The Burger plan to unburden the court

Chief Justice Burger has long warned of a breakdown in the US justice system unless the ballooning caseload of the Supreme Court is reduced. Now he has spelled out a bold experiment – a special federal appeals court to ease the burden on the Supreme Court for five years while more permanent solutions are sought.

Both Congress and private citizens are challenged to respond.

For Congress this means two things:

● Pushing laws to activate the Burger plan or an effective alternative. Without a full-scale legislative effort, the argument will never be fully aired between reformers and those who believe substantial change is unnecessary or demeaning to the stature of the court.

● Testing all statutes on whether they create more causes for legal action like the plethora of new ones cited by Mr. Burger as weighing down the justices. Not that Congress should refrain from developing new legal protections where necessary. But how about some sort of "litigation impact statement" to help lawmakers foresee the results of their work?

For private citizens the challenge is likewise twofold:

● As individuals they can help resolve more disputes outside the courtroom, as Justice O'Connor has urged. She suggests America's litigious society need not be as litigious as it is if people would remember the golden rule of doing unto others as they would be done by: "That might make you a little more generous, save you a lot of time and money, and make my job a lot easier."

● Private citizens can also help through their companies or other institutions. For example, Mrs. O'Connor calls on businessmen to consider providing in their contracts that any dispute be resolved by arbitration. She notes the delays and costs that can be avoided through legislatively mandated arbitration, simplified probate proceedings, and dispute resolution centers where laymen rather than lawyers help mediate landlord-tenant and other problems between citizens.

Yes, the public can foster a climate for lessened litigation. But the Supreme Court's rising caseload needs specific attention now. Ironically, for all the warnings by Mr. Burger and other justices, there has been a decline in the caseload this term. But such a dip is seen as affected by the high cost of litigation running into the recession. The expectation is for numbers between 4,000 and 5,000 a year to continue, with the justices writing opinions on 140 to 150.

A tall order compared to the thousand cases coming before the court a generation ago. Or compared to the 400 to 500 it would receive under a screening plan proposed some time ago by a commission headed by constitutional law professor Paul Freund. The weeding out would be done by a new judicial body.

This far-reaching reform has been criticized as cutting off litigants from the right of Supreme Court review. But, even as it is, there are many conditions under which appeal to the Supreme Court is not guaranteed. Congress ought to look into the matter as it considers the whole question.

Chief Justice Burger's proposal echoes another part of the Freund recommendation: a body to decide cases referred by the Supreme Court. These would mainly have to do with conflicts of interpretation between the circuit courts – conflicts that occur frequently in such realms as social security, environmental law, taxation, and labor relations. There would still be right of review by the Supreme Court, but the presumption would be to let the new body's decisions stand and cut down on resort to the high court.

Naturally there has been skepticism over Mr. Burger's suggestion of a "temporary" body, what with the potential difficulty of dismantling a court once it is established. He has wisely sought to address such skepticism by suggesting that the body not have its own quarters but take up residence in existing facilities. He would have it report each year on how well the experiment is going. Meanwhile, a new commission would undertake an overall study of the court structure with an eye to future recommendations.

Can America afford to do less when its chief justice warns of judicial breakdown?

2/9/83
DATE

The New York Times

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No Need for a Sub-Supreme Court

For 14 years Chief Justice Warren Burger has sought sympathy for the burdens of the "overwhelmed, overworked" Supreme Court. Congress, which could provide relief, remains skeptical. The Chief Justice's latest cry for help, in a speech to the American Bar Association, remains unpersuasive.

Mr. Burger proposes a five-year experiment with a kind of assistant Supreme Court, made up of judges drawn from the 13 Federal circuit courts of appeals. The new court would relieve the high court of the least important third of its decision docket — cases in which two or more lower appellate courts have issued conflicting interpretations of the same legal issue. Resolving those conflicts is desirable, but the high court's time usually can be used more effectively on other cases.

Yet since the losers could still try to take their cases to the Supreme Court, the sub-supreme court would add another layer of judicial decision-making and delay, even on an experimental basis. It would also divert experienced judges from courts with heavy caseloads of their own.

In arguing for the new court, the Chief Justice overstates the issue. The high court may have a caseload problem, but is it "perhaps the most important single problem facing the judiciary"? And are the Court's 5,000 filings a year all so weighty that "fundamental changes in the structure and jurisdiction" are necessary?

Congress could help in a much simpler way. It could eliminate completely a category of cases the justices are now required to hear, such as appeals from state supreme courts upholding the constitutionality of state laws. Abolishing this mandatory jurisdiction would leave the justices free to choose only the cases they deemed most important for oral argument and signed opinions.

Opposition to this reform is just about nonexistent. The House and Senate have each voted for it — but in different Congresses. The bill became temporarily unmovable two Congresses ago when Senator Jesse Helms of North Carolina attached one of his unconstitutional school prayer bills, but that snag should not deter renewed efforts.

The Chief Justice considers the change important but inadequate. But this reform can be tested easily enough. Let Congress try it before experimenting with sub-supreme courts.

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Court of Appeals

THE WHITE HOUSE

WASHINGTON

February 10, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Chief Justice's Proposals

The Chief Justice devoted his Annual Report on the State of the Judiciary to the problem of the caseload of the Supreme Court, a problem highlighted by several of the Justices over the course of last year. The Chief Justice proposed two steps to address and redress this problem: creation of "an independent Congressionally authorized body appointed by the three Branches of Government" to develop long-term remedies, and the immediate creation of a special temporary panel of Circuit Judges to hear cases referred to it by the Supreme Court -- typically cases involving conflicts between the Courts of Appeals.

It is difficult to develop compelling arguments either for or against the proposal to create another commission to study problems of the judiciary. The Freund and Hruska committees are generally recognized to have made valuable contributions to the study of our judicial system -- but few of their recommendations have been adopted. I suspect that there has been enough study of judicial problems and possible remedies, but certainly would not want to oppose a modest proposal for more study emanating from the Chief Justice.

The more significant afflatus from the Chief Justice is his proposal for immediate creation of a temporary court between the Courts of Appeals and the Supreme Court, to decide cases involving inter-circuit conflicts referred to it by the Supreme Court. The Chief would appoint 26 circuit judges -- two from each circuit -- to sit on the court in panels of seven or nine. The Chief estimates that this would relieve the Supreme Court of 35 to 50 of its roughly 140 cases argued each term. The Supreme Court would retain certiorari review of decisions of the new court.

It is not at all clear, however, that the new court would actually reduce the Court's workload as envisioned by the Chief. The initial review of cases from the Courts of Appeals would become more complicated and time-consuming. Justices would have to decide not simply whether to grant or

deny certioriari, but whether to grant, deny, or refer to the new court. Cases on certiorari from the new court would be an entirely new burden, and a significant one, since denials of certiorari of decisions from the new court will be far more significant as a precedential matter than denials of cases from the various circuits. The existence of a new opportunity for review can also be expected to have the perverse effect of increasing Supreme Court filings: lawyers who now recognize that they have little chance for Supreme Court review may file for the opportunity of review by the new court.

Judge Henry Friendly has argued that any sort of new court between the Courts of Appeals and the Supreme Court would undermine the morale of circuit judges. At a time when low salaries make it difficult to attract the ablest candidates for the circuit bench, I do not think this objection should be lightly dismissed. Others have argued that conflict in the circuits is not really a pressing problem, but rather a healthy means by which the law develops. A new court might even increase conflict by adding another voice to the discordant chorus of judicial interpretation, in the course of resolving precise questions.

The proposal to have the Chief Justice select the members of the new court is also problematic. While the Chief can be expected to choose judges generally acceptable to us, liberal members of Congress, the courts, and the bar are likely to object. In addition, as lawyers for the Executive, we should scrupulously guard the President's appointment powers. While the Chief routinely appoints sitting judges to specialized panels, the new court would be qualitatively different than those panels, and its members would have significantly greater powers than regular circuit judges.

My own view is that creation of a new tier of judicial review is a terrible idea. The Supreme Court to a large extent (and, if mandatory jurisdiction is abolished, as proposed by the Chief and the Administration, completely) controls its own workload, in terms of arguments and opinions. The fault lies with the Justices themselves, who unnecessarily take too many cases and issue opinions so confusing that they often do not even resolve the question presented. If the Justices truly think they are overworked, the cure lies close at hand. For example, giving coherence to Fourth Amendment jurisprudence by adopting the "good faith" standard, and abdicating the role of fourth or fifth guesser in death penalty cases, would eliminate about a half-dozen argued cases from the Court's docket each term.

So long as the Court views itself as ultimately responsible for governing all aspects of our society, it will, understandably, be overworked. A new court will not solve this problem.

Contact: Toni House

(202) 252-3211

EMBARGOED UNTIL DELIVERY
4:00 P.M., CENTRAL STANDARD TIME
SUNDAY, FEBRUARY 6, 1983
(Subject to changes on delivery)

ANNUAL REPORT ON THE STATE OF THE JUDICIARY

REMARKS OF WARREN E. BURGER
CHIEF JUSTICE OF THE UNITED STATES
at the
MID-YEAR MEETING OF THE
AMERICAN BAR ASSOCIATION

New Orleans, Louisiana
Sunday, February 6, 1983

THE NEED FOR "TIME AND FRESHNESS OF MIND ... AND REFLECTION ... INDISPENSABLE TO THOUGHTFUL, UNHURRIED DECISIONS."

For the 14th year you provide me the opportunity to lay before the leaders of our profession some of the problems facing the courts. On prior occasions I have often presented a series of problems, my observations on each, and a request for your advice and support.

This year I will focus on only one subject which is perhaps the most important single, immediate problem facing the judicial branch. It is the caseload of the Supreme Court. I am well aware that having raised my voice on many occasions during the past 14 years concerning the overburdening of the courts and of the Supreme Court, I take the risk that anyone takes in repeatedly "crying wolf." But I suggest the analogy of the early pioneer who, looking out the window of his log cabin, saw a pack of wolves destroying his livestock, killing his chickens and clawing at his smokehouse with its supply of food. Someone in that situation need not be apologetic about calling for help -- if there is anyone within hearing who can help.

Beginning when I first appeared as an advocate in the Supreme Court and later during my service on the United States Court of Appeals, I was able to observe the Court's work at close range and I soon reached the conclusion that there were some serious problems down the road. When I took my present office in 1969 I was well aware that in 1953, the first year of the tenure of my distinguished predecessor Chief Justice Warren, the Court had 1,463 cases on its docket and had issued 65 signed Court opinions.[1] The caseload had grown steadily from 1953 to 1969.

Footnote(s) 1 will appear on following pages.

In the Term that ended last July the Supreme Court had 5,311 cases on its docket, and issued 141 signed Court opinions.[2] You will observe that this is an increase of approximately 270% in the docket and more than double the number of signed opinions. The best single measurement[3] of the Court's work is its signed Court opinions. We see therefore that during my tenure in office the steady increase of preceding decades has become almost a tidal wave. Occasionally filings reach a plateau but not for long. Part, but not all of the explanation for the increase in cases is that in just the short span of 14 years, Congress has enacted more than 100 statutes creating new claims, entitlements and causes of action. Judicial opinions have also created new causes of action but to a lesser extent by far.

In this period another development has become acute. Gradually over the last 30 years or more the content and complexity of the cases have changed drastically and often there are few precedents to guide the courts in these new areas. The wholly new kinds of cases that are reaching the courts reflect changes in our increasingly complex society and changes in the relationships of government to individuals.

Increasingly the Court has been confronted with more claims of prisoners relating to the condition of their confinement; some are absurd and frivolous, some are valid. There are new claims of teachers and professors relating to their tenure and the conditions of their employment, and new claims of employment discrimination. There are challenges to the validity of new kinds of taxes levied by the hard-pressed states giving rise to serious constitutional questions. We have seen difficult and complex cases arising out of long overdue recognition of the rights of women and of minorities. New legal problems arise from the growth of multi-national corporations, and cases on conflicts between protection of the environment and development of new sources of energy and new industry. Still other new cases relate to an ancient problem, the status and the rights of illegitimate children.

This is not surprising for we live in a dynamic society. As a people we have never been content with the status quo. We have recognized the impact of all this on the lower courts by more than doubling the number of judges in 30 years. In 1953

THIS IS THE PROBLEM!

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[1]This figure does not include concurring or dissenting opinions, or Chambers opinions granting or denying stays of judgments or other extraordinary relief.

[2]Id.

[3]In the Term ending July 1982 the U.S. Law Week reported a total of 141 signed Court opinions and 10 Per Curiam opinions.

there were 279 authorized federal judgeships; today there are 647 and these are the judges who produce the grist for the Supreme Court "mill." In 1953 District Court filings were about 99,000; there were about 3,200 Court of Appeals filings. Currently there are nearly 240,000 District Court filings and 28,000 Court of Appeals filings.

If we project the experience of the past 14 years over the next 14 years, the Supreme Court may well have 7,000 to 9,000 filings annually. I leave it to you to say how many fully argued cases requiring full treatment and signed opinions that would reasonably call for.

For nearly 14 years I have pored over the records of the Court's work and of the Justices who have gone before us. Recently I took off the shelves the volumes of the U.S. Reports for the 1882 Term. I will anticipate the critics of what I say today, by acknowledging that the Court's 1882 Reports show 260 opinions, but as we know neither cases nor opinions are fungible. Turning to the first page of Volume 106 of the 1882 Term, we find that what is indexed as an "opinion" is simply an explanation of why the Court denied a petition for rehearing. Today we dispose of such petitions with one line on the Monday Order List. No opinion is needed. An analysis of all the opinions in the 1882 Term reveals that out of the 260 "cases" indexed as such, more than one half ranged from one to four pages. A majority of the cases could fairly be described as "landlord and tenant" type cases, cases important to the individual litigants, but of no lasting general importance to federal law.

If the Court had been authorized to exercise discretionary certiorari jurisdiction in that day, at least half of what were described in 1882 as "cases" probably would have been denials of certiorari. The 1925 certiorari amendment which Chief Justice Taft persuaded Congress to adopt enlarged the Court's discretion to grant or deny review, but that discretion has gradually been eroded. In the most recent Term of the Court 25% of the argued cases were mandatory appeals and more than 50% of all those disposed of on the merits were mandatory appeals.

It is of no little significance that the final opinion of the 1882 Term is dated May 7. So from May 7 to October 8, when the Term opened, there were no stacks of about 90 to 100 new filings handed or mailed to each Justice each week as is the case today.

When I arrived at the Supreme Court in 1969, after observing these developments at close range for more than 15 years, I concluded that something needed to be done. The first step necessary was a comprehensive study of the Court's workload, its practices and its jurisdiction. Fortunately we had the advantage of the monumental study of the American Law Institute of 1969 recommending significant changes in federal jurisdiction, including curtailment of diversity jurisdiction, the elimination

of most mandatory jurisdiction of the Supreme Court and the modification of three judge District Court jurisdiction.

Even if all these recommendations had been followed that would not have solved the caseload problems of the Supreme Court. All of them should have long since been adopted but it is fortunate that Congress responded to our urgings and substantially narrowed the jurisdiction of three judge District Courts with the mandatory right of appeal to the Supreme Court.

Against this background I appointed a committee of distinguished lawyers in 1971 to study the Supreme Court's problems, and prevailed upon Professor Paul Freund, one of America's foremost legal scholars, experienced in Supreme Court work, to chair that committee. The members of this committee included other lawyers with long experience in the Supreme Court.[4] In the face of the stark figures I have mentioned, that is the changes in the number and kinds of cases from 1953 to 1969, I would have been derelict in my duty had I not taken the step of creating the Freund Committee.

I also urged the Congress to create a commission, with representatives of each of the three branches of the government, to study the growth of the work of all of the federal courts including the Supreme Court. Congress responded and created the Commission chaired by Senator Roman Hruska of Nebraska.[5] That body's 1974 report and recommendations with respect to the Supreme Court were generally similar to those made by the Freund Committee in 1972. The central piece in each report was that an intermediate appellate court of some kind should be created to give relief to the Supreme Court. It is against this background that I wish to discuss with you today the very grave problems of the Supreme Court, now more acute than in 1953 or 1969.

I assure you at the outset that if I knew precisely how to solve this problem I would not hesitate to say so, but I do not have the answers. When the Freund Committee report was made in 1972 followed by the Hruska Commission Report, some lawyers and

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[4]Professor Paul Freund, Professor Alexander M. Bickel, Peter D. Ehrenhaft, Dean Russell D. Niles, Bernard G. Segal, Robert L. Stern, and Professor Charles Alan Wright.

[5]Senator Roman L. Hruska, Judge J. Edward Lumbard, Senator Quentin N. Burdick, Senator Hiram L. Fong, Senator John L. McClellan, Honorable Emanuel Celler, Dean Roger C. Cramton, Francis R. Kirkham, Judge Alfred T. Sulmonetti, Congressman Jack Brooks, Congressman Walter Flowers, Congressman Edward Hutchinson, Congressman Charles E. Wiggins, Judge Roger Robb, Bernard G. Segal, Professor Herbert Wechsler.

members of the judiciary were quite startled. You may remember too that in 1974 and again in 1976 the House of Delegates of this Association had the foresight to conclude there was an urgent need for such an intermediate appellate court.

It is fair to say that four or five members of the Supreme Court at that time were in general agreement with the diagnosis of the problem made in those two important reports. However, when no consensus either within the Supreme Court or within the legal profession emerged I concluded I had no choice but to await events, keep a watchful eye on the docket and from time to time draw the subject to your attention. I have done that. Today I do it again.

In a lecture at New York University last November commemorating the 30th Anniversary of the Institute of Judicial Administration and paying tribute to the pioneer of all administrative innovators, Chief Justice Vanderbilt of New Jersey, I undertook to discuss with lawyers and judges how other countries deal with these problems. The highly civilized and industrialized countries from Sweden down to Italy draw their legal institutions primarily from the law of Rome and the Napoleonic Codes. In those countries as we know, judicial authority has not achieved the status that it has under our Constitution. In only a few countries of the world do courts exercise the authority to declare an act of the legislative branch or the executive unconstitutional because the action violates the national constitution.

In France, for example, a nine member Constitutional Council has exclusive authority to deal with constitutional questions. Other French courts of last resort deal with decisions of administrative agencies, and civil or criminal cases. In England, from whence our law and judicial institutions derive, we find a similar division. We remember of course that England's structure of government does not contain the sharp separation of executive, legislative and judicial authority that we have under our Constitution. In England the true tribunal of last resort is not a strictly judicial body in our constitutional sense, but rather it is the Parliament itself. The formal title of Parliament, as we recall from our law school days, is the "High Court of Parliament." Final review by the Law Lords is only by leave. Until a few years ago two five member panels divided about 40 cases a year. Currently, except for about 50 to 70 cases a year reviewed by the Law Lords, final judgments are rendered by the two courts of appeal -- one for civil and one for criminal cases.

The Lord Chief Justice presides over the Court of Appeal for criminal cases and the Lord Master of the Rolls presides over the court dealing with appeals other than criminal. This specialized division should not startle us unduly because two of our own states, Texas and Oklahoma, have followed this pattern.

I do not suggest for a moment that we slavishly follow the models of England or other European countries. What I do suggest is that any intelligent analysis and consideration of our problems demands a close look at these other systems by a tripartite commission which I, today, ask Congress to create.

The problems of all the other courts in our federal courts can be met by a combination of improved procedures, wider use of court administrators, and ultimately, by the addition of more judges. And this is what we have done. But in the Supreme Court more Justices would not help. As Chief Justice Hughes pointed out in 1937, more Justices would be a handicap, not a remedy.

Within the Court we can and we have changed a number of our procedures since 1969. For example we have reduced the oral argument from one hour to 30 minutes with rare exceptions when we grant additional time. We have increased the number of summary dispositions on the merits without hearing full oral arguments, and, if there is not prompt action to give relief, I predict there will be a large increase in summary dispositions, particularly in dealing with criminal cases when the lower courts have either misread or ignored our controlling holdings. Many lawyers are disturbed that some of our Courts of Appeal have found it necessary to reduce or eliminate oral argument because of the calendar pressures.

But given the conditions the Supreme Court faces we have gone about as far as we can go.

In 1958, when the Court issued only 99 signed Court opinions, Professor Henry Hart of Harvard in the Annual Review of the Supreme Court's work, concluded that:

> "...the number of cases which the Supreme Court tries to decide by full opinion, far from being increased, ought to be materially decreased."[6]

He was saying that 99 full signed Court opinions were too many. In 1959 Justice Frankfurter echoed Professor Hart saying:

> "[T]he judgments of this Court ... presuppose ample time and freshness of mind for [the] private study and reflection ... [and] fruitful interchange ... indispensable to thoughtful, unhurried decision. ... It is therefore imperative that the docket of the Court be kept down so that its volume does

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[6]Henry J. Hart, Jr., "Foreword: The Time Chart of the Justices," 73 Harvard Law Review, 84, 99 (1959).

not preclude wise adjudication."[7]

When Justice Frankfurter said that, there were 97 signed Court opinions. Other qualified observers have reached the same conclusion since then.

From 27 years on the Bench almost equally divided between the Court of Appeals and the Supreme Court, I agree heartily with Professor Hart and Justice Frankfurter .

I repeat that the straightforward, relatively simple remedies applicable to the other courts do not provide answers for the Supreme Court. Only fundamental changes in structure and jurisdiction will provide a solution that will maintain the historic posture of the Supreme Court, will insure "proper time for reflection," preserve the traditional quality of decisions, and avoid a breakdown of the system -- or of some of the Justices.

It will no longer do to say glibly, as some have, that we do not need "another tier of courts," or another court, or a change in the structure of appellate procedure at the highest level simply because we have functioned since 1891 with the present structure of three tiers of courts. That is meaningless in terms of the needs of the present and particularly of the next 10 to 20 years and for the 21st Century. We can no longer tolerate the vacuous notion that we can get along with the present structure "because we have always done it that way."

Ninety-two years ago when Congress finally got around to creating the federal courts of appeals, that new structure was adequate for a period only a quarter of a century removed from the Civil War. By that time we had substituted steel pens for quill pens, the steam engine was here to stay and steam moved boats on the rivers and on the oceans and pulled trains on rails. Nine Justices were adequate to deal with 250 of the kinds of cases filed with the Court in those days. Transportation has moved from horses and steam to jet power, science and engineering has landed us on the moon, and satellites in outer space are a routine part of our communications systems, but we are still expecting nine Justices to deal, not with 900 filings a year as was true in 1933, but with 4,000 to 5,000.

These problems did not fall on us suddenly and if by default something approaching a disaster comes on us it will not come like a Pearl Harbor. Indeed it might be better if that were the case, because a sudden disaster galvanizes people, raises the adrenalin, sharpens the intellect, energizes them to meet the

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[7] Dick v. New York Life Insurance Co., 359 U.S. 437, 458-459 (1959) (Frankfurter, J., dissenting).

crisis.

The problems we face have resulted from the growth of the country, changes in science and engineering, the increasing complexity of society, the increasing complexity of the structure of business and industry, the enlargement of rights of individuals, changes in the relationships of people to government, and underlying all this, the increasing litigiousness of our people.

Individually we on the Court have "nibbled around the edges" of our dilemma for a dozen years without coming as near to the heart of the problem as either the Freund or the Hruska Reports. But I am happy to observe that in recent months all members of the Court who have spoken on the subject -- now a clear majority of the Court -- are essentially of one mind: that there is indeed a very grave problem and that something must be done.

I assure them -- and you -- that I warmly welcome this concern in what we know is an old problem. The Justices may not agree as to particular solutions, but all those who have spoken agree generally on the diagnosis of the structural illness. Now that the diagnosis has been made it is time to turn our attention to the remedies. I hope this will be done -- and done very soon -- by an independent Congressionally authorized body appointed by the three Branches of the Government.

I will be very candid and say to you that my purpose today is to provoke you and others and to stimulate a vigorous debate and discussion. For some time I have invited suggestions and recommendations as to a solution and I will now discuss several possible solutions without any idea that any one of them or any combination of them will meet the needs. Any careful study will, of course, develop alternatives other than those which I put forward to you today.

The first proposal that merits consideration of the study commission is one that is already familiar to us since it was the one recommended by both the Freund Committee and the Hruska Commission. It is that an intermediate court of appeals be created and that the Supreme Court be authorized to transfer to that court such cases as it elects to refer.[8] Since that has been debated and discussed I need say no more about it at this time.

Another proposal has been made by a distinguished State

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[8] See also Advisory Council for Appellate Justice's "Recommendation for Improving the Federal Intermediate Appellate System" (1974).

Supreme Court Justice -- former Chief Justice of Arizona, Justice James Duke Cameron. He has proposed an intermediate National Court of State Appeals to review decisions of state courts on federal constitutional questions.

Still another alternative advanced would be to create not one but two intermediate courts of appeals, one for criminal cases and one for civil cases.

The need to seek solutions is so great in the minds of some knowledgeable people that an even more drastic proposal has been suggested. In response to my inquiries one lawyer with long experience in the Supreme Court has made a proposal which, even as I outline it to you, I am bound to say I would not advocate it. But because I disagree with it is not a reason to brush it aside. I hope it will provoke you. The suggestion is that nine additional Justices be authorized as a separate panel of the Supreme Court with jurisdiction of all but criminal and constitutional cases. Those cases would remain with the present Court. These two panels would be permanently separated as to functions. This would be a radical departure from our tradition and leaves me with grave reservations. Moreover this drastic remedy could well require a constitutional amendment.

While all options are being studied I advocate an interim solution which would provide immediate relief and also provide concrete information on which decisions can be made. I propose that, without waiting for any further study, a special, but temporary panel of the new United States Court of Appeals for the Federal Circuit be created. This special temporary panel, which I now propose, could be added to that court for administrative purposes. It should have special and limited function to decide all intercircuit conflicts, and a limited five year existence.

I recommend that Congress promptly authorize this panel as it has authorized so many important temporary courts in the past dozen years. Congress has created special, temporary panels including one for the selection of a public prosecutor, the Temporary Emergency Court of Appeals, the Multi-District Litigation Panel and the United States Foreign Intelligence Surveillance Court. These courts share a common pattern: (a) they are temporary; (b) the members are designated from among the existing federal judges so that no new permanent court structure is created. In the past 20 years more than 50 judges have been designated by the Chief Justice under authority granted by Congress.

The interim and temporary panel I suggest could be made up of two judges designated from each Circuit, creating a pool of 26 judges. Subject to further study, my suggestion would be that for periods of six months -- or perhaps one year -- a panel of seven or nine judges be drawn from the 26 judges in that pool. That panel would hear and decide all intercircuit conflicts and

possibly, in addition, a defined category of statutory interpretation cases.

You may appropriately ask "What will this accomplish?" It would accomplish this: it could take as many as 35 to 50 cases a year from the argument calendar of the Supreme Court. The Supreme Court would retain certiorari jurisdiction over such cases. Here again you may properly ask "How will this help if the decisions of that special panel may need to be heard by a fourth tier, that is the Supreme Court itself?" First we do not know whether they will in fact later be reviewed by the Supreme Court. I would have confidence that the 26 experienced judges assigned in this manner would resolve the conflicts among the Circuits -- in such a way that the Supreme Court would not often find it necessary to grant further review. That has been the case with the Temporary Emergency Court of Appeals and the other special, temporary panels.

I have suggested this special panel be attached, for administrative purposes, to the Court of Appeals for the Federal Circuit partly because it has excellent court facilities in Washington. However, the special panel could as well be attached to the Temporary Emergency Court of Appeals, which is also headquartered in Washington.

If I am correct, this could reduce the Supreme Court calendar to some figure at or near the 100 argued cases and 100 signed opinions a year that Frankfurter, Hart and others suggested as the appropriate limit. While this special panel is functioning the Congressionally created commission can study its work. I emphasize that such a special panel should be authorized for a limited period not exceeding five years with a requirement that it report annually to the Congress, the President and the Judicial Conference of the United States. In that way the commission would be able to evaluate the over-all problem.

COMMISSION RECOMMENDATION

I repeat that if I were sure that this is the best solution I would not hesitate to advance it as a permanent remedy. I advance it only as a temporary, interim measure until it is tested or until some better long range solution can be devised. If Congress acts, as I hope it will, the commission will have a concrete example of the utility of this special temporary panel for review of intercircuit conflicts. The commission would therefore have the advantage of seeing whether such an intermediate reviewing court is workable rather than simply theorizing about it. As the Hruska Commission had the benefit of the Freund Report, a new commission will have the benefit of both and of the special temporary panel. I have long hesitated to endorse the idea of a new intermediate court because of my concerns about creating another permanent tier of courts in the system before we know whether it will serve the intended purposes.

* * * *

Some years ago a German psychologist was engaged in exploring the comparative functioning of the minds of human beings and chimpanzees, the highest order of primates. He placed a chimpanzee in a cage with a small stick. Then he put some bananas, the favorite food of primates, outside the cage but beyond the reach of the chimpanzee. The chimpanzee tried to reach for the fruit, but could not touch it. He moaned and whimpered and complained -- some might say as we judges complain about the litigious society and the overload of cases. Some time passed. Suddenly the chimpanzee seized the stick, reached out and pulled the bananas into the cage. The chimpanzee had found a solution.

Just as the chimpanzee could see the bananas, we can now see the problem. What we need is to find the stick. Finding that stick -- the solution -- is as much your responsibility as it is mine or that of the other Justices.

If this Association moves on this problem, its leadership will be crucial, as it was in creating the Institute for Court Management, the National Center for State Courts, the National Institute of Corrections and the seminal Pound Conference of 1976.

I therefore urge you to ask the Congress, without delay, to enact a statute in two parts: first to create a tripartite commission to pick up where the Freund and Hruska reports left off, and second, create the special temporary appellate panel to resolve circuit conflicts.

You have not failed the Judiciary or the American people in the past with respect to improving the administration of justice.

I am confident you will not fail them on this occasion.

ANNUAL REPORT ON THE STATE OF THE JUDICIARY

Remarks of

WARREN E. BURGER
CHIEF JUSTICE OF THE UNITED STATES

at the Midyear Meeting

American Bar Association

New Orleans, Louisiana

February 6, 1983

THE NEED FOR "TIME AND FRESHNESS OF MIND . . . AND REFLECTION . . . INDISPENSABLE TO THOUGHTFUL, UNHURRIED DECISION."

For the 14th year you provide me the opportunity to lay before you, the leaders of our profession, problems facing the courts. On prior occasions I have often presented a series of problems, my observations on each, and a request for your advice and support.

Today I will focus on only one subject which is perhaps the most important single, immediate problem facing the Judiciary and that is the caseload of the Supreme Court and the need for the "time and [the] freshness of mind . . . and reflection . . . indispensable to thoughtful, unhurried decision."

I am well aware that having raised my voice on many occasions during the past 14 years concerning the overburdening of the courts and of the Supreme Court, there is the risk that anyone takes in repeatedly "crying wolf." But I suggest the analogy of the early pioneer who, looking out the window of his log cabin, saw a pack of wolves destroying his livestock, killing his chickens and clawing at his smokehouse with its supply of food. Someone in that situation need not be apologetic about calling for help—if there is anyone within hearing who can help—as you who are within hearing can help.

Beginning when I first appeared as an advocate in the Supreme Court and later, during 13 years on the United States Court of Appeals, I observed the Supreme Court's work at close range and I reached the conclusion that there were some serious problems down the road. When I took my present office in 1969 I was well aware that in 1953, the first year of the tenure of my distinguished predecessor Chief Justice Warren, the Court had 1,463 cases on its docket and had issued 65 signed Court opinions.[1] In the Term that ended last July the Supreme Court had 5,311 cases on its docket, and issued 141 signed Court opinions, an increase of approximately 270% in the docket and more than double the number

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[1] This figure does not include concurring or dissenting opinions, or Chambers opinions granting or denying stays of judgments or other extraordinary relief.

of signed opinions.[2] The best single measurement of the Court's work is its signed Court opinions.[3] We see therefore that during my tenure in office the steady increase of preceding decades has become almost a tidal wave. Occasionally filings reach a plateau but do not remain on a plateau for long. Part, but not all of the explanation for the increase in cases is that in just the short span of 14 years, Congress has enacted more than 100 statutes creating new claims, entitlements and causes of action. Judicial opinions have also created new causes of action but to a lesser extent.

In this period another development has become acute. Gradually over the last 30 years or more the content and complexity of the cases have changed drastically and often there are few precedents to guide the courts in these new areas. These wholly new kinds of cases that are reaching the courts reflect changes in our increasingly complex society and changes in the relationships of government to individuals.

Increasingly the Court has been confronted with more and more claims of prisoners relating to the condition of their confinement; some are absurd and frivolous, some are valid. There are new claims of teachers and professors relating to their tenure and the conditions of their employment, and new claims of employment discrimination. There are challenges to the validity of new kinds of taxes levied by the hard-pressed states, giving rise to difficult constitutional questions. There are difficult and complex cases arising out of long overdue recognition of the rights of women and of minorities. New legal problems arise from the growth of multinational corporations, and cases on conflicts between protection of the environment and development of new sources of energy and new industry. These are but a few examples.

This is not surprising for we live in a dynamic society. As a people we have never been content with the status quo. We have recognized the impact of all this on the lower courts

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[2] *Ibid.*

[3] In the Term ending July 1982 the U. S. Law Week reported a total of 141 signed Court opinions and 10 Per Curiam opinions.

by more than doubling the number of judges in 30 years. In 1953 there were 279 authorized federal judgeships; today there are 647 and these are the judges who produce the grist for the Supreme Court "mill." In 1953 District Court filings were about 99,000; there were about 3,200 Court of Appeals filings. Currently there are nearly 240,000 District Court filings and 28,000 Court of Appeals filings—increasing from 99,000 to one quarter million in the district court and from 3,200 to 28,000 in the court of appeals.

If we project the experience of the past 14 years over the next 14 years, the Supreme Court may well have 7,000 to 9,000 filings annually. I leave it to you to say how many fully argued cases requiring full treatment and signed opinions that would reasonably call for. Does anyone think nine Justices could cope with 9,000 filings?

Recently I took off the shelves the volumes of the U. S. Reports for the 1882 Term. I will anticipate the critics of what I say today, by acknowledging that the Court's 1882 Reports show 260 opinions. We know of course, neither cases nor opinions are fungible. On the first page of Volume 106 of the 1882 Term, we find that what is indexed as an "opinion" is simply an explanation of why the Court denied a petition for rehearing. Today we dispose of such petitions with one line on the Monday Order List. No opinion is needed. An analysis of all the opinions in the 1882 Term reveals that out of the 260 opinions indexed as such, more than one half ranged from one to four pages. A majority of those cases could fairly be described as "landlord and tenant" type cases, cases important to the individual litigants, but of no lasting general importance to federal law.

If the Court had been authorized to exercise discretionary certiorari jurisdiction in 1882, probably half of what were described in 1882 as "cases" probably would have been denials of certiorari. The 1925 certiorari amendment which Chief Justice Taft persuaded Congress to adopt enlarged the Court's discretion to grant or deny review, but that discretion has gradually been eroded. In the most recent Term of the Court 25% of the argued cases were mandatory appeals

and more than 50% of all those disposed of on the merits were mandatory appeals.

It is of no little significance that the final opinion of the 1882 Term is dated May 7. So from May 7 to October 8, when the 1883 Term opened, there were no stacks of about 90 to 100 new filings handed or mailed to each Justice each week as is the case today.

When I arrived at the Supreme Court in 1969, after observing these developments at close range for more than 15 years, I concluded that something needed to be done. The first step necessary was a comprehensive study of the Court's workload, its practices and its jurisdiction. Fortunately we had the advantage of the monumental study of the American Law Institute of 1969 recommending significant changes in federal jurisdiction.

Even if all these recommendations had been followed that would not have solved the caseload problems of the Supreme Court. All of them should have long since been adopted but it is fortunate that Congress responded to our urgings and substantially narrowed the jurisdiction of three judge District Courts with the mandatory right of appeal to the Supreme Court.

Against this background I appointed a committee of distinguished lawyers in 1971 to study the Supreme Court's problems, and prevailed upon Professor Paul Freund, one of America's foremost legal scholars, experienced in Supreme Court work, to chair that committee. The members of this committee included other lawyers with long experience in the Supreme Court.[4] In the face of the stark figures I have mentioned, that is the changes in the number and kinds of cases from 1953 to 1969, I would have been derelict in my duty had I not taken the step of creating the Freund Committee.

At that time, I also urged the Congress to create a commis-

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[4] Professor Paul Freund, Professor Alexander M. Bickel, Peter D. Ehrenhaft, Dean Russell D. Niles, Bernard G. Segal, Robert L. Stern, and Professor Charles Alan Wright.

sion, with representatives of each of the three branches of the government, to study the growth of the work of all of the federal courts including the Supreme Court. Congress responded and created the Commission chaired by Senator Roman Hruska of Nebraska.[5] That body's 1974 report and recommendations with respect to the Supreme Court were generally similar to those made by the Freund Committee in 1972. The central piece in each report was that an intermediate appellate court of some kind should be created to give relief to the Supreme Court. It is against this background that I wish to discuss with you today the very grave problem of the Supreme Court, now more acute than in 1953 or 1969.

I assure you at the outset that if I knew precisely how to solve this problem I would not hesitate to say so, but I do not have the answers. When the Freund Report was made in 1972 followed by the Hruska Report, some lawyers and members of the judiciary were quite startled. In 1974 and again in 1976, the House of Delegates of this Association had the foresight to conclude there was an urgent need for such an intermediate appellate court. That need is far more urgent today.

It is fair to say that in 1972 four or five members of the Supreme Court were in general agreement with the diagnosis of the problem made in those two important reports. However, when no consensus emerged as to the remedy, within the Supreme Court or within the legal profession, I concluded I had no choice but to await events, keep a watchful eye on the docket and from time to time draw the subject to your attention. I have done that. Today I do it again.

In a lecture at New York University last November commemorating the 30th Anniversary of the Institute of Judicial

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[5] Senator Roman L. Hruska, Judge J. Edward Lumbard, Senator Quentin N. Burdick, Senator Hiram L. Fong, Senator John L. McClellan, Honorable Emanuel Celler, Dean Roger C. Cramton, Francis R. Kirkham, Judge Alfred T. Sulmonetti, Congressman Jack Brooks, Congressman Walter Flowers, Congressman Edward Hutchinson, Congressman Charles E. Wiggins, Judge Roger Robb, Bernard G. Segal, Professor Herbert Wechsler.

Administration and paying tribute to the pioneer of all administrative innovators, Chief Justice Vanderbilt of New Jersey, I undertook to discuss with lawyers and judges how other countries deal with these problems. The highly civilized and industrialized countries from Sweden down to Italy draw their legal institutions primarily from the law of Rome and the Napoleonic Codes. In those countries as we know, judicial authority has not achieved the status that it has under our Constitution. In only a few countries of the world do courts exercise the authority to declare an act of the legislative branch or the executive unconstitutional.

In France, for example, a nine member Constitutional Council has exclusive authority to deal with constitutional questions. Other French courts of last resort deal with decisions of administrative agencies, and civil or criminal cases. In England, from whence our law and judicial institutions derive, we find a similar division. We remember of course that England's structure of government does not contain the sharp separation of executive, legislative and judicial authority that we have under our Constitution. In England the true tribunal of last resort is not a strictly judicial body in our constitutional sense, but rather it is the Parliament itself. The formal title of Parliament, as we recall from our law school days, is the "High Court of Parliament." Review by the Law Lords is only by leave. Until a few years ago two five member panels divided about 40 cases a year. Currently, except for about 50 to 70 cases a year reviewed by the Law Lords, final judgments are rendered by the two courts of appeal—one for civil and one for criminal cases. Each panel of the Law Lords annually hears 35 cases, more or less.

The Lord Chief Justice presides over the Court of Appeal for criminal cases and the Lord Master of the Rolls presides over the court dealing with all other appeals. This specialized division of jurisdiction should not startle us unduly because two of our own states, Texas and Oklahoma, have followed this pattern.

I do not suggest for a moment that we slavishly follow the models of England or other European countries. What I do

suggest is that any intelligent analysis and consideration of our problems demands a close look at other systems by a tripartite commission which I, today, ask Congress to create.

The problems of all the other courts in our federal system can be met by a combination of improved procedures, wider use of court administrators, and ultimately, by the addition of more judges. And adding judges is what we have done. But in the Supreme Court more Justices would not help. As Chief Justice Hughes pointed out in 1937, more Justices would be a handicap, not a remedy.

Within the Court we can and we have changed a number of our procedures since 1969. For example we have reduced the oral argument from one hour to 30 minutes. We have increased the number of summary dispositions on the merits without hearing full oral arguments. I predict that if there is not prompt action to give relief there will be a large increase in summary dispositions, particularly in dealing with criminal cases when the lower courts have either misread or ignored our controlling holdings.

Given the conditions the Supreme Court faces we have gone about as far as we can go.

In 1958, when the Court issued only 99 signed Court opinions, Professor Henry Hart of Harvard in the Annual Review of the Supreme Court's work, concluded that:

> ". . . the number of cases which the Supreme Court tries to decide by full opinion, far from being increased, ought to be materially decreased."[6]

Professor Hart was saying that 99 full signed Court opinions were too many. In 1959 Justice Frankfurter echoed Professor Hart saying:

> "[T]he judgments of this Court . . . presuppose ample time and freshness of mind for [the] private study and reflection . . . [and] fruitful interchange . . . indispensable to thoughtful, unhurried decision. . . . It is

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[6] Henry J. Hart, Jr., "Foreword: The Time Chart of the Justices," 73 *Harvard Law Review*, 84, 99 (1959).

> therefore imperative that the docket of the Court be kept down so that its volume does not preclude wise adjudication."[7]

When Justice Frankfurter said that, there were 97 signed Court opinions.

From 27 years on the Bench almost equally divided between the Court of Appeals and the Supreme Court, I agree heartily with Professor Hart and Justice Frankfurter.

I repeat that the straightforward, relatively simple remedies applicable to the other courts do not provide answers for the Supreme Court. Only fundamental changes in structure and jurisdiction will provide a solution that will maintain the historic posture of the Supreme Court, will insure "proper time for reflection," preserve the traditional quality of decisions, and avoid a breakdown of the system—or of some of the Justices.

It will no longer do to say glibly, as some have, that we "do not need another tier of courts," or another court, or a change in the structure of appellate procedure at the highest level simply because we have functioned with the present structure of three tiers of courts since 1891. That is meaningless in terms of the needs of the present and particularly of the next 10 to 20 years and for the 21st Century. We can no longer tolerate the vacuous notion that we can get along with the present structure "because we have always done it that way."

Ninety-two years ago when Congress finally got around to creating the federal courts of appeals, that new structure was adequate for a period only a quarter of a century removed from the Civil War. By that time we had substituted steel pens for quill pens, the steam engine was here to stay and steam moved boats on the rivers and on the oceans and pulled trains on rails. Nine Justices were adequate to deal with 250 of the kinds of cases filed with the Court in those days. But transportation has moved from horses and steam to jet

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[7] *Dick* v. *New York Life Insurance Co.*, 359 U. S. 437, 458–459 (1959) (Frankfurter, J., dissenting).

power, science and engineering has landed us on the moon, and satellites in outer space are a routine part of our communications systems, yet we are still expecting nine Justices to deal, not with 900 filings a year, as was true in 1933, but with 4,000 to 5,000—and who knows how many in the years ahead.

These problems did not fall on us suddenly and if by default something approaching a disaster comes on us it will not come like a Pearl Harbor. Indeed it might be better if that were the case, because a sudden disaster galvanizes people, raises the adrenalin, sharpens the intellect, energizes them to meet the crisis.

The problems we now face have resulted from the growth of the country, changes in science and engineering, the increasing complexity of society, the increasing complexity of the structure of business and industry, the enlargement of rights of individuals, changes in the relationships of people to government, and underlying all this, the great and increasing litigiousness of our people who historically have a passion for "taking to the Law."

Individually we on the Court have "nibbled around the edges" of our dilemma for a dozen years without coming as near to the heart of the problem as either the Freund or the Hruska Reports. But I am happy to observe that in recent months all members of the Court who have spoken on the subject—now a clear majority of the Court—are essentially of one mind: that there is indeed a very grave problem and that something must be done.

I assure them—and you—that I warmly welcome this concern for what we know is an old problem. The Justices may not agree as to particulars, but all those who have spoken agree generally on the diagnosis of the illness. Now that the diagnosis has been made it is time to turn our attention to the remedies. I hope this will be done—and done very soon—by an independent Congressionally authorized body appointed by the three Branches of the Government.

I will be very candid and say to you that my purpose today is to provoke you and others and to stimulate a vigorous debate and discussion. For some time I have invited sugges-

tions and recommendations as to a solution and I will now discuss several possible solutions without any idea that any one of them or any combination of them will meet the needs.

The first proposal that merits consideration of the study commission is one that is already familiar to us since it was the one recommended by both the Freund Committee and the Hruska Commission. It is that an intermediate court of appeals be created and that the Supreme Court be authorized to transfer to that court such cases as it elects to refer.[8] Since that has been debated and discussed I need say no more about it at this time.

Another proposal has been made by a distinguished State Supreme Court Justice—former Chief Justice of Arizona, Justice James Duke Cameron. He has proposed an intermediate National Court of State Appeals to review decisions of state courts on federal constitutional questions. That deserves study.

Still another alternative advanced would be to create not one but two intermediate courts of appeals, one for criminal cases and one for civil cases.

The need to seek solutions is so great in the minds of some knowledgeable people that an even more drastic proposal has been suggested. In response to my inquiries one lawyer with long experience in the Supreme Court has made a proposal which, even as I outline it to you, I am bound to say I would not advocate it. But because I disagree with it is not a reason to brush it aside. I hope it will provoke you. The suggestion is that nine additional Justices be authorized as a separate panel of the Supreme Court with jurisdiction of all but criminal and constitutional cases. Those cases would remain with the present Court. These two panels would be permanently separated as to functions. This would be a radical departure from our tradition and leaves me with grave reservations. Moreover this drastic remedy could well require a constitutional amendment.

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[8] *See also* Advisory Council for Appellate Justice's "Recommendation for Improving the Federal Intermediate Appellate System" (1974).

While all options are being studied I advocate an interim step which would provide immediate relief and also provide a concrete experience and information on which decisions can be made. I propose that, without waiting for any further study, a special, but temporary panel of the new United States Court of Appeals for the Federal Circuit be created. This special temporary panel, which I now propose, could be added to that court for administrative purposes. It should have special and narrow jurisdiction to decide all intercircuit conflicts, and a limited five year existence.

Legislation along these lines was introduced in the 97th Congress by Senators Thurmond, Heflin and by Congressman Kastenmeier. I recommend that Congress promptly authorize such a panel as it has authorized so many important temporary panels and courts in the past dozen years. In the past 20 years Congress has created special, temporary panels including one for the selection of a public prosecutor, the Temporary Emergency Court of Appeals, the Multi-District Litigation Panel and the United States Foreign Intelligence Surveillance Court. These courts share a common pattern: (a) they are temporary; (b) the members are designated from among the existing federal judges so that no new permanent court structure is created. More than 50 judges have been designated by the Chief Justice under authority granted by Congress.

This interim, temporary panel I suggest could be made up of two judges designated from each Circuit, creating a pool of 26 judges. Subject to further study, my suggestion would be that for periods of six months—or perhaps one year—a panel of seven or nine judges be drawn from the 26 judges in that pool. That panel would hear and decide all intercircuit conflicts and possibly, in addition, a defined category of statutory interpretation cases.

You may appropriately ask "What will this accomplish?" It could accomplish this: it could take as many as 35 to 50 cases a year from the argument calendar of the Supreme Court. The Supreme Court would retain certiorari jurisdiction over such cases. Here again you may properly ask

"How will this help if the decisions of that special panel may need to be heard by a fourth tier, that is the Supreme Court itself?" First we do not know whether they will in fact later be reviewed by the Supreme Court. I would have confidence that 26 experienced judges assigned in this manner would resolve the conflicts among the Circuits in such a way that the Supreme Court would not often grant further review. That has been the case with the Temporary Emergency Court of Appeals and the other special, temporary panels.

I have suggested this special panel be attached, for administrative purposes, to the Court of Appeals for the Federal Circuit partly because it has excellent court facilities in Washington.

If I am correct, this could reduce the Supreme Court calendar to some figure at or near the 100 argued cases and 100 signed opinions a year that Frankfurter, Hart and others suggested as the appropriate limit. While this special panel is functioning the Congressionally created commission could study its work. I emphasize that such a special panel should be authorized for a limited period not exceeding five years with a requirement that it report annually to the Congress, the President and the Judicial Conference of the United States. In that way the commission would be able to evaluate the over-all problem.

I repeat that if I were sure that this is the best solution I would not hesitate to advance it as a permanent remedy. I advance it only as a temporary, interim measure until it is tested or until some better long range solution can be devised. If Congress acts, as I hope it will, the commission will have a concrete example of the utility of this special temporary panel for review of intercircuit conflicts. The commission would therefore have the advantage of seeing whether such an intermediate reviewing court is workable rather than simply theorizing about it.

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Some years ago a German psychologist was engaged in exploring the comparative functioning of the minds of human

beings and chimpanzees, the highest order of primates. He placed a chimpanzee in a cage with a small stick. Then he put some bananas, the favorite food of primates, outside the cage but beyond the reach of the chimpanzee. The chimpanzee tried to reach for the fruit, but could not touch it. He moaned and whimpered and complained—some might say as we judges complain about the litigious society and the overload of cases. Some time passed. Suddenly the chimpanzee seized the stick, reached out and pulled the bananas into the cage. The chimpanzee had found a solution.

The chimpanzee could see the bananas, and now we can see the problem. What we need is to find the stick. Finding that stick—the solution—is as much your responsibility as it is mine or that of the other Justices.

If this Association moves on this problem, its leadership will be crucial, as it was in creating the Institute for Court Management, the National Center for State Courts, the National Institute of Corrections and the seminal Pound Conference of 1976.

I therefore urge you to ask the Congress, without delay, to enact a statute in two parts: first to create a tripartite commission to pick up where the Freund and Hruska reports left off, and second, create the special temporary appellate panel to resolve circuit conflicts.