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2	LETTER	ROBERTS TO FRIENDLY (ORIGINAL OF ITEM #1) (OPEN IN WHOLE)	1	11/18/1983	B6	1243

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THE WHITE HOUSE

WASHINGTON

November 18, 1983

Dear Judge:

I know the last thing you need is additional reading material, but I thought the enclosed may be of interest since it contains the Administration's long-awaited statement of a position on the Intercircuit Tribunal proposal. The position bears the muddled marks of compromise, but came out considerably better than I had reason to expect. Basically, the Administration opposes the Tribunal unless it is accompanied by reforms directed to the underlying causes of the caseload problem throughout the federal judiciary. Such reform would include abolition of Supreme Court mandatory appellate jurisdiction, repeal of diversity jurisdiction, and restrictions on prisoner petitions (§ 1983 as well as habeas corpus). In other words, we will only support the proposal if other reforms are enacted that render it unnecessary -- admittedly an odd position logically, but at least on the right side of the question.

There will be peace in Lebanon before Congress repeals diversity jurisdiction or restricts prisoner petitions, so I think our position is fairly fixed. The copy of your letter to Representative Kastenmeier provided valuable ammunition for the internal deliberations on this question, for which I am grateful.

Warmest personal regards for the holiday season.

Sincerely,

John

John Roberts

The Honorable Henry J. Friendly
United States Court of Appeals
Second Circuit
U.S. Courthouse
New York, NY 10007

STATEMENT

OF

JONATHAN C. ROSE

ASSISTANT ATTORNEY GENERAL

OFFICE OF LEGAL POLICY

CONCERNING

THE WORKLOAD OF THE SUPREME COURT

BEFORE

THE COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES

AND THE ADMINISTRATION OF JUSTICE

OF THE

UNITED STATES HOUSE OF REPRESENTATIVES

NOVEMBER 10, 1983

Mr. Chairman and Members of the Subcommittee:

I am pleased to appear today to discuss the nature and causes of the workload crisis now faced by the Supreme Court of the United States, and some possible solutions to that problem.

My testimony today is divided into four parts. The first part addresses the threshold issue of the existence of a workload problem in the Supreme Court. It also addresses the specific inquiry suggested in the invitation to testify -- the role that government litigation policy has played in the growth of the Court's workload.

I will then discuss the causes of the rising federal caseload, and some measures that should be taken to reduce it. Specifically, Part II discusses the need for greater judicial restraint and for Congress to avoid enacting legislation that encourages litigation. Part III discusses a variety of legislative proposals, most of which are already before Congress, which would substantially reduce the caseloads of the Supreme Court and the lower federal courts.

In the fourth and final part of my testimony, I will address the Intercircuit Tribunal proposal.

I. The Supreme Court's Work

A. The Supreme Court's Work

In recent public stateme
Supreme Court have been essentiall
there is a serious workload proble
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plenary review by the Court provic
Justices' statements. Over the p
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Term. This increase in cases a
accompanied by a large increas
from Term to Term. 1/

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113 at the end of th

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bility for this increase, because the Court has
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ly unanimous in their view that
blem in the Court and that remedi-
the statistics concerning cases given
t provide independent support for the
over the past few years, there has been a
number of cases argued before the Supreme
from 156 in the 1979 Term to 183 in the 1982
ease in cases argued each Term has also been
a large increase in accepted cases carried over
Term. 1/

1/ The number of cases accepted for plenary review carried over to the next Term rose from 78 at the end of the 1979 Term to 113 at the end of the 1982 Term.

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filings in the courts of appeals rose from 20,000 to nearly 30,000. 3/

If the Supreme Court is to discharge its responsibilities of interpreting the Constitution, supervising the lower courts, and resolving decisional conflicts, it is clear that the Court cannot simply sidestep the caseload problem by reviewing an ever-smaller fraction of lower court decisions. Accordingly, the workload of the Supreme Court cannot sensibly be separated from the broader problem of overload in the court system as a whole. Remedial measures, if they are to provide more than temporary, symptomatic relief, must address this broader problem.

B. Government Litigation

1. Litigation Statistics. The Subcommittee's invitation to testify asked that the Department of Justice address the extent of government litigation before the Supreme Court, and its contribution to the Court's workload. While the government continues to be the most frequent party to appear before the

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3/ The statistics on inferior court caseloads in this statement are generally taken from the Annual Reports of the Director of the Administrative Office of the U.S. Courts. Year numbers given in connection with such statistics refer to the Administrative Office's reporting years, which end on June 30. For example, reporting year 1982 covers the twelve-month period ending June 30, 1982. Statistics relating to the 1983 reporting year were obtained directly from the Administrative Office of the U.S. Courts.

Court, the general level of government applications for review in the Supreme Court has stayed the same over the past decade. The average annual number of applications has been 68, ranging from a low of 60 in 1978 and 1980 to a high of 80 in 1974. The figure for the most recent term on which complete statistics are available, 1981, was 74. 4/

The government's applications for review are usually granted by the Court. Over the five year period from 1977 to 1981, for example, 70 percent of the government's petitions for certiorari were granted, ranging from a low of 58 percent in 1977 to a high of 79 percent in 1981. 5/ This success rate reflects the careful screening of government cases by the Solicitor General's office before the decision is made to file a petition. In comparison, over the same five-year period, only from 5 percent to 6 percent of all petitions for certiorari filed in the Supreme Court were granted each year.

4/ Government applications from 1972 to 1981, including both certiorari petitions and appeals, were as follows: 1981--74; 1980--60; 1979--65; 1978--60; 1977--68; 1976--65; 1975--61; 1974--80; 1973--75; 1972--73.

5/ For the period from 1972 to 1981, government petitions for certiorari accepted out of all government petitions for certiorari were as follows: 1981--45 out of 57; 1980--31 out of 50; 1979--43 out of 55; 1978--37 out of 52; 1977--33 out of 57; 1976--37 of of 48; 1975--38 out of 50; 1974--47 out of 66; 1973--39 out of 61; 1972--36 out of 52.

The number of cases in which Supreme Court review was sought by a private party suing or opposing the government in litigation also has not changed significantly in the past decade. The average annual number of applications was 1,630 for the period from 1972 to 1981, ranging from a low of 1,513 in 1972 and 1979 to a high of 1,906 in 1976. The figure for the 1981 term was 1,589. 6/

In recent years, the government typically has participated in some manner in about one-half of all cases decided on the merits by the Supreme Court. In the five-year period from 1977 to 1981, the government participated in 48 percent of such cases. 7/ During this period, 70 percent of the cases in which the government participated were decided in favor of the government's position. 8/

6/ The number of applications for review against the government in the period 1972 to 1981, including both certiorari petitions to which the government was respondent and appeals in which the government was appellee, was as follows: 1981--1,589; 1980--1,543; 1979--1,513; 1978--1,735; 1977--1,669; 1976--1,906; 1975--1,532; 1974--1,666; 1973--1,632; 1972--1,513.

7/ Cases in which the government participated out of all cases decided by the Court from 1977 to 1981 were as follows: 1981--136 out of 315; 1980--128 out of 277; 1979--158 out of 281; 1978--122 out of 267; 1977--139 out of 276.

8/ Cases decided favorably to the government out of all cases in which the government participated from 1977 to 1981 were as follows: 1981--111 out of 136; 1980--92 out of 128; 1979--104 out of 158; 1978--82 out of 122; 1977--87 out of 139.

The statistical data suggests that the government's re-litigation policy has not been a significant factor in the recent increase in the Supreme Court's workload. Both the number of cases argued before the Court in which the government was a party 9/ and the number of cases accepted for review by the Court in which the government was a party 10/ have decreased each year since 1979, and have generally decreased over the past ten years. 11/

2. Litigation Policy. The Subcommittee's invitation also requested that the Department discuss the effect of government litigation policy or practice on the generation or avoidance of intercircuit conflicts. In general, the government is in the same position as other parties with regard to its ability to re-litigate legal issues before different courts of

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9/ The number of argued cases in which the government participated as petitioner, respondent, appellant or appellee from 1972 to 1981 was as follows: 1981--57; 1980--68; 1979--78; 1978--63; 1977--75; 1976--65; 1975--76; 1974--89; 1973--67; 1972--75.

10/ For example, the number of granted certiorari petitions filed by the government together with the number of granted certiorari petitions to which the government was respondent from 1972 to 1981 were as follows: 1981--63; 1980--79; 1979--94; 1978--88; 1977--82; 1976--114; 1975--80; 1974--93; 1973--108; 1972--87. When the number of mandatory cases accepted for plenary review (set for argument or jurisdiction noted) in which the government was appellant or appellee are added in, the figures are as follows: 1981--83; 1980--95; 1979--103; 1978--96; 1977--89; 1976--123; 1975--94; 1974--114; 1973--128; 1972--102.

11/ See also the figures cited in notes 4-8 supra.

appeals. Following an adverse decision, both the government and the private parties it faces in litigation may assert the view of the law each believes to be correct in later cases before other courts of appeals, or even in later cases before the same court of appeals where that court is asked to overrule an adverse precedent. Experience shows that the government's position is usually vindicated when the Supreme Court finally decides an issue that has been litigated in a number of circuits.

The timing of the decision to seek Supreme Court review, as it relates to intercircuit conflicts, also merits some brief discussion. If the initial decisions on an issue are favorable to the government's position then there is, of course, no basis for the government to seek Supreme Court review. The question will only arise if private parties opposing the government's position decide not to acquiesce in these decisions and obtain favorable rulings upon re-litigation of the issue in later cases.

In some cases where the initial decision is adverse to the government, the issue presented is of such pressing importance that we will seek Supreme Court review immediately. One example is the district court decision in United States v. Ptasynski, 12/ which invalidated the crude oil windfall profits

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12/ Ptasynski v. United States, 550 F. Supp. 549 (D. Wyo. 1982), rev'd, 103 S. Ct. 2239 (June 6, 1983).

tax. More frequently, however, Supreme Court review will not be sought until favorable decisions have been obtained in other circuits. This practice reflects, in part, the fact that the Supreme Court is more likely to grant review if it sees a need to resolve a difference among the circuits. It also reflects the general consideration that a reviewing court is more likely to uphold the position of a litigant if that position is supported by the reasoned opinions of inferior courts.

As a general matter, re-litigation of issues in different circuits, within reason, is not undesirable and has positive value in promoting the sound development of the law. The appellate judges who first address an issue may not fully appreciate the ramifications of their decision. Early decisions may be found to be wrong or overbroad by courts that consider an issue later with the benefit of both the initial decisions and the arguments of counsel that focus on the reasoning and practical consequences of those decisions. Re-litigation of an issue also enables the lower courts to set out different options and to explore different resolutions of a legal question. This aids the Supreme Court when it finally considers the issue.

II. The Need for Restraint

A. Judicial Restraint

While the Supreme Court cannot be faulted for hearing more cases, in light of the caseload explosion in the district and circuit courts, it seems evident that some of the Court's decisions have contributed to that explosion. In recent times, the Supreme Court has demonstrated a hospitality to constitutional arguments which address claims the resolution of which has traditionally been the responsibility of the state judiciaries or the political process. It has been observed that the Court has been part of a trend wherein the role of the courts is viewed less as one of interpreting the Constitution and statutes, guided principally by their text and the legislative intent of the Framers and Congress, to one that encourages courts to resolve public policy questions guided by the perceived values of an enlightened society. 13/ We view this trend of moving from interpretivism to judicial activism as disturbing. To some degree, decisions that expand rights and enlarge judicial remedies foster more litigation and counteract the intended effect of court reform legislation.

The growth of prisoner litigation provides a good illustration of this problem. Thirty years ago, the number of

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13/ See R. Bork, The Struggle Over the Role of the Court, National Review 1137-39 (September 17, 1982).

suits brought by prisoners in the federal courts each year was about thirteen hundred. 14/ Today, the annual figure is about 30,000, and the number continues to increase rapidly from year to year. 15/ Prisoner petitions are exceptional among major categories of federal litigation -- not only are they typically frivolous, but they are also largely unaffected by the normal disincentives to litigation. The expense of attorney's fees and other costs -- a significant deterrent to frivolous suits in most other areas -- is largely absent, since most prisoners sue pro se and qualify for in forma pauperis status. 16/ Since litigation appeals to prisoners primarily as a legitimized form of aggression against the system and a means of relieving boredom, 17/ the normal disincentive of the stress and unpleasantness of litigation is also largely inapplicable.

14/ The number of prisoner suits in 1953 was 1,336; it had been fairly constant for the preceding decade and was 1,204 in 1944. By 1961 the number had increased to 2,609; by 1970 to 15,997; and by 1982 to 29,303. A table giving annual figures from 1961 to 1982 appears in S.Rep. No. 226, 98th Cong., 1st Sess. 4 n.11 (1983).

15/ See S. Rep. No. 226, 98th Cong., 1st Sess. 4 n.11 (1983).

16/ See P. Robinson, An Empirical Study of Federal Habeas Corpus Review of State Court Judgments 4(a) (Dept. of Justice 1979) (in sample studied, 81.8% of habeas corpus petitions in forma pauperis and 79.2% pro se); Turner, When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts, 92 Harv. L. Rev. 610, 617 (1979) (prisoner §1983 suits in sample studied overwhelmingly in forma pauperis and pro se); Note, Limitation of State Prisoners' Civil Rights Suits in the Federal Courts, 27 Catholic U.L.Rev. 115, 116-17 (1977).

17/ See generally Note, supra note 16.

Congress never authorized this flood of litigation; its growth is primarily attributable to judicial decisions. The legal basis for such suits was provided primarily in the 1950's, 1960's and 1970's, when the Court expanded the federal causes of action contained in surviving fragments of Reconstruction-era legislation. This is true of both suits under 42 U.S.C. § 1983 18/ and federal habeas corpus petitions by state prisoners, 19/ which together account for the bulk of prisoner litigation. 20/ The Supreme Court, as well as the lower courts, has suffered from the impact of this added caseload. In a recent term, 20 percent of

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18/ See generally Developments in the Law--Section 1983 and Federalism, 90 Harv.L.Rev. 1133, 1153-56, 1169-75 (1977).

19/ See generally William French Smith, Proposals for Habeas Corpus Reform in R. Rader & P. McGuigan, eds., Criminal Justice Reform: A Blueprint 137, 137-40, 147-50 (1983); Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 463-507 (1963); Mayers, The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian, 33 U. Chi. L. Rev. 31 (1965); Oaks, Legal History in the High Court--Habeas Corpus, 64 Mich. L. Rev. 451 (1966).

20/ See S.Rep. No. 226, 98th Cong., 1st Sess. 4 n.11 (1983).

The remedy for federal prisoners corresponding to state prisoner habeas corpus is the motion remedy of 28 U.S.C. §2255. The §2255 motion remedy is essentially a codification of habeas corpus, as it applies to federal convicts, and its expansion in scope through judicial innovation has gone hand-in-hand with the corresponding expansion of state prisoner habeas corpus. The remedy against federal officials corresponding to §1983 suits against state officials is the Bivens-type action, which was created ex nihilo in the case of Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).

the cases decided by the Court involved § 1983 and over 10 percent of all filings in the Court were state prisoner habeas corpus cases. 21/

The tremendous growth in the number of actions under 42 U.S.C. §1983 deserves particular note. 22/ Section 1983 was enacted in 1871 as a direct response to the rise of Ku Klux Klan terrorism in the South during Reconstruction, and the general unwillingness or inability of the governments in the former Confederate States to control this pervasive disorder. Originally intended as a narrow civil remedy, § 1983 has ballooned into a major source of federal court litigation with a scope far beyond anything that Congress contemplated in 1871. The 1,254 pages of annotations under 42 U.S.C.A. § 1983 (1981) reflect the enormous range of state and local activity that is now the subject of

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21/ See Justice Sandra Day O'Connor, "Comments on the Supreme Court's Workload," Delivered Before a Joint Meeting of the Fellows of the American Bar Foundation and the National Conference of Bar Presidents, New Orleans, Louisiana, February 6, 1983, at 14 (20% of cases decided by Supreme Court in the 1981 term involved § 1983); Justice Lewis F. Powell, Address Before the A.B.A. Division of Judicial Administration, San Francisco, California, Aug. 9, 1982, at 13 n.14 (estimated 450 state prisoner habeas corpus cases filed with Supreme Court in 1981 term); see also id. at 9 n.10 ("During the 1981 Term . . . petitions for certiorari were filed in more than 30 cases by a single prisoner. Each petition . . . became a case on our docket, duplicate copies were sent to each Justice, and each of us had to make a personal decision as to the petition's merit.").

22/ In 1960, only 280 suits filed in federal district courts were characterized as "civil rights" actions. For reporting year 1983, it can be estimated that § 1983 suits alone accounted for over 26,000 cases in the district courts.

litigation under § 1983. No grievance seems too trivial to escape translation into a § 1983 claim. For example, the question whether a school official who insisted that a student cut his or her hair has invaded a Constitutional right and is liable under § 1983 has been before every federal court of appeals and has drawn at least nine denials of certiorari from the Supreme Court, three of them with dissenting opinions. 23/

The dramatic increase in the scope of § 1983 is the result of several decisions. First, the Court has held that § 1983 applies to the actions of state officers even where the actions are unsupported by state law, custom and usage, and adequate state-law remedies exist. 24/ Thus, § 1983 now covers many wrongs previously actionable only in state tort suits. Second, the Supreme Court has held that municipalities are "persons" subject to suit under § 1983 and that a municipality has no "good faith" defense to § 1983 actions. 25/ Third, the Court has said that even negligently caused injuries may be encompassed by § 1983. 26/ Finally, because exhaustion of state

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23/ See Zeller v. Donegal School District Bd. of Education, 517 F.2d 600, 602-03 (3d Cir. 1975).

24/ See Monroe v. Pape, 365 U.S. 167 (1961). But see id. at 225-36 (Frankfurter, J., dissenting) (legislative history shows that § 1983 was not meant to reach acts subject to state remediation).

25/ See Monell v. Dept. of Social Services of the City of New York, 436 U.S. 658 (1978), overruling Monroe v. Pape, 365 U.S. 167 (1961); Owen v. City of Independence, 445 U.S. 622 (1980).

26/ See Paratt v. Taylor, 451 U.S. 527 (1981).

administrative remedies is not a prerequisite to bringing suit under § 1983, 27/ individuals and municipalities often are not given the chance of resolving disputes before cases are filed in federal court.

Increased litigation also results when constitutional rights are defined ambiguously, or in a manner that requires unfeasibly precise judgments or distinctions in their application. In the areas of obscenity and automobile searches, for example, upon occasion the Court drew lines so fine or uncertain that a case-by-case determination by the Court seemed to be required in every instance. 28/ When the rules of decision are unclear, litigants have a powerful incentive to petition for Supreme Court review. Now that the Court has adopted clearer rules in these areas, 29/ the number of such cases coming to the Supreme Court should decrease significantly.

While the Court has resolved many uncertainties that once existed on these particular issues, new problems have arisen

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27/ Patsy v. Florida Bd. of Regents, 457 U.S. 496 (1982).

28/ See Roth v. United States, 354 U.S. 476 (1957); Jacobellis v. Ohio, 378 U.S. 184 (1964); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 82-83 (1973) (Brennan, J., dissenting); Robbins v. California, 453 U.S. 420 (1981).

29/ See Miller v. California, 413 U.S. 15 (1973); United States v. Ross, 456 U.S. 798 (1982); New York v. Belton, 453 U.S. 454 (1981).

in other areas. The Court's recent decision in Solem v. Helm 30/ is a good example. In that case, the Supreme Court invalidated a sentence of life imprisonment without parole imposed on a seven-time felony convict, and authorized judicial review of sentences of imprisonment for proportionality under a set of criteria stipulated in the Court's opinion. In contrast, its 1980 decision in Rummel v. Estelle, 31/ and its 1982 decision in Hutto v. Davis, 32/ to all appearances, had barred such review of prison terms. It is predictable that large numbers of incorrigible offenders will now challenge their sentences in federal court, and that considerable efforts will be required to elaborate on the Solem test. 33/

The decision in Solem is particularly disturbing in light of the previous effects of corresponding developments in the area of capital punishment. Invoking similar principles of proportionality, the Supreme Court, since 1971, has imposed a host of special requirements and restrictions on the imposition of capital sentences. The over-particularization of Constitutional rights in that area, coupled with the open-ended availability of habeas corpus and dilatory tactics by defense

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30/ 51 U.S.L.W. 5019 (June 28, 1983).

31/ 445 U.S. 263 (1980).

32/ 454 U.S. 370 (1982).

33/ See 51 U.S.L.W. at 5029 (Burger, C.J., dissenting).

attorneys in capital cases, has virtually nullified the capital punishment legislation of the states. 34/ For the foreseeable future, it appears that capital cases will be the subject of endless litigation in the state courts, the inferior federal courts, and the Supreme Court itself.

It also appears that the Court may make its job more burdensome by the length of its opinions. Last term, the Court issued 151 full opinions, many of which were long, broad in scope, and heavily footnoted, and which contained an extraordinary number of concurrences and dissents. The number of opinions per case may reflect an unavoidable division of opinion over the correct result in some cases. However, the number of long, exhaustive opinions could be an indication that the Court is not resolving the minimum number of issues on the narrowest possible grounds. 35/

34/ See generally William French Smith, Proposals for Habeas Corpus Reform in P. McGuigan and R. Rader, eds., Criminal Justice Reform: A Blueprint 137, 145-46 (1983); Statement of Justice Lewis F. Powell Before the Eleventh Circuit Conference in Savannah, Georgia, May 8-10, 1983, at 9-14.

35/ For the view of a state justice on how a court can make its job easier without decreasing its docket, see Douglas, How to Write a Concise Opinion, 22 Judges' Journal 4 (Spring 1983).

B. Congressional and Executive Restraint

As the federal government has assumed a greater role in the economic and social life of the nation, the function and authority of the federal courts has also greatly expanded. The courts have been charged with the interpretation and implementation of a plethora of new statutes and regulations. In proposing and enacting many of these initiatives, and particularly the economic regulatory statutes passed over the last dozen years, both the Executive Branch and the Congress have unnecessarily encouraged litigation and, in effect, have left critical policy decisions for resolution by the courts.

The most fundamental objections to this trend reflect concerns of federalism and the separation of powers; the increased power of the federal judiciary is necessarily at the expense of the functions of the state judiciaries and the Constitutional prerogatives of the political branches of government. The caseload problem provides additional support for a cautious attitude by Congress and the Executive toward proposals to enlarge the role of the courts.

If all federal statutes were precise and unambiguous, and judicial review of their implementation were narrowly circumscribed, the resulting role and workload of the courts would be less significant. Under many federal statutes, however, the substantive standards or standards of review (or both) are

ambiguous or inconsistent. 36/ This thrusts the courts into a policy-making role and ensures that abundant opportunities for litigation will arise in the administration of the affected programs.

The adverse consequences of effectively delegating legislative functions to the courts through vague or open-ended statutes are frequently compounded by legislative decisions to delegate enforcement functions to unaccountable private interests. This tendency is reflected both in broad statutory definitions of the classes of persons given standing to sue under regulatory statutes 37/ and in ever-broader statutory authorization of awards of attorney fees against the government. Under the traditional American rule, each party bears its own costs of litigation. Statutory departures from this rule may establish favorable standards for the award of fees to a party prevailing

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36/ Examples include the Freedom of Information Act, 5 U.S.C. § 552; Clean Air Act, 42 U.S.C. §§ 7401 et seq.; Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201 et seq.; Endangered Species Act, 16 U.S.C. §§ 1531 et seq.; Toxic Substances Control Act, 15 U.S.C. §§ 2601 et seq.; Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136 et seq.; Occupational Safety and Health Act, 29 U.S.C. §§ 651 et seq.; and Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 et seq.

37/ Suits by "any person" or "any citizen" are authorized to enforce a broad range of regulatory statutes including the Clean Air Act, 42 U.S.C. § 7604; Endangered Species Act, 16 U.S.C. § 1540(g); Federal Water Pollution Control Act, 33 U.S.C. § 1365; Marine Protection, Research and Sanctuaries Act, 33 U.S.C. § 1415(g); Noise Control Act, 42 U.S.C. § 4911; and Toxic Substances Control Act, 15 U.S.C. § 2619.

against the government but provide no comparable authorization for the government to recover the full costs of a suit it has defended at the public's expense where the outcome of the litigation demonstrates that the suit was unwarranted. 38/ When the incentives are structured in this manner, it is inevitable that such suits will proliferate.

Considering the effects of broad judicial review in many areas and the workload crisis in the court system, proposals to create judicial review in areas in which it does not currently exist should be approached with caution. In the area of veterans benefits determinations, for example, judicial review is now generally barred by statute. 39/ The Senate has passed legislation which would create judicial review in that area. 40/ When the courts are struggling with their current caseloads, one may

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38/ See, e.g., Hensley v. Eckerhart, 103 S. Ct. 1933, 1937 & n.2 (1983), construing Civil Rights Attorney Fees Awards Act, 42 U.S.C. § 1988 (in suits under 42 U.S.C. § 1983 and other specified civil rights statutes, prevailing plaintiff normally receives attorney fees but prevailing defendant only receives fees if suit was frivolous or harassing); Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E) (statutory authorization of awards of attorney fees limited to assessment of fees against the United States in favor of substantially prevailing complainants).

39/ See 38 U.S.C. § 211(a).

40/ S. 349 of the 97th Congress.

question the wisdom of a change the immediate effect of which would be a major increase in the workload of the district courts. 41/

Proposals to increase the scope of judicial review in areas in which it currently exists in a more limited form are another type of change that merits careful scrutiny in light of these concerns. The proposal to eliminate the presumption of validity for administrative action (the "Bumpers Amendment") provides an example. 42/ If parties challenging administrative action have the benefit of review standards that afford them a greater likelihood of success, such challenges will necessarily be brought with greater frequency.

III. Legislative Reforms

In the long run, judicial restraint and the enactment of legislation that neither encourages litigation nor defers legislative decisions to the courts is the surest way to bring the caseload explosion under control. However, there are immediate steps that could be taken to reduce federal caseloads.

41/ See Statement of Deputy Assistant Attorney General Carolyn B. Kuhl Concerning Judicial Review of Veterans' Claims Before the Subcomm. on Oversight and Investigation of the House Comm. on Veterans' Affairs (July 21, 1983); S. Rep. No. 466, 97th Cong., 2d Sess. 141-43 (1982)

42/ See generally Statement of Assistant Attorney General Jonathan C. Rose on S. 1080 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary (Sept. 21, 1983).

Several reform proposals now before Congress would go far toward meeting the workload problem faced by the Supreme Court and the rest of the federal judiciary.

A. Supreme Court Mandatory Appeals

As stated in our letter of September 13 on H.R. 1968, the proposal to make the Supreme Court's appellate jurisdiction fully discretionary, except for appeals from three-judge district courts, should be enacted immediately. 43/ In the 1982 term, for example, 21 appeals set for oral argument would have been eligible for review only by certiorari under the reform. 44/ There is no means of determining precisely how many of these cases would have been accepted for discretionary review. However, the Justices have stated that they often find it necessary to call for full briefing and oral argument in mandatory appeal cases of no general public importance on account of the complexity of the legal questions presented. 45/ Since such cases would simply be

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43/ See Letter of Assistant Attorney General Robert A. McConnell to Honorable Peter W. Rodino Concerning H.R. 1968 (Sept. 13, 1983).

44/ The figure of 21 does not include four appeals from three-judge district courts, which would not be affected by the reform of H.R. 1968. The remaining cases set for argument in the term were 154 certiorari cases and 3 original jurisdiction cases.

45/ See Mandatory Appellate Jurisdiction of the Supreme Court -- Abolition of Civil Priorities -- Juror Rights: Hearing on H.R. 2406, H.R. 4395 and H.R. 4396 Before the Subcomm. on

(Footnote Continued)

denied review if presented on certiorari, it is clear that the reform would be of significant value in reducing the Supreme Court's workload, though not by itself sufficient to resolve the workload problem. 46/

B. Diversity Jurisdiction

The Department of Justice has consistently supported proposals to limit or abolish diversity jurisdiction, 47/ which in the past year burdened the federal district courts with over 57,000 state law cases. Diversity cases account for about one-quarter of all civil filings, 40 percent of all civil trials, and 60 percent of all civil jury trials in the federal courts. The general elimination of diversity jurisdiction would not only relieve the district courts of this burden, but would also produce a large reduction in the workload of the courts of appeals -- about 15 percent of all appeals of district court decisions arise in diversity cases.

(Footnote Continued)

Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 97th Cong., 1st Sess. 22-24 (1982) (letter of the Justices to Chairman Kastenmeier).

46/ See Justice Sandra Day O'Connor, "Comments on the Supreme Court's Workload," Delivered Before a Joint Meeting of the Fellows of the American Bar Foundation and the National Conference of Bar Presidents, New Orleans, Louisiana, February 6, 1983, at 12.

47/ See generally Diversity of Citizenship Jurisdiction: Hearing on H.R. 6691 Before the Subcomm. on Courts, Civil

(Footnote Continued)

The House of Representatives has passed a bill to abolish diversity jurisdiction in the past. Last year, this Committee again reported the proposal favorably. 48/ Unfortunately, this important reform has not been viewed favorably by the Senate. I should note, Mr. Chairman, that you recently introduced a series of bills that would limit diversity jurisdiction in different ways. The Department continues to support the complete abolition of diversity jurisdiction as the best approach. While we have not yet taken formal positions on the specific proposals in these bills, we are encouraged by the practical and flexible approach they represent, and hope that they may provide the basis for a generally acceptable compromise.

C. Habeas Corpus

There is a generally recognized need for reform in the system of federal collateral remedies, including federal habeas corpus for state prisoners, by which the federal district courts effectively engage in appellate review of state criminal cases. 49/ The Administration's habeas corpus reform proposals

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(Footnote Continued)

Liberties and the Administration of Justice of the House Comm. on the Judiciary, 97th Cong., 2d Sess. 7-12 (1982) (testimony of Assistant Attorney General Jonathan C. Rose).

48/ See 129 Cong. Rec. H 6023 (daily ed. July 29, 1983) (remarks of Rep. Kastenmeier).

49/ See, e.g., Rose v. Lundy, 455 U.S. 509, 546-47 (1982) (Stevens, J., dissenting); Schneckloth v. Bustamonte, 412

(Footnote Continued)

were considered expeditiously in the Senate following their transmittal in March of 1982, and they have been reported favorably by the Senate Judiciary Committee in this Congress by a vote of 12 to 5. 50/ There have, however, been no hearings or other action on the proposals in this Subcommittee in the twenty months since their transmittal, though a number of the Subcommittee's members have sponsored bills incorporating them. 51/ We strongly recommend that the Subcommittee act promptly on our proposals in the next session of Congress.

(Footnote Continued)

U.S. 218, 250 (1973) (concurring opinion of Powell, J., joined by Burger, C.J., and Rehnquist, J.); Chief Justice Warren E. Burger, 1981 Year-End Report on the Judiciary 21; Sandra Day O'Connor, Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge, 22 William & Mary L. Rev. 801, 814-15 (1981); Justice Lewis F. Powell, supra note 21, at 9-13; Interview with Justice Potter Stewart, 14 The Third Branch 1, 6 (Jan. 1982); Judge Carl McGowan, The View from an Inferior Court, 19 San Diego L. Rev. 659, 667-69 (1982); Judge Henry Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142 (1970); The Habeas Corpus Reform Act of 1982: Hearing on S. 2216 Before the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. 231-40 (1982); see generally S. Rep. No. 226, 98th Cong., 1st Sess. 3-6 (1983).

50/ See S. Rep. No. 226, 98th Cong., 1st Sess. 31 (1983). The Senate bill is S. 1763; the corresponding House bill in the current Congress is H.R. 2238. See generally the cited Senate Committee Report, supra; The Habeas Corpus Reform Act of 1982: Hearing on S. 2216 Before the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. 16-107 (1982) (Administration statements and testimony); William French Smith, supra note 19.

51/ See S. Rep. No. 226, 98th Cong., 1st Sess. 2 nn.3-4 (1983).

D. Administrative Alternatives to Litigation

In certain areas, the replacement or supplementation of existing judicial remedies with more efficient administrative mechanisms is a promising reform option. 52/ We have supported a general authorization of the imposition of civil penalties for fraud under government funding and assistance programs by administrative process. 53/ This reform would reduce the litigation burden on both the courts and the government while making the administration of these programs and the punishment of fraudulent practices more effective.

E. Other Reforms

There are various other possibilities that may be considered in addressing the workload problem of the courts.

52/ See generally Recommendations and Reports of the Administrative Conference of the United States 23-26, 203-375 (1979) (regarding monetary penalties for regulatory violations); Erwin N. Griswold, "Cutting the Cloak to Fit the Cloth: An Approach to Problems in the Federal Courts," The Brendan F. Brown Lecture Delivered at Catholic U. of America Law School, Washington, D.C., March 23, 1983, at 14 (regarding employers' liability).

53/ See Program Fraud Civil Penalties Act: Hearing on S. 1780 Before the Senate Comm. on Governmental Affairs, 97th Cong., 2d Sess. 11-29 (1982) (testimony of Assistant Attorney General J. Paul McGrath).

While we have not yet taken a position on specific reforms discussed below, we believe that they merit serious study and consideration.

In areas in which there is a particularly great need for technical expertise or for national uniformity and certainty in the law, there may be value in increased use of appellate forums with exclusive nationwide jurisdiction. The principal existing example is the Federal Circuit Court of Appeals, which has exclusive jurisdiction over appeals in such areas as government contracts, international trade, and patents. 54/ This type of reform directly reduces the workload of the regional appellate courts by transferring certain classes of cases to national forums. Since a substantial part of the Supreme Court's work consists of resolving differences that arise among the various circuits, consolidating appeals in a single forum tends to reduce the Supreme Court's workload as well. 55/

54/ This approach is exemplified to a more limited extent by the District of Columbia Circuit Court of Appeals. The D.C. Circuit has concurrent jurisdiction with the regional appellate courts in review of most types of administrative action, but in some areas its jurisdiction is exclusive. The Temporary Emergency Court of Appeals, a specialized court staffed by judges from the regular circuit courts, illustrates a different approach to consolidated appellate review.

55/ See Justice Sandra Day O'Connor, "Comments on the Supreme Court's Workload," Delivered Before a Joint Meeting of the Fellows of the American Bar Foundation and the National Conference of Bar Presidents, New Orleans, Louisiana, February 6, 1983, at 12-13; Justice William J. Brennan, Some

(Footnote Continued)

Forums with nationwide jurisdiction also currently exist at the trial level -- the Court of International Trade, the Tax Court and the Claims Court. Trial courts of this type also reduce the workload of the regionally-based courts by handling certain classes of cases that would otherwise have to be adjudicated in the district courts. If a trial court of nationwide jurisdiction has exclusive jurisdiction in its subject matter area and review of its decisions is limited to a single appellate court, economies result for the regional circuit courts and the Supreme Court as well.

There may be additional areas in which creation of courts with nationwide jurisdiction in defined subject matter areas would be beneficial. For example, proposals have been advanced to create an Article I court to assume the reviewing function in Social Security cases which is presently carried out in the district courts. 56/ While we have not yet taken a position on this proposal, we view the idea with great interest.57/

(Footnote Continued)

Thoughts on the Supreme Court's Workload, 66 Judicature 230, 232, 235 (1983); Interview with Chief Judge Howard T. Markey of the Federal Circuit Court of Appeals, 15 The Third Branch 1, 7 (Oct. 1983) (no petitions for certiorari granted by Supreme Court to review Federal Circuit decisions in first year of its existence).

56/ See, e.g., H.R. 3865 and H.R. 5700 of the 97th Congress.

57/ In 1981, the number of Social Security cases commenced in the district courts was 9,319; in 1982 it was 13,188. Extrapolating from the figure for the first nine months of the present year (20,027), it appears that the number of

(Footnote Continued)

F. Omnibus Judgeships.

We have suggested a number of measures to decrease the number of cases filed in the federal court system, and thereby reduce the pressure on the Supreme Court from below. However, as long as the caseloads continue to grow, and as long as the jurisdiction of the courts and the incentives to litigate remain the same, the need for new district and circuit judges must be met.

Every two years, the Judicial Conference of the United States conducts an exhaustive study of the need for new judgeships. The Department's experience has been that both the procedures and the recommendations of the Judicial Conference are sound. Since the last judgeship bill was passed in 1978, the Judicial Conference has twice identified the new positions that are needed. While the Senate has incorporated the Judicial Conference's 1982 recommendations in S. 1013, the bankruptcy courts bill approved by the Senate last April, the House has taken no action. We strongly urge that action be taken in the near future to create these positions.

(Footnote Continued)

Social Security cases brought in 1983 will be about 27,000. Information provided by the Department of Health and Human Services.

IV. The Intercircuit Tribunal Proposal

Near the start of this year, Chief Justice Burger advanced the proposal to create an Intercircuit Tribunal as an immediate response to the workload problem of the Supreme Court. This proposal has since been introduced in the House of Representatives as H.R. 1970 and has been reported by the Subcommittee on Courts of the Senate Judiciary Committee as Title VI of S. 645.

The Intercircuit Tribunal proposal would provide the Supreme Court with an adjunct tribunal to which cases could be referred for a nationally binding decision. All versions of the proposal have had certain common features. The Tribunal would automatically go out of existence at the end of a certain period of time unless renewed or continued by new legislation. The Tribunal would be composed of sitting circuit judges. The Supreme Court could refer any type of case to the Tribunal for a nationally binding decision. The decisions of the Tribunal would be reviewable by certiorari in the Supreme Court.

The Department of Justice has reviewed and carefully weighed the substantial amount of testimony that has been presented before both houses of Congress on the Intercircuit Tribunal proposal. The recommendation of Chief Justice Burger and the favorable comments of several scholars of the federal

judiciary must be given great weight. 58/ However, no consensus has been developed for the proposed Intercircuit Tribunal, and a number of serious concerns have been expressed about the impact that such a tribunal would have on the operations of the federal judiciary. 59/

The Department is not able to endorse the Intercircuit Tribunal proposal without the concurrent adoption of significant changes in the federal judicial system. The changes we have suggested above would address the underlying problem of the caseload explosion in the Supreme Court and lower federal courts.

58/ See, e.g., Chief Justice Warren E. Burger, Annual Report on the State of the Judiciary (Feb. 6, 1983); Remarks of Chief Justice Warren E. Burger at the 60th Annual Meeting of the American Law Institute (May 17, 1983); Statement of Daniel J. Meador on H.R. 1970 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary (April 27, 1983); Testimony of A. Leo Levin on S. 645 Before the Subcomm. on Courts of the Senate Comm. on the Judiciary (March 11, 1983); Statement of Chief Judge John C. Godbold on H.R. 1970 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary (Sept. 22, 1983); Statement of Chief Judge Collins J. Seitz on H.R. 1968 and H.R. 1970 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary (Sept. 22, 1983).

59/ See, e.g., Statement of Chief Judge Wilfred Feinberg on H.R. 1970 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary (Sept. 22, 1983); Statement of Chief Judge Donald P. Lay on H.R. 1970 and H.R. 1968 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary (Sept. 22, 1983); Judge J. Clifford Wallace, The Nature and Extent of Intercircuit Conflicts: A Solution Needed for A Mountain or a Molehill?, 71 Cal. L. Rev. 913 (1983).

We could endorse the Intercircuit Tribunal proposal only after Congress has acted on existing proposals to repeal the Court's mandatory appellate jurisdiction, limit or repeal diversity jurisdiction, and restrict prisoner petitions. These reforms should be tried before, or at least at the same time as, a structural change of perhaps major magnitude.

If Congress sees fit to adopt a temporary Intercircuit Tribunal proposal under the circumstances we have described, we believe that the proposed structure contained in Title VI of S. 645, as approved by the Senate Subcommittee on Courts, is generally a good approach. The principal change that we would make to S. 645 would be to shorten the length of the term of the Tribunal from five to three years, with the judges serving for the entire three year period. We would be pleased to provide this Subcommittee with additional technical advice if such is desired.

* * *

To summarize, while the volume of federal government litigation in the Supreme Court has not increased in the past ten years, the general growth of litigation in the federal courts has resulted in a workload problem in the Court. A response that only addressed and temporarily accommodated the effects of this litigation explosion would be inadequate. It is essential that the growth in the caseload of the Supreme Court and the lower

federal courts be addressed by a broad based set of reforms. Generally, the courts must exercise judicial restraint and Congress must act in a manner that will decrease rather than increase the incentives to litigation.

Specific measures that should be adopted in response to the caseload problem include completing the evolution of the Supreme Court's jurisdiction toward discretionary review, limiting or eliminating diversity jurisdiction, addressing the problem of prisoner petitions, and developing, in appropriate areas, administrative alternatives to litigation. We believe that these proposals will go a long way toward eliminating the underlying cause of the Court's caseload crisis -- the burgeoning federal caseload. Therefore, we would endorse the concept of an Intercircuit Tribunal only if Congress takes action on these less fundamental but highly significant changes.

I would be pleased to answer any questions the Committee may have.

THE WHITE HOUSE

WASHINGTON

November 18, 1983

Dear Judge:

I know the last thing you need is additional reading material, but I thought the enclosed may be of interest since it contains the Administration's long-awaited statement of a position on the Intercircuit Tribunal proposal. The position bears the muddled marks of compromise, but came out considerably better than I had reason to expect. Basically, the Administration opposes the Tribunal unless it is accompanied by reforms directed to the underlying causes of the caseload problem throughout the federal judiciary. Such reform would include abolition of Supreme Court mandatory appellate jurisdiction, repeal of diversity jurisdiction, and restrictions on prisoner petitions (§ 1983 as well as habeas corpus). In other words, we will only support the proposal if other reforms are enacted that render it unnecessary -- admittedly an odd position logically, but at least on the right side of the question.

There will be peace in Lebanon before Congress repeals diversity jurisdiction or restricts prisoner petitions, so I think our position is fairly fixed. The copy of your letter to Representative Kastenmeier provided valuable ammunition for the internal deliberations on this question, for which I am grateful.

Warmest personal regards for the holiday season.

Sincerely,

John

John Roberts

The Honorable Henry J. Friendly
United States Court of Appeals
Second Circuit
U.S. Courthouse
New York, NY 10007

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

CHAMBERS OF
HENRY J. FRIENDLY
CIRCUIT JUDGE
U. S. COURTHOUSE
NEW YORK N. Y. 10007

October 18, 1983

John Roberts, Esq.
The White House
Washington, D.C.

Dear John:

Thank you for your letter of October 11 with its combination of good and bad news.

I was a little surprised at the bad news since I had had word that on the congressional side a considerable amount of disillusionment with the intercircuit tribunal proposal had developed. I had understood in particular that the House Subcommittee was going to convass the Justices. My information was that while this would undoubtedly develop a majority in favor of the proposal there would be opposition from three or perhaps four -- hardly a formidable endorsement.

I am enclosing a copy of my letter of June 14 to Chairman Kastenmaier of the House Subcommittee in the hope that it may furnish you with a few more arguments. I had written a similar letter on June 7 to Senator Dole, but the Kastenmaier letter is a bit better.

As you doubtless know, Chief Judge Feinberg has expressed the opposition of the Second Circuit. I think quite a number of other circuits, notably the Seventh, also oppose.

If we are to have an intermediate tribunal, I would prefer the National Court of Appeals which would be an institution that over time could command respect rather than the supposedly temporary intercircuit tribunal with appointments so designed as almost to insure mediocrity. One thing which I completely fail to understand is how an intercircuit tribunal, whether of 27 judges or of 13, is going to handle the en banc problem. The bills that I have seen make no provision whatever for this.

October 18, 1983

John Roberts, Esq.
2

Perhaps the best strategy would be to have someone introduce a bill for a National Court of Appeals, in the hope that bickering about the relative merits of the two proposals might result in neither being enacted.

All good wishes.

Sincerely,

Henry Friendly

Enclosure

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

CHAMBERS OF
HENRY J. FRIENDLY
CIRCUIT JUDGE
U. S. COURTHOUSE
NEW YORK N. Y. 10007

June 14, 1983

Hon. Robert W. Kastenmaier, Chairman
Subcommittee on Courts, Civil Liberties and
the Administration of Justice
Committee on the Judiciary
United States House of Representatives
Washington, D.C. 20510

Dear Representative Kastenmaier:

I heartily endorse the letter dated June 7, 1983, which Chief Judge Feinberg has written you on behalf of the judges of the Second Circuit in active service in regard to the Intercircuit Tribunal proposed in H.R. 1970. Having lived for many years with the problem of the increasing burdens on all levels of the federal court system and written or testified in opposition to previous proposals to inject a fourth level, I wish to submit some additional thoughts, which I would like to have made part of the record.

All citizens must be concerned over what Justice Brennan has termed "a calendar crisis" in the Supreme Court, see New York State Bar Journal, May 1983, p. 14. All must desire to help the Justices to surmount this. Yet there is danger that these concerns and desires may lead to inadequately considered action which, without significantly assisting the Supreme Court, will produce serious evils. With respect, in my view H.R. 1970 fits that description.

The first adverse effect is delay. In order to appreciate this, one should consider a typical case litigated in federal court. The case, at least if it be a civil one, will have spent some years awaiting trial in the district court. It will then have spent some months -- in some circuits more than that -- awaiting hearing and still more time awaiting decision on appeal. The Federal Rules of Appellate Procedure authorize petitions for rehearing, and these are often accompanied by suggestions that the rehearing should be en banc. This means that after denial of the petition by the panel, all judges in active service must be polled on whether any one of them desires a vote on

the suggestion and if he (or a senior judge who was on the panel) so requests, a poll must be taken. If a majority of the active judges vote for such a rehearing, there is a further delay of several months. While the vast majority of suggestions for rehearing en banc do not reach the vote stage, the process nevertheless piles much additional time on the long delay already experienced. Meanwhile the time for seeking certiorari from the Supreme Court is tolled. The losing party then has 60 days in which to petition for certiorari; his opponent 30 days in which to respond. The time required for disposition of the petition will vary. If the matter is not ripe for action by the Supreme Court before it recesses in late June, at least another three months of delay are added.

Interposition of the proposed Intercircuit Tribunal would add substantial further delay in the cases referred to it for decision. If the rules of the Tribunal were to follow the Federal Rules of Appellate Procedure, nearly three months would be allowed for briefing. One cannot predict how long after that the case would be reached for argument, but an estimate of another month would be sanguine. Then there is the time needed for decision and opinion writing, the latter of which would be considerably augmented by the fact that the panels presumably would not remain together after argument but would return to their regular seats, for petitions for rehearing, and (although H.R. 1970 does not now provide for this) for affording opportunity to seek reconsideration either by the full Tribunal or at least by something more than the seven member panel. If this would be the end, one could still argue that the process would be no more time consuming than in the Supreme Court; indeed, due to lower congestion in the Tribunal, it might be less. But it would not be the end. A litigant who had fought thus far will not refrain from taking the next step, namely, again petitioning the Supreme Court for certiorari. This would entail, in almost all cases, a further delay of at least four months, more if the petition was not ripe for decision by the Court by late June. Then, in the cases where certiorari was granted, and I will state later why I think this proportion would be substantial, there would be the further indeterminate delay, close to an additional year, incident to briefing and awaiting argument and decision in the Supreme Court. Although the number of such cases would not be large, they are important to the parties and the law remains uncertain until they are decided with finality.

Creation of the proposed Tribunal would increase the number of decisions of the federal courts of appeals and of the highest courts of the States subjected to further review -- with the delay necessarily attendant upon this. Congress should not proceed under an illusion that reference to the Tribunal would occur only in the fifty cases a year which the Supreme Court wishes to be relieved of the burden of deciding. The present system builds in a salutary restraint on the grant of certiorari; when the Court grants a petition, it is taking on additional work. If the restraint were to be lifted by the possibility of reference to the Tribunal for decision, many more petitions would be granted. Proponents of a new layer of review consider this to be a good thing; indeed, the supposed lack of adequate reviewing capacity was the primary reason for their support of the Hruska Commission's proposal for a National Court of Appeals. I do not, for reasons stated in my testimony before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 94th Cong., 2d Sess., on S. 2762 and S. 3423, p. 231 et seq. At the very least the House of Representatives must seriously consider how H.R. 1970 would affect the number of decisions of the federal courts of appeals and of the highest courts of the States that are subjected to further review.

Another difficulty relates to the Supreme Court's determination to refer or not to refer a case to the Tribunal for decision. Section 259(a) of H.R. 1970 differs from the corresponding provision of the Senate bill, S.645, in not expressly requiring the affirmative vote of five Justices. Whatever the number, it would seem that, unless the Supreme Court delegated the certiorari granting power to the Tribunal, separate talleys on the grant of certiorari and reference to decide would be required. How does this leave the Justice who believes a case to be worthy of review by the proposed Tribunal but not, at least initially, by the Court? What about the Justice who perceives a majority on the Court for what he considers the right result but cannot predict what result would be reached by the Tribunal? In the hearings before the Hruska Commission, Professor Rosenberg, a proponent of the National Court of Appeals there being considered as he is of the Tribunal, conceded that this would impose added burdens on the Supreme Court which he characterized as "consequential, if not crushingly onerous", Hearings, Vol. II, p. 1088. Before enacting legislation of this sort Congress should have some notion how the Supreme Court would operate under it.

Let me now explain why I think a substantial proportion of the Tribunal's decisions would be reviewed by the Supreme Court. I begin by conceding that there are a few areas, of which interpretation of the Internal Revenue Code is the most evident, where the Court might be willing to let even what four of its members regarded as an erroneous decision stand -- largely because such a decision quickly becomes known to the Congress, which can take corrective action for the future if so advised. Those who say that this benign attitude would spread over the whole breadth of the Tribunal's jurisdiction, which is in no way limited to intercircuit conflicts, have not sufficiently focused on the problem of conscience with which a Justice would be confronted. At present a Justice can decline to vote for certiorari without having to worry overmuch whether the decision of the lower court was correct since he can be confident that if it was not, some other court will disagree. Under §1272(b) no other court can disagree; the decisions of shifting seven member panels of the Tribunal even by a 4-3 vote, "shall be binding on all courts of the United States and, with respect to questions arising under the Constitution, laws, or treaties of the United States, on all other courts." To be sure the Court would not be precluded from granting certiorari and taking unto itself a later decision which followed the rule laid down by a panel of the Tribunal. Yet I should think it would be hard for a Justice to permit what he thought to be serious error to be mandated throughout the land for many years when he had the power to correct it here and now. With more certioraris granted and a considerable portion of the Tribunal's decisions taken for review, the Supreme Court's argument calendar would soon be back to or above what it now is -- with delay the only result.

By the very nature of things a large proportion of the decisions of the Tribunal reviewed by the Supreme Court will be reversed. The combination of even a moderately high review rate and a very high reversal rate in the cases taken for review would hardly inspire public confidence in the Tribunal.

Another point that seems to me to have been inadequately considered is the relationship between the Intercircuit Tribunal and the highest courts of the states. Although judges of the federal courts of appeals will not happily accept the idea of being bound by decisions

of shifting panels of their own rank who cannot reasonably be supposed to derive superior wisdom because they come from different parts of the country, the affront is magnified when such a panel is allowed to impose its will on constitutional questions (including questions under the Supremacy Clause) on the highest courts of the fifty states. When Chief Justice Marshall spoke of "giving the court of the nation the power of revising the decisions of local tribunals, on questions which affect the nation", in Cohens v. Virginia, 6 Wheat. (19 U.S.) 264, 423 (1821), he was hardly thinking of something like these panels. I respectfully suggest that the views of the Conference of State Chief Justices with respect to H.R. 1970 should be solicited.

I wish finally to make some comments about the way in which the proposed Tribunal is to be constituted. Professor Meador testified before Senator Dole's subcommittee that he thought the method proposed in S.645, essentially the same as that in H.R. 1970, was "the poorest way to achieve the objectives that we have in mind" but supported the bill nevertheless. In my view, if we must have a federal appellate court, intermediate between the courts of appeals and the state courts on the one hand and the Supreme Court on the other, of which I am not at all convinced, it should be so constituted that it would acquire an institutional character and come to command the respect of the Supreme Court, the federal courts of appeals, the highest courts of the states, the bar, and the public. Only such a court could acquire the capacity to render opinions that would be respected not only for the precise point decided but as sources affording guidance for the determination of other issues. In H.R. 1970 this goal is subordinated to an idea of equality among the federal circuits (regardless of wide disparities in their population and judgeships) and of the virtue of randomness. Each circuit council (including district judges) would select two circuit judges, with no indication what the basis for choice would be, and the judges so selected "shall be designated to serve on sitting panels in such a manner that all of the judges on the Tribunal hear and determine cases that are representative of all types of cases reviewed by the Tribunal." §61(a)(2). No provision is made for en banc reconsideration although something of the sort will have to be established unless Congress desires to make it possible for four judges of the Tribunal to impose forever (unless modified by the Supreme Court) a view with which a huge majority of the Tribunal disagrees then or later.

Chief Justice Burger advanced an alternative proposal in his annual address to the American Law Institute in May. Under this proposal the Tribunal would consist of one judge from each of the circuits, appointed by him, and would sit in panels of nine. While this meets some of the concerns voiced above, it gives rise to others.

To say that the Tribunal is simply a temporary experiment, which will expire on September 30, 1988, §7(d)(1), is not a sufficient answer to the points here made. Experience has shown that once institutions are created, they take on a life of their own. No one can now tell what will be occupying the attention of members of Congress in 1988, although it would not be hard to guess one. Unless the Tribunal proved to be a total failure, the likelihood is that its term would be prolonged simply for lack of consensus what to do. Furthermore, if existence of the Tribunal had led the Supreme Court to greater liberality in the grant of certiorari as suggested above, it might indeed be difficult to dispense with the Tribunal.

It is argued that, whatever the drawbacks of the Tribunal, it must be created since the Supreme Court is facing a crisis and there is no other solution. I strongly doubt this. One way to help the Court would be to eliminate mandatory jurisdiction, which the Justices have been urging for years. The Chief Justice has estimated that mandatory appeals constitute 25% of the argued cases. Of course, the relief from abolishing mandatory jurisdiction would not be that great since many cases where jurisdiction is now mandatory would be good candidates for certiorari. A year or two would tell how much the relief would be.

Another measure of relief, which lies within the Court's power to accomplish at any time, is greater care in the grant of certiorari. One proposal to that end is Justice Stevens' suggestion to substitute a rule of five for the rule of four. Such a rule could be adopted, say, for the October 1983 Term, with the Court automatically reverting to the rule of four thereafter unless a majority of the Court found the rule of five to have been an improvement. Justice Brennan has said, New York State Bar Journal, May 1983, p. 15:

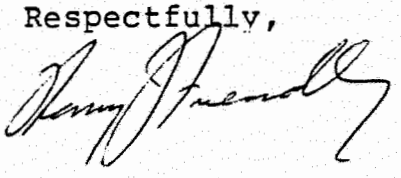
> I must admit frankly that we too often take cases that present no necessity for announcement of a new proposition of law but where we believe only that the court below had committed error.

and has remarked that the Court has "made mistakes in granting certiorari at an interlocutory stage of a case when allowing the case to proceed to its final disposition in the court below might produce a result that makes it unnecessary to address an important and difficult constitutional question". A high order of priority should be given to a scholarly study of the Court's handling of certiorari petitions in the last several terms; this should be understood not as a criticism of the Justices but as an effort to help them to develop and apply criteria for the grant of certiorari more satisfactory than those now embodied in Supreme Court Rule 17. There are many proposals that would lessen the flow of certiorari petitions. In addition to those discussed by Chief Judge Feinberg, I would favor more frequent use of the rule permitting the imposition of sanctions for filing a certiorari petition when there was no reasonable basis for thinking it would be granted -- a practice which the Court has recently initiated. A look at any issue of the United States Law Week would show how many such petitions there are. If it be said that imposition of sanctions would be a further burden on the Justices, the answer is that once the practice had become established it would not need to be often invoked.

I have not discussed the provisions in §§1259(a) and 1272 authorizing the Supreme Court to delegate to the Tribunal the function of granting or denying certiorari. This is not because I believe the idea to be a good one but rather beacuse I do not believe the Supreme Court would utilize the authority.

I apologize for the length of this letter. My excuse is the importance to all citizens of not tampering, even if only in spirit, with the Founders' concept of "one supreme Court" unless, after deliberate consideration, the need should be found by Congress to be clear and the means to be the most appropriate.

Respectfully,



The Washington Post

intercircuit tribunal

DATE: 11-25-83

PAGE: A21

INSIDE: THE FEDERAL JUDICIARY

Congress adjourned last week, still deadlocked over competing proposals to restructure the nation's bankruptcy system, which the **Supreme Court** declared was unconstitutional 18 months ago.

When Congress returns in late January, however, the pressure to do something will be even more intense.

For one thing, there is a formidable new player in the game: organized labor. The AFL-CIO is now seeking amendments to make it more difficult for companies to abrogate negotiated contracts by filing for bankruptcy. Labor's lobbyists know they cannot get what they want unless the stalemate over the bankruptcy court is broken.

Second, if nothing is done, the bankruptcy courts could self-destruct on March 31. On that date, the statutory authority that has allowed the system to continue operating on an ad hoc basis expires. Barring congressional action, the nation's bankruptcy judges will no longer exist.

"The current system will collapse," said **Jonathan C. Rose,** assistant attorney general for legal policy. "We think it would be an extremely dire situation," he said, leaving only the district judges, already swamped with work, to handle tens of thousands of bankruptcy cases. "This is not a false alarm."

The current problem stems from 1978 legislation designed to streamline the bankruptcy system by expanding the judicial power of bankruptcy judges. The law gave them authority that was previously reserved for U.S. district court judges to rule on all issues related to bankruptcy proceedings.

But the law did not give them the protections, such as tenure for life, enjoyed by district court judges. For that reason, the Supreme Court ruled the system unconstitutional in June, 1982.

Congress has been paralyzed on the issue since by competing interests that will not budge. Some, like House Judiciary Chairman **Peter W. Rodino Jr.** (D-N.J.) want bankruptcy judges to get tenure for life, which would give President Reagan a windfall of choice judicial appointments.

Others, notably Rep. **Robert W. Kastenmeier** (D-Wis.), chairman of

REP. ROBERT W. KASTENMEIER
... opposes upgrading of judges

the subcommittee on courts, and the **Judicial Conference of the United States,** headed by Chief Justice **Warren E. Burger,** think the bankruptcy judges still should have less status and be forced to depend on other federal judges for much of their authority.

Further complicating things, the consumer credit industry is trying to push through amendments designed to correct what it considers abuses of the bankruptcy laws by consumers trying to escape debts.

And now labor, following the highly publicized contract abrogation by Continental Airlines, has gotten into the act.

"... It is clear to us that any legislation dealing with collective bargaining must also be a part of a larger effort to deal with bankruptcy judges and consumer bankruptcy issues," said **Howard Marlowe,** associate director of legislation for the AFL-CIO.

"We would like to see it taken care of early next year," he said, noting that the AFL-CIO is now trying to get the "key parties on the House side to talk to each other and work this thing out."

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COURT WORKLOAD ... In August, Kastenmeier wrote Burger, soliciting the views of the Supreme Court justices on how to reduce its workload. So far, only Justice **John Paul Stevens** has responded.

In a letter to Kastenmeier, he criticized Burger's proposal for a new national appeals court—an "intercircuit tribunal"—to help resolve the problem. Stevens said the new court "would do nothing to alleviate the workload" of the Supreme Court and would create a variety of problems for the federal appeals courts, including reducing them from "the second to the third rank" in the federal system.

"Although outsiders tend to minimize the significance of intangible factors such as one's status in the profession," Stevens wrote, "I can assure you that such factors are not unimportant for judges who are being paid far less than the true value of their services."

The Reagan administration also has told Kastenmeier's subcommittee that it cannot endorse the proposal unless Congress moves to reduce the load. Among the steps recommended by Rose in testimony are restricting petitions by prisoners and repealing or limiting the types of cases the Supreme Court is required by law to review.

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ANOTHER VIEW ... **Paul D. Carrington,** dean of the Duke University Law School, has offered Kastenmeier's subcommittee his analysis of what might be causing the overload. The federal appeals process, he said, has increasingly become "a game of chance" in which the outcome is always uncertain.

Adversaries are thus encouraged to appeal, rather than settle a dispute, he recently told the subcommittee.

Carrington said litigants are uncertain about the law because they do not know the identity of the appeals court judges who will decide their cases. That depends on the random selection after an appeal is filed of three judges to sit on an appellate panel.

—Fred Barbash

DATE: 12-31-84

PAGE: 7

The New York Times

Burger Urges Congress To Help Cut Court Load

By LINDA GREENHOUSE
Special to The New York Times

WASHINGTON, Dec. 30 — Chief Justice Warren E. Burger today renewed his call to Congress for help with the Supreme Court's caseload.

In his year-end report on the judiciary, the Chief Justice warned, "Supreme Court Justices must now work beyond any sound maximum limits." He added that "the precious time for reflection so necessary to a court that decides cases with far-reaching consequences has been reduced to, and possibly below, an absolute minimum."

The Chief Justice urged Congressional action on two proposals he has advocated for a number of years. One is the creation of a new Federal court, an "intercircuit tribunal," that would relieve the Supreme Court's caseload by deciding legal questions to which the 13 Federal appeals courts provideconflicting answers.

The Court feels obliged to resolve many such conflicts in order to give Federal statutes a uniform interpretation throughout the country. At least several dozen of the 150 cases the Court decides on the merits each term are in this category.

Decisions Would Be Binding

Under the Chief Justice's proposal the Supreme Court would refer cases to the new court, the decisions of which would be binding on all Federal courts unless the Supreme Court itself decided to modify a decision. The new court would have no permanent judges, but would borrow judges from other Federal courts.

Bills to create the new court were introduced in both houses of Congress in the last session, but did not reach the floor.

In an interview published Saturday in the American Bar Association Journal Mr. Burger called for the creation of a 10th Supreme Court justice to ease the administrative burdens that have forced him to "put in 80 hours a week of work."

The additional justice would work with the Administrative Office of the United States Courts and the two Federal judicial administration bodies that Mr. Burger heads by virtue of his position as Chief Justice.

For Administration Only

Under the Burger's proposal, the administrator would be selected by the Chief Justice from among the sitting Federal judges and would hear no cases. The new position would have to be approved by Congress.

Chief Justice Burger was quoted by the journal as saying his administrative work did not slow adjudication of cases but "it interferes with my family life, hobbies, recreation and a lot of other things."

The Chief Justice's other proposal for reducing the caseload was for abolishing the Supreme Court's "mandatory" jurisdiction. While the Court has discretion over whether to accept most cases, it is required by statute to issue rulings on the merits in several categories of cases.

Mandatory appeals are most frequently taken from decisions by Federal courts declaring acts of Congress unconstitutional. All nine Justices have expressed support for abolishing the mandatory jurisdiction. In each of the last four sessions of Congress, bills that would do so passed the House or the Senate, but then died.

'Inflation' in the Courts

In his 15-page year-end report, the Chief Justice said the Federal courts were suffering from "inflation," with District Court caseloads up by 7.4 percent last year and those of the appeals courts up by 6.2 percent.

He did not give a comparable percentage for the Supreme Court, noting only that the Court had 5,100 cases on its docket last term. The Court's caseload has held at that level since 1979, with the exception of the 1981 term when the docket had 5,300 cases. It then fell to 5,100 and is down slightly so far this term.

Chief Justice Burger also called for increased salaries for Federal judges. He said it was "unseemly" and "unjust" that judicial salaries had failed to keep up with inflation, and suggested in a footnote that allowing this erosion of judicial salaries might be unconstitutional as well.

The footnote referred to Article III of the Constitution, which provides that the compensation of Federal judges "shall not be diminished during their continuance in office."

Jury Proposal Criticized

The Chief Justice observed that former Supreme Court law clerks, "with few exceptions," earn more than Justices after 10 years of law practice. The Chief Justice's salary is $104,700 a year, while the Associate Justices earn $100,600; judges of the United States Courts of Appeals earn $80,400, and Federal District judges $76,000.

Some of the strongest language in the Chief Justice's report was aimed at proposals to increase the role of lawyers in jury selection in Federal courts.

While many state court systems permit lawyers to conduct questioning of prospective jurors, current Federal rules permit the judge to assume this function, and many judges do so. As a result, jury selection for Federal trials tends to be much quicker than in state courts.

"Under no circumstances" should Congress change the current judge-oriented procedure, the Chief Justice said. He noted that two bills were introduced in the last session of Congress to require Federal judges to turn the questioning over to the lawyers.

Chief Justice Burger said, "This would add an intolerable and unwarranted burden on our Federal Court system," with "incalculable delays" as a result.

He urged Congress to approve a request by the Judicial Conference, the governing body of the Federal court system, for a new building on Capitol Hill to house two agencies, the Administrative Office of the United States Courts and the Federal Judicial Center.

Operations of these agencies are now scattered in five buildings. The site in question is next to Union Station, the railroad passenger terminal. It is owned by the Federal Government and is used as a parking lot.

The Chief Justice returned to one of his favorite themes, the need to turn prisons into "factories with fences" by providing increased training and employment for prisoners.

He quoted a Washington taxi driver's description of the prison problem: "Right now, prisons are like putting a shirt in water with no soap. Putting it in and taking it out. It's getting wet, but you ain't getting no dirt out."

2