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U.S. Department of Justice

Office of Legal Policy

Washington, D.C. 20530

May 10, 1983

John Roberts
Associate Counsel to the President
Room 112-OEOB
Washington, D.C. 20500

John:

Following our phone conversation a few days ago, I had the feeling that we had touched on various important points affecting the merits of the Intercircuit Tribunal proposal, but had been unable to follow them out adequately in the context of an impromptu oral discussion. Since the proposal is still under study, I thought it might be useful to you to have a written statement that sets out the issues in a more orderly fashion.

As you know, the basic considerations that have been advanced in support of the proposal are alleviation of the Supreme Court's workload and provision of an enlarged appellate capacity at the national level. While reasonable people may disagree over how well an Intercircuit Tribunal would achieve these objectives, only actual experience with the operation of such a Tribunal could take the debate on this question out of the realm of speculation. The negative concerns suggested in our conversation were as follows:

1. The Experimental or Permanent Character of the Tribunal. One concern is that the temporary character of the Tribunal would prove to be illusory, and that it would inevitably be established on a permanent basis at the conclusion of the five-year trial period. While this concern was also raised by some of the participants in the Department's study, I do not really find it convincing. There are various examples of the past abolition of federal courts. The Emergency Court of Appeals, established during World War II, was abolished after the wartime conditions to which it was addressed had passed. The Commerce Court, established earlier in this century, was abolished after a few years as the result of public dissatisfaction with its performance. The old circuit courts were eventually abolished after the courts of appeals were created.

The current proposals provide for automatic termination of the Intercircuit Tribunal after five years. My personal experience with court reform legislation indicates that even the least controversial proposals run into extraordinary difficulties and delays in moving through Congress. Hence, I think it is most improbable that Congress would enact legislation establishing the Tribunal on a permanent basis in a pro forma manner.

The design of the Tribunal ensures that allowing it to lapse after five years would cause no large dislocations or other difficulties. The judges assigned to the Tribunal would be sitting circuit judges and would simply continue on their own courts if the Tribunal were not renewed.

2. Selection of the Tribunal after the Trial Period. A second concern is that a Democratic President might get to select the members of the Tribunal if it were established permanently following the trial period. This concern rests on the assumption that Presidential selection would be employed in connection with a permanent Tribunal, though this approach is not being seriously considered for the experimental Tribunal.

To the extent that the Tribunal proposal presents this risk, it presents a corresponding potential benefit -- it is equally likely that the President five years from now will be the current President, or some other Republican, and he could be in a position to select the initial members of a permanently established Intercircuit Tribunal.

Even if there is a Democratic President five years from now, the effect of his selections to the Tribunal would be limited to a few years. An essential element of the Intercircuit Tribunal concept is the use of sitting judges who are assigned to the Tribunal for limited terms. It differs in this respect from earlier "National Court of Appeals" proposals which would have created a new judicial tier with its own permanent judges. There is no longer any significant support for the National Court of Appeals approach and there is not likely to be any in the future.

It seems to me that the political concerns underlying this objection actually support our endorsing the Intercircuit Tribunal proposal at the present time. The pending proposals contemplate that Congress will receive a report on the Tribunal's work after four years and will begin to consider its continuation and permanent character at that point. If the experimental Tribunal is created in the near future, that will put Congress's consideration of its permanent establishment within a possible second term of the present Administration. Hence, creation of the Tribunal now maximizes the likelihood that we will have input on the question of its continuation and its permanent character. If we oppose the creation of the Tribunal now, I think it is probable that the pressures of the federal caseload will result in its eventually being established in any event, at a time when we may be in no position to influence the process.

3. Effect on the Supreme Court's Workload. A third concern is that the need to review cases coming back to the Supreme Court from the Tribunal will perversely increase the Supreme Court's workload. The usual answer to this objection is that cases referred to the Tribunal will be cases the Justices have already decided do not require their personal attention. Hence, it is not likely that they would often grant review following a decision by the Tribunal in such cases. Since the concurrence of at least a majority of the Justices would be required to refer cases to the Tribunal, 1/ I do not think that individual Justices could manipulate the process to secure a later hearing of a case by the Supreme Court.

This objection may also presuppose a certain lack of common sense on the part of the Justices. If they found that referring certain types of cases -- or any cases -- to the Tribunal proved counterproductive in terms of workload, they could simply refrain from referring such cases. There is nothing in the pending proposals which would require the Justices to refer cases.

In practical terms, I would expect that cases referred to the Tribunal would tend to be statutory cases of a more-or-less technical nature. This has been a common assumption of the participants at the Congressional hearings on the proposal. The effect will probably be some increase in the proportion of constitutional cases and statutory cases presenting policy questions in the Court's own workload, but I do not see much advantage in leaving such issues to the conflicting opinions of the courts of appeals, or in requiring the Supreme Court to give them short shrift in favor of cases presenting less important issues which could be handled equally well by an auxiliary Tribunal. I do not really see any reason to think that the cases the Court keeps for itself will be far removed from real life. All cases presented for review at the national level would still have to be presented initially to the Supreme Court, so the Justices would remain familiar with the full range of issues arising in federal adjudication through their screening work.

4. Other Considerations. In deciding on how to proceed with the Intercircuit Tribunal proposal, I think it is

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1 If the Supreme Court followed the traditional "rule of four" approach currently used in certiorari decisions, four Justices could prevent a reference to the Tribunal and secure the hearing of a case by the Court itself. Under this approach, the concurrence of six Justices would normally be required to refer cases to the Tribunal. Even if the "rule of four" approach were not followed in this context, at least a simple majority would be required to refer cases.

important to understand the status of the proposal in Congress and the likely effects of our position on it.

The Senate sponsors of the proposal are Senators Dole, Thurmond, and Heflin. There is obviously a certain presumption against taking an unfavorable position on a measure whose sponsors include two of the most important Republican Senators, unless good reasons can be found for doing so.

In the House there are 19 sponsors, including both Republicans and Democrats. The principal sponsor is Representative Kastenmeier, the Chairman of the Subcommittee responsible for courts legislation. We have developed good working relations with Kastenmeier and his staff on courts issues, notwithstanding rather intense ideological differences on most other matters. Kastenmeier is currently irate over our failure to appear at his Subcommittee's April 27 hearing on the Intercircuit Tribunal proposal -- which had been scheduled for our convenience -- and at our continued failure afterward to provide an Administration position. I do not think that appearing at the upcoming May 18 hearing with an adverse position on his proposal would do much to restore amicable relations. In general, I am very concerned about the effect of an unfavorable position on our ability to work in the future with either Judiciary Committee on courts issue, and perhaps on other issues as well.

In the Congressional hearings that have been held so far, the participants -- including legal scholars, practitioners, and members of the judicial branch -- have been overwhelmingly favorable to the Intercircuit Tribunal proposal. An adverse position may accordingly cast the Administration in the role of a lone opponent to a reform which is supported by virtually every other interested group.

Finally, as you know, the Chief Justice has publicly supported the Intercircuit Tribunal proposal. Justice O'Connor has also publicly stated support for this proposal at a recent appropriation hearing. On the basis of the past statements of the remaining Justices on national court proposals and their recent statements on the workload problem, I would infer that most or all of them would agree. 2/ An adverse position would

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2 See 67 F.R.D. 394-409 (1975) (responses of the Justices to inquiry of the Hruska Commission).

In the cited responses to the Hruska Commission, the Chief Justice advanced the idea of a court composed of sitting judges which would initially be established on a temporary, experimental basis. This was one of the earliest statements of the Intercircuit Tribunal proposal. (Cont. on next pg.)

not enhance our relations with the Supreme Court, including the Justices who side with us on most other matters.

I hope these thoughts will be useful to you in your consideration of the Intercircuit Tribunal proposal. Please feel free to call on me if I can provide any other assistance.

Sincerely,

David J. Karp

David J. Karp

(Cont. from previous pg.)
Justices Rehnquist, White, Powell, and Blackmun stated support for the creation of a new national court having jurisdiction over cases referred to it by the Supreme Court. The statements of White, Powell and Blackmun suggested the desirability or possibility of establishing the new court initially on an experimental basis, as the current Intercircuit Tribunal proposals contemplate.

Justice Brennan stated that he saw no need for a new national court, but that "if ... such a court were created, he was unable presently to perceive any reasons indicating that its proposed reference jurisdiction would be unworkable." Brennan has since changed his views concerning the existence of a workload problem in the Supreme Court, and has indicated in recent statements that he considers the current situation extremely serious.

Justice Marshall stated that creating a national court with reference jurisdiction from the Supreme Court "might be a good move," but suggested that more extensive use of appellate courts with exclusive nationwide jurisdiction in certain areas could be a better approach.

There is no adequate basis for inferring Justice Stevens' views on the Intercircuit Tribunal proposal.

to: Ms Roberts

room: _____ date: 5/18/83

Department of the Treasury
Office of the General Counsel

The views expressed in this paper are solely the views of the General Counsel and do not reflect his more conservative staff (i.e. me).

Margery Waxman
Deputy General Counsel
room 3308
phone 566-2977

OFFICE OF THE SECRETARY OF THE TREASURY

WASHINGTON, D.C. 20220

MEMORANDUM TO: Becky Norton Dunlop
Director, Office of Cabinet Affairs
The White House

SUBJECT: Intercircuit Tribunal Proposal

Attached are the Department of the Treasury's comments on the Intercircuit Tribunal Proposal to be considered at the May 19, 1983, meeting of the Cabinet Council on Legal Policy.

David Chew
Executive Assistant
to the Secretary

Attachment

THE GENERAL COUNSEL OF THE TREASURY
WASHINGTON, D.C. 20220

MAY 18 1983

MEMORANDUM TO: Becky Norton Dunlop
Director, Office of Cabinet Affairs
The White House

FROM: Peter J. Wallison

SUBJECT: Comments of the Department of the Treasury on the Proposal for an Intercircuit Tribunal

The Treasury Department supports the Justice Department's proposal for an intercircuit tribunal to review cases assigned by the Supreme Court. As we understand it, the tribunal would be appointed by the Chief Justice, with the concurrence of the Supreme Court, from among sitting circuit court judges; it would exist for five years, on an experimental basis, would consist of a single panel of seven or nine court of appeals judges and its decisions would be nationally binding. Decisions of the tribunal could be further appealed to the Supreme Court on writ of certiorari.

We have given great weight to the arguments in opposition to the proposal: that it may cause an increase in the number of petitions for review directed to the Supreme Court; that it may require the Supreme Court to review decisions of the Tribunal, and thus add yet another layer of litigation; that appointment by the Chief Justice, even though it involves sitting judges already appointed by the President, diminishes the President's authority; that the existence of the Tribunal will give the Supreme Court more time to interfere in the prerogatives of the other two branches; and that the Tribunal would inevitably become a permanent institution once it is established.

Nevertheless, we are of the view that an Intercircuit Tribunal would be a useful experiment. There are a large number of highly technical issues relating to the interpretation of Federal statutes which do not require decision by the Supreme Court except to resolve conflicts that have developed among the circuits. Resolving these conflicts seems to us to be the most appropriate function for the tribunal and, to the extent possible, legislation relating to the tribunal's mandate should stress this aspect of its purpose. In the case of tax litigation particularly, conflicts among the circuits interfere with the orderly administration of the tax laws; the tribunal would offer an opportunity to resolve these conflicts expeditiously and with considerable benefit to tax administration.

Many of the other objections to the tribunal are somewhat conjectural. While there may be more petitions for Supreme Court review because of its enhanced review capacity, this may be a good thing if the result is a more uniform interpretation of the laws. Currently, the inability of the Supreme Court to review a substantial proportion of all of the circuit court decisions that warrant such review may encourage the circuit courts to take more venturesome positions, leaving litigants without further recourse and increasing the number of legal theories on which later litigation might be based.

Although the Supreme Court may have to review decisions of the tribunal from time to time, given the purpose of the tribunal it is unlikely that the Supreme Court will be inclined to do so; moreover, the possibility that subsequent review may be necessary in important cases will induce the Supreme Court to refer to the tribunal only those cases -- such as matters involving conflict among the circuits on technical matters -- which do not entail major policy or constitutional issues.

Freeing the Supreme Court to interfere in the prerogatives of the other branches is an important concern, but this is a matter of balancing advantages and disadvantages -- and we see the considerable advantages of a tribunal as outweighing the somewhat theoretical possibility that the Supreme Court will then use its new freedom for judicial adventurism. There will still be much for the Supreme Court to do even if it is relieved of a portion of its more routine burden, and the way to avoid judicial activism is to appoint non-activist Justices, not to clog the Court with cases.

Similarly, appointment of the judges of the tribunal by the Chief Justice rather than by the President should not be troubling as long as the tribunal is a temporary body whose members are drawn from among sitting circuit judges. These judges have already been appointed by a President, with the concurrence of the Senate, and there seems to be no substantial reason why the President should be required to make a further appointment to a tribunal of this character. Should the tribunal become permanent, a different set of conditions would apply, since under these circumstances appointments might be made directly to the tribunal rather than to a circuit court. In this case, appointments should indeed be made by the President, with the concurrence of the Senate, and should be phased in over time so as to avoid the dominance of the tribunal by appointments made by one President.

Finally, while there is a danger that the tribunal will become permanent, a properly drawn statute should provide for sunsetting after five years, and it is unlikely that the tribunal will in that time develop such a strong constituency that Congress will feel compelled to extend it.

In summary, then, the Treasury Department sees some advantages in establishing the tribunal on an experimental, temporary basis, and few disadvantages that are other than speculative.

Supreme Court

THE WHITE HOUSE
WASHINGTON

Date 5/27/88

Suspense Date _____

MEMORANDUM FOR: John Poindexter

FROM: D. EDWARD WILSON, JR.

ACTION

_____ Approved

_____ Please handle/review

__✓__ For your information

_____ For your recommendation

_____ For the files

_____ Please see me/call me

_____ Please prepare response for

_____ signature

_____ As we discussed

_____ Return to me for filing

COMMENT

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THE RECORD

DOJ Report Favoring Creation of Intercircuit Court

A Justice Department committee consisting of all of the assistant attorneys general has approved legislation that would create an intercircuit tribunal to hear cases referred to it by the U.S. Supreme Court.

The committee's report, dated April 6, recommends that the tribunal consist of seven to nine sitting circuit court judges selected by the U.S. chief justice. The report was prepared under the leadership of Harvard Law School Professor Paul M. Bator, who chaired the committee as deputy solicitor general and counselor to U.S. Solicitor General Rex Lee.

The report has been circulated in recent weeks to various cabinet officers in anticipation of a meeting of President Reagan's cabinet council to discuss White House policy on the issue. Several White House officials, including Counsel Fred Fielding, reportedly have opposed the creation of the new court. No official administration position has been taken on the measure, which was proposed in February by Chief Justice Warren E. Burger and was embodied in some form in both House and Senate bills.

Full text of the committee's report, and the dissenting views of Assistant Attorney General for Civil Rights William Bradford Reynolds, follows:

At your direction an intradepartmental committee, composed of most of the Assistant Attorneys General,[1] was established to study Chief Justice Burger's proposal to create an Intercircuit Tribunal of the United States. The Committee has completed its work; this is its report.

The Committee considered two questions:

- (1) Should the Department support the proposal to create an Intercircuit Tribunal on a five-year experimental basis?
- (2) How should such an Intercircuit Tribunal be designed?

I. Summary of Recommendations

(a) The Committee recommends that the Department support the proposal that an appropriately designed Intercircuit Tribunal be created on a five-year experimental basis.[2]

(b) The Committee is unanimously of the view that such a Tribunal should consist of a single panel of 7 or 9 court of appeals judges sitting *en banc*, and that the Department should oppose the proposal (contained in the pending bills) that the Tribunal be comprised of a large pool (28) of judges sitting in shifting panels of 5 or 7.

(c) The Committee recommends that the Department oppose the proposal in the pending bills that the judges of the new Tribunal be designated by the Circuit Councils. The consensus of the Committee was that the most practical and sensible system for assigning court of appeals judges to the Tribunal during the experimental period would be to have the assignments made by the Chief Justice, subject to the approval of the Supreme Court.[3] The Committee was agreed that the Department's support for such a system on an interim basis should not prejudice our right to insist that if an Intercircuit Tribunal becomes a permanent or long-term entity, appointments to it must be made by the President (subject to Senate confirmation).

(d) The strong consensus of the Committee was to support most of the other principal features of the pending bills. The new Tribunal should have jurisdiction to decide only those cases referred to it by the Supreme Court. The Supreme Court should have power to refer any case within its appellate jurisdiction,[4] after or before certiorari has been acted on.[5] Decisions of the Tribunal should be nationally binding. Decisions of the Tribunal should be reviewable on certiorari by the United States Supreme Court.

II. Background and Status Of the Proposal

The proposal for an Intercircuit Tribunal was made by the Chief Justice in his February Annual Report on the State of the Judiciary. It is currently embodied in Title VI of S. 645, introduced by Senators Dole and Heflin. Hearings on S. 645 were held before the Subcommittee on Courts of Senate Judiciary; the testimony was generally favorable. We have been asked to give our views by April 14. A variant of the proposal is also embodied in H.R. 1970, introduced by Mr. Kastenmeier. Hearings before House Judiciary are scheduled in mid-April. The Department has in the past always opposed the creation of a National Court of Appeals.

III. Discussion

A. Should An Intercircuit Tribunal Be Created?

(1) *Is There a Caseload Problem?* Our Committee is prepared to accept the opinion of virtually all the Justices that there is a substantial overload on the Supreme Court that threatens the effective functioning of the Court. There are now almost 4500 filings in the Court (compared to about 4000 in 1979 and 3500 in 1970). The number of petitions granted (210) last Term exceeds the number of cases that can be argued in one Term. Serious and nonpartisan scholars agree that the Court labors under an excessive workload.

The Court's workload is generated primarily by the huge rise in the number of filings in the district courts and courts of appeals.[6] The fact that the Supreme Court cannot decide more than about 150 cases on the merits means that a smaller and smaller proportion of cases in the federal courts can be reviewed. This shortage of national appellate capacity increases the risk that conflicts among lower courts will remain unresolved.

We point out that some of the problems of overload are self-inflicted. The Justices write too many dissenting and concurring opinions; and the opinions are needlessly long and sprawling. The Court has encouraged litigation by permitting easy access to the federal courts in areas such as habeas corpus and §1983. The problems have been aggravated by Congressional action fostering litigation (such as broadened authorizations for the award of attorneys' fees against the government).

The causes for the Court's excessive burdens are, in other words, complex. Nevertheless, there is substantial evidence that the caseload problem is real; and it will only worsen with time.

(2) *Effects of the Proposal on the Supreme Court and the National Appellate Capacity.* We believe the proposal, if adopted, would make a substantial contribution to alleviating the Supreme Court's workload. There should be an immediate 25-30% decrease in the Court's argument calendar. The proposal may induce an increase in the number of certiorari petitions, but this is conjectural and would in any event still produce a substantial net gain. We do not anticipate that the Court would have to devote much time to reviewing the work of the Tribunal.

Mr. Reynolds' Separate Statement disagrees with this assessment. A more extensive discussion of the matter and justification for the Committee's conclusions with respect to it will be found at pp. 3-4 of the Issue Paper serving as an attachment to this Report.

Similarly, we believe that the new Tribunal's contribution to expanding the national appellate capacity will help resolve conflicts and thus contribute to the administration of justice.[7]

(3) *Effects of the Proposal on the Department of Justice.* It seems clear that the Supreme Court's existing workload does not now substantially prejudice the litigation of the Department. The Department has a high success rate with its petitions for certiorari; and no Division reports substantial dissatisfaction with its ability to get conflicts resolved.

Indeed, it should be noted that adoption of the proposal will probably cause some increase in the workload of the litigating Divisions and a substantial increase in the workload of the Office of Solicitor General. However, none of the Divisions foresaw any substantial adverse impact of the proposal on their litigation activities.

Our Committee further concluded that it would be shortsighted to conclude that the Supreme Court bottleneck will not begin soon to have an adverse impact on the Department's litigation activities. Solicitor General Griswold, who supports the current proposal, has stated that as Solicitor General, he was obliged to forego appeal in a substantial number of cases meriting review at the national level because of the limited capacity of the Supreme Court. This problem will become more acute as the number of petitions increases. It is also inevitable that, unless there is relief, more of our petitions will be denied; and more will be resolved summarily. In addition, there will be an increase in litigation resulting from uncertainty in the law.

(4) *Alternatives.* The Department has traditionally taken the position that other, less radical, steps should be taken before we experiment with a new national court of appeals. And it is clear that there are other reforms that could contribute to solving both the problem of Supreme Court workload and that of inadequate national appellate capacity.

The Department has in fact supported some of these reforms in the past and should continue to support them now (abolishing mandatory appeals to the Supreme Court; restricting habeas corpus). Others could and should be considered (e.g., increased use of specialized appellate courts with nationwide jurisdiction in special subject matters; restricting access to federal courts in §1983 cases). Reforms in the Supreme Court's own internal processes should also be considered.[8]

Our Committee's consensus is that, although many of these proposals are promising and should be pursued, their existence does not justify opposition to the Intercircuit Tribunal proposal. The latter has some momentum and, with our support, may be enacted. Alternative solutions are largely theoretical, because of the chronic difficulties of enacting court-reform proposals. Moreover, even if they could be enacted, these other reforms would only postpone the time when increased national appellate capacity would have to be created. It would be regrettable if a constructive and sensible experimental reform were sidetracked on the basis of the availability of alternatives that were purely theoretical and that would only postpone temporarily the need to consider more fundamental reform.

None of this should, however, deter the Department from vigorous efforts to cut down on the volume of federal litigation. These efforts are justified on their own terms, quite apart from the problems addressed by the Intercircuit Tribunal proposal.

(5) *Conclusion: The Department Should Support the Proposal on an Experimental Basis.* It is the consensus of the Committee, in conclusion, that the proposal for a five-year experiment with a properly-designed Intercircuit Tribunal deserves constructive support. The proposal addresses problems that are real and that can only worsen with time. If the proposal is now rejected, it will certainly come up again, and may do so at a time when we can no longer contribute to its wise formulation. Misgivings about the proposal are largely conjectural (and could be raised about virtually any alternative); the point of the experiment is to discover whether the misgivings are soundly based.

It should further be noted that this proposal differs significantly from previous proposals—opposed by this Department—to establish a National Court of Appeals. It is a temporary court, allowing us to benefit from experience before a full commitment to a permanent tribunal is made. Further, it is to be staffed, not by newly appointed "permanent" judges, but by sitting court of appeals judges. Thus there is no permanent commitment to a new tier of judges to sit "above" the regular courts of appeals judges.

The Assistant Attorney General, Civil Rights Division, does not concur in this recommendation. He stated to the Committee that the Tribunal will not be truly experimental but will inevitably become a permanent Tribunal; and he expressed serious reservations about the question whether this new Tribunal, with all of the uncertainties and problems it may generate, has as yet been justified.

Although many members of the Committee shared the concerns expressed by Mr. Reynolds (and agreed that some sort of intercircuit tribunal would probably become a permanent fixture), the consensus in the group was that it would be constructive and useful for the Department to express

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THE RECORD

DOJ Report Favoring Creation of Intercircuit Court

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support for the proposal.

B. How Should the Intercircuit Tribunal Be Designed?

(1) *Structural Issues.* The Committee agreed that the Department should oppose the suggestion that the new Tribunal consist of a large number of judges (the pending bills call for 28) sitting in shifting panels of 5 or 7. A multi-panel court would simply generate new conflicts and instabilities in the law.[9] Rather, the new Tribunal should consist of 7 or 9 court-of-appeals judges, sitting always *en banc.*[10]

(2) *Authority to Assign Judges to the Tribunal.* How Judges are to be assigned to the experimental Tribunal is a major concern. The Committee was unanimously of the view that the proposal in the pending bills, calling for the designation of the judges by the circuit councils, is an unwieldy and unhappy solution that should be opposed.

At the Senate Hearing on S. 645, Professor Levin and Senator Hruska suggested an alternative: members of the Tribunal should be designated by the Chief Justice, subject to the approval of the Supreme Court. This would be comparable to the normal selection procedure for temporary and special courts—assignment by the Chief Justice—but would also assure that the judges of the Tribunal enjoy the confidence of the Supreme Court. This system makes particular sense here, because the value of the Tribunal would depend on the willingness of the Supreme Court to refer cases to it and to let its judgments stand.

Nevertheless, several members of the Committee were concerned that the proposal does not call for the appointment of judges to the new Tribunal by the President (subject to Senate confirmation). In principle, appointments of judges to a new tribunal with a new nationwide authority should not bypass Presidential and Senatorial scrutiny; there was certainly strong feeling within the Committee that that would constitute the proper procedure if this Tribunal were continued beyond the experimental period.

The Committee consensus was, however, that the Department should not insist that the experimental proposal call for appointment of judges by the President. Any such insistence would probably doom the proposal on political grounds. There is ample historical and constitutional precedent for temporary assignment of judges to new responsibilities without Presidential and Senatorial scrutiny.[11] There are both pragmatic and principled reasons justifying the conclusion that the most sensible system for staffing this new Tribunal on a temporary basis is assignment by the Chief Justice, with the approval of the Supreme Court.[12]

(3) *Other Features of the Tribunal.* The Committee recommends that the Department support the remaining features of the pending bills. The new Tribunal should be authorized to decide only those cases that are referred to it by the Supreme Court. The Supreme Court should have the authority to so refer any case within its appellate jurisdiction.[13] Cases on appeal should be referred to the Tribunal for a decision on the merits. Cases within the Supreme Court's certiorari jurisdiction would have two possible "tracks": (a) the Supreme Court could direct the Tribunal to decide such a case; (b) the Supreme Court could refer the certiorari petition to the new Tribunal, and the latter would decide whether or not the case warrants further review. In any event, all decisions by the new Tribunal would be reviewable by the Supreme Court on certiorari. Decisions on the merits by the new Tribunal would constitute binding national authority.

IV. Conclusion

For the foregoing reasons, the Committee recommends that the Department support the Chief Justice's proposal for the creation of a five-year experimental Intercircuit Tribunal with a reference jurisdiction, the Tribunal to consist of 7 or 9 court-of-appeals judges assigned to the Tribunal by the Chief Justice with the concurrence of the Supreme Court. We believe the proposal constitutes a modest but constructive step toward a long-range solution of some of the problems of the federal courts.

Reservations of Mr. Reynolds

I retain some reservations about what is generally a thoughtful Committee Report.

It is beyond dispute that action is urgently needed to ease the Supreme Court's workload and increase its efficiency. In my view, however, serious questions remain about whether the creation of an intercircuit tribunal is really the right answer to what is universally acknowledged to be a critical problem. Until we can satisfactorily resolve these questions, I have misgivings about endorsing any intercircuit tribunal proposal.

Much of the favorable discussion of the current proposals is premised upon the "temporary" nature of the tribunal. While it is always desirable to "fine tune" new institutions in light of experience, there can be little doubt that, once created, the new court will be a permanent fixture of the federal judicial system. There is no reason to believe that judicial bodies are any less subject to inertial tendencies than are other bureaucratic entities. Our consideration of the intercircuit tribunal proposals, therefore, should reflect an awareness that, notwithstanding a "sunset" provision, any new court which is created is likely to be around for a long, long time.

Although the principal reason given for creating a new intercircuit tribunal is the need to relieve the strain upon the Supreme Court's crowded docket, I am not convinced that the proposals currently being discussed will actually result in a decreased workload for the Court. Left wholly unaddressed is the grave problem faced by the Court in attempting to screen an ever-increasing number of petitions for certiorari. One probable consequence of the creation of a new court will be a surge in the number of petitions for review prompted by the existence of additional review capacity.

Another likely consequence is that the Supreme Court's task of reviewing petitions for certiorari will be made more complex by the availability of a third option, namely, referral of a case to the new tribunal. In addition, there may be jurisdictional issues related to referrals which the Court will have to address in individual cases. And, ultimately, little gain will be realized if the Supreme Court decides to review a significant number of the new tribunal's decisions. The temptation to grant review may be even greater with respect to decisions of that court than those of the circuit courts, since the former are national in scope and importance.

Another area of concern pertains to the method of selection of the judges who will sit on the intercircuit tribunal. Whether the selection is by circuit court councils, the Chief Justice, or a majority of the Justices of the Supreme Court, a serious question of judicial accountability is raised. The intercircuit tribunal would decide matters of great national importance, yet unlike other Article III courts with general subject matter jurisdiction, its members would not be chosen through the political process for the court on which they are to sit.

While it is true that each of the judges appointed to the intercircuit tribunal will have been previously appointed by the President and confirmed by the Senate, there is a great deal of difference in the closeness of the scrutiny and visibility of appointments to regional courts of appeal compared with that traditionally accorded appointments to the Supreme Court, heretofore our only national tribunal. Even if members of the intercircuit tribunal were ultimately nominated and confirmed for appointment to that court in the conventional manner, there is the not so remote prospect that all initial appointments to the court could be given to a President and Congress of the same party, thus enabling that party to exercise inordinate influence over the composition and philosophy of the tribunal for years to come.

I also have concern about the shift in emphasis in the Supreme Court's docket which will likely result from the creation of the proposed intercircuit tribunal. That new court can be expected to acquire expertise in various areas of statutory interpretation, such as tax, labor relations, maritime rights and/or antitrust law. The Supreme Court would at the same time become more exclusively a constitutional tribunal. I do not regard this as an altogether sanguine prospect. Frequent, detailed review of federal statutes and regulations by the Supreme Court, in my view, enhances respect for Congress as an institution and for the principle of separation of powers.

A docket that overemphasizes constitutional issues would merely reinforce the view of the Supreme Court as a solomonic council whose prerogative it is to interpret the spacious language of the Constitution in accordance with the predelictions of its members. This has been at the heart of much of the judicial activism over the past several decades. A Supreme Court docket weighted more heavily toward constitutional issues would only add subtle momentum to this development at a time when we are striving mightily to moderate the judicial reach.

I would note, finally, that the creation of [illegible] symptom and not the cause of the major problem which confronts our judicial system and our society generally. That problem is the explosion of litigation—the propensity of Americans to seek a judicial solution for every private conflict and social need—which has occurred in recent decades. Rather than responding with more and more federal judges, and now a new court, the emphasis should be on promoting an increased measure of judicial self-discipline, so that litigiousness is discouraged rather than accommodated.

As Dean Griswold stressed in his recent speech, the burgeoning Supreme Court docket is part of a large problem that afflicts the whole judicial system. It is best remedied by reducing the flow of cases into and through the federal system. An end to federal diversity jurisdiction, revitalization of justiciability doctrines constraining judicial activism, clearer, more concise judicial opinions, and a review of proposed statutes for their litigative impact, are but a few of the ways that that objective can be achieved. Rather than rushing to endorse the creation of a new tribunal, we might be better advised to focus public attention on the underlying factors which the Committee quite properly identifies as the real impediments to lasting relief.

I recognize that the proposal to create an intercircuit tribunal has prominent support and many thoughtful advocates. For me, however, as I have attempted to suggest, there remain a number of unanswered questions. It would be my recommendation that we resolve these troubling aspects of the proposal in our own minds before venturing forth with a Justice Department endorsement.

[1] Members of the Committee included: Assistant Attorneys General Glenn L. Archer, Jr., William F. Baxter, Carol E. Dinkins, D. Lowell Jensen, Robert A. McConnell, J. Paul McGrath, Theodore B. Olson, William Bradford Reynolds, and Jonathan C. Rose.

[2] Mr. Reynolds has reservations about this recommendation. His Separate Statement is attached hereto.

[3] Mr. Reynolds expresses reservations about any system of assignment, even for the experimental period, that did not involve appointment by the President and confirmation by the Senate.

[4] Some members felt that the statute should specify that cases may be referred to the Tribunal only where there is a statutory conflict among the circuits. This issue is discussed in the body of this report.

[5] The Tribunal would be required to decide cases where the Supreme Court has so directed; otherwise it could itself grant or deny review.

[6] (The memo included a chart showing that the caseload of the courts of appeals increased from 20,000 to 28,000 between 1979 and 1982, while the caseload of the district courts increased from 190,000 to 256,000 during the same time period—Ed.)

[7] We expect the Tribunal to hear some 60-100 cases a year. Some 30-50 of these may be cases the Supreme Court would have heard in any event. Another 30-50 may be cases in which certiorari would today be denied even though they merit review.

[8] The Chairman of the Committee has a number of suggestions, including (a) permitting the Court to review certs in panels of 3 Justices, the petitions to go to the full Court in case of any disagreement; (b) reforms in the management of the very burdensome and badly managed original Docket; (c) opening the Term the week after Labor Day; (d) allowing the Court to order a case to be set for rehearing *en banc* by the relevant court of appeals. These suggestions have not been discussed by the Committee and are not endorsed by it.

[9] Strong criticism of the multi-paneled approach was contained in the testimony of Pro-

SELECTED FREEDOM OF INFORMATION ACT REQUESTS

Antitrust Division, DOJ

Requested by: Philip L. O'Neill; Squire, Sanders & Dempsey, D.C. ATD's amicus curiae brief in *Shop & Save Food Markets Inc. v. Pneumo Corp.* Disposition: Granted, 4/15/83.

Requested by: Maxwell G. Battle Jr.; Cason and Henderson, Tampa. Information related to the Cone Corp. Disposition: Partially granted, 4/22/83. Exemptions: (b)(5), (b)(7)(A).

Requested by: Stephen I. Danzansky; Willkie Farr & Gallagher, D.C. Documents related to the acquisition of C.T. Bowring & Co. by Marsh & McLennan Companies Inc. Disposition: Granted, 4/22/83.

Requested by: Robert E. Wagner; Wallenstein, Wagner, Hattis, Strampel & Aubel, Ltd., Chicago. Information related to Invacare Corp. Disposition: Partially granted, 4/22/83. Exemptions: (b)(5), (b)(7)(D).

Requested by: Donald A. Farmer Jr.; Beckman and Farmer, D.C. Documents previously released related to 1977 proceedings before the Civil Aeronautics Board. Disposition: Granted, 4/22/83.

Commodity Futures Trading Commission

Requested by: Howard S. Eilen; Bloom & Tese, New York, 2/17/83. Documents related to Clarke Commodities Service Corp., George A. Clarke, and James Pantelidis. Disposition: Partially granted, 4/13/83. Exemptions: (b)(3), (b)(6), (b)(7)(A).

Requested by: Mark J. Astarita; Gusrae, Kaplan, Lowy & Bruno, New York, 2/25/83. Information related to Stephen Hafer, Fahy International Trading Corp., Justlee International Management Corp., and International Trading Group Ltd. Disposition: Partially granted, 4/15/83. Exemptions: (b)(3), (b)(6), (b)(7)(A).

Requested by: Felice Sacks; Shea & Gardner, D.C., 2/23/83. Financial information regarding C.M. & M. Group Co. and its 10 subsidiaries. Disposition: Granted, 4/20/83.

Comptroller of the Currency

Requested by: Mary C. Carter; Covington & Burling, D.C., 4/8/83. Information regarding the title change of First National Bank (Golden, Colo.). Disposition: Granted, 4/20/83.

Requested by: Bobbie B. Merzazada; Gibson, Dunn & Crutcher, D.C., 4/7/83. Unpublished opinion letters related to 12 C.F.R. §9.18(b)(12) (Collective investment trust funds and fees). Disposition: Partially granted, 4/22/83. Exemptions: (b)(4), (b)(6).

Requested by: Alison Strasburger; Milbank, Tweed, Hadley & McCloy, New York, 4/8/83. Applications related to nonbank banks owned by Parker Pen Co., McMahan Valley Stores, and a subsidiary of Gulf & Western. Disposition: Partially granted, 4/22/83. Exemptions: (b)(4), (b)(6), (b)(8).

Requested by: Angelo R. LoMaicolo; Baker & McKenzie, New York, 4/8/83. (1) Applications filed by Gulf International Bank BSC, Bahrain, and Hang Seng Bank Ltd., Hong Kong, to establish federal branches in New York, and (2) trust powers portion of the federal branch application of Creditanstalt-Bankverein, Vienna. Disposition: Partially granted, 4/22/83. Exemptions: (b)(4), (b)(6).

Department of Energy

Appeal

Requested by: Kirkpatrick, Lockhart, Johnson & Hutchison, Pittsburgh, 3/23/83. (1) Report entitled "The Decline of Controlled Oil" dated 3/16/82, (2) a 140-page draft of a collegial report on disappearing old oil, with a one-page cover memo to DOE General Counsel R. Tenney Johnson from Administrator T. Wendell Butler of the Economic Regulatory Administration, dated 9/8/81, (3) a 26-page memo to Butler from Peter A. Antonelli (former DOE official), concerning the Tertiary Incentive Program, and (4) any other documents related to the Tertiary Incentive Program. Disposition: Partially granted (partially remanded for further determination as to applicability of exemption (b)(4)), 5/10/83.

Federal Trade Commission

Requested by: Gregory Griffin; Levett, Rockwood & Sanders, Westport, Conn., 4/12/83. Information regarding acquisitions and/or divestitures of Procter & Gamble or Duncan Hines since 1/75. Disposition: Denied, 4/28/83. Exemption: (b)(3).

Requested by: Craig J. Hattier, Esq., New Orleans, 4/14/83. Answers to interrogatories submitted by GM Corp. in the investigation of General Motors (Dkt. No. 9145). Disposition: Denied, 5/3/83. Exemptions: (b)(3), (b)(4).

Requested by: John Michael Adragna; Spiegel & McDiarmid, D.C., 4/14/83. Information regarding McGraw-Edison Co., Worthington Compressors Inc., Worthington Service Corp., and Edison International Inc. Disposition: Partially granted, 5/4/83. Exemptions: (b)(3), (b)(4), (b)(5).

Requested by: Richard L. McConnell Jr.; Kirkland & Ellis, D.C., 4/19/83. FTC response to the complaint of National Oil Jobbers Council, related to American Gas Association's "The Future Belongs to the Efficient" ad campaign. Disposition: Granted, 5/5/83.

Requested by: Ray A. Gerritzen; Gerritzen & Gerritzen, St. Louis, 4/19/83. Information related to the 5/2/83 settlement with GM concerning undersizing of the 200 series transmission. Disposition: Partially granted, 5/9/83. Exemptions: (b)(3), (b)(4), (b)(5), (b)(7)(A).

Requested by: M. Scott Barksdale; Gray, Gilliland & Gold, P.C., Atlanta, 4/19/83. Documents related to compliance of Witco Chemical Corp. with a 11/4/74 FTC decision and order. Disposition: Granted, 5/9/83.

Requested by: James J. Sabella; Breed, Abbott & Morgan, New York, 4/21/83. (1) Documents in investigation file no. 741-0049, *Hallmark Cards Inc., et al.*, and (2) the investigation file related to a transaction between American Greetings, Norcross, and Rust Craft. Disposition: Partially granted, 5/9/83. Exemptions: (b)(3), (b)(4), (b)(5).

Securities and Exchange Commission

Requested by: Lester L. Levy; Wolf Popper Ross Wolf & Jones, New York, 4/6/83. Information related to the investigation of International Systems and Controls Corp. Disposition: Granted, 5/1/83.

Requested by: Evelyn C. McDonald; Tarpon Springs, Fla., 4/2/83. Information concerning A.L. Williams Corp. Disposition: Denied, 5/1/83. Exemption: (b)(7)(A).

Requested by: Kenneth J. Bialkin; Willkie Farr & Gallagher, New York, 4/14/83. Documents related to the notice of annual meeting of stockholders and the proxy statement of Louisiana Land and Exploration Co., filed 4/7/83, related to proposed acquisition of Belco Petroleum Corp. Disposition: Granted, 5/4/83. ■

DOJ Memo Favoring Proposal to Create New Appeals Court

Continued from page 39

fessor Leo Levin before the Senate. His testimony is attached to this report.

[10] A single court sitting *en banc* could be constituted by assigning all of its judges for the full period of the experiment. In the alternative, staggered terms could be envisaged, thus assuring some rotation among judges.

[11] District judges can be assigned by the Chief Justice to sit temporarily on the courts of appeals. During World War II, sitting judges were assigned to constitute the Emergency Court of Appeals (with important nationwide responsibilities over the wartime stabilization program) on a temporary basis. Assignments to the now-existing Temporary Emergency Court of Appeals are made without Presidential and Senatorial scrutiny.

[12] Concerns have been expressed that the choosing of these judges by the Court would lead to factionalism and divisiveness within the Court. We are confident that such problems can be solved with a little good will and common sense.

[13] Some members of the Committee felt that the statute constituting the new Tribunal should specify that only cases involving statutory inter-circuit conflicts should be referable to the new Tribunal. The consensus was, however, that this would be undesirable. The primary mission of the new Tribunal would in fact be to resolve inter-circuit conflicts. But so to specify in the statute would create a new, litigable, threshold jurisdictional issue that could confound and complicate the reference jurisdiction. This is particularly so because it is not at all easy to define cases in which there is a "true" conflict. Further, it seems wise to give the Supreme Court some flexibility in determining what sorts of cases are appropriately referable to an interior national tribunal. As long as there is to be an experiment, some flexibility in the on-going design of the experiment seems prudent. ■

Alternatives Include Procedural Changes, More Justices

No Need for a New Court

By Jeffrey Glekel
Special to The National Law Journal 5/30/83

FOR MORE than a decade many prominent jurists, scholars and legislators have been urging the creation of a new appellate court to assist the U.S. Supreme Court in performing its duties. Recently, Chief Justice Warren E. Burger asked Congress to create a national court of appeals on an experimental basis while yet another commission studied whether and in what form such a court should be retained permanently.

It is difficult to oppose experiments and study commissions. There are occasions, however, when proposals are so fundamentally unsound that their pursuit can achieve nothing but the diversion of attention from more promising solutions. Unfortunately, the national court of appeals is such a proposal. If there is a problem that requires immediate action, the answer lies not in a new court but in changes in Supreme Court procedures.

Advocates of a national court of appeals contend that the Supreme Court is unable to hear many cases which require authoritative resolution on a national level and may already be deciding more cases than is consistent with the need for careful deliberation. The chief function of a new national court under the various proposals advanced would be to serve as a subordinate arm of the Supreme Court and adjudicate cases that should be decided on a national level but which the Supreme Court lacks the capacity to accept for review.

There is ample basis for disagreement among reasonable people whether a problem in need of solution exists. On the one hand, there can be little doubt that the Supreme Court today denies certiorari in a significant number of cases that it would have automatically accepted 20 years ago. Furthermore, the growing number of appellate decisions resulting from increases in the number of judges and the volume of litigation may be creating a situation where courts with increasing frequency ignore or circumvent Supreme Court precedents with the expectation that constraints upon the size of its docket make the prospect of Supreme Court review extremely remote. It seems fairly clear that the justices cannot be physically expected to increase substantially the number of cases they decide under the court's present operational format, which generally includes oral argument before all nine justices and a full written opinion.

On the other hand, it is far from clear that there are a significant number of controversies currently being denied review by the Supreme Court that urgently require definitive resolution by a court with national jurisdiction. Indeed, a plausible argument could be made that many cases which the Supreme Court selects for decision on the merits do not require its attention. Moreover, there is little evidence that the court is currently deciding more cases than its resources permit.

EVEN IF ONE agrees that there is a problem which requires solution — and there may well be one — the proposals advanced for a national court of appeals are highly implausible. Such a national court would in all likelihood fail to solve the problem that prompted its creation and to the extent it did would create new problems as serious as those it is designed to cure. This is so for two simple reasons.

First, by the act of deciding cases on a national level the national court would generate a significant body of decisions that present compelling credentials for Supreme Court review. Second, the creation of an additional court designed to decide finally a great number of cases — perhaps nearly as many as the Supreme Court — would create uncertainty among lower courts concerning which court would ultimately review significant issues. This would inevitably detract from the role of the Supreme Court in shaping and controlling the evolution of legal doctrine.

Proponents of a national court of appeals tacitly assume that the Supreme Court would decline to review most of its decisions. The strong likelihood is that precisely the opposite would occur.

It is quite common at present for the Supreme Court to refrain from reviewing cases that a majority of the justices tentatively view as having been wrongly or questionable decided because of the possibility that other appellate courts might decide the questions involved differently or provide further insight into the issues. The justices would undoubtedly adopt a quite different approach, however, where an appellate court has definitively decided an issue on a national basis. One could not realistically expect the justices to permit decisions of such binding authority that they tentatively believe to be erroneous to go unreviewed.

Indeed, the Supreme Court would probably review the decisions of the national court whenever the justices were uncertain of their correctness. As a result, the national court, rather than increasing significantly the number of cases authoritatively decided on a national level, would merely increase the time and resources required to litigate a case up to the Supreme Court.

Furthermore, the national court could not even theoretically achieve its objective of finally resolving a significant number of cases without infringing seriously upon the role of the Supreme Court. The influence of the Supreme Court is not limited to the cases it actually decides. Its decisions and opinions shape the course of legal analysis and doctrinal development in areas well beyond the scope of its holdings. Lower courts when deciding cases for which there are no authoritative precedents carefully consider the reasoning, implications and trends of Supreme Court decisions. The creation of a national court would, to the extent it had the final word in resolving controversies, decrease substantially the tendency of lower courts to look to the Supreme Court for guidance. Lower courts would realize that there was a substantial possibility that the national court rather than the Supreme Court would ultimately resolve difficult legal issues and as a result would be guided in part by its opinions and doctrinal trends.

IT WOULD BE a grave mistake to assume that the national court would be merely a carbon copy of the Supreme Court. Although one assumes the national court would not defy Supreme Court precedents, it would consist of judges with their own judicial philosophies and personalities who would be fully aware that the Supreme Court could not review a substantial portion of its decisions without destroying the rationale for its creation. The consequence might well be that lower courts, cognizant of the existence of two centers of ultimate judicial power, would feel even greater freedom than they do now to follow their own paths.

Fortunately, a much better alternative to a national court of appeals exists: increasing the decisional capacity of the Supreme Court. There are several ways in which the Supreme Court could increase the number of cases it decides without increasing the time that the justices devote to their work.

One possibility is for the court to increase the number of cases that it disposes of summarily without oral argument and with only short per curiam opinions. Many statutory construction cases and cases in which the justices believe that lower courts have departed significantly from Supreme Court precedents appear to be excellent candidates for such treatment. No doubt there are others. Every year there are numerous cases on the Supreme Court's argument docket important enough to merit consideration by the Supreme Court but nevertheless of little precedential or jurisprudential value. Perhaps the court should end its practice of automatically hearing oral argument in cases that it selects for full briefing and opinion. It is far from clear that oral argument is valuable in every case.

Consideration should also be given to permitting the court to decide some cases in panels of less than nine — perhaps of five justices — with a procedure for reconsidering such cases en banc in those instances where it appears likely that the entire court might reach a different result.

FINALLY, if more radical steps are required, it might be desirable to increase the number of Supreme Court justices. An increase of two justices, even if unaccompanied by any of the other changes suggested above, might increase substantially the number of full opinions the court would be capable of issuing.

None of the modifiations in the operation of the Supreme Court suggested above is desirable in itself. Each has its disadvantages. They do have the merit, however, of assuring the disposition of a significantly larger number of cases than the Supreme Court can currently handle without infringing upon its role as the ultimate source of legal guidance. Perhaps there are other alterations in Supreme Court practice that would better achieve these goals. My submission is only that modifying the Supreme Court's procedures would be far more efficacious in increasing the volume of cases decided on a nationwide basis and have fewer undesirable consequences than creating another institution to share its responsibilities. To the extent that such changes appear to be undesirable, careful study should be given to whether a problem currently exists that is more troublesome than its cure.

Mr. Glekel, a member of the New York firm of Skadden, Arps, Slate, Meagher & Flom, served as law clerk to Supreme Court Justice Byron R. White.

THE WHITE HOUSE

WASHINGTON

August 26, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: DOJ proposed report on H.R. 1968, a bill to provide greater discretion to the Supreme Court in the selection of cases for review

OMB has provided us with a copy of the proposed Justice Department report on H.R. 1968, a bill that would largely eliminate the mandatory appellate jurisdiction of the Supreme Court. This bill, which would ease the caseload problem by eliminating the need for the Court to decide mandatory appeals of little broader significance, has long been supported by the Administration. It has actually passed both Houses at different times. Justice's proposed report reiterates Administration support, and attaches past testimony on the subject.

Attachment

THE WHITE HOUSE

WASHINGTON

August 26, 1983

MEMORANDUM FOR BRANDON BLUM
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: DOJ proposed report on H.R. 1968, a bill to provide greater discretion to the Supreme Court in the selection of cases for review

Counsel's Office has reviewed the above-referenced report, and finds no objection to it from a legal perspective.

FFF:JGR:aea 8/26/83

cc: FFFielding
JGRoberts
Subj.
Chron

THE WHITE HOUSE

WASHINGTON

August 26, 1983

MEMORANDUM FOR BRANDON BLUM
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING
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Subj.
Chron

ID #

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WHITE HOUSE
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Subject: DOJ proposed report on H.R. 1968, a bill to provide greater discretion to the Supreme Court in the selection of cases for review

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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

165036

August 24, 1983

LEGISLATIVE REFERRAL MEMORANDUM

SPECIAL

TO: LEGISLATIVE LIAISON OFFICER

Administrative Office of the U.S. Courts

SUBJECT: DOJ proposed report on H.R. 1968, a bill to provide greater discretion to the Supreme Court in the selection of cases for review

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

Please provide us with your views no later than [redacted]

Direct your questions to Branden Blum (395-3802), the legislative attorney in this office.

James C. Murr for
Assistant Director for
Legislative Reference

Enclosure
cc: M. Horowitz
M. Uhlmann
R. Hauser
K. Wilson

Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable Peter W. Rodino, Jr.
Chairman, Committee on the Judiciary
United States House of Representatives
Washington, D. C. 20515

Dear Mr. Chairman:

This is in response to your request for the views of the Department of Justice on H.R. 1968, a bill to provide greater discretion to the Supreme Court in the selection of cases for review. The bill would generally eliminate mandatory appeals to the Supreme Court in favor of discretionary review by certiorari, except for appeals from three-judge district courts.

This legislation originated in the 95th Congress as S. 3100. It was reintroduced in the 96th Congress as H.R. 2700 and S. 450, and in the 97th Congress as H.R. 2406, Title I of H.R. 6872 and S. 1531. It has been enacted at different times by both Houses of Congress -- by the House of Representatives as Title I of H.R. 6872 in the 97th Congress, and by the Senate as S. 450 in the 96th Congress. There has been no opposition to this proposal since its initial introduction in the 95th Congress.

The Department of Justice strongly supports this reform and urges its immediate enactment. The grounds of our support are fully set out in our prior statements and testimony. 1/ The urgency of this reform is heightened by the development of a

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1/ See Letter of Assistant Attorney General Robert A. McConnell to Honorable Peter W. Rodino, Jr., Concerning H.R. 2406 (Dec. 4, 1981); Statement of Deputy Assistant Attorney General Timothy J. Finn Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary Concerning H.R. 2406, H.R. 4396 and H.R. 4395 (June 22, 1982); Statement of Assistant Attorney General Jonathan Rose Before the Subcomm. on Courts of the Senate Comm. on the Judiciary Concerning S. 1529, S. 1531 and S. 1532 (Nov. 16, 1981).

backlog of cases in the Supreme Court, and by the recent statements of nearly all of the Justices that the workload of the Supreme Court is becoming unmanageable.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

Robert A. McConnell
Assistant Attorney General

Enclosures

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

DEC 04 1981

Honorable Peter W. Rodino, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This is in response to your request for the views of the Department of Justice on H.R. 2406, a bill relating to the jurisdiction of the Supreme Court. The general effect of this legislation would be to convert the mandatory appellate jurisdiction of the Supreme Court to jurisdiction for review by certiorari, except in connection with review of decisions by three-judge district courts.[1]

This legislation originated in the 95th Congress as S. 3100.[2] It was reintroduced in the 96th Congress as H.R. 2700 and S. 450. S. 450 was passed by the Senate in April of 1979.[3]

1/In addition to retaining appeals from three-judge district courts, the bill does not eliminate one extremely narrow area of appellate jurisdiction -- 45 U.S.C. § 743(d) authorizes direct appeal to the Supreme Court of certain determinations of the special railroad reorganization court.

2/A bill to the same effect, S. 83, had been introduced earlier by Senator Bumpers.

3/The report accompanying S. 3100 is S. Rep. No. 985, 95th Cong., 2d Sess. (1978). The report accompanying S. 450 is S. Rep. No. 35, 96th Cong., 1st Sess. (1979). There is little difference between the two reports. Hearings on S. 3100 were held in the Senate. See Supreme Court Jurisdiction Act of 1978: Hearings on S. 3100 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess. (1978) [hereafter cited as "Senate Hearings"].

S. 3100 was endorsed in a letter signed by all the Justices of the Supreme Court [hereafter cited as "Letter of the Justices"]. The letter is reprinted in S. Rep. No. 985, 95th Cong., 2d Sess., at 15-16 (1978), and in S. Rep. No. 35, 96th Cong., 1st Sess., at 15-16 (1979).

We believe that the changes effected by this legislation are long overdue, and will bring about a substantial improvement in the administration of justice in the federal courts. The essential defect of the current system is that the Supreme Court is required to devote a large portion of its time to deciding on the merits cases of no special importance because they happen to fall within the categories which qualify for review by appeal under the current statutes. There is no necessary correlation between the difficulty of the legal questions in a case and its public importance. When the Justices are uncertain concerning the appropriate disposition of a case presented on appeal, they are obliged to devote the time and energy to it required for reaching a decision on the merits--including, in many cases, full briefing and oral argument--though all may agree that it raises no question of general interest and would not have warranted the granting of a writ of certiorari.[4]

The present system also interferes with the ability of the Court to select appropriate cases for the decision of recurrent legal questions of public importance. A particular case may raise an important issue, but the record in it may be unclear. The Court's ability to reach a sound decision with respect to a complex and significant issue may be facilitated by first letting several lower courts explore the ramifications of the problem.[5] By forcing the Court to decide the merits of dispositive issues whenever they may arise in a case presented for review by appeal, the current system interferes with the Court's ability to pass on issues at a time and in a context most conducive to the sound development of federal law.

Commentators and commissions that have studied the jurisdiction of the Supreme Court have generally agreed that the categories defined by the existing appeal provisions are essentially arbitrary. Innumerable cases of the greatest significance have been brought under the certiorari jurisdiction of the Supreme Court.[6] Conversely, the statutory categories qualifying for appeal encompass broad classes of cases of no

4/See Letter of the Justices, supra note 3; S. Rep. No. 985, 95th Cong., 2d Sess. 17 (1978)(prefatory remark of Justice Stevens in relation to First Federal Savings and Loan Ass'n of Boston v. Tax Comm'n of Massachusetts, 437 U.S. 255 (1978), and Moorman Manufacturing Co. v. Bair, 437 U.S. 267 (1978)); S. Rep. No. 35, 96th Cong., 1st Sess. 17 (1979)(same).

5/See Colorado Springs Amusements, Ltd. v. Rizzo, 428 U.S. 913, 918 (Brennan, J., dissenting from denial of certiorari); Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 918 (1950) (opinion of Frankfurter, J., respecting denial of certiorari).

6/See, e.g., United States v. Nixon, 418 U.S. 683 (1974); Regents of the University of California v. Bakke, 438 U.S. 265 (1978); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Shelley v. Kraemer, 334 U.S. 1 (1948).

special importance. This point may be appreciated more fully in the context of a detailed consideration of the principal jurisdictional provisions that would be affected by H.R. 2406--28 U.S.C. § 1257(1)-(2), 28 U.S.C. § 1254(2), and 28 U.S.C. § 1252:

28 U.S.C. § 1257(1)-(2). 28 U.S.C. § 1257(1) authorizes review by appeal of a decision of the highest state court in which a decision could be had where the validity of a federal law is drawn in question and the decision is against its validity. 28 U.S.C. § 1257(2) provides similarly for review of state court decisions where the validity of "a statute of any state" is drawn in question on federal grounds and the decision is in favor of its validity.

The purpose of authorizing appeal in such cases is apparently to assure that the supremacy and uniformity of federal law will be upheld by requiring Supreme Court review where federal laws are invalidated or federal challenges to state laws are rejected. However, there is no reason at all to believe that the Supreme Court would be derelict in carrying out this responsibility if given discretion to decide in which cases review is warranted to vindicate federal interests.

As a practical matter, the categories defined by § 1257 do not restrict appeal to cases of general import or unusual significance. The term "statute of any state," as used in § 1257(2), is not confined to laws of statewide applicability, but includes municipal ordinances[7] and all administrative rules and orders of a "legislative" character.[8] In light of the doctrine of Dahnke-Walker Milling Co. v. Bondurant,[9] qualification for appeal under this provision does not require that a challenge be rejected to the general validity of a state law. It is sufficient if a claim was rejected that the application of the state law under the facts of the particular case was barred on federal grounds. Hence, the ability of a litigant to obtain review on appeal depends to a very large degree on his attorney's ability to describe the outcome of the case as a rejection of a challenge to the validity of a state law as applied, rather than on any substantive difference between his case and state cases falling under the certiorari jurisdiction of the Supreme Court described in § 1257(3).[10]

28 U.S.C. § 1254(2). 28 U.S.C. § 1254(2) authorizes appeal by a party relying on a state statute held to be invalid on federal grounds by a federal court of appeals. The category specified in this provision also does not define a class of cases

7/See, e.g., Coates v. City of Cincinnati, 402 U.S. 611 (1971); Jamison v. Texas, 318 U.S. 413 (1943).
8/See Lathrop v. Donohue, 367 U.S. 820, 824-27 (1961).
9/257 U.S. 282 (1921).
10/See Hart & Wechsler, The Federal Courts and the Federal System 631-40 (2d ed. 1973).

of unique importance either to the individual states or to the nation. As in § 1257, the notion of a "statute" in this provision applies to municipal ordinances[11] and administrative orders,[12] and it suffices if a state law is held to be invalid as applied.[13]

28 U.S.C. § 1252. 28 U.S.C. § 1252 provides for direct appeal to the Supreme Court of decisions of lower federal courts holding acts of Congress unconstitutional in proceedings in which the United States or its agencies, officers, or employees are parties. Ordinarily, lower federal court decisions invalidating acts of Congress present issues of great public importance warranting Supreme Court review. We doubt, however, that the Supreme Court would frequently refuse to grant a discretionary writ of certiorari in such a case. In addition, in cases in which expedited consideration by the Supreme Court is required, it is possible for the litigants to apply to the Supreme Court for a writ of certiorari before final judgment in the court of appeals, as the government recently did in Dames & Moore v. Regan, No. 80-2078 (July 2, 1981).[14] Hence, elimination of "direct appeals" under 28 U.S.C. § 1252 need not prove an obstacle to expeditious review in cases of exceptional importance.

In sum, the existing grounds of Supreme Court appellate jurisdiction are essentially arbitrary or unnecessary. We also do not believe that alternative broad rules of mandatory review could be devised that would assure consideration of important cases in a principled and consistent way, but would avoid the types of problems that have arisen under the current system.[15] If the general regime of discretionary review contemplated by H.R. 2406 proves unsatisfactory in particular areas after its enactment, there will be ample time then to consider restoring carefully controlled bases of appellate review to the Supreme Court's jurisdiction.

We do not anticipate that the proposed changes will present any drawbacks from the perspective of the operations of the Department of Justice. For many years Supreme Court practice has

11/See City of New Orleans v. Dukes, 427 U.S. 297, 301 (1976).
12/See Public Service Comm'n of Indiana v. Batesville Telephone Co., 284 U.S. 6 (1931) (assuming that order of state Public Service Commission invalidated by court of appeals is a "statute," but dismissing appeal on other grounds); Stern & Gressman, Supreme Court Practice 64 (5th ed. 1978).
13/See Dutton v. Evans, 400 U.S. 74, 76 n. 6 (1970); Stern & Gressman, Supreme Court Practice 65 (5th ed. 1978).
14/The same procedure was employed in the Nixon tapes case, United States v. Nixon, 418 U.S. 683 (1974).
15/See Senate Hearings, supra note 3, at 33-34 (prepared statement of Prof. Arthur Hellman).

tended to minimize differences between application for appeals as of right and review by certiorari. Parties (including the government) wishing to invoke the Supreme Court's appellate jurisdiction have been required, as a practical matter, to draw up jurisdictional statements similar in character to petitions for certiorari. Hence, the statutory reform that is proposed should not substantially change our practice before the Supreme Court.

Finally, it may be noted that the proposed measures will entail no costs or expenditures. Their effect will only be to allow the Supreme Court to utilize the resources it presently possesses in a more rational manner.

For the foregoing reasons, the Department of Justice supports H.R. 2406, and urges its speedy enactment.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

(Signed) Robert A. McConnell

Robert A. McConnell
Assistant Attorney General

Department of Justice

STATEMENT

OF

TIMOTHY J. FINN
DEPUTY ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL POLICY

BEFORE

THE

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES AND THE
ADMINISTRATION OF JUSTICE
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

H.R. 2406 - MANDATORY APPELLATE JURISDICTION
OF THE SUPREME COURT

H.R. 4396 - ABOLITION OF CIVIL PRIORITIES

H.R. 4395 - RELATING TO JUROR RIGHTS

ON

JUNE 22, 1982

Mr. Chairman and Members of the Committee:

I am pleased to appear before the Subcommittee on Courts, Civil Liberties and the Administration of Justice to discuss the Administration's views on the following bills:

(1) H.R. 2406, relating to the mandatory appellate jurisdiction of the Supreme Court;
(2) H.R. 4396, relating to the abolition of civil priorities, and
(3) H.R. 4395, relating to jury service.

I. H.R. 2406 -- Supreme Court Jurisdiction

H.R. 2406 would generally convert the Supreme Court's mandatory appellate jurisdiction to jurisdiction for review by certiorari, except in connection with review of decisions by

Circuit Courts of Appeals Act of 1890. [4/] This legislation not only created a new level of courts, but also introduced the concept of discretionary review by certiorari. The burden on the Supreme Court was temporarily improved, but by 1925, long delays in the Court's docket led Chief Justice Taft to urge Congress to enact the Judiciary Act of 1925 [5/], which greatly expanded certiorari jurisdiction. In the 1970's Congress further limited the Court's obligatory jurisdiction. [6/]

The Department of Justice believes that the changes incorporated in this legislation are long overdue, and will bring about a substantial improvement in the administration of justice in the federal courts. Justice Frankfurter elucidated the reasons that make curtailment of the mandatory appellate jurisdiction of the Supreme Court desirable:

4/ 26 Stat. 826 (1891).

5/ 43 Stat. 936 (1925).

6/ Legislation adopted in the 1970's that reduced the Supreme Court's mandatory jurisdiction includes: revisions in 1970 to the Criminal Appeals Act, 18 U.S.C. § 3731 (eliminating direct appeals by the United States from certain types of district court criminal decisions); the Antitrust Procedures and Penalties Act, 88 Stat. 1706 (1974) (eliminating direct appeals in cases under the antitrust laws and the Interstate Commerce Act authorized by the Expediting Act of 1903); and the repeal of 28 U.S.C. §§ 2281 and 2282, which required the convocation of three-judge district courts to hear and determine injunctive challenges to the constitutional validity of State or Federal statutes, 90 Stat. 1119 (1976).

term, for example, appeals accounted for about one-quarter of the cases set for oral argument and plenary consideration. Such cases frequently raise no question of general interest and would not warrant the grant of a writ of certiorari.

The current system of mandatory appellate review is also the source of unnecessary confusion in the law. The Court is required to review hundreds of such appeals on the merits, disposing of many in a summary fashion. As the Justices themselves have noted, such summary dispositions "often are uncertain guides to the courts bound to follow them and not infrequently create more confusion than clarity." 10/ The proposed legislation would eliminate the problem of determining the precedential effect of summary dispositions of obligatory cases.

More importantly, the current system should be changed because it interferes with the resolution of recurrent legal questions of public importance. Mandatory appellate review interferes with the Court's ability to pass on issues at a time and in a context most conducive to the sound development of federal law. The Court should not be required to afford review where, for example, the record in a case presenting an important legal question is unclear or the Court's ability to reach a sound decision with respect to a complex and significant issue may be

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10/ Letter from the Justices to Senator DeConcini, cited in note 9 supra.

Committee chaired by former Solicitor General Robert H. Bork stated in 1977, "This residue of implicit distrust has no place in our federal system." 12/

Section 1257 does not restrict appeal to cases of general or unusual significance. The term "statute of any state," as used in Section 1257(2), is not confined to laws of statewide applicability, but includes municipal ordinances 13/ and all administrative rules and orders of a "legislative" character. 14/ Moreover, Dahnke-Walker Milling Co. v. Bondurant 15/ held that the challenge rejected by the state court need not be to the general validity of a state law. Appeal to the Supreme Court may be taken even if the application of the state law was barred on federal grounds only in the particular facts of an individual case. Hence, the availability of appeal may depend simply on an attorney's description of the outcome of a case as a rejection of a challenge to the validity of a state law as applied, rather than on any real difference

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12/ Department of Justice Committee on Revision of the Federal Judicial System, The Needs of the Federal Courts 13 (January 1977).

13/ See, e.g., Coates v. City of Cincinnati, 402 U.S. 611 (1971); Jamison v. Texas, 318 U.S. 413 (1943).

14/ See, e.g., Lathrop v. Donohue, 367 U.S. 820, 824-27 (1961).

15/ 257 U.S. 282 (1921).

noted that in cases in which expedited consideration by the Supreme Court is required, it is possible for the litigants to apply to the Supreme Court for a writ of certiorari before final judgment in the court of appeals, as the government did in United States v. Nixon. 20/

We do not believe that alternative broad rules of mandatory review can be devised that will assure consideration of important cases in a principled and consistent way, and still avoid the problems arising under the current system. If the discretionary review contemplated by this bill proves in practice to be unsatisfactory in particular areas, Congress can restore more carefully defined areas of appellate review to the Supreme Court's jurisdiction.

The proposed measure will entail no additional government costs or expenditures and will permit the Supreme Court to utilize its current resources in a more rational manner. For the foregoing reasons, the Department of Justice supports H.R. 2406, and urges its speedy enactment.

II. H.R. 4396 -- A Bill to Eliminate Statutory Priorities for Civil Cases

H.R. 4396 eliminates over 50 different provisions scattered throughout the United States Code which require that

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20/ 418 U.S. 683 (1974).

number of provisions which require the court to hear particular categories of cases before all others, but no indication of how conflicts between such categorical priorities are to be resolved. The sheer number of cases afforded some kind of priority assures frequent conflict among priorities, and can substantially limit the intended effect of a priority provision.

The various problems presented by civil priorities led the American Bar Association to adopt a resolution calling for the abolition of all civil priorities except habeas corpus. 21/ A particularly serious problem discussed at that time was the delay to non-priority actions caused by these provisions in courts experiencing substantial backlogs. In the late 1970's, for instance, the number of priority civil and criminal cases continually filed in the heavily backlogged Fifth Circuit were so great that for several years the court heard nothing but priority cases. This raised a real fear that non-priority cases might never be heard. Even today, in courts much less heavily backlogged, the priority cases can significantly delay the progress of non-priority cases. Thus, a report of the New York City Bar Association noted that non-priority cases in the Ninth Circuit in 1981 were, on the average, heard 6-8 months after priority cases. 22/

21/ See ABA Special Committee on Coordination of Judicial Improvements, Report of the House of Delegates (Feb. 1977).

22/ New York City Bar Association Committee on Federal Legislation, The Impact of Civil Expediting Provisions on the United States Courts of Appeals (1981).

is a special public or private interest in expeditious treatment of their case will be able to use the general expedition provision provided in H.R. 4396 to the same effect as existing priority provisions.

While we endorse the general design of this bill, I would, however, note that we have not yet been able to complete our own review of the large number of affected statutes to assure that there are no other specific exceptions which can be clearly justified in addition to those two that are identified in the bill. Though we are not prepared to offer any at this time, there may be some additional priorities provisions which are not inconsistent with the basic purpose of this bill, are not over-broad, and can be usefully maintained without burdening the courts. We recognize, however, that any exceptions to the general rule should apply only to very limited and well-defined categories of cases, for which expedition is almost invariably required.

We would also like to note one additional concern with this bill. As it is presently drafted, the bill would require the court to expedite "any action for temporary or permanent injunctive relief." It is clearly desirable to retain existing rules of expedition applicable to certain injunctions under the Federal Rules of Civil Procedure and to require that injunctive actions be expedited "if good cause therefor is shown." As drafted, however, we believe that the bill is over-broad. This

The three changes proposed by the bill share the common purposes of encouraging jury service, making it fairer, and improving the efficiency of court administration. These purposes are obviously important, and the bill's provisions seem reasonable means to those ends. We have reviewed the rationale of the Judicial Conference in recommending passage of this bill, and find it persuasive. The Judicial Conference has, of course, particular expertise in this area and has made what appears to be a thorough study of the need for these changes.

A. Compensation for Injury to Jurors

Section One of the bill would extend federal employees workmen's compensation coverage to all federal petit and grand jurors. At present, coverage extends to jurors who are already federal employees. Jury duty is an important service to the federal government, and it is, of course, desirable to assure that it will not result in excessive financial burdens. Providing this protection against loss due to injury while on jury duty -- however unlikely and infrequent such injury may be -- is an inexpensive and fair measure. Moreover, it seems incongruous that the current law does not provide this protection to private citizens serving as jurors when the protection is accorded to federal employees serving as jurors (5 U.S.C. §8101(1)(A)) and to "individual[s] rendering personal service to the United States similar to the service of a civil officer or employee of the United States, without pay or for nominal pay" (5 U.S.C. §8101(1)(B)).

The efficiency and cost arguments advanced by the Judicial Conference in favor of this proposal are obvious and persuasive. Moreover, so long as it is clear that service by regular mail would only be a first-step means to achieve voluntary compliance, and that the more formal means of summons service would be employed before any sanctions are sought against non-complying recipients, no countervailing arguments occur to us.

In sum, the Department of Justice finds the proposals of H.R. 4395 to be sensible and beneficial. We support these reforms.

I greatly appreciate the opportunity to express our support for these important bills.

STATEMENT

OF

JONATHAN ROSE
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL POLICY

BEFORE

THE

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON COURTS
UNITED STATES SENATE

CONCERNING

S. 1529 - NATIONAL COURT OF APPEALS

S. 1531 - MANDATORY APPELLATE JURISDICTION OF THE SUPREME COURT

S. 1532 - VOIR DIRE CHANGES TO FEDERAL RULES

ON

NOVEMBER 16, 1981

Mr. Chairman and Members of the Committee:

I am pleased to appear before the Subcommittee on Courts to discuss the Administration's position on the following bills: (1) Senate Bill 1529, to establish a National Court of Appeals; (2) Senate Bill 1531, to eliminate mandatory appellate jurisdiction of the United States Supreme Court; and (3) Senate Bill 1532, to change the Federal Rules of Civil and Criminal Procedure regarding voir dire.

1. S. 1529, to establish a National Court of Appeals

S. 1529 would establish a National Court of Appeals. Its jurisdiction would extend to all matters referred to it by the Supreme Court, and its decisions would be binding on all lower federal courts. While this proposal offers some potential benefits, the Department of Justice believes that these benefits are outweighed by the adverse effects which we fear such a substantial change of our judicial structure might entail.

Proposals to create a National Court of Appeals have been discussed at length during the last ten years. Such proposals were intended to deal with the increasing workload of the Supreme Court and, especially, the burgeoning number of applications for certiorari. The dimensions of the increase can be illustrated by the number of cases on the docket of the Supreme Court. In 1949, there were 867 such cases; in 1980, there were

many cases of conflicts between circuits."[4/] This proposal evoked considerable opposition in part because it removed from the Supreme Court to a lower decisional level its critical power to screen and thereby determine which cases the nation's highest court would decide.[5/]

In 1975, a commission chaired by the Honorable Roman L. Hruska proposed creation of a National Court of Appeals similar in structure and powers to that proposed in the current legislation.[6/] The Hruska Report stated that the purpose of a National Court of Appeals was "to increase the capacity of the federal judicial system for definitive adjudication of issues of national law."[7/] The desire to increase the capacity of the judicial system was based upon the existence of "inter-circuit conflicts, delay, uncertainty and the burden presently placed upon the Supreme Court to decide cases which are not truly impor-

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4/ Freund Report, supra note 3, at 18.

5/ See, e.g., Brennan, supra note 2, at 476. See also Gressman, The Constitution v. The Freund Report, 41 Geo. Wash. L. Rev. 951 (1973); Warren, A Response to Recent Proposals to Dilute the Jurisdiction of the Supreme Court, 20 Loy. L. Rev. 221 (1974). But see A. Bickel. The Caseload of the Supreme Court (1973); Freund, supra note 1; and Haynsworth, A New Court to Improve the Administration of Justice, 59 A.B.A.J. 841 (1973).

6/ U.S. Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change (1975), reprinted at 67 F.R.D. 195 (1975) (hereinafter cited as Hruska Report).

7/ Hruska Report, supra note 6, at 5, 67 F.R.D. at 208.

proposed court would inevitably create additional burdens for the Supreme Court.

The new work which would be imposed upon the Supreme Court if the National Court of Appeals were created could be very substantial. A Committee chaired by former Solicitor General Robert H. Bork observed in 1977 that in addition to "simply accepting or declining to accept cases for review, [the Justices] would have to decide whether cases should be reviewed initially by the Supreme Court or referred to the National Court of Appeals. That determination would require considerable study to identify the pivotal issues of cases and to understand their ramifications."10/ At present, the Supreme Court has only to decide whether to take a case or not. The additional options created by the existence of the proposed court would require additional and difficult evaluations where the decision now is simply to accept or deny. Requests for review would become substantially more burdensome and time-consuming.

The responsibility to consider petitions for certiorari after the National Court of Appeals has decided a case referred to it would be an added new burden upon the court. As Judge Luther M. Swygert of the Court of Appeals for the Seventh Circuit

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10/ Department of Justice Committee on Revision of the Federal Judicial System, The Needs of Federal Courts at 18 (January 1977) (hereinafter cited as the Bork Report).

Even if the creation of a National Court of Appeals were to lessen the Supreme Court's workload, the Department of Justice has some serious concerns about the possible impact of the proposed court. As Judge Henry J. Friendly of the Second Circuit stated, establishing such a court would result in the "diminution of authority and prestige of the present courts of appeals."12/ This diminution will certainly make it more difficult to attract and retain judges of the highest stature for such courts. We are especially concerned about this because the cap on pay received by Federal Judges has made it harder than ever to persuade able people to serve. Indeed, the sharing of the Supreme Court's power to interpret the constitution and national law might even tend to dilute the prestige of the Supreme Court itself.

In some areas of law, such as tax and patents, where national uniformity serves important economic planning purposes, the proposed National Court of Appeals could serve a useful and important role in resolving inter-circuit conflicts. Nevertheless, we do not believe that the need for more frequent resolution of inter-circuit conflicts is sufficiently critical at the present time to justify creation of a National Court of Appeals. Wilfred Feinberg, Chief Judge of the Court of Appeals

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12/ Letter of Honorable Henry J. Friendly, Senior Circuit Judge, United States Court of Appeals for the Second Circuit (April 22, 1975), in II Commission on Revision of the Federal Court Appellate System, Hearings, Second Phase, 1974-75, at 1311.

Court of Appeals against conflicting dicta of the Supreme Court?15/

While the Department of Justice is very concerned with the problems which this legislation seeks to address, we have concluded that creation of a National Court of Appeals would be inadvisable at this time. There are preferable ways to lessen the workload of the Supreme Court, such as elimination of mandatory jurisdiction, discussed below.

2. S. 1531, Supreme Court Jurisdiction

S. 1531 would convert the Supreme Court's mandatory appellate jurisdiction to jurisdiction for review by certiorari,

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15/ Alexander Hamilton discussed the need for control of the lower courts by a single Supreme Court during the controversy surrounding adoption of the Constitution:

> There are endless diversities in the opinions of men. We often see not only different courts but the judges of the same court differing from each other. To avoid the confusion which would unavoidably result from the contradictory decisions of a number of independent judicatories, all nations have found it necessary to establish one court paramount to the rest, possessing a general superintendence and authorized to settle and declare in the last resort a uniform rule of civil justice. The Federalist Papers, No. 22, (A. Hamilton) (New Am. Lib. ed. 1961).

certiorari jurisdiction. In the 1970's Congress further converted the Court's remaining obligatory jurisdiction.[19]

The Department of Justice believes that the changes incorporated in this legislation are long overdue, and will bring about a substantial improvement in the administration of justice in the federal courts. Justice Felix Frankfurter elucidated the several reasons that make curtailment of the mandatory appellate jurisdiction of the Supreme Court imperative:

> To resolve conflicts among coordinate appellate tribunals and to determine matters of national concern are the essential functions of the Supreme Court. But such issues appear in myriad forms and no general classification of cases can hope to forecast the specific instances deserving the Court's ultimate judgment. . . . In marking the boundaries of the Court's jurisdiction its broad categories must be supplemented by ample discretion, permitting review by the Supreme Court in the individual case which reveals a claim fit for decision by the tribunal of last resort.[20]

Chief Justice Burger has endorsed these views in stating that, "all mandatory jurisdiction of the Supreme Court that can be,

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19/ Legislation adopted in the 1970's that converted the Supreme Court's mandatory jurisdiction includes: revisions in 1970 to the Criminal Appeals Act, 18 U.S.C. 3731 (eliminating direct appeals by the United States from certain types of district court criminal decisions); the Antitrust Procedures and Penalties Act, 88 Stat. 1706 (1974) (eliminating direct appeals in cases under the antitrust laws and the Interstate Commerce Act authorized by the Expediting Act of 1903); and the repeal of 28 U.S.C. 2281 and 2282, which required the convocation of three-judge district courts to hear and determine injunctive challenges to the constitutional validity of State or Federal statutes, 90 Stat. 1119 (1976).

20/ Frankfurter and Landis, The Business of the Supreme Court, (1982), pp. 257-258.

affirm summarily, and to dismiss for want of a substantial federal question . . . are votes on the merits of the case."[23] However, in Edelman v. Jordan[24] the Court stated that summary affirmances "are not of the same precedential value" as an opinion of the Court "treating the question on the merits." In Hicks v. Miranda,[25] the Court stated that a dismissal of a challenge to the constitutionality of a state statute for lack of a substantial federal question is a decision on the merits. The precedential value of such decisions is unclear.[26] In Mandel v. Bradley,[27] the Court attempted to explain the significance to be attached to summary affirmances. It stated that an affirmance of a lower court decision on appeal affirmed only the judgment, not the reasoning of the lower court. The Court stated that "[t]he precedential significance of the summary action . . . is to be assessed in the light of all the facts in that case."[28] Thus the effect of summary dispositions of appeals is still

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23/ Ohio ex rel. Eaton v. Price, 360 U.S. 246, 247 (1959).

24/ 415 U.S. 651, 670-1 (1974).

25/ 422 U.S. 332, 344-5 (1975). The Court noted that, "Ascertaining the reach and content of summary actions may itself present issues of real substance, and in circumstances where the constitutionality of a state statute is at stake, that undertaking itself may be one for a three-judge court." Id. at 345 n.14.

26/ See C. Wright, Law of Federal Courts 495 (2d ed. 1970).

27/ 432 U.S. 173 (1977) (per curiam).

28/ Id. at 176-177.

circumstances where, for instance, the record in a case presenting an important legal issue may be unclear or the Court's ability to reach a sound decision with respect to a complex and significant issue can be enhanced by examination of subsequent decisions of several lower courts.30/ Moreover, the categories defined by the existing appeal provisions encompass broad classes of cases not all of which are of sufficient importance to merit Supreme Court review. The certiorari jurisdiction of the court, on the other hand, results in the review of cases which ought to be decided because of their importance. This point may be appreciated more fully in the context of the principal jurisdictional provisions that would be affected by S. 1531: 28 U.S.C. Sections 1257(1)-(2), 1254(2), and 1252.

Section 1257(1) authorizes review by appeal of a decision of the highest state court in which a decision could be had where a federal law is found invalid. Section 1257(2) provides similarly for review of decisions by the highest state court where the validity of "a statute of any state" is challenged on federal grounds and upheld.

The purpose of authorizing appeal in such cases is apparently to assure that the supremacy and uniformity of federal

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30/ See Colorado Springs Amusements, Ltd. v. Rizzo, 428 U.S. 913, 918 (Brennan, J., dissenting from denial of certiorari); Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 918 (1950) (opinion of Frankfurter, J., concerning denial of certiorari).

case as a rejection of a federal constitutional challenge to the validity of a state law as applied.[35]

Section 1254(2) authorizes appeal by a party relying on a state statute held by a federal court of appeals to be invalid on federal grounds. The category specified in this provision also does not define a class of cases which are always of special importance. As is the case for Section 1257, a "statute" under this provision includes municipal ordinances[36] and administrative orders.[37] It suffices if a state law is held to be invalid as applied under the facts of a particular case.[38]

Section 1252 provides for direct appeal to the Supreme Court of decisions of lower federal courts holding acts of Congress unconstitutional in proceedings in which the United States or its agencies, officers, or employees are parties. Ordinarily, lower federal court decisions invalidating acts of Congress present issues of great public importance warranting Supreme Court review. There is no reason to believe that the Supreme Court would frequently refuse to grant a discretionary

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35/ See Hart & Wechsler, The Federal Courts and the Federal System, 631-40 (2d ed. 1973).

36/ City of New Orleans v. Dukes, 427 U.S. 297, 302 (1976).

37/ Public Service Comm'n v. Batesville Telephone Co., 284 U.S. 6 (1931).

38/ Dutton v. Evans, 400 U.S. 74, 76 n.6 (1970).

Section 310, Section 801 of the FECA [42] provides means of judicial review. Section 801(b)(2)[43] states that a three-judge panel of the district court "shall have jurisdiction of proceedings, pursuant to this subsection;" with any appeal lying directly to the Supreme Court, under 28 U.S.C. § 2284. The present structure can result in different courts dealing with aspects of the same case. Judicial economy and consistency in results are best served by providing in the FECA for judicial review by the same courts under the same procedures. Therefore, the Department favors deletion of Section 310(b) of the FECA, but simultaneous amendment of Section 801(b) to conform it to the amended Section 310. In the alternative, the current provisions for a three-judge panel with direct appeal to the Supreme Court in section 801 could be retained only in the most exceptional circumstances, namely actions brought by Presidential candidates, with all other cases handled according to the procedure of the revised Section 310 of the FECA.

We do not believe that alternative broad rules of mandatory review can be devised that will assure consideration of important cases in a principled and consistent way, and still avoid the problems arising under the current system. If the discretionary review set forth in practice proves to be

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42/ 26 U.S.C. § 9011.

43/ 26 U.S.C. § 9011(b)(2).

The Notes of the Advisory Committee on Rules of Practice and Procedure to the Judicial Conference on Fed. R. Civ. P. 47(a) state that the current rules on voir dire were based on pre-existing practice which had been "found very useful by federal trial judges." The Advisory Committee also thought it desirable to have a uniform federal practice for criminal and civil cases.44/ The Department of Justice agrees with both of these points.

The Department of Justice is aware of the concerns in the bar regarding the importance of voir dire. Permitting counsel to conduct examination of prospective jurors would likely result in a more thorough examination and could help to assure maximum guarantees against juror bias. However, we do not believe that it would be best to make the changes suggested at this time. Examination of veniremen by counsel would make trials longer; increase the cost to the taxpayer in civil and criminal cases in which the government is a party; and further burden the judicial system. These costs would be incurred even though the present system works well and provides adequate guarantees against juror bias.

The assurance that defendants in criminal trials will receive an impartial hearing before the jury is especially

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44/ See Notes of the Advisory Committee on Rules of Practice and Procedure to the Judicial Conference on Fed. R. Civ. P. 24(a).

Thus in our view the current system provides adequate guarantees of fairness. Moreover, practical considerations strongly support maintaining the traditional federal rule. After conducting a broad study of the federal jury system in 1960, a committee of the Judicial Conference concluded in pertinent part:

> The voir dire examination of trial jurors by the judge, together with supplemental examination, at the instance of the parties and counsel, by the judge, as provided by the above quoted rules, results in a great savings of time, and the character of the examination is thereby much improved. The Committee recommends that this practice be followed in all districts.[49]

Many commentators agree that the federal method of conducting voir dire yields a substantial savings in time when compared with other methods.[50] Some scholars have even criticized voir dire as "a cumbersome, time consuming, meaningless part of the jury trial."[51] Chief Justice Burger has called it a "major piece of litigation, consuming days or weeks."[52] Moreover, one of the major justifications for court-conducted voir

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49/ The Jury System in Federal Courts, 26 F.R.D. 409, at 467 (1960).

50/ Levit, Nelson, Ball & Chernick, Expediting Voir Dire: An Empirical Study, 44 S. Cal. L. Rev. 916 (1971).

51/ Ryan and Neeson, Voir Dire; A Trial Technique in Transition, 4 Am. J. of Trial Advocacy 523, 524 n.3 (1981). See also, Craig, Erikson, Friesen & Maxwell, Voir Dire; Criticism and Comment, 47 Den. L.J. 465 (1970); Imlay, Federal Jury Reformation: Saving a Democratic Institution, 6 Loy L.A. L. Rev. 247 (1973); Levit, Nelson, Ball & Chernick, supra note 45.

52/ National Conference on the Judiciary, Williamsburg, Virginia, March 12, 1971.

time-consuming and expensive, the Department of Justice has concluded that the current system should be retained.

I appreciate very much the opportunity to speak to the Committee about these important bills.