioned between the existing courts of appeals and the Supreme Court, to be composed of either circuit judges sitting by designation or of permanent judges of its own.

In contrast, the chief justice proposes a special "panel" of circuit judges to be attached administratively to either the U.S. Court of Appeals for the Federal Circuit or the Temporary Emergency Court of Appeals. Most significant of all is that this is the first time the chief justice has endorsed formally a specific means of addressing these problems. Until now he has only urged study of the matters.

Under the chief justice's suggestion the mission to be performed by the new appellate panel would be essentially the same as that envisioned in discussion

during the last decade for this type of court: deciding inter-circuit conflicts. The premise is that there is a significant number of these conflicts calling for resolution in the interest of clarity and uniformity that the Supreme Court cannot reach because of its overload and a large number of pressing constitutional questions.

Estimates vary as to the magnitude of these inter-circuit conflicts; they range from as few as a dozen up to several dozen a year. Whatever the precise magnitude, however, there seems to be general agreement that there are a sufficient number of those conflicts to make worthwhile a mechanism for resolving them and that a mechanism does not exist in the overloaded Supreme Court. Thus, the new forum is envisioned as an overflow chamber to which the Supreme

The chief justice envisions staffing the panel with circuit judges sitting by designation. It has been recognized as the most desirable means of composing a new appellate court.

Court would refer these cases—principally involving statutory questions—for resolution.

Although the chief justice emphasizes inter-circuit conflicts, he also mentions statutory questions even though there may be no conflict. He is sound on this point; uncertainty about the ultimate meaning to be given statutory provisions can make the work of lawyers and administrators difficult and more costly to citizens and to government.

What is important here is the creation of a mechanism to decide these cases with nationwide binding effect. The precise means is less important than that some mechanism be established. The chief justice's specific proposal has the advantage of using the administrative personnel and physical facilities of an existing forum, one that already has

nationwide appellate jurisdiction. This method of increasing appellate capacity at the top of the system would involve the smallest outlay of funds and the least alteration of existing structure of any of the proposals made thus far. It requires no new judgeships.

Staffing the panel

The statute creating the special panel would need to specify the composition of the panel. The chief justice envisions staffing the panel with circuit judges sitting by designation. There is much to be said for this idea. In recent years it has been increasingly recognized as the most desirable means of composing a new appellate court. Because the chief justice already is vested with statutory authority to designate circuit judges to sit on courts other than their own, no new statutory provisions are needed for that purpose. The statute should specify the number of judges that would constitute the panel.

The chief justice's suggestion of seven or nine judges seems about right; however, no "pool" of a larger number is necessary. Both active and senior circuit judges should be eligible. They should sit en banc in every case. Designations should be for a substantial period of time, not on a case-by-case or a short-term basis, in order to provide stability and continuity in decision making and in the development of case law. The chief justice mentions six months to a year. A minimum of two years on the panel seems preferable, with a staggered rotation, to assure the requisite continuity and stability. The objective of introducing more certainty and uniformity into federal law could not be achieved as well through a frequently shifting collection of judges. In view of its function and composition this body might appropriately be named the Intercircuit Panel of the United States Courts of Appeals.

A significant element in the chief justice's proposal is the "sunset" provision. The special panel would be in existence for only five years, unless continued by another act of Congress. This should go far toward satisfying people skeptical as to need as well as those apprehensive about any new federal jurisdictional arrangements.

If there is no need or if the special appellate forum serves no useful purpose,

we should be able to learn that within five years. On the other hand, if the forum is a worthwhile idea with beneficial effects for the legal system, that too should become evident within five years. Because the forum would be a panel consisting of existing circuit judges, it could be discontinued with ease.

Holmes reminded us that all life is an experiment. This is particularly true in matters such as these. We need a way to test the utility of a device for enhancing the national appellate capacity, which, at the same time, may prove to be a device for alleviating pressures on the Supreme Court. Not only can we determine the utility of the new forum as a means for settling national law, we also may be able to determine the extent to which the availability of this forum enables the Supreme Court to function with that quality of deliberation and care we expect of the Court on legal issues of the highest national importance. The chief justice's proposal would provide a test run that is inexpensive and free of risk. The proposal also would leave the Supreme Court in position to determine the amount and kind of help it and the system need.

Chief Justice Burger is surely right in saying that this proposal can be enacted promptly by Congress without further study. Bills aimed at the same objective, introduced by Sen. Howell T. Heflin of Alabama and Rep. Robert W. Kastenmeier of Wisconsin, were pending before the last Congress, and two hearings were held in the Senate. After a decade of debate, a modest, temporary device of this sort seems ripe for adoption.

If the Supreme Court justices were to rally behind this idea—or any other specific proposal—that action might have more positive influence on Congress than any other step. The Judge's Bill of 1925, establishing the current certiorari jurisdiction, resulted largely from a few justices submitting a proposed statute to Congress. If even three or four of the justices would unite on a specific measure such as that suggested by the chief justice, Congress would likely take note in a way that it does not when the individual justices speak in all directions.

Examining the federal judiciary

A properly constituted study commission on the federal judiciary is a necessary step because Congress is not likely

to have the time and resources to study these matters sufficiently. Theoretically the judiciary committees of the Senate and House can study a subject, gather information, discuss proposed solutions, and develop effective measures to overcome the judiciary's problems. But the realities are that the overwhelming demands concerning the economy, national defense, taxation, social security, and constituent needs crowd out serious consideration of court problems. A commission can provide Congress with a bipartisan mechanism for gathering information and developing sound solutions to the difficulties besetting the federal courts.

The Hruska Commission submitted its final report in 1975. Although it did an excellent job and developed ideas that continue to merit serious attention, it had

The strongest influence on Congress might be to have the justices rally behind one proposal. For example, the current certiorari jurisdiction resulted from a few justices submitting a proposed statute.

a relatively narrow mandate: it could deal only with the appellate courts. It is necessary that we examine the federal judiciary from top to bottom to develop an integrated, co-ordinated blueprint that will equip the entire system to handle its business effectively in the late 20th century. While the chief justice speaks of a commission in relation to the Supreme Court's business, a new commission should not be confined to anything less than the concerns of the entire federal judiciary. Justice Sandra O'Connor made this point in a speech she delivered in New Orleans a few hours before the chief justice gave his address.

In recent years many ideas have been advanced for improving the federal judiciary, and many data have been gathered. The major challenge now is to bring together all of the ideas and information and to formulate a well-thought-

out plan that will attract a broad spectrum of support. A commission composed of officials from the three branches of the government and knowledgeable lawyers and academicians seems the most promising way of achieving that objective. Final authority of course, would lie in Congress to consider and enact the proposals developed.

Proposals for a commission of this sort have been under consideration for some time. The idea was discussed at an American Enterprise Institute conference in 1980. Two years ago at the annual Interbranch Seminar on the Administration of Justice at Williamsburg, held under the aegis of the Brookings Institution, the proposal received support from several quarters. Judge J. Clifford Wallace of the Ninth Circuit, as a result of his survey of the federal judiciary's needs for the remainder of this century, concluded that a study commission is a necessary step. Chief Justice Burger's explicit endorsement should give impetus to the proposal in Congress.

President should act

This commission is of sufficient importance in the equipping of the federal judiciary to deal with its role that I consider it appropriate to urge that the president, with the assistance of the Department of Justice, act to create the commission if Congress itself does not do so by the close of the current session. It would be helpful if the chief justice himself were to make this recommendation to the president. An administration that appointed a bipartisan commission to strengthen the social security system should be open to a similar step regarding the third branch of the government.

The American Bar Association long ago endorsed the concept of a national appellate forum to do what Chief Justice Burger now recommends. The Association should not hesitate to support this proposal, and it should lend its influence to the creation of a study commission to consider the full range of problems confronting the federal judiciary. *Journal*

(Daniel J. Meador is James Monroe Professor and director of the Graduate Program for Judges at the University of Virginia Law School. He was an assistant attorney general in the Department of Justice from 1977 to 1979.)

Rx

for an overburdened Supreme Court: is relief in sight?

At the mid-year meeting of the American Judicature Society February 5 in New Orleans, New York Times Supreme Court correspondent Linda Greenhouse moderated a panel of seven lawyers, judges, and law professors which examined the workload of the U.S. Supreme Court, and what can be done to alleviate it. Here is an edited transcript of that discussion. (The participants were given an opportunity to review the transcript and make minor modifications.) We invite your comments.

Linda Greenhouse: Our job today is to focus on the overload on the Supreme Court, to diagnose it for what it is, to examine some possible remedies and to ascertain whether some of those remedies might, in fact, be worse than the disease. First, I am going to ask the panel to make the case for change; if they believe, in fact, that structural changes are needed. Then, we will debate the remedies.

This is a discussion that has been going on for a very long time—a National Court of Appeals was first proposed in the 1880s. In modern times, the driving force that has kept that debate alive has been the chief justice who appointed Professor Freund's Commission in 1971. The search for relief for the Court's workload has been high on Chief Justice Burger's agenda for virtually his entire 14 year tenure. (See "Responding to the Court's workload: a short history," page 400.)

In 1971 when the Supreme Court received 3,600 new filings, the chief justice warned in his annual speech that "we cannot keep up with the volume of work and maintain a quality historically expected from the Supreme Court." A few months ago, during a term that will probably produce about 4,200 filings compared to 3,600, the chief justice warned that "if some changes are not made, the work of the Court will fall more and more behind, and quality will suffer." And last summer, Justice Stevens livened up this de-

bate considerably, allying himself with the Freund Commission's proposal for a court that would assume the Supreme Court's screening function. (See "What the justices have said about the Court's workload," page 404.)

Before we begin, let me give you some updated statistics. Filings at the Court this term continue to decrease. They are now about 2,300 compared to 2,430 at this time in the term last year. Interestingly, the pauper filings are just about even. The decrease has come in the paid filings, which may be as much of a reflection of the economy and people's willingness to pay for lawyers as anything else. The last term saw a big jump in the number of cases accepted for argument (certiorari grants last year were up 14 per cent over the previous term for a total of 210 granted cases), but the Court seems to be making a concerted effort to hold down the number of grants this year. The 96 cases granted so far represent a drop of 18 per cent from this time last year. This trend indicates to me that there is a fair amount that the Court can do to help itself.

Now let me throw out a few questions. Are the raw numbers, the sheer size of the docket, a valid indication of the Court's real workload? How intolerable are conflicts among the circuits? How integral a part of the Court's work is the screening function? And finally, is the Court now doing everything in its power without outside help to manage its workload?

Professor Daniel J. Meador: I would say there are two problems that ought to be kept separate, because the remedy for one may not be the remedy for the other. One is the overload on the Supreme Court. I am satisfied in my own mind that there is an overload. Eight justices have now spoken to that effect, and only one member of the Court has said nothing in the last seven or eight months. That alone is rather persuasive evidence, but even if they had all been silent, it seems to me that over 4,000 filings a year attacks the capacity of nine justices to do the kind of job we expect the Court to do.

There is another separate problem that overlaps and is related to it, and yet is distinct. That is the lack of appellate capacity in the federal judicial system as a whole; the lack of adequate means to deliver decisions on questions of federal law that have nationwide binding effect, and to do so within a reasonable time. We need to think about solutions that address both of those problems.

Senator Roman Hruska: I hope the time has come or will soon come when we will have a consensus on at least four points:

- that the burden of the Supreme Court is beyond a reasonable capacity;
- that the judicial system lacks the capacity, as pointed out by Professor Meador, to render an adequate number of decisions of nationwide binding effect;

The participants on the panel

Moderator: **Linda Greenhouse**, Supreme Court correspondent, *New York Times*. Panelists: **Paul A. Freund**, Carl M. Loeb University Professor Emeritus, Harvard University Law School, who served as Chairman of the Study Group on Supreme Court Caseload; **Arthur D. Hellman**, Professor of Law, University of Pittsburgh, who served as Deputy Executive Director for the Commission on Revision of the Federal Court Appellate System; **Patrick Higginbotham**, Judge, United States Court of Appeals for the Fifth Circuit; **Roman L. Hruska**, Attorney, Omaha, Nebraska, who served as United States Senator from Nebraska and Chairman of the Commission on Revision of the Federal Court Appellate System; **Daniel J. Meador**, James Monroe Professor of Law, University of Virginia, who served as Assistant Attorney General in charge of the Office for Improvements in the Administration of Justice; **Alvin B. Rubin**, Judge, United States Court of Appeals for the Fifth Circuit; and **Robert L. Stern**, Attorney, Chicago, Illinois, who served as Acting Solicitor General and as a member of the Study Group on Supreme Court Caseload. Chief Justice **Warren Burger** attended the discussion and made a few extemporaneous comments at its conclusion.

ALVIN B. RUBIN

- that the most appropriate remedy is to create some court which will be above the circuit courts of appeals and below the Supreme Court, which will deal with the problem of increasing the capacity for the appellate jurisdiction; and,

- that this new court will be a court of reference jurisdiction so that the Supreme Court may remain supreme and in control of its docket.

Now, I do hope that we are going to have that kind of consensus soon, and then we can repair to the task of fleshing out the framework which follows those principal points.

Judge Alvin Rubin: I know the Supreme Court is overburdened only because they say they are. That sounds at least skeptical, and perhaps, iconoclastic. But in terms of actually decided cases, the Supreme Court is deciding about 150 a year, and writing about 135 opinions. Divided by nine, that comes out to an average of about 15 opinions a year. I understand that if the Supreme Court is measuring its intake properly, those are all very difficult and very important cases. But it averages out to only slightly more than one opinion a month, and that is not an impossible workload, even for very hard cases.

The workload is a measure of the applications for certiorari and the perceived difficulty of examining those applications, and screening out from them the 150 cases or so that will be heard. Whether the Supreme Court is overburdened, then, depends in part on what is done in handling those cert petitions—who reads them, and how carefully

and how intensively and how many are left unheard that need to be heard. I think we should address that question, rather than the question of whether 150 cases are too many for a court to hear. We should also address the question whether there are cases that should be heard but cannot be because of the Supreme Court's workload.

The one thing we must avoid at all costs is the further fragmentation of our appellate process by injecting another decision level where cases will have to wait for attention. Someone will have to decide what attention petitions get, and they will have to go somewhere else to get that attention. The process right now, hard as the courts of appeals may work, is almost unconscionable. Nowhere in the nation does it take less than four or five years—and sometimes it is seven or eight—from the time a district court receives a case until the time the Supreme Court acts on cert. I don't think we can afford to put further stress on the system with further delay. So when we talk about solutions, we ought to be thinking, "How can we expedite the process, reduce the work, and not add further decision points, further delay and further expense?"

At the outset, I said, provocatively, that only the members of the Court itself really know whether there is an urgent need for a new court. They say that there is, and the data support their conclusions. When the Hruska Commission held its hearings, I testified that Congress should create a national court of appeals to hear the cases that the Court is now unable to take. That court should have a limited term and should be composed of incumbent appellate judges rather than newly-appointed ones. After an experiment of, perhaps, five years duration, the need for it should be reconsidered.

Professor Arthur Hellman: Professor Meador is quite right in saying that there are two separate issues here. Is the court overworked? And separately, are there issues of national law that should be decided on a nationally binding basis but are not being decided? On the overwork issue, one of course must consider the statements that have come from so many of the justices in recent months. And yet it puzzles me a little. Yes, 4,500 cases are a lot of cases, but they are not like cases in the courts of appeals. More than 90 per cent of them are petitions for certiorari. The Court does not have to decide them on the merits.

Second, in deciding whether to decide them, the Court need not consider whether the court below was wrong, but whether there is an important issue. That, it seems to me, is a much less time-consuming process than deciding whether there was probable error in the court below. A few years ago, Justice Brennan said that more than 70 per cent of those petitions were so clearly not cert worthy that not even one justice wanted to discuss them at conference. That percentage may be even higher today. I confess that I am a little puzzled at these statements that case selection is just impossible; it seems to me it ought not to take that much time.

On the question of the national appellate capacity, there are two ways of looking at this. There has been a lot of attention paid to inter-circuit conflicts that the Court supposedly does not resolve. In my research thus far, I have not found very many square conflicts, or even side-swipes, as someone has called them, that the Court doesn't resolve. For the most part, a conflict comes up and the Court seizes the case. The more difficult question is whether the Court is engaging in what I would call interstitial lawmaking. The Court hands down a landmark decision, and then maybe says nothing about that area of law for several years. That, I think, may be the problem in the lack of national appellate capacity.

Judge Patrick Higginbotham: I think when the Court says that it is overworked, we can take it at face value, but respond to it by understanding what may be afoot. When I hear discussion about structural change and appellate workload, I hear the drumbeat of the Commission on Revision of the Federal Court Appellate System. The Commission stated that there were four particular problems: they said there were unresolved inter-circuit conflicts; that there was delay in resolving those conflicts; that the Supreme Court was overburdened; and that there was uncertainty as to whether conflicts might exist. Three of those four, it seems to me, are overlapping considerations of inter-circuit conflict. All sum to the question of whether or not the Supreme Court is now discharging its role as a national arbiter.

We should be very careful when we suggest that these conflicts must each and all be resolved. First, it is often foolish to pursue what I think is an illusion, and that is "the certainty of the law,"—the quick answer to

ROMAN L. HRUSKA

the problem. Second, that quest places a premium upon a quick decision which may, in turn, engender another whole host of problems. I question whether these "conflicts" are so fundamental as to justify structural change.

When we consider raw numbers, say, the 4,000 cert petitions, we must look at the content of those 4,000 cases. A substantial percentage are made up of appeals in criminal cases, which is a direct product of having accorded free appeal to indigent criminal defendants. We get appeals in virtually all of these criminal cases, and the transcript, etc. is free. I don't suggest a change in the rule. I only make the point that a substantial percentage of the 4000 are made up of cases not worthy of certiorari.

Professor Paul Freund: In 1972, after our study group listened to each of the justices on the subject of the caseload, we concluded that the Court is now at the saturation point, if not actually overwhelmed. If trends continue, and if no relief is provided, the function of the Court must necessarily change. In one way or another, placing more reliance on an augmented staff, the Court could perhaps manage to administer its docket, but it will be unable to adequately meet its essential responsibility. Remedial measures comparable in scope to those of 1891 and 1925 are called for once again.

The Court has progressively increased staff in the form of law clerks, and general clerks for the Court as a whole, from one to two per justice in 1947, to three in the 1960s, to four in the 1970s. The Court has reduced standard oral argument from one hour to one-half

hour per side. The Court has dispensed with the filing of records on petitions for certiorari, which may have contributed to the number of improvident grants of certiorari.

I think one can look at the product and the measures already taken, and ask whether the model which is presented is the right model. I think that model has been a bureaucratic one: the increase of staff, which results in a separation of performance from responsibility and a product which is related to the measures taken. I am speaking now of both the length and the proliferation of opinions, and the lack of what might be called a magisterial style, which law clerks cannot be expected and ought not to try to achieve.

The 1891 and 1925 reforms have become part of the problem. In 1891, the intermediate court of appeals was introduced, and that reform has now produced a big problem of conflicting decisions. The 1925 reform, which was very helpful at the outset in giving primarily discretionary jurisdiction to the Supreme Court, has resulted in this flood of thousands of [cert] petitions per year. The model of the Supreme Court which we must adopt is either the bureaucratic model or the model of a small company of thinkers trying to settle fundamental legal questions to clarify and illuminate in the pursuit of justice.

Robert Stern: The major part of the problem is whether there are enough final appellate decisions being rendered in this country. There are cases of clear conflict, and others where the conflict is not so clear, which the Court is not disposing of. It may be easier for the Court to let a problem simmer in the courts of appeals until there are lots of conflicts and opinions. But just think, that leaves many clients and lawyers out there who don't know what the law is on a particular subject.

I am not talking about the length of time it takes to dispose of one case, but the time it takes to get the Court to decide issues after they have gone through the courts of appeals. It takes years, sometimes 10 years in tax cases. Sometimes they don't ever decide them.

But there are a lot of questions which seem important and yet we would have to advise our clients that we don't think the Court would take them. And often you don't petition for certiorari. That convinces me not only that there is a problem with the workload, but that there is a problem as to whether more final appellate capacity is needed.

ROBERT L. STERN

Linda Greenhouse: I think we are lucky to have a panel that encompasses a range of attitudes and has raised very interesting points. Professor Freund, I think your point about the difference between a court that is thriving and a court that is surviving is particularly interesting.

In our second round, I would like people to address themselves to whether they think fundamental change is needed in the structure and function of the Court itself or is there, perhaps, a second approach—an internal management approach—that can be accomplished without structural change, such as Justice Stevens' proposal to modify the rule of four [and require five justices to vote] to grant cert? Are there legislative proposals that could reduce the Court's workload, such as abolishing diversity jurisdiction, abolishing the court's mandatory appellate jurisdiction, limiting statutory causes of action, and creating various specialized courts of nationwide jurisdiction? And is there a danger of perhaps creating too much appellate capacity in the system?

Professor Meador: I think Mr. Stern has made a very good point—it is not simply a matter of conflicts among the circuits, it is also a matter of unresolved issues. Erwin Griswold has often charged that issues of national law that are important to people, important to lawyers who are advising their clients and planning their work, simply do not get resolved. They remain in a state of uncertainty for years, even though there is no square conflict between the circuits.

We need to devise a solution here that is not

DANIEL J. MEADOR

radical, a solution that can be terminated if it proves not to be effective. So I pick up on the work of the Freund Committee and the Hruska Commission with the idea of creating a new appellate tribunal, to be inserted between the existing courts of appeals and the Supreme Court. There is a growing and substantial body of opinion that a forum of that kind could serve a useful purpose. It would be a sort of overflow chamber for the Supreme Court, to which the Supreme Court could refer cases for resolution on the merits. Perhaps as many as 150 cases a year, somewhere between 100 and 200 a year, where the Court deems a definitive decision desirable and yet the Court simply cannot reach it. These would largely be questions of statutory interpretation, not global questions, but questions important to the even-handedness and certainty of national law.

It is important, though, in constituting that tribunal, to do it very carefully in a way that minimizes the disruption and fundamental alteration in the system. To me, the most appealing way is to constitute that tribunal out of existing United States circuit judges sitting by designation. I think that the court should have a lot of stability and continuity. I don't think it would be wise to create a large, ever fluctuating pool of circuit judges who are designated ad hoc to come in on this case or that case. That is part of the problem now at the courts of appeals level. We have a roulette game of panels. You roll the dice hoping you will get a favorable decision out of the next threesome that pops up.

I would favor a forum of seven or nine U.S.

circuit judges who would sit together on a gradually rotating basis, from three to six years each. The court could easily be dismantled if it didn't work, or if the need disappeared. Indeed, I would not even oppose an express sunset provision, although I would not want anything less than five or six or seven years.

Now that helps increase appellate capacity, but it does not affect the overload on the Supreme Court. We need other measures, I think, to deal with the problem. There are several that will help, such as a move to a rule of five instead of a rule of four. But there is another idea I merely mention without exploring, which is more controversial: creating a new appellate tribunal, say of nine circuit judges, sitting by designation, and with a measure of direct appellate jurisdiction over state criminal cases, which would go directly to that court on cert petitions. Similar suggestions have been made by Judge Clement Haynesworth, John Frank, Justice James Duke Cameron and Erwin Griswold.

Senator Hruska: There is such a massive and complex increase in the litigiousness of the American public that there will not be, in my judgment, any relief afforded by increased appellate capacity without resorting to another body. There must be, and let me give an example why.

In 1947, there was a question of the priority of withholding taxes in bankruptcy cases. Where do they go, in category one, two, three or four? The Eighth Circuit passed on it first in 1947. And there followed two or three courts of appeals decisions to the contrary. Do you know it took 27 years to resolve that very simple question? This indicates that more cases before the Supreme Court which are not constitutional in nature can well be taken care of by an inferior court to the Supreme Court, a court that will be able to speak on a nationwide basis. As to percolation I think that the gain from maturation of thoughts, as Dean Griswold says, from letting the matter simmer for awhile, is not nearly as great as the harm which comes from years of uncertainty.

Some 25, 30 years ago, one-third of the caseload of the Supreme Court was constitutional questions, and two-thirds were legislative or state problems. That proportion has now been reversed, and the constitutional questions are two-thirds of the load. What happens, then, to the one-third of those cases

which are so essential to commerce and industry? They must be deferred. We simply must enlarge the appellate capability by using a body which will possess all of the Supreme Court's attributes except one—the Supreme Court remains supreme.

Judge Rubin: I don't think Congress is likely to thrust on the Supreme Court a remedy most of its members would oppose. But almost all members who have spoken on the subject have advocated a change in the Supreme Court's jurisdiction to an all-cert jurisdiction. That, by itself, would help re-

lieve the workload, and certainly the members of the Supreme Court think so.

My other suggestion revolves around the fact that part of the cert burden stems from efforts to avoid a final decision. Litigants know that once a mandate issues by a court of appeals, the battle is largely over. Appellate judges are more liberal in staying mandates during the application for cert than we are in staying a lower court decision where we are asked for an injunction or stay pending appeal, because in reviewing an application for stay pending appeal we have some requi-

Responding to the Court's workload: a short history

One hundred and ninety-three years ago, the federal court system was established and still exists today with only a few significant structural changes. The most important change came in 1891, when nine circuits of the U.S. courts of appeals were established to assist the U.S. Supreme Court, which then had a docket of 492 cases, in its reviewing function. In 1892, the U.S. Supreme Court decided 275 cases, and a large number of those were summarily determined.

The Supreme Court was also granted at that time the power to exercise discretion over the review of certain cases. These reforms helped to reduce the number of cases docketed in the Supreme Court, and resulted in a more effective administration of justice.

From that time on, however, the number of cases on the Supreme Court's docket has increased steadily. In its 1951 term, the Supreme Court had 1,353 cases on its dockets. It decided approximately 275 cases—the same number as in its 1892 term. In the 1961 term, the number of cases on the docket had increased to 2,570, and again the number of cases actually decided was approximately 275. In the 1981 term, the docket swelled to 3,814. Also during the 1982 term, the Supreme Court received 4,242 petitions for writs of certiorari. It granted 289, less than seven per cent. One hundred and seven of those granted were summarily decided and only 182 were scheduled for oral argument. Note that almost every year, the number of cases decided is approximately 275. Clearly, more than six or seven per cent of the cases filed deserved to be heard, but our highest court has little choice.

There appears to be no sign of a tapering off or decline in the volume of judicial business. It is clear that the existing judicial structure is not designed to handle this increased docket load.

The major response thus far has been to add personnel, but this has not solved the problem of maintaining a nationally uniform body of federal law, or of handling the increased volume of litigation adequately.

During the 1970's, two important and influential studies recommended the creation of a National Court of Appeals to provide relief to the Supreme Court.

In 1971, the Chief Justice of the United States, Warren Burger, appointed a seven-member study group on the caseload of the Supreme Court. This group, headed by Professor Paul A. Freund of Harvard Law School, studied the problems confronting the Court, explored alternatives and in December of 1972 submitted its recommendations that Congress establish a seven-member National Court of Appeals.

As conceived by the Freund study, the National Court of Appeals would screen all petitions for review filed with the Supreme Court. Several hundred of the most important cases would be certified to the Supreme Court for further screening and the Supreme Court would select from this group the cases it wished to hear.

Under the Freund plan, the National Court of Appeals could deny review and no appeal would lie from its refusal to allow review. Also, cases of real conflict between appellate tribunals on important issues would be certified to

sites, such as a substantial likelihood of success. I don't think we review application for a stay of mandate the same way.

This means that there is a litigation advantage simply in taking 90 days and an extension of time to seek cert, then filing the application for cert and allowing that to remain until the Supreme Court disposes of it, which may at some times be a year or more. If you are a loser, you've gotten 15 months before the judgment takes effect. If we could by court rule or statute change the rules for stay of mandate, we might reduce the number of cert.

the Supreme Court, and the National Court of Appeals would hear cases of lesser importance involving conflicts between circuits.

on } The second study was begun in 1973 by the Commission of Revision of the Federal Court Appellate System, called the Hruska Commission after its Chairman, Senator Roman Hruska of Nebraska. Statute mandated the Commission to study the structure and internal procedures of the United States Circuit Courts of Appeals system.

In June, 1975, the Hruska Commission issued its report in which it recommended the creation of a National Court of Appeals, although one substantially different from the one recommended by the Freund group.

As proposed by the Hruska Commission, the National Court of Appeals would not screen cases for the Supreme Court. Jurisdiction of the new court would extend to two classes of cases: (1) those referred by the Supreme Court and, (2) those transferred by one of the U.S. Courts of Appeals, Court of Claims, Court of Customs and Patent Appeals.

Under the Hruska plan, the seven judges of the new court would be appointed by the president subject to confirmation by the Senate.

During the 94th Congress, Senator Hruska introduced a revised version of his original bill for the creation of a new court. His new bill eliminated transfer jurisdiction of the National Court of Appeals and allowed a phase-in-appointment of judges by the president over an eight-year period.

From a statement by Senator Howell Heflin to the U.S. Senate on August 10, 1982.

applications which comprises a large part of the workload.

One other possible solution is the creation of specialized national courts—or since we now have one—more specialized national courts. It seems that this goes against the tide of 200 years of federal judicial tradition that, by and large, federal judges are generalists. I think there would be a grave danger both to the quality of our decisionmaking and to the functioning of our system if we had three, four or five special courts.

Another solution lies in the hands of Congress—which could create a mechanism to call to its attention the existence of conflict at an early stage. Conflict in interpretation is, of course, caused by the legislative process itself. But Congress can act very quickly on at least some of these problems if there is a mechanism expressly for calling attention to the need for legislative clarification. The legislative process [could thus] reduce the need for the judicial interpretation of a statutory problem.

ARTHUR D. HELLMAN

Professor Hellman: One does get the impression from Justice White's dissents that there are quite a few inter-circuit conflicts that the Court is not resolving. They deny cert despite a conflict. Well, I went back to last term and counted them. I found a grand total of 12 cases in which Justice White had dissented from the denial of cert on the basis of an inter-circuit conflict. Two of these involved the same issues: three of them involved issues that are on the Court's docket this term. Perhaps Justice White does not dissent or make a notation in every case where there is an inter-circuit conflict, and yet he has been advocating a remedy for this problem. And vigorous

advocate that he is, one would think that if there were dozens of these cases around, he would be calling a few more of them to our attention. So it seems to me that inter-circuit conflicts are not really the problem.

Nevertheless, Mr. Stern is right in saying that the absence of a conflict does not mean that there is not an issue that the Court ought to resolve. Here we get back to the question of elaborating upon precedent and providing the guidance that is necessary. Yet, it is very difficult to isolate the effects of what the Court does not do from the effects of what it does do. I will give an example.

One of the most hotly contested issues in maritime law is the duty of a ship owner toward employees on his ship. The statutory issue has been litigated for about 10 years. There was not only an inter-circuit conflict, I think there were three or four separate positions. The Supreme Court finally took a case. They had about a dozen other cases pending before them at the time which they didn't take; some of them they sent back for reconsideration, others they denied all together.

Is the law clearer now with one decision? Well, I am not sure of that, because the decision, although unanimous, seemed to say "well, it's not quite this, it's not quite that . . . , here is some notion of where we come out on the problem." There were two separate opinions, both by justices who were joined in the majority, interpreting the majority opinion. How are you going to separate the uncertainty that comes from having only one case on this very important and recurring issue from the uncertainty that comes from trying to figure out what the justices have said in that case?

If we are to do something, I agree with Professor Meador and Senator Hruska that the answer lies in the direction of an overflow court with reference jurisdiction. Of all the long term solutions that have been proposed that seems to me the most promising, and yet I am very troubled by it because the new court would be envisioned as primarily a statutory court. I would worry about a system under which the Supreme Court would be encouraged to send all of these statutory issues to other judges to resolve. The legitimacy of the Court in its constitutional decisions comes from the fact that it is a court deciding cases, and it's important that among those cases there be some technical lawyers' issues to keep the justices on their mark and to strengthen

the legitimacy of what the Court does when it reviews the constitutionality of federal or state governmental action. I am not sure how that problem can be resolved.

And there are intermediate solutions that ought to be tried before more radical structural changes are made. One is the abolition of the obligatory jurisdiction. A few years ago I didn't think that would really make much difference. Because the Court was treating most appeals so summarily, abolishing obligatory jurisdiction would not have had much effect on the workload. I am not so sure now.

I also think we ought to give some consideration to Justice Stevens' suggestion of a rule of five, and take some of these other steps before we take, what seems to me, the rather radical step of creating this overflow court.

PATRICK HIGGINBOTHAM

Judge Higginbotham: I agree with the suggestion of a legislative mechanism for resolving disputes among circuits about statutory interpretation. Many of those avenues have not received the intensive scrutiny and consideration as have the structural proposals.

With regard to the overload, I suggest that we have a bit of a conundrum. I have been fascinated by Professor Frank Easterbrook's analysis taking the discipline of Kenneth Arrow on decisional pass and the problem of group decisions, and applying it to the question of the proliferation of opinions; why we have a proliferation of opinions, if indeed we do, from the justices on single issues. The point that has been made forcefully by Arrow, for which he was awarded the Nobel Prize, is that with a fixed group (such as nine) that adheres to an external discipline, such as *stare decisis*, the sequencing of the decisions itself (the decisional pass) becomes integral to the ultimate decision that is made. The Court, in

deciding which issues it will take, and when it takes them, may very well be going a long way toward deciding how that issue will come out. The sequence of the privacy issue that is taken such as, for example, dealing with the rights in the area of sex, as distinguished from other issues, could have effected the outcome of later cases, as Professor Easterbrook has suggested, given adherence to *stare decisis*.

This means that if there is any validity to those theories as applied here, we ought to be very careful in pulling from the Court its certiorari process. Justice Brennan made the point very forcefully as to the value of the justices' engaging in this process (*The National Court of Appeals: Another Dissent* 40 U. CHICAGO L. REV. 473 (1973)). We all remember Justice Brandeis' statement with regard to what makes the Supreme Court great. The answer was "we do our own work."

We do have this incredibly large number of cases forcing their way up, and we know that it impacts the Court in fundamental ways. When we start to create a structure to address two distinct problems—the absence of the appellate capacity and the overload of the Court—we ought to think very carefully as to what we are really going to achieve by that. Dan Meador suggested that perhaps it would decide 150 more cases. Well, apparently people are not satisfied with a proportion of 150 written opinions by the Supreme Court to the increase in knocks on the door of some 4,000 cases. Will 150 more decisions make that much difference, and is that the price to be paid for this kind of fundamental structural change when one also adds to that decisional process the reality that there is seldom an ultimate answer to a legal problem? One decision will produce, in turn, another sub-set of problems. That is the analogical process, it seems to me, of the common law, it is the common law tradition.

Finally, as Senator Hruska pointed out, before 1960 non-constitutional holdings constituted two-thirds of the docket, but now constitutional holdings make up two-thirds. But if you ask now what happened to the other group of cases, you might as well ask the same question with regard to 1960. What happened to the other groups of cases then? I don't think those numbers inform the present issue. The Court's workload is a mirror of the social changes in this country and the problems that the society brings to it. The Court does not create its own workload, it responds to it.

PAUL A.
FREUND

Professor Freund: The Supreme Court has a special responsibility in dealing with fundamental constitutional questions to ensure that such questions be settled correctly. I think that this special responsibility needs to be kept in mind when, for instance, comparing figures on the output. Fifteen opinions per justice a year may seem a modest output. I am wondering if the courts of appeals would be able to produce 15 per judge if they sat in panels of nine. Furthermore, as a professor, I wonder if I should be expected to write 15 law review articles per year. I am not suggesting that the Supreme Court opinions be law review articles—some of them too much resemble law review articles as it is—but the kind of thought and preparation going into Supreme Court opinions ought to resemble that which would go into a law review article.

I favor an intermediate court, an overload court, and I endorse the view that at the outset, at least, it be established on a somewhat experimental basis and manned by existing circuit court judges on a rotating basis, but with sufficient tenure, so that some coherent and consistent line of decision could be expected in given areas.

I would not welcome specialized courts of appeals at this appellate stage, however. The trouble with a specialized court, in particular for criminal cases, would be the risk of polarization, even politicization. Where you have a one-issue court, you are likely to have appointments to it made on the basis of the nominee's philosophy on one issue. And that, I think, would be a move in the wrong direction. It is true, of course, that we have specialized tribunals of first instance like the tax court, but they face a review by a court of generalists.

I would also oppose an intermediate court for all statutory construction questions as distinguished from constitutional questions, though such a change would mean that a

higher proportion of Supreme Court decisions would be in the constitutional field. But I strongly feel that to limit Supreme Court jurisdiction to constitutional cases would be unworkable and undesirable. Unworkable because of the necessary interplay of constitutional questions and statutory interpretation, and undesirable because it would encourage Supreme Court justices to be super legislators giving reign to their social and political values unchecked by the more conventionally professional constraints of the law such as statutory interpretation.

The Freund Commission proposed an intermediate court of appeals with two functions: One, a preliminary screening function for certiorari petitions, under which that court would refer to the Supreme Court some 400 or 500 cases from which the Supreme Court could choose its ultimate docket for argument; and secondly, the function of deciding conflicting decisions, ultimately resolving the conflicts. I think if there is an intermediate court dealing with certiorari then the Su-

preme Court should be given latitude. I respectfully, therefore, disagree with Justice Stevens' more radical proposal that the intermediate court ultimately decide on the cases to be reviewed by the Supreme Court. I also think that a screening function only would not suffice for a court of this importance and prestige, and that a considerable jurisdiction on the merits, whether by reference from the Supreme Court or by original submission by the parties in lieu of submission to the Supreme Court, would be important to incorporate.

Mr. Stern: Despite the apparent recent drop in the number of certs granted and possibly the certs filed, we must realize that in the last several years the number of circuit judges and the number of district judges have increased tremendously. Almost inevitably that is going to increase the amount of litigation and the number of cases which are given to the Supreme Court. It may very well be that after having granted more petitions for cert in the last couple of years, with the result that they

What the justices have said about the Court's workload

Although Chief Justice Burger has been voicing his concern about the Court's workload for 14 years; the public has only recently begun to hear the other justices echoing his warnings. Within the last year, seven other members of the Court have also spoken out.

Justice John Paul Stevens initiated the discussion when he spoke last August before the American Judicature Society. He proposed the creation of a court "to which the Supreme Court would surrender some of its present power—specifically, the power to decide what cases the Supreme Court should decide on the merits." This suggestion was similar to that posed by the Freund Commission in 1972, but Justice Stevens pointed out one critical difference. "I would allow that [new] court to decide—not merely to recommend—that a certiorari petition should be granted or denied." Delegating the screening process would give the Court more time for the priority work of deciding cases, he believes.

The Court's senior member, Justice William J. Brennan, Jr., took issue with Justice Stevens' suggestion, but did acknowledge (for the first time) that a caseload problem exists. "There is a limit to human endurance," he

said, "and with the ever-increasing complexity of many of the cases that the Court is reviewing in this modern day, the number 150 taxes that endurance to its limits." He added, however, "I completely disagree with my respected and distinguished colleague. The screening function is second to none in importance."

Brennan supports the workload remedy advanced by Justice Byron R. White. Justice White has proposed reducing the number of conflicting decisions by federal appeals courts by establishing new appeals courts with national jurisdiction over specific subjects like the court already established to hear patent cases. Decisions from the new courts could be appealed to the Supreme Court, but because the courts would have nationwide authority, the frequency of appeals would be decreased.

Justice White has also proposed that a vote of *all* judges in a circuit should be necessary before a federal appeals court can place itself in conflict with another circuit court. Right now a three-judge circuit panel can issue a conflicting opinion.

Following Justice White's statements, Justice Thurgood Marshall criticized the Court

are now unable to hear—within a year—all of the petitions for cert they granted during the last year, they are now trying to cut back.

That may just aggravate the other side of the problem. It may mean they will catch up on their work and hear the cases which they have granted, but it may also mean that there are more cases which they should have granted in view of the general public interest. All of these things are very difficult to analyze statistically. It is hard for anybody who isn't going to analyze all of the cases in which certiorari is denied, in their full sociological as well as legal context, to see whether they should have been granted.

There are a few things which can be done which I don't think are very drastic—the most obvious, eliminating the direct appeals from state courts in any case in which the state court has upheld the state statute as being constitutional under the federal Constitution. That is undoubtedly the main remaining area of direct appeals, and also the area in which hardly any are allowed to be argued.

for giving "short shrift" to major legal issues and urged it to alter its procedures and allow parties in cases subject to summary dispositions to file briefs on the merits of their cases. "I am disturbed by the too often cavalier treatment of the rights and interests of the parties involved in such cases," he said. He charged that summary dispositions serve to favor the government over individuals.

Justice William H. Rehnquist sees bureaucratization as the bench's major threat. "It may be, that with the ever increasing case-loads, we are inevitably headed towards more bureaucratization. ... I suspect it may not be too long a leap from a corps of law clerks, staff attorneys, settlement counsel, and screening and pro se clerks to the 'opinion writing bureaus' which many major federal agencies rely upon."

In another vein, Justice Lewis F. Powell, Jr. suggested that the Supreme Court's "appellate jurisdiction, already limited, [be] replaced entirely by discretionary review on certiorari." He also asserted the need for statutory reform to reduce the flow of cases into the district courts.

Justice Sandra Day O'Connor also sees the

Another idea is the kind of thing which has just been done for patent cases by requiring them all to go to one court of appeals and, therefore, avoiding any further conflicts in that area. If there was an important enough patent case, I suppose the Supreme Court still could or would take it. The same thing could be done, as Erwin Griswold suggested years ago, in tax cases. And possibly in other cases—though Paul Freund has argued very persuasively that specialization in courts, particularly appellate courts, is a bad thing. I am not quite so positive that it is really that harmful as compared to the benefits that can be achieved by reducing the workload of the courts.

What I would call the medium kind of remedy would be the establishment of an intermediate court of appeals. What no one has mentioned is that having the Supreme Court decide which cases should be transferred to the lower appellate court really isn't as novel as we seem to think it is. It would be novel for the U.S. Supreme Court, but I don't think many people know that four states are

need for jurisdiction changes. In a recent address to a group of ABA members, she proposed the abolition of the Court's mandatory jurisdiction, creation of specialized appeals courts with exclusive jurisdictions over such areas as taxation, the possible elimination or reduction of diversity jurisdiction in federal court, and the encouragement of alternate forms of dispute resolution.

The most extensive proposal has come from the Chief Justice. He has asked for a new intermediate court of appeals that would be a temporary (five-year) panel of the new U.S. Court of Appeals for the Federal Circuit. The new court would decide all inter-circuit conflicts and would possibly rule on cases of statutory interpretation. It would be composed of a pool of 26 judges—two judges from each circuit serving rotating six-month or one-year terms on panels of seven or nine. The Supreme Court could exercise certiorari jurisdiction over the court.

The justices' wait for relief may be nearing an end. Congress is currently considering the Chief Justices' proposal, and there is administration support for reform.

—Miriam Krasno

already doing it. In Iowa, Oklahoma, Hawaii and Idaho, all appeals are taken to the state supreme court. Then it decides which cases it will refer back to the court of appeals in those states, which is very similar to what we have been talking about here. The Supreme Court would be able to refer to the intermediate court the cases I call of intermediate national importance and which are not quite important enough for the Supreme Court to take if it is overloaded.

In those states, and in Massachusetts, which has something very similar, the supreme court looks at every appeal which is taken to the courts of appeals, and then they take up, before argument in the courts of appeals, whatever cases they think are important. The result in Massachusetts, although they still retain certiorari jurisdiction over the courts of appeals, is that they don't take up many. Maybe 30 to 40 a year out of their caseload are the cases they leave with the courts of appeals to decide in the first instance.

This has the advantage of eliminating double oral argument and of eliminating double briefing, although that could be done anyhow. It is not absolutely necessary that if a case goes to a court of appeals and then goes to the new national court of appeals, that the latter court act on new briefs and not on the briefs which are filed in the first court of appeals. The lawyers could be permitted to file a supplemental brief, but not a rebrief of the whole case. That would avoid a good deal of the duplication which we want to eliminate by having an additional court of appeals. So I don't think creating a national court of appeals with cases to be decided on reference by the Supreme Court is really that radical.

Oklahoma and Texas, as we know, have a specialized supreme court for criminal cases, separate from their supreme court for civil cases. They call it the Court of Criminal Appeals, but it is really a supreme court in the criminal area. And that may not have been working out so badly either, even though it is a specialized court. It may be, in the long run, that this country is going to be too big to ever permit one group of judges to be the final arbiters of everything, even with all the protection the certiorari process provides.

Professor Meador: In regard to the Supreme Court's work, I believe the cases these days are not only more numerous but also considerably more complex, difficult and controversial

than they were a quarter of a century ago. Moreover we have focused on the Court's role in riding herd over the lower federal courts, but it is also a final appellate tribunal for all 50 state systems, the D.C. courts, and Puerto Rico. That is 52 independent judicial systems churning up business in addition to the lower federal courts. Not only have those courts been deciding more cases because of the litigation explosion, but the proportion of cases in which there are federal questions has gone up. One study showed in 1959 that decisions from four state supreme courts, taken as a random sample, involved federal law about 21 per cent of the time. By 1979, the percentage was 41 per cent, roughly doubling the state cases involving federal questions. That doesn't mean that every one of those state decisions had a controlling federal issue that would have been subject to Supreme Court review, but it does suggest that the proportion of all state decisions that might be candidates for Supreme Court review has substantially increased.

Finally, at the intermediate level, the idea of what I call subject matter organization of an appellate court holds enormous promise. (I drop the word "specialization" because it raises all kinds of emotional overtones that are really inapplicable.) You can organize the docket of an intermediate appellate court such as the U.S. court of appeals, on subject matter lines so that every case is decided only by the same group of judges, and, therefore, there can be no internal conflict. Although you can still have intercircuit conflicts, at least within each circuit there would be a known predictable group of judges deciding every issue. But those judges are confined to that one issue. They would have a mixture of the docket but in any one category or case, only that judge would decide it.

Linda Greenhouse: I'll comment on your point about the increasing number of federal questions decided by state supreme courts. I think there is an interesting counter-trend that the Court is now seeing of state supreme courts learning how to cert proof some of their decisions by resurrecting their state constitutions. Audience? Any questions for the panel?

Justice Ben Overton (Florida): Let me ask the panel if the circuit courts of appeals should be given the discretionary authority to certify issues that they feel are important for the Supreme Court to pass on, not that the Supreme Court must take the case, but at least

CHIEF JUSTICE WARREN BURGER AND
PANEL MODERATOR LINDA GREENHOUSE

to identify issues that judges think are important for them to take. We are utilizing this process in our state and are finding that it is working very well.

Judge Rubin: It would place a certain imprimatur on the certification of that question. I think that is not unrelated to my suggestion that another approach is to reduce the number of stays of mandate so that if a court of appeals stayed the mandate, it would in effect signal to the Supreme Court that this is a significant case. That might have the same effect and yet reduce the number of applications.

Judge Higginbotham: It seems to me that it is basically antithetical to the notion that the Supreme Court must set its own docket. I am wary of any proposal which would take away from the Court the basic power to control its docket. If anything, that is one of the few weapons it has to deal with the problem. One of the Court's functions is to decide what it will decide, and to have somebody else tell the Supreme Court, it seems to me, would have constitutional implications about where the power of supremacy resides. In that same vein, the courts of appeals can do more to ensure that decisions that are possibly headed for the Court represent the final judgment of that court. In the Fifth Circuit, we circulate opinions that will cause a conflict with another circuit.

Chief Justice Burger: Thank you very much, Ms. Greenhouse, for having moderated this very valuable discussion. I found it enlightening. Of course the real value of having this panel is that you get people who understand these problems, and while they don't all agree—they are not like the nine of us on the Court, who always agree—they are well informed and they contribute a great deal. It has contributed to my own thinking.

The one thing I would emphasize perhaps a little more than any member of the panel has emphasized is that we are approaching a disaster area, not just a problem, a disaster area. Over 50 years ago Oliver Wendell Holmes wrote to one of his friends, and spoke of the numbing experience when they finished up the term about May 1. They did not have really much of anything to do until the first Monday in October because they didn't have this great rush of cases—they only had 500-700 cases being filed a year—and during the summer only a couple of hundred. Now we've got 90 to 100 cases filed every week. And the people who think we are on vacation, of course, are interpreting the judicial use of the term "vacation" in terms of the popular and vernacular use of that term. I have been surprised that we haven't had a breakdown of the system, to say nothing of a physical breakdown, of some of the justices. Sixty hours a week minimum, 70 and 80 to some extent, isn't a very good diet for human beings, especially when they get beyond 40, as most of us now are.

I was glad to see my good friend Dan Meador refer to the increasing complexity. If you look over the the cases we have heard in the last two weeks' sitting, you will find that we had more really difficult cases in that two weeks than many courts and Supreme Courts had in an entire year, back 40, 50, 60 years ago. Especially 50 and 60 years ago, before the new deal days when a lot of new problems came on the courts. 

I welcome this discussion; I have enjoyed it and profited by it, and I congratulate all of the people who took part and who sponsored it. □



U.S. Department of Justice

Office of Legal Policy

Washington, D.C. 20530

April 6, 1983

BY HAND

James W. Cicconi, Esq.
Special Assistant to the President
The White House
Washington, D.C. 20500

Department of Justice Comments
in Support of the Elimination
of Diversity Jurisdiction

Dear Mr. Cicconi:

Tex Lezar informed me this morning of your interest in proposals to eliminate diversity jurisdiction and directed me to summarize the Justice Department's position on this issue in preparation for James A. Baker's address to the Fifth Circuit Judicial Conference. We support the proposed change in the law in order to reduce the caseload of the federal courts, to promote judicial efficiency and to further the principles of federalism which are a cornerstone of the Administration's legal philosophy.

Elimination of diversity jurisdiction would result in a significant cost savings as well as a substantial reduction in the administrative burdens currently placed on the federal courts. Diversity cases typically represent about one quarter of the civil caseload of the federal district courts. 1/ Diversity cases, in contrast to civil cases in general, are likely to remain in the system for longer periods of time, to require more pretrial proceedings, to go to trial rather than to be settled, and, by an overwhelming number, to require jury trial. 2/

1/ There were 50,556 diversity cases commenced during the 12 month period ending June 30, 1982, approximately 24.5 percent of the civil cases filed. Annual Report of the Director, Administrative Office of the United States Courts (1982).

2/ For the 12 month period ended June 30, 1982, 23.6 percent of the civil cases terminated by the district courts were diversity cases, but they accounted for only 14 percent of the civil cases terminated before pretrial. 39 percent of the cases that went to trial and 59 percent of the civil jury trials were diversity cases. Moreover, 10.1 percent of all diversity cases were terminated by trial, a rate nearly twice that for all other civil cases.

We also believe that the abolition of diversity jurisdiction would promote judicial efficiency by eliminating a considerable amount of procedural litigation associated with establishing diversity of citizenship. As Professor Thomas D. Rowe, Jr. of the Duke Law School noted in a recent study of the non-obvious effects of diversity cases, federal judges must spend considerable time determining the actual state citizenship of the parties, attempting to identify manipulation or collusion designed to invoke or defeat federal diversity jurisdiction, determining the proper alignment of the parties, sorting out the jurisdictional problems encountered by joinder and intervention, and dealing with the troublesome separate-claim removal provision. (28 U.S.C. § 144(c). 3/

Consistent with the Administration's federalism principles, the Department of Justice is committed to support legislative initiatives designed to restore the power of the states to make fundamental choices affecting the lives of their citizens, and believes that state courts should have the paramount role in resolving disputes concerning matters of local interest involving issues of state law.

The Justice Department has advocated the elimination of diversity jurisdiction in both the Carter and Reagan Administrations, with the support of the Chief Justice. Past efforts have been unsuccessful in the Congress, in part because of concern over exceptional cases in which local bias against persons from other places might affect the impartiality of state adjudications and against which state change of venue rules do not provide adequate protection.

The Department of Justice supports the retention of statutory interpleader based on diversity, where the federal courts, with authority for nationwide service of process, fulfill a function which state courts cannot adequately perform. For the same reason, the Department would support a measure permitting certain multi-party injury actions to be brought in federal courts where all parties whose presence is necessary to achieve the just adjudication of a case are so disbursed that they cannot be gathered in a single state court.

3/ T. Rowe, Jr., Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms, 92 Harv.L.Rev. 963, 970-81 (1979). Opponents of the Elimination of Diversity Jurisdiction, however, contend that these same goals of judicial efficiency would also be furthered by a simplification of removal procedures.

Please let me know if I may be of further assistance in your preparation of Mr. Baker's remarks. My telephone number is 633-3643.

Sincerely yours,

A handwritten signature in cursive script that reads "J. Michael Shepherd".

J. Michael Shepherd
Special Assistant to the
Assistant Attorney General

cc: Tex Lezar, Esq.

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U.S. Department of Justice

Office of Legal Policy

Assistant Attorney General

Washington, D.C. 20530

MEMORANDUM

March 18, 1983

TO: Fred F. Fielding
Counsel to the President

FROM: Jonathan C. Rose *JCR*
Assistant Attorney General

SUBJECT: Bankruptcy Courts Bills

Enclosed is a memorandum briefly summarizing the possible compromise on S. 443, reached yesterday afternoon at the Senate staff level. Also enclosed are two sets of talking points for use by persons at the White House. You should feel free to choose whichever set you think will best serve the purpose. The Republican senators that need telephone calls are: East, Denton, Mathias, Hatch, and Specter. Also, someone should touch base with Senator Laxalt on this matter.

Enclosures



U.S. Department of Justice

Office of Legal Policy

Assistant Attorney General

Washington, D.C. 20530

MEMORANDUM:

March 18, 1983

TO: Fred F. Fielding
Counsel to the President

FROM: Jonathan C. Rose *JCR*
Assistant Attorney General

SUBJECT: Bankruptcy Courts Compromise

We currently support S. 443, the Dole-Thurmond bankruptcy courts bill, which would provide the omnibus judges recommended by the Judicial Conference to handle existing civil and criminal caseloads, along with 115 district judges to handle the bankruptcy caseload. A possible compromise has been worked out among staff for Senators Dole, DeConcini and Thurmond.

The Dole-Thurmond bill, S. 443, which we currently support:

24	Circuit judges
166	District Judges
<u>190</u>	Total judges

The proposed compromise:

20	Circuit judges
26	District judges, general jurisdiction
110	District judges, bankruptcy divisions
<u>156</u>	Total judges

Net change of adopting the compromise:

-4	Circuit judges
<u>-30</u>	District judges
-34	Total judges

The compromise would provide most of the omnibus judgeships, as well as 110 district judges assigned to bankruptcy divisions in 55 out of the 94 judicial districts. The bankruptcy division judges could handle non-bankruptcy matters if the senior bankruptcy judge in the district and the chief judge of the circuit certified that such assignment would not interfere with the handling of the bankruptcy caseload. In districts without a bankruptcy division, the work would be handled by district judges.

The Dole bill as written appears unlikely to obtain sufficient support to achieve the necessary 10 affirmative votes in the Senate Judiciary Committee. The compromise, with its bankruptcy divisions in all but the smallest districts, stands to gain support from those Democrats whose first choice is the Rodino bill. They will understand that this compromise is the best Article III bill, from their perspective, that could be approved by the Senate.

I feel that this compromise is about the best we can get out of the Senate. It goes a long way toward achieving our principal objective, which is to appoint the maximum number of judges who could handle socially significant cases, and thereby offset the liberal impact of the judges appointed by President Carter. The circuit judges would alter the ideological balance in about six circuits. The bankruptcy judges would steer bankruptcy law in a pro-creditor direction, and should have sufficient extra time to handle a large number of non-commercial cases. For these reasons, I recommend that we support this compromise, if it is found acceptable by Senators Dole and Thurmond.



Assistant Attorney General

Washington, D.C. 20530

MEMORANDUM

March 18, 1983

TO: Fred F. Fielding
Counsel to the President

FROM: Jonathan C. Rose *JCR*
Assistant Attorney General

SUBJECT: Talking Points on Bankruptcy Courts
for Calls to Republican Senators

1. The compromise Dole bill, S. 443, would provide for 156 judges, including 20 circuit judges, 26 regular district judges and 110 district judges assigned to bankruptcy divisions in 55 out of the 94 judicial districts. It would provide for bankruptcy administrators to handle administrative matters and uncontested proceedings, while the judges would handle only contested matters. The bankruptcy division judges could handle non-bankruptcy matters if it were clear that such assignment would not interfere with the handling of the bankruptcy caseload.

2. We favor this proposal over Senator Heflin's Article I approach because it would cost less, avoid all constitutional uncertainties, avoid jurisdictional litigation, and result in the appointment of fewer total judges. It also would help achieve our goal of offsetting the liberal impact of the judges appointed by President Carter, for the judges that are provided could be called upon to handle all types of cases, including sensitive social issues.

3. We oppose the Article I approach sponsored by Senator Heflin because:

A. It would split jurisdiction over bankruptcy cases and related matters between the district courts and the bankruptcy courts. This would cause needless expense to the parties, who would litigate over which court they should be in.

B. It would produce constitutional uncertainty, as the courts struggle to decide whether this new system meets the vague constitutional standards set by the Supreme Court in the Northern Pipeline decision. The system probably is invalid, because it would have persons who lack the judicial power of Article III resolving disputes between private parties based on

state law. The Court in Northern Pipeline was less than clear, but it seems to have held that Article I judges can decide only those disputes to which the government is a party. It indicated that the nature of a dispute as being between private parties, e.g., a contract or tort case, does not change just because one party has asked for a discharge of his debts.

C. The Democrats support the Heflin proposal because it would allow the President to appoint fewer judges who can decide the whole range of federal issues. The Article I judges would be limited strictly to issues of federal bankruptcy law. Conversely, we oppose this approach because we want to appoint judges who will steer the judiciary in a more conservative direction.



Assistant Attorney General

Washington, D.C. 20530

MEMORANDUM

March 18, 1983

TO: Fred F. Fielding
Counsel to the President

FROM: Jonathan C. Rose *JCR*
Assistant Attorney General

SUBJECT: Talking Points on Bankruptcy Courts
for Calls to Republican Senators

1. Must act quickly. It is important that some legislative action on this issue be taken quickly. We are stumbling along under the Emergency (Interim) Rule, but the bankruptcy system is showing strains. After April 1, 1984, it is doubtful whether the district courts will have jurisdiction over bankruptcy cases. It is clear that the terms of the bankruptcy judges, who still do the vast majority of the work, will expire then. Appointing new judges will require substantial lead time, and there is only a little over a year left to the political conventions, after which it will be difficult to obtain confirmation of the President's nominees.

2. Democratic positions. Most Senate Democrats prefer a so-called Article I approach, i.e., to staff separate bankruptcy courts with judges who lack life tenure and have limited jurisdiction. This view is shared by the House leadership. Another approach with Democratic support is that favored by Rep. Rodino, which would staff separate courts with non-fungible Article III judges, appointed for life. Both approaches would satisfy the concern of the Democratic constituent groups, which is that the large number of new judges appointed by President Reagan be limited to bankruptcy and related commercial cases, and be unable to decide civil rights, environmental, labor, etc., issues. Many Democratic judges have been lobbying hard for the Article I approach for this partisan reason, including Jim Browning of the 9th Circuit, Barefoot Sanders of Texas and Frank Kaufman of Baltimore. They all had strong ties to the Kennedy-Johnson Administrations.

3. Our Position. We support the compromise Dole bill, S. 443. It would provide for 156 judges, including 20 circuit judges, 26 regular district judges and 110 district judges assigned to bankruptcy divisions in 55 out of the 94 judicial

districts. It would provide for bankruptcy administrators to handle administrative matters and uncontested proceedings, while the judges would handle only contested matters. The bankruptcy division judges could handle non-bankruptcy matters if the senior bankruptcy judge in the district and the chief judge of the circuit certified that such assignment would not interfere with the handling of the bankruptcy caseload.

We favor this proposal over Senator Heflin's Article I approach because it would cost less, avoid constitutional uncertainties, avoid jurisdictional litigation, and result in the appointment of fewer total judges. It also would help achieve our goal of offsetting the liberal impact of the judges appointed by President Carter, for the judges that are provided could be called upon to handle all types of cases, including sensitive social issues.

4. Objections to Article I approach. We oppose the Article I approach of the Kastenmeier/Heflin bills because of the following problems, which will exist unless all parties to a bankruptcy case consent to have everything heard by the Article I judge.

A. Split jurisdiction. An Article I court would result in jurisdiction being split between district and bankruptcy courts. Avoiding the inconveniences and delays of litigating in several courts was one of the principal goals of the 1978 Act, and was one of the most beneficial results before Northern Pipeline. However, under an Article I approach, the district court would retain related cases, i.e., separate actions where the debtor is a party, but send the bankruptcy case and all of its motion-like proceedings to the bankruptcy court.

B. Doubtful constitutionality. It is doubtful whether an Article I judge can decide core bankruptcy matters where an issue of state law provides the rule of decision. Examples are: whether to allow a claim based on a contract or tort, whether to defeat a claim based on the state law of exemptions or fraudulent conveyances, and whether to affirm the validity and priority of a lien. The Brennan plurality opinion appears to hold that the substantive legal rights at issue do not become "public rights", which an Article I court could decide, just because they are addressed in a federal scheme for discharging debts. "Public rights" by definition involve the government as a party, such as tax, government contracts, immigration and public lands cases. Under the Rehnquist concurrence, the rights at issue probably are still "the stuff of traditional actions at common law", requiring Article III judicial power for a decision.

C. Constitutional uncertainty. The validity of an Article I approach will not be clear until the Supreme Court decides at least one other case, 2-4 years from the time the new system takes effect. In the meantime, there will be considerable

uncertainty and constitutional litigation. If the Court holds that matters involving state law require an Article III judge, we will have appointed 200-300 Article I judges with little to do, as about 85% of the bankruptcy caseload involves issues of state law.

5. Omnibus judges. Any bankruptcy courts bill would be a sensible vehicle to pass omnibus judges. The 51 district and 24 circuit judgeships recommended by the Judicial Conference are needed to handle the growth in civil and criminal caseloads since the last bill was passed in 1978. Also, they would help offset the effect of the liberal judges appointed by President Carter. We can compromise on this under the compromise Dole bill, because many of the bankruptcy division judges will have time to decide a large number of civil and criminal cases. However, we cannot compromise on this under the Heflin bill, as Article I judges are limited strictly to bankruptcy work.