THE WHITE HOUSE

WASHINGTON

September 19, 1983

MEMORANDUM FOR FRED F. FIELDING

THRU: RICHARD A. HAUSER

FROM: JOHN G. ROBERTS

SUBJECT: Department of Justice Proposed Report on S. 645, the "Courts Improvement Act of 1983" Establishing the Intercircuit Tribunal

In late August, the Department of Justice attempted to obtain OMB clearance of its latest version of a report on S. 645. The proposed Justice report expressed support for the creation of a temporary Intercircuit Tribunal, and attempted to condition that support on simultaneous pursuit of more basic reforms of the federal judicial system. We advised OMB on August 29 (copy of memorandum attached) that we continued to oppose any support for the Intercircuit Tribunal. Michael Uhlmann did the same, and accordingly OMB advised Justice that its proposed report could not be cleared. Justice has now responded that its draft report reflects an agreement worked out between Justice and the White House. As "evidence" of the agreement, Justice submitted a May 27 memorandum for Mr. Meese from the Attorney General.

That memorandum simply sets forth the Justice position. It hardly reflects an agreement of any kind. I have raised the matter with Uhlmann, who strongly rejected the suggestion that an agreement to support the Intercircuit Tribunal in any form had been reached. Unless you have a different understanding of where this dispute stands, I will advise OMB that we adhere to our opposition to the Intercircuit Tribunal and are aware of no agreement to support it.

Attachment

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

August 29, 1983

TO: RICHARD A. HAUSER

FROM: JOHN G. ROBERTS

SUBJECT: S. 645 - Courts Improvement Act of 1983

I discussed the latest version of Justice's proposed report on S. 645 with Mr. Fielding earlier this morning. (The report was analyzed in my memorandum of August 22, a copy of which is attached.) Mr. Fielding concluded that we should reiterate our philosophic objection to the Intercircuit Tribunal, and a memorandum doing so is attached for your review and signature.

Attachments

THE WHITE HOUSE

WASHINGTON

August 22, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Department of Justice Report on Subcommittee Markup of S. 645, the "Courts Improvements Act of 1983"

OMB has sent us the Justice Department's proposed report to Senator Thurmond on S. 645, the so-called "Court Improvements Act of 1983." This omnibus bill has cleared the Subcommittee on Courts and is now before the Judiciary Committee. The Administration has previously supported Title I (abolition of mandatory jurisdiction of the Supreme Court) and Title II (abolition of civil priorities), and has previously opposed Title IV (creation of a State Justice Institute). These positions are reiterated in the proposed letter, and I have no objection to them.

Title III would direct OPM to conduct a study of judicial benefits. The original bill increased judicial survivors annuities, but the subcommittee switched to the general study approach. The letter takes no position, stating that it is "most appropriate" for the Executive to defer to the Congress and Judiciary on such matters. I do not know why that is so. The Executive has a critical interest in attracting candidates for the bench, and should assume a larger role in improving judicial benefits. Title III in its present version only calls for a study, however, so I see no need to object to Justice's approach at this time.

Title V would create a bipartisan Federal Courts Study Commission, with representatives from each of the three branches and the state judicial systems, to sit for ten years. Justice supports such a commission - long a pet proposal of the Chief Justice - but supports reducing its life-span to three years. My own view is that the one thing that is not needed in this area is more study, but it is always difficult to resist the call for more research and evaluation. I see no reason not to defer to Justice on the desirability of a commission. The commission would be purely advisory and accordingly the fact that some members would be appointed by the Chief Justice and congressional leaders presents no difficulty.

Title VII would exempt juidicial salaries from standard administrative adjustments, requiring specific legislation to effect any increase. This proposal is a reaction to United States v. Will, 449 U.S. 200 (1980), in which the Supreme Court ruled that increases in judicial salaries which automatically went into effect under general provisions could not be rolled back as with other federal employee salaries. You will recall that existing legislation calls for substantial annual increases under comparability provisions unless Congress acts before a specified date to reduce the increase. Congress invariably rolls back such increases, but, with its typical slippage, usually not until a day or two after they go into effect. In Will, the Justices - in a rare display of unanimity - discharged the distasteful but profitable task of ruling that the increases for federal judicial salaries could not be revoked, citing the judicial compensation clause of the Constitution. Avoiding such back-door increases in judicial salaries strikes me as a good government reform, not because the salaries should not be augmented but because such action should not be taken through inadvertance with constitutional ramifications. Justice opposes the provision, however, on the ground that it will make judicial salary increases harder to obtain. Congress has already taken action in appropriations bills to avoid the Will decision, so the matter is not of sufficient consequence to justify an objection.

Title IX amends the judicial disqualification statute to provide that disqualification not occur until after certification in class action suits. Justice's letter points out that while some reform may be desirable, to address particular problems which have arisen, the proposal as drafted is too broad. I have no objection.

Title VII, perhaps the silliest of the provisions of the bill, would create a new office with the Anglomaniacal title of "Chancellor of the United States." The proposal is another of the Chief Justice's pet projects, so it is not surprising that the new American Chancellor would be appointed by and serve at the pleasure of the Chief, and have the duty of assisting the Chief in the performance of his non-judicial functions. The Chief would select the Chancellor from among Courts of Appeals judges. Justice essentially supports the proposal, suggesting only a few minor modifications. The bill does not specify whether the Chancellor will wear a powdered wig.

Any time a new office is created, and appointment to that office is not by the President, there is an appointments clause issue. Art. II, § 2. The appointments clause does permit appointment of inferior officers by "the Courts of Law", but this would not cover appointment by the Chief Justice alone. The question, therefore, is whether the Chancellor is an "Officer of the United States", who must

accordingly be appointed by the President, with the advice and consent of the Senate. I have no difficulty concluding that he is not, since his duties are purely internal matters of judicial administration, perhaps equivalent to the Clerk of the House. The title "Chancellor of the United States" suggests something more, but that appears to be a function of the pretentiousness of the title rather than the substance of the job. I see no need to create the office of "Chancellor", but also no serious reason to oppose it if it will make the Chief Justice happy.

Title VI of the bill would establish the Intercircuit Tribunal, composed of nine regular judges and four alternates, chosen by the Supreme Court for three-year terms from among active and senior circuit judges. The Tribunal would receive cases referred by the Supreme Court for five years, and sit until it had disposed of all cases referred to it. You are familiar with this proposal, and my objections to it. (See attached memoranda.) Justice supports the proposal, but its support is contingent on the provisional character of the Tribunal and the pursuit of reforms to attack the underlying causes of the Supreme Court's alleged caseload problem. Justice also favors limiting the Tribunal's lifespan to three years. It is my understanding that this modified support position is the result of the deliberations conducted under the auspices of the Cabinet Council. This approach is a significant improvement over Justice's original position, although I would still prefer outright opposition. It is, however, probably not fruitful to continue to pursue our objections at this point. We should discuss.

Attachments

JGR:aea 8/22/83

cc: Subj.
Chron

THE WHITE HOUSE

WASHINGTON

August 29, 1983

MEMORANDUM FOR BRANDEN BLUM
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING Orig. signed by FFF
COUNSEL TO THE PRESIDENT

SUBJECT: S. 645 - Courts Improvement Act of 1983

Counsel's Office has reviewed the proposed Justice Department report on S. 645, the "Courts Improvement Act of 1983." We continue to think that support for Title VI of the bill, which would establish the Intercircuit Tribunal, is ill-advised. The draft Justice Department report itself recognizes the danger that "enlargement of the appellate capacity at the national level would accommodate the expansion of the federal judicial function that has occurred so far, and would open the way for further expansion in the future." Creating an Intercircuit Tribunal to ease the perceived caseload problem of the Supreme Court would simply mask symptoms rather than cure the underlying disease that has resulted in the shifting of so many disputes away from the politically accountable branches or the states to the federal judiciary.

The proposed Justice Department report recognizes this problem, but nonetheless supports creation of a temporary Intercircuit Tribunal on the condition that more basic reforms are also pursued. It makes far more sense to pursue the basic reforms first and then consider whether additional appellate capacity is still needed. Creation of additional appellate capacity will relieve the pressure to pursue more basic reform.

We also question how easy it will be to terminate the Intercircuit Tribunal once it has become a feature of the federal judiciary, particularly if, as seems likely, the Justices simply replace the cases referred to the Tribunal with new ones they otherwise would not have heard. The Intercircuit Tribunal could begin as a temporary expedient but quickly become a necessary crutch.

FFF:JGR:aea 8/29/83

cc: FFFielding
JGRoberts✓
Subj.
Chron

ID #_____ CU

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) 1 1

Name of Correspondent: Brandon Blum

☐ **MI Mail Report** **User Codes: (A)** _____ **(B)** _____ **(C)** _____

Subject: Department of Justice proposed report on S.645, the "Courts Improvement Act of 1983" establishing the Intercircuit Tribunal.

ROUTE TO:		ACTION		DISPOSITION		
Office/Agency	(Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CU#011		ORIGINATOR	83/09/15			/ /
		Referral Note:				
CUAT18		A	83/09/15			/ /
		Referral Note:				
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ACTION CODES:
A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet to be used as Enclosure
I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

DISPOSITION CODES:
A - Answered
B - Non-Special Referral
C - Completed
S - Suspended

FOR OUTGOING CORRESPONDENCE:
Type of Response = Initials of Signer
Code = "A"
Completion Date = Date of Outgoing

Comments: _____

Keep this worksheet attached to the original incoming letter.
Send all routing updates to Central Reference (Room 75, OEOB).
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5/81

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET

ROUTE SLIP

TO	Richard Hauser	Take necessary action ☐
	Mike Uhlmann	Approval or signature ☐
		Comment ☐
		Prepare reply ☐
		Discuss with me ☐
		For your information ☐
		See remarks below ☐
FROM	Branden Blum (x3802)	DATE 9/13/83

REMARKS

DOJ proposed report on S. 645, the "Courts Improvement Act of 1983"

Per our discussions, I have advised Justice that the Administration does not support Title VI of the bill, which would establish the Intercircuit Tribunal. Accordingly, the Justice report should be changed.

Justice has advised me that it feels there is White House support for the Intercircuit Tribunal (see attached memo) and that the Justice report is consistent with the Administration's position.

I do not know whether the attached memo reflects an agreement reached between the White House and Justice on this issue. Please advise.

cc: K. Wilson

OMB FORM 4
Rev Aug 70

Office of the Attorney General
Washington, D. C. 20530

May 27, 1983

MEMORANDUM FOR EDWIN MEESE III
COUNSELLOR TO THE PRESIDENT

FROM: WILLIAM FRENCH SMITH
ATTORNEY GENERAL

SUBJECT: Proposed Intercircuit Tribunal

As you and I discussed at the end of last week's Cabinet Council on Legal Policy meeting, everyone agrees that the federal judicial system, and particularly the Supreme Court, is suffering from serious caseload problems. The Chief Justice's proposal for an intercircuit tribunal has strong and persuasive support. The best position for the Administration to take on this question is, in my judgment, to support a limited version of the intercircuit tribunal (for example, a panel that would exist for an experimental period of three, rather than five, years) but as part of a larger program of judicial reform. Under this approach Congress would also address the workload problems of the lower courts, such as eliminating diversity jurisdiction, abolishing the Supreme Court's mandatory appellate jurisdiction (which accounts for one-fourth of the cases the Court hears annually), limiting federal habeas corpus review of final state court convictions, and creating the additional district and circuit court judgeships the Administration has requested. Any other position would both be incomplete and would put us at odds with many of those who share our views about judicial restraint.

See p. 8 of Justice Rept

John – FYI

THE WHITE HOUSE

WASHINGTON

September 19, 1983

MEMORANDUM FOR FRED F. FIELDING

THRU: RICHARD A. HAUSER

FROM: JOHN G. ROBERTS

SUBJECT: Department of Justice Proposed Report on S. 645, the "Courts Improvement Act of 1983" Establishing the Intercircuit Tribunal

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That memorandum simply sets forth the Justice position. It hardly reflects an agreement of any kind. I have raised the matter with Uhlmann, who strongly rejected the suggestion that an agreement to support the Intercircuit Tribunal in any form had been reached. Unless you have a different understanding of where this dispute stands, I will advise OMB that we adhere to our opposition to the Intercircuit Tribunal and are aware of no agreement to support it.

Attachment

OK – but Pls set up mtg w/ Mike Uhlmann + me to [redacted] + EM to see this straightened out Thanks 9/19

9/20/83 holding Wed. 9/28/83 5:00pm EM's office will confirm

THE WHITE HOUSE

WASHINGTON

September 26, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Talking Points for Intercircuit Tribunal Meeting (Wednesday, September 28, 5:00 p.m.)

The attached talking points review in outline form our objections to the Justice Department proposal to support creation of the Intercircuit Tribunal, and respond to some points raised by Justice.

Attachment

SUGGESTED TALKING POINTS FOR MEETING ON
INTERCIRCUIT TRIBUNAL

-- The President has long opposed bureaucracy and judicial activism. The Intercircuit Tribunal proposal would create a new federal bureaucracy to permit the courts to do more than they already do.

-- By relieving the Supreme Court of some of its more mundane cases, the Intercircuit Tribunal will free the Court to take on more Constitutional cases.

-- Increasing the capacity of the federal judiciary increases its power, ineluctably at the expense of the other branches, including the Executive.

-- Vesting broad powers - essentially those of a Supreme Court Justice - in judges not selected by the President undermines the impact of our own appointees to the Courts of Appeals. However chosen, the members of the Intercircuit Tribunal will be representative of sitting federal appellate judges, a group on which Carterites are disproportionately represented. Why increase the powers of that group?

-- Creating the Intercircuit Tribunal as a "safety valve" for overload in the federal judiciary would relieve the pressure for more basic reform and greater judicial self-discipline. It is like punishing a child who exceeds his allowance by giving him more money. The response is likely to delay a cure by masking the symptoms.

-- Expanding the corps of judges who can render nationally-binding opinions is a first step in the bureaucratization of the Supreme Court. The members of the Intercircuit Tribunal would essentially be Deputy Justices, and their existence would go far to transforming the unique character and sense of responsibility of the Supreme Court.

RESPONSES

-- Point: We will only support creation of the Intercircuit Tribunal for a three-year, experimental period.

Response: Like all new bureaucratic structures, it is likely that once the Tribunal is in place, it will develop a life of its own. Paradoxically, if the Tribunal's critics are correct that the Supreme Court will simply take on new cases to replace those referred to the Tribunal, it will be even harder to terminate the Tribunal. Thus, the greater the failure of the Tribunal, the harder it will be to end it. It will become a necessary crutch.

-- Point: The Justices support the proposal and we will alienate them if we oppose it.

Response: The Court of Appeals and District Court judges are almost unanimous in their vehement opposition to the Tribunal, and we should be at least as concerned about alienating them.

-- Point: Our support will be contingent on more basic reform, and such linkage is a good means of securing that reform.

Response: There is no way to ensure such linkage once we have given our blessing to the Intercircuit Tribunal concept. The proposal should be and will be considered on its own merits.

-- Point: The additional appellate capacity represented by the Intercircuit Tribunal is needed to rein in wayward liberal circuit courts.

Response: Whether the Tribunal will rein courts in or ride off with them will depend on its composition, which under all proposals is beyond our control or even influence. To the extent the Tribunal reflects the disposition of sitting judges, it is unlikely to be a restraining influence. Nor is it likely to give the only slightly more conservative Supreme Court more time to rein in the Courts of Appeals, since the Supreme Court will have to police the Intercircuit Tribunal itself as well as the circuit courts.

-- Point: The Chief Justice has a great deal invested in the proposal.

Response: This is not surprising, since it dramatically increases the powers of the branch he heads and, depending on which appointment scheme is adopted, his own personal power. We have supported many of his proposals - including the ludicrous "Chancellor" proposal - and, if the Chief is at all reasonable, we can be forgiven for defending the institutional interests of our own branch in this instance.