THE WHITE HOUSE

WASHINGTON

February 23, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Commerce Testimony on S. 1917, Proposal to Reduce and Eliminate Broadcast Content Regulation

OMB has asked for our views by February 24 on testimony Assistant Secretary of Commerce David J. Markey proposes to deliver before the Senate Committee on Commerce, Science, and Transportation. The testimony concerns S. 1917, a bill to eliminate content regulation of radio and television. The testimony begins by reviewing the three major "rules" requiring content regulation of broadcasters -- the Fairness Rule, the Equal Time Rule, and the Political Access Rule -- as well as several less prominent content regulations. Markey supports repeal of the three major content rules, arguing that the original justification for the rules -- the scarcity of broadcast fora -- has been seriously eroded by the dramatic expansion in the number of radio outlets and development of cable television. Markey's views are based on an extensive study of the industry conducted by his staff and shared with the Committee. Markey does note that S. 1917 may be too broad, in doing away with all content regulation rather than simply the three most prominent content-based rules. Since the staff study did not consider, for example, regulation of obscene programs, limits on airing of network-supplied programs, and a host of other miscellaneous restrictions, Markey is unprepared to endorse their elimination, and warns that S. 1917, as drafted, may inadvertently do so.

I have no objections.

Attachment

THE WHITE HOUSE

WASHINGTON

February 23, 1984

MEMORANDUM FOR GREGORY JONES
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

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

SUBJECT: Commerce Testimony on S. 1917, Proposal to Reduce and Eliminate Broadcast Content Regulation

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

FFF:JGR:aea 2/23/84
cc: FFFielding/JGRoberts/Subj/Chron

ID # _____ CU

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING
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Name of Correspondent: James Muir

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

Subject: Commerce Testimony on S1917, a proposal to reduce and eliminate broadcast content regulation.

ROUTE TO:		ACTION		DISPOSITION		
Office/Agency	(Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CU	HOLL	ORIGINATOR	84/10/22			/ /
CU	AT 18	Referral Note: D	84/12/22		S	84/10/24
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ACTION CODES:
A - Appropriate Action
C - Comment/Recommendation
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5/81

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

SPECIAL

February 21, 1984

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer

Department of Justice

SUBJECT: Commerce testimony on S. 1917, a proposal to reduce and eliminate broadcast content regulation

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 February 24, 1984.

Direct your questions to Gregory Jones (395-3856), of this office.

James C. Murr for
Assistant Director for
Legislative Reference

Enclosures

cc: F. Fielding
M. Uhlmann
A. Curtis
M. Horowitz
C. Goldfarb
J. McNicholas

Statement for the record

Statement of David J. Markey
Assistant Secretary for Communications and Information
U.S. Department of Commerce
Before the Committee on Commerce, Science, and Transportation
United States Senate
On S. 1917 and Related Legislative Proposals to
Reduce and Eliminate Broadcast Content Regulation

Introduction

Radio, television, and other electronic mass media currently are subject to statutory and other limitations governing program content. 1/ The "Fairness Doctrine," said to be codified as part of section 315 of the Communications Act of 1934, as amended (47 U.S.C. Sec. 315 (1982)) requires broadcasters, for example, to cover controversial issues of public importance and to do so "fairly," 2/ Under the "Equal Time Rule," also codified in section 315, broadcasters must accord all candidates for public

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1/ See generally Brazelon, FCC Regulation of the Telecommunications Press, 1975 Duke L.J. 213 (1975); Chamberlain, Lessons in Regulating Information Flow: The FCC's Track Record in Interpreting the "Public Interest" Standard, 60 N.C.L. Rev. 1057 (1982); Coyne, The Future of Content Regulation in Broadcasting, 69 Cal. L. Rev. 555 (1981); Robinson, The FCC and the First Amendment: Observations on 40 years of Radio and Television Regulation, 52 Minn. L. Rev. 67 (1967).

2/ See, e.g., Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 396 (1969); CBS, Inc. v. Democratic National Committee, 412 U.S. 94, 116 (1973); NBC v. FCC, 516 F.2d 1101 (D.C. Cir. 1974); Public Media Center v. FCC, 587 F.2d 1322 (D.C. Cir. 1978); Fairness Doctrine Primer, 48 FCC 2d 1, 15 (1974); Editorializing by Broadcast Licenses, 13 FCC 2d 1246 (1949). See generally Lange, The Role of the Access Doctrine in the Regulation of the Mass Media: A Critical Review and Assessment, 52 N.C.L. Rev. 1,2 (1973) (and citations therein); Comment, Enforcing the Obligation to Present Controversial Issues: The Forgotten Half of the Fairness Doctrine; 10 Harv. C.R. & C.L. L. Rev. 137 (1975)

office equal air time should one candidate be granted media access, subject to a number of exceptions and conditions. 3/ Section 312(a)(7) of the Act, added in conjunction with election reform legislation enacted by Congress in the 1970s, further obliges broadcasters to afford all candidates for Federal elective office on-air access and to do so at the "lowest unit rate." 4/ These statutory requirements have been generally applied both to new media such as cable television as well as to the national television networks directly. 5/

In addition to the familiar Fairness, Equal Time, and Political Access requirements, broadcast licensees are also subject to additional program content regulations. Special requirements obtain, for example, with respect to "personal attacks." 6/ Broadcasting obscene, indecent, or profane programming is proscribed. 7/ Noncommercial,

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3/ See, e.g., Farmers Co-op v. WDAY, 360 U.S. 525 (1959); Flory v. FCC, 528 F.2d 124 (1975).

4/ See, e.g., CBS, Inc. v. FCC, 453 U.S. 367, 375 (1981); Kennedy Committee v. FCC, 636 F.2d 432 (D.C. Cir. 1980). See generally Deisley, Recognition of Federal Candidates' Right of Access to Broadcasting Facilities, 1982 Utah L. Rev. 641 (1982); Henwood, The Affirmative Right of access for Federal Candidates, 35 Ark. L. Rev. 637 (1982).

5/ See generally Geller & Lampert, Cable, Content Regulation, and the First Amendment, 32 Cath. U.L. Rev. 603 (1983); Krattenmaker & Metzger, FCC Regulatory Authority over Commercial Television Networks, 77 Nw. L. Rev. 403 (1982); Melnick, Access to Cable Television: A Critique of the Affirmative Duty Theory of the First Amendment, 70 Cal. L. Rev. 1393 (1982).

6/ See Straus Communications, Inc. v. FCC, 530 F.2d 1001, 1007 (D.C. Cir. 1976); Personal Attack Rules, 45 P. & F. Radio Reg. 2d 1635 (1959)

7/ See 18 U.S.C. Sec. 1462 (1982); FCC v. Pacifica Foundation, 438 U.S. 726 (1978).

educational broadcasters are circumscribed in their ability to editorialize [8], and prohibited from airing most commercial advertising. [9] Under section 508 of the Communications Act, broadcasters may not air paid-for programming without also disclosing such payment or the actual sponsor [10], may not air cigarette advertisements under provisions of title 15, U.S. Code [11], and under section 509 of the Communications Act also may not air staged or otherwise misleading contests. [12] In addition to these statutory restrictions on program content, Federal Communications Commission rules and "policy statements" have the practical effect of proscribing a number of discrete categories of programming. [13] Television stations, for example, are constrained in the volume of network-supplied programs they may air during "prime time" hours, and also limited in the number

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8/ See 47 U.S.C.A. Sec. 399 (1983). See also Community Service Broadcasters v. FCC, 593 F.2d 1102 (D.C. Cir. 1978); Muir v. Alabama Educ. Telev. Comm'n, 688 F.2d 1033 (5th Cir. 1982); League of Women Voters v. FCC 547 F. Supp 379 (S.D. Cal. 1982), cert. granted, 52 USLW 3086 (1983). See generally Charkes, Editorial Discretion of State Public Broadcasting Licensees, 82 Colum. L. Rev. 1161 (1982).

9/ See 47 U.S.C.A. Sec. 399b(b)(Supp. 1983). Cf. Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981); Central Hudson Gas & Elec. Corp. v. New York PSC, 447 U.S. 557(1980); ConEd v. NYPSC, 447 U.S. 530 (1980)

10/ Cf. United States v. Vega, 447 F.2d 698 (2d Cir. 1971).

11/ See 15 U.S.C. Sec. 1335 (1982); Larus & Brother Co. v. FCC, 447 F.2d 876 (4th Cir. 1971); Capital Broadcasting v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971).

12/ See Melody Music, Inc. v. FCC, 345 F.2d 730 (D.C. Cir. 1965).

13/ E.g., certain horse racing results (47 CFR 73.4135), obscene songs (47 CFR 73.4170), sirens and emergency sounds (47 CFR 73.4240), subliminal messages (47 CFR 73.4250), astrology (47 CFR 73.4030).

of networks with which they may affiliate. 14/ Finally, provisions of the Communications Act (47 U.S.C. Sec. 325 (1982)) as well as the copyright laws in general affect broadcasters in their program choices.

Proposed Legislation

S. 1917, the "Freedom of Expression Act of 1983" evidently aims at repealing the most widely debated of the FCC's program content controls, namely those required by sections 312 and 315 of the Communications Act. Section 4 of the bill would, first, repeal the "Political Access" requirements discussed above. Second, section 4(2) of S. 1917 would repeal section 315 of the Communications Act in its entirety, thus rescinding the Fairness and Equal Time rules. Finally, S. 1917 would amend the existing anti-censorship provision of the Communications Act (47 U.S.C. Sec. 326 (1982)) ostensibly to eliminate all regulatory authority to police or otherwise regulate program content.

NTIA's Views on the Principal Issues

In our 1981 statement to the House Subcommittee on Telecommunications, Consumer Protection, and Finance concerning the need, if any, for special Federal constraints governing electronic media programming, we concluded that any case for the three most debated rules -- Fairness, Equal Time, and Political Access -- had been significantly eroded by technological and commercial changes in the U.S. mass media marketplace. We voiced strong support for the FCC's Radio Deregulation initiative, one aspect of which was the elimination of some of the regulatory

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14/ See, e.g., National Assoc. of Indep. Telev. Producers & Distributors v. FCC, 502 F.2d 249, 516 F.2d 526 (2d Cir. 1974, 1975); Access to Programs of More than One Network, 28 FCC 2d 169, 31 FCC 2d 87 (1971).

program control "underbrush" with respect to AM and FM radio. 15/ Similarly, we concluded that the public policy case for imposing traditional content controls on cable television systems was exceedingly weak and we noted again with approval, the FCC's Cable Television Deregulation ruling that, as with radio, curtailed some of the then-prevailing content controls. 16/ We did not, however, specifically address controls imposed under statutory provisions other than sections 312 and 315 of the Communications Act.

Most traditional program content controls, of course, have been premised on "scarcity" notions or, more recently, assumptions regarding the unique persuasiveness or "immediacy" of the electronic media. 17/ As we noted, however, the sheer number of radio stations now available to most of the public -- 10,137 nationwide at last count -- and the plethora of viewing options currently offered the nation's 60 million cable television viewers largely negate any scarcity basis for regulating radio or cable programming, assuming, again, that such regulation is constitutionally permissible.

We did not endorse proposals to lift program content limitations from television in 1981 because we were concerned that many of the analytical underpinnings present for cable and radio deregulation did not then exist for television. We indicated, however, our belief that the case for extending

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15/ See Radio Deregulation, 84 FCC 2d 968 (1981), aff'd and rev'd in part sub nom., Office of Communications of the United Church of Christ v. FCC, ___F.2d.___, 53 P.& F. Radio Reg. 2d 1371 (D.C. Cir. 1983).

16/ See Cable Television Deregulation, 71 FCC 2d 632 (1979), aff'd sub nom., Malrite TV v. FCC, 652 F.2d 1140 (2d Cir. 1981).

17/ See CBS, Inc. v. Democratic Nat'l Committee, supra, 412 U.S. at 116. See generally Jaffe, The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access, 85 Harv. L. Rev. 768, 787 (1972); Note, Content Regulation and the Dimensions of Free Expression, 96 Harv. L. Rev. 1854 (1983).

content deregulation to television would likely prove relatively easy to develop.

In response to the Senate Commerce Committee's subsequent request, NTIA staff undertook a careful review of the television broadcasting field. The results of this survey were forwarded to the Committee and have been made a part of the public record. 18/ Our report focused chiefly on the "scarcity" rationale; we did not endeavor to address the more troublesome "impact" rationale sometimes advanced as justification for content controls. This latter rationale does not easily admit to objective, quantitative analysis. Indeed, the "impact" rationale, in our view, is a particularly dangerous justification for Government involvement in media content control as it is potentially expansible to encompass a broad range of other communications media that some subjectively might deem to have an impact equal to, perhaps greater than, broadcasting. See, e.g., Miami Herald Publ. Co. v. Tornillo, 418 U.S. 241, 252 (1974).

Based on our earlier appraisal of prevailing conditions in the radio and cable television markets, and our more recent review of broadcast television, we believe repeal of sections 312(a)(7) and 315 of the Communications Act is warranted. The traditional scarcity rationale for these particular content control provisions, in our view, no longer obtains. We see no other constitutionally permissible basis for imposing restrictions on commercial stations' editorial freedoms such as these twin, related provisions of the Communications Act impose.

Concerns with the Breadth of S. 1917

We support the elimination of the Fairness Equal Time, and Political Access rules that S. 1917 contemplates. Our review and,

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18/ See NTIA Staff Report, Print and Electronic Media: The Case for First Amendment Parity, reprinted as S. Print 98-50 (May, 1983).

indeed, the extensive record that the Committee has developed to date, persuades us that these rules are no longer justifiable on the basis of assumed media scarcity. By discouraging coverage of controversial issues and legitimate political debate, these three rules, in our view, impose unacceptable opportunity costs and for no sound reason thus unreasonably constrain Mr. Justice Holmes' "free trade in ideas" (Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)). We believe a sound case exists for eliminating these constraints with respect to radio, cable television, broadcast television, and the other new electronic mass media now emerging.

We are concerned, however, that the broad language in the proposed revision of section 326 of the Communications Act could be construed as eliminating far more than merely those restrictions on editorial freedoms contained in sections 312 and 315 of the Act. As indicated above, currently there are a diversity of additional limitations placed on electronic media programs both by other provisions of the Communications Act and by other laws (whose terms are reflected in implementing FCC regulations).

Many of these additional constraints may be as unwarranted as those imposed under sections 312 and 315, given the changes in the marketplace that have occurred since their enactment. Our review of marketplace circumstances and the adverse consequences of FCC program controls has been limited, however, to the effects on radio, cable, and television of sections 312 and 315. While we are not necessarily unsympathetic to the goal of eliminating all distinctions between printed and broadcast media, we do not now have a firm factual basis for endorsing elimination of all restrictions on broadcast programming reflected in current law.

Conclusion

We support the repeal of sections 312(a)(7) and 315 of the Communications Act, as S. 1917 proposes. Our analysis indicates no sound basis for the Fairness Doctrine, Equal Time, and Political Access rules. We now believe, moreover, that such repeal is warranted by the facts with respect to radio, cable, and broadcast television, based in part on the detailed and extensive report prepared last year at the Committee's request.

Although we thus believe there is a sound policy and factual basis for eliminating these three, most widely debated broadcast content controls, we are concerned about the breadth of the language contained in proposed new section 326. If enacted, this latter language in S. 1917 could have the effect of eliminating a diversity of programming rules that we have not yet fully studied.

We are reluctant, based on the facts now available to us, to endorse rescission of virtually all limitations on electronic media content, which this proposed language in the bill could be construed to accomplish. The elimination of all of these additional content controls may be desirable. Prior to reaching that determination, however, we would prefer more carefully to evaluate each constraint. The Fairness, Equal Time, and Political Access rules have been individually analyzed and evaluated in the context of industry conditions as they now exist. The same has not yet been accomplished with respect to other content-related rules, however, and until that has been done, we endorse only the repeal of sections 312(a)(7) and 315 called for in S. 1917.

THE WHITE HOUSE

WASHINGTON

February 27, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS/JGR

SUBJECT: Testimony on H.R. 3668

OMB has asked for our views by close of business Tuesday, February 28, on two sets of testimony to be delivered on March 1 by Administration officials before the Subcommittee on Administrative Law and Governmental Relations of the House Judiciary Committee. Both Deputy Assistant Attorney General Stuart Schiffer and Department of Defense Assistant General Counsel Dennis Trosch plan to oppose H.R. 3668. That bill would eliminate the requirement in current law that contractors certify that contract claims against the Government in excess of $50,000 are made in good faith, that supporting data are accurate and complete to the best of their knowledge, and that the amount claimed is that for which the contractor believes the Government to be liable.

Trosch notes in his testimony that the certification requirement is not cumbersome and serves the very useful purpose of eliminating "gamesmanship" by contractors seeking to obtain a favorable settlement of their claims. Schiffer argues in his testimony that this is not an anomalous requirement, despite the fact that private parties trying to reach a settlement do so by just such a process of gamesmanship. The difference is that the Government party in these cases -- a contracting officer -- must under law carefully consider and resolve claims in a quasi-judicial manner. In short, the Government cannot play the usual settlement "game;" accordingly, the certification requirement reasonably inhibits contractors from doing so.

I have no objections.

Attachment

THE WHITE HOUSE

WASHINGTON

February 27, 1984

MEMORANDUM FOR GREGORY JONES
LEGISLATIVE ANALYST
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT Original Signed by FFF

SUBJECT: Statements of Stuart E. Schiffer and Dennis H. Trosch Concerning H.R. 3668 -- Contract Disputes Improvement Act -- on March 1, 1984

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

FFF:JGR;aea 2/27/84
cc: FFFielding/JGRoberts/Subj/Chron

ID # _____ CU

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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Name of Correspondent: Greg Jones

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

Subject: Statement of Stuart Schiffer before House Judiciary Committee concerning HR 3668 - Contract Disputes Improvement Act on March 1st, 1984

ROUTE TO:		ACTION			DISPOSITION		
Office/Agency	(Staff Name)	Action Code	Tracking Date YY/MM/DD		Type of Response	Code	Completion Date YY/MM/DD
CU HOLC		ORIGINATOR	84 02 24				/ /
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Name of Correspondent: James MUIR

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

Subject: Department of Justice testimony on H.R. 3668, a bill to amend the Contract Dispute Act of 1978. Statement of Stuart Schiller.

ROUTE TO:		ACTION		DISPOSITION		
Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CU HOLL	ORIGINATOR	84 10 24			/ /
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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

February 24, 1984

SPECIAL

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer

General Services Administration
Department of the Treasury
Department of Defense
Department of Energy
Department of Health and Human Services
Office of Personnel Management
National Aeronautics and Space Administration

SUBJECT: Department of Justice testimony on H.R. 3668, a bill to amend the Contract Disputes Act of 1978.

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.

A response to this request for your views is needed no later than

COB - Tuesday, February 28, 1984

Questions should be referred to Gregory Jones (395-3856), the legislative analyst in this office.

James C. Murr for
Assistant Director for
Legislative Reference

Enclosures
cc: Fred Fielding Pat Szervo Lee Dowd Al Burman Bob Bedell
Wilda Schreiber Mike Horowitz

DRAFT

FEB

STATEMENT

OF

STUART E. SCHIFFER
DEPUTY ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION

BEFORE

THE

HOUSE JUDICIARY COMMITTEE
SUBCOMMITTEE ON ADMINISTRATIVE LAW
AND GOVERNMENTAL RELATIONS

CONCERNING

H.R. 3668 - CONTRACT DISPUTES IMPROVEMENT ACT

ON

MARCH 1, 1984

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to appear before you today to express the views of the Department of Justice on H.R. 3668.

In our view, the present certification requirement appears to be working well. At the same time, we are aware of concerns which have been expressed with respect to perceived problems with the requirement. We believe that it is possible to deal with the bona fide concerns of contractors, while preserving the salutary purposes of the certification requirement.

As a separate matter, we also propose that the current one-year time limit for appealing adverse contracting officer's decisions to the Claims Court be reduced to the same 90-day period presently applicable to the boards of contract appeals.

The requirement that a contractor certify contract claims in excess of $50,000 was enacted into law as part of the Contract Disputes Act of 1978. The certification provision requires a contractor to state, when submitting a contract claim in excess of $50,000, that the claim is made in good faith, that the supporting data are accurate and complete to the best of the contractor's knowledge and belief, and that the amount requested accurately reflects the amount for which the contractor believes the Government is liable. That is all. Certification does not freeze the contractor into any particular characterization of his claim or any particular amount of claim. All the requirement does is prohibit the submission of claims in which the contractor

does not believe or claims which the contractor has knowingly inflated.

The importance of the certification requirement is that it brings balance to the process by which contract disputes are negotiated and settled at the contracting officer level. That process is not analogous to the process by which two private parties might negotiate a settlement. When a claim is presented to a Government contracting officer, the contracting officer is not free to posture or to take positions unrelated to the merits of the claim for negotiation purposes. A contracting officer must act in a quasi-judicial capacity and render an impartial decision as to the contractor's entitlement. This was so even prior to the advent of the certification requirement in 1978. Then, contractors were free to burden the Government's contracting officers with inflated claims and claims based upon legal theories which not even the contractors believed in. Government contracting officers were not free to reject such claims out of hand, but were required to sort objectively through the contractor's submission in order to determine if there was any legal entitlement. This task was made all the more difficult because contracting officers could not have any confidence that the amount claimed was that which the contractor actually wanted and to which he thought he was entitled.

The certification requirement requires contractors to submit only those claims in those amounts to which they believe they are honestly entitled. The certification requirement thus limits the

opportunity for contractors to posture in the presentation of their claims just as the Government has long been prohibited from posturing when responding to those claims. The result is that both sides are now required to place on the negotiating table only those positions in which they honestly believe. The balance imposed upon the negotiation process by the certification requirement will, over the long run, significantly improve the climate in which contract disputes between the Government and contractors are considered and will increase the likelihood that such disputes can be settled administratively. These benefits will be lost, however, if the certification requirement is eliminated or, even worse, changed so that certification does not occur until after the contracting officer's decision has been rendered.

One of the complaints frequently voiced against the certification requirement is that it has engendered a substantial amount of litigation. This was true during the first two years after the Contract Disputes Act. However, that litigation is largely behind us. When the certification requirement was new, there were a series of cases in which its parameters were tested. These were necessary largely because some contractors did not take the certification requirement seriously. For example, some prime contractors attempted to submit claims certified only by their subcontractors. Other contractors attempted to qualify their certifications in ways not permitted by the statute. Other contractors attempted to divide large claims into a number of smaller claims, all of which were less than $50,000 so as to

avoid the certification requirement. Still others, having failed to certify their claims before the contracting officer, sought to cure those defects months or years later when the disputes were pending before a board or court.

The result of all of these cases has been a judicial interpretation which holds that the certification requirement means exactly what it says. That is, the claim must be certified by the parties submitting the claim, it must be certified with only those qualifications permitted by the statute, and it must be certified before the contracting officer can render a decision on the claim if the claim is in excess of $50,000. Now that it is clear that the certification requirement cannot be finessed or avoided and must be met at the time the claim is submitted, there are virtually no new disputes over whether the certification requirement has been fulfilled.

Another problem with the certification requirement frequently raised by contractors is that they are obliged to quantify their claims before presenting them to the contracting officer. It is asserted that there are certain types of claims for which a contractor should be able to obtain the Government's view of its liability before the contractor is burdened with collecting the data needed to quantify the claim. We strongly believe this complaint is unfounded for several reasons.

First, it ignores the fact that the Act envisions that most disagreements between the contractor and the Government will be negotiated and resolved without there ever being a formal

"claim." If the contracting officer agrees that the contractor is entitled to be paid, the amount itself is usually always negotiated. A contractor has a practical need to submit a claim under the Act only if he has been unable informally to persuade the contracting officer to modify the contract. At that point, assembling the data needed to quantify the claim is something the contractor would eventually do anyway.

Second, it is simply a fact of human nature that parties are much more likely to settle a contract dispute if they both know the amount of money at issue. It bears reiterating that the Contract Disputes Act was intended to foster the negotiated settlement of claims without formal claims proceedings. Agencies have advised us of numerous cases in which a contractor has discovered, after going through the exercise of quantifying his claim, that the claim was worth less than he thought and, indeed, within a range that the contracting officer would accept. Returning to the old days in which contractors were not obliged to assess what their claims were actually worth before trying to settle them with the contracting officer is not the way to foster negotiated settlements.

Third, it is our experience that the certification requirement is already being flexibly applied by the boards of contract appeals and the United States Claims Court in situations where the amount of the claim is not necessary to a meaningful decision by the contracting officer. For example, where one liability determination would be determinative of a whole series of claims

by the contractor, some of which had not even accrued yet, a certification was approved by the Claims Court which presented only the liability issue and did not even purport to quantify the claim. Only where it has been concluded that the contracting officer "was left unable to intelligently and confidently evaluate the presented claims" has the certification been held to be unacceptable because the amount of the claims asserted was uncertain, ambiguous, or undeterminable. We fail to see any bona fide purpose for relieving contractors of the purported burden of quantifying their claims in such cases.

The only problem that we can perceive with the certification requirement, and it is not clear that even this is a problem, concerns the accrual of interest. In order to encourage contractors to expedite the submission of claims, the accrual of interest on their claims has been linked to the date upon which the claim is certified. There are certain types of claims, however, where the basis of the disagreement is known before all the financial consequences of the Government's position can be assessed. On claims of this type, where certain costs have been incurred but additional costs are expected to be incurred in the future, it is said that the certification requirement places contractors on the horns of a dilemma. If they certify their claim on the basis of the costs known early on, they will preserve their right to interest on those costs but may lose the opportunity to recover later incurred costs. On the other hand, if contractors wait

until all their costs are known, they will have lost a substantial amount of interest on costs which were incurred immediately after the claim first arose.

This potential problem assumes that contractors are not free to recertify claims in a larger amount based upon later incurred costs. Although the question has not been finally decided, both the Claims Court and the boards of contract appeals which have considered the matter have concluded that a contractor is not limited by his initial certification but may recover a larger amount than the amount certified if that larger amount is eventually proved. We would agree that the certification requirement should not be used to thwart contractors from recovering interest on costs which they have incurred in connection with a claim. Thus, while we vigorously oppose the elimination of the certification requirement contemplated by H.R. 3668, we would have no objection to clarifying the Contract Disputes Act to eliminate any doubt as to whether contractors can recertify claims in larger amounts based upon later incurred costs. Interest on these later incurred costs could then accrue from the date on which they were certified. This change would make it certain that contractors will receive interest on all claim-related costs and yet preserve the incentive to file claims promptly and not to overstate them knowingly.

We proposed to the Administrative Conference of the United States specific language that would accomplish this result without eviscerating the certification requirement. Our proposal

to the Administrative Conference was rejected only by a vote of 22 to 21, with the Chairman casting the decisive tie-breaking vote. We would be happy to work with Committee staff to incorporate our proposed language into a suitable bill if the Committee would so desire.

Two other changes in the CDA which would be made by H.R. 3668 merit brief attention. Section (d) would amend the interest provision so that interest accrues from the date a claim is submitted to the contracting officer. Provided that the language is changed so that interest accrues from the date a claim is first certified, we have no objection to this proposal. Section (c) would change the scope of judicial review of board of contract appeals decisions from the present standard, which is one of substantial evidence, to a broader standard permitting reversal of decisions found to be clearly erroneous. The narrower, substantial evidence, standard of review is the one traditionally applied to administrative decisions. It is the standard of review which has been applied to decisions of the boards of contract appeals since 1950. We know of no reason why boards of contract appeals decisions should be singled out and subjected to a broader scope of review than other administrative decisions.

Finally, since you have requested our views on the Contract Disputes Act apart from the changes proposed by H.R. 3668, we would urge you to consider reducing the current one-year period for appeals to the Claims Court to the same 90-day period applicable to boards of contract appeals. It has never been clear why

appeals to one forum should not be filed as promptly as claims to another, particularly where the scope of relief available in both forums is essentially the same. The one-year delay available to a contractor presents a substantial hardship to the Government, moreover, when the decision of the contracting officer is on a Government claim such as the assessment of excess reprocurement costs. At present, it is unclear whether the Government can take any action to collect its claims against a contractor until it is known whether the contractor will appeal the contracting officer's assessment. Requiring a contractor to decide whether to appeal such an assessment within 90 days would not impose a significant burden on contractors and, where no appeal is intended, it would enable us to accelerate the collection of debts admittedly owed to the Government.

In sum, it is our view that the certification requirement is now serving a very salutary and important function in the resolution of contract disputes and that is generally working well. To the extent that the certification requirement may be having an unintended effect of limiting the entitlement of contractors to interest on costs legitimately incurred, it should be changed. But the way to solve that problem is not to eliminate the certification requirement or to move the certification requirement to a later time in the disputes procedure or to muddle up the certification requirement with ambiguities that will only foment additional litigation. Rather, it is to make plain that contractors are free to increase the amount of their certification to include

later discovered costs that could not have been known when the original certification was made.

In closing, it should be noted that the certification requirements added by the Contract Disputes Act of 1978 were part of a compromise in which the contracting community obtained streamlined disputes procedures and the Government, through the certification requirement, obtained relief from having to consider on the merits claims which contractors believed were inflated or unfounded. Government contractors accepted that bargain in 1978. We believe that the public interest requires that the certification requirements imposed by the legislative bargain in 1978 should be maintained. Even further, we believe that the preservation of the certification requirement will serve the long-term interest not only of the public but of the contracting community as well. The amendment I have proposed would cure what we see as the only valid concern regarding the present operation of the certification requirement and would continue to protect the interest of the taxpaying public.

Once again, Mr. Chairman, I wish to thank you for this opportunity to appear before you today to express the views of the Department of Justice.

ID # _____ CU

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Name of Correspondent: James Murr

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

Subject: Department of Defense testimony H.R. 3668, a bill to amend the Contract Disputes Act of 1978. Statement of Dennis Trosch.

ROUTE TO:	ACTION		DISPOSITION		
Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CUTHOLL	ORIGINATOR	84/02/24			/ /
CUAT TB	Referral Note: D	84/02/24		S	84/02/28
	Referral Note:				C.O.B
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A - Appropriate Action
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F - Furnish Fact Sheet to be used as Enclosure
I - Info Copy Only/No Action Necessary
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S - For Signature
X - Interim Reply

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5/81

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

SPECIAL

February 24, 1984

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer

General Services Administration
Department of the Treasury
Department of Justice
Department of Energy
Department of Health and Human Services
Office of Personnel Management
National Aeronautics and Space Administration

SUBJECT: Department of Defense testimony on H.R. 3668, a bill to amend the Contract Disputes Act of 1978.

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.

A response to this request for your views is needed no later than COB - Tuesday, February 28, 1984.

Questions should be referred to Gregory Jones (395-3856), the legislative analyst in this office.

James C. Murr for
Assistant Director for
Legislative Reference

Enclosures

cc: Fred Fielding Pat Szervo Lee Dowd Al Burman Bob Bedell
Hilda Schreiber Mike Horowitz

1984 FEB 24 PM 5:50

FEB - 4

STATEMENT OF

DENNIS H. TROSCH

ASSISTANT GENERAL COUNSEL (LOGISTICS)

ON

H.R. 3668, AMENDMENTS TO THE CONTRACT DISPUTES ACT OF 1978

BEFORE THE

HOUSE JUDICIARY COMMITTEE

MAY 1, 1984

Good morning Mr. Chairman and members of the Committee. I appreciate the opportunity to appear before you today to discuss H.R. 3668, a bill to amend the Contract Disputes Act of 1978 to eliminate the requirement that contract claims be certified.

The proposed amendments to the act would; (1) eliminate the requirement that contract claims in excess of $50,000 be certified by the contractor, (2) change the standard of judicial review for decisions of fact issued by the boards of contract appeals, and (3) require that members of agency boards shall be examined, prior to appointment, in the same manner as administrative law judges appointed pursuant to section 3105 of Title 5.

We believe that the Government's interests are protected by the requirement, now included in the Act, that for claims over $50,000, the contractor shall certify that the claim is made in

good faith, that the supporting data are accurate and complete to the best of the contractors knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable.

Let me explain in very general terms the nature of the claims that arise under our contracts. Claims usually occur as a result of some action taken by a Government official, such as the requirement to do some work that is not required by the specifications or other terms of the contract. Occasionally a claim arises because the Government did not do something that was required under the contract, such as furnish equipment that the contract required the Government to furnish. In either of these cases the Government will usually owe the contractor money for the additional effort required of the contractor. Where the Government and the contractor both agree, and this often happens, that the contractor was required by the Government to perform additional work and the parties agree what the payment should be for this work, there is no dispute and there is no claim. It is only when there is a dispute over whether the work was additional or whether it was included in the contract or when there is a dispute over the amount of payment to which the contractor is entitled that the claims/disputes procedures come into play.

It is in the Government's interest to know as soon as possible when an event giving rise to a claim has occurred. If the Government knows early enough it may be able to take corrective

action. Some have argued that the certification requirement delays the Government obtaining this information. We disagree. We use a clause asking contractors to give us notice of such events as early as possible. No certification is required and at this point only estimates of the potential cost can be identified. Thus, where the contractor honors these notice requirements the Government can take corrective action where appropriate.

During the period immediately following notice to the Government the parties can and usually do discuss whether this act is one for which the Government is liable (if there is any doubt on this point), and what the payment to the contractor should be. Often during these discussions, agreement is reached and the contract is modified to reflect the agreement.

Occasionally there is no agreement and the contractor wishes to involve the quasi-judicial dispute resolving mechanism provided under the Contract Disputes Act. At this point the certified claim must be filed.

Some argue that certification is an onerous obligation imposed on the contractor that opens the contractor to potential liability. Let us look at what must be certified.

First, that the claim is made in good faith.

Second, that the supporting data are accurate and complete to the best of the knowledge and belief of the contractor.

Last, that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable.

This certification is hardly onerous given the circumstances and I believe that it is unlikely to subject to liability a contractor who so certifies honesty and in good faith.

How does such a certificate protect the interests of the Government? The claim, when submitted, will be analyzed in detail by the Government--often by a number of people. The result of this analysis may lead to settlement discussions or it may lead directly to the decision of the contracting officer--a quasi-judicial decision from which the contractor can appeal either to the Armed Services Board of Contract Appeals or directly to the U.S. Claims Court.

Although most contractors are honest and forthright, unfortunately, in the past prior to the requirement for certification, there was quite a bit of gamesmanship on the part of some contractors in the filing of claims. Claims were often inflated with the expectation that a settlement would be reached at a high amount. Sometimes if the Government disagreed with the rationale for the liability or the amount of the claim, supple-

mental justification and additional support would be submitted or revisions made in the original submissions. Sometimes several such supplements or revisions were submitted. Each time the Government would expend time and money analyzing the revision or the additional material and often, because of the time elapsed, would have to go back over the original submission.

Admiral Rickover graphically described this process in his testimony on the Contract Disputes Act of 1978 at the joint hearings, held in 1978, of the Subcommittee on Federal Spending Practices and Open Government of the Senate Committee on Governmental Affairs and the Subcommittee on Citizens and Shareholders Rights and Remedies of the Senate Committee on the Judiciary.[1] I ask that Admiral Rickover's testimony be included in the record here, rather than my attempting to summarize his position.

It is in no one's interest to encumber the dispute process with this sort of gamesmanship. The Government can not afford it and I submit that managers of reputable companies would prefer not to expend their resources in this manner either.

[1]Contract Disputes Act of 1978: Joint Hearings on S. 2292, S. 2787 and S. 3178 Before the Subcommittee on Federal Spending Practices and Open Government of the Senate Committee on Governmental Affairs and the Subcommittee on Citizens and Shareholders Rights and Remedies of the Senate Committee on the Judiciary, 95th Cong., 2d Sess. 27 (1978). (Testimony of Admiral Hyman G. Rickover, Deputy Commander, Nuclear Power Directorate, Naval Sea Systems Command.)

The certification requirement ensures that corporate officials will review significant claims that are being made on behalf of the company and that these claims are as certified--

- made in good faith

- accurately and completely supported to the best of the contractor's information and belief, and

- accurately reflect the contract adjustment for which the contractor believes the Government is liable.

The certification is designed to eliminate this gamesmanship with a concomitant reduction in the expenditure of resources in the analysis of the claim. The certification is an assurance that the claim that is submitted represents what the contractor believes he is really entitled to.

The proposed amendments could open the issue of when interest on a claim begins to run. If contracting officers are required to issue final decisions on uncertified claims the courts could decide that for purposes of section 12 of the act interest on the claim begins to run from the date the contracting officer receives the uncertified claim. Such a result could lead contractors to submit incomplete or inflated claims just to start

As a related matter, there are those who argue that interest should be paid by the Government as reimbursement to contractors who use their own funds to finance increased work necessitated by Government action under a contract. They reason that when Government action results in increased work under a contract, the contractor must fund the increased work until their claim is reviewed and paid. Accordingly, they argue that the Government is using their funds to finance additional contract work and therefore, interest should be paid from the time the claim first arrose. Although, this argument has a certain simplicity and appeal it ignors the realities of contracting with the Government.

When a claim arrises under a Government contract it is generally because of Government action that requires the performance of additional contract related work and the dispute is over whether the contract price should be increased to cover the work. However, pending resolution of the claim the contractor performs the work and requests progress payments for the cost of such work along with other costs incurred in performance of the contract. Under this financing arrangement a contractor does not incur increased out of pocket expense until such time as the maximum limit on progress payments is reached. Even in those instances where the contractor uses his own funds to complete contract performance, under current judicial interpretations he will be made financially whole, provided that he submits a certified claim prior to the exhaustion of progress

payments and his claim is upheld. In short contractors may be required to finance increased work under a Government contract but it only occurs when contract financing is exhausted and in those instances the expense is minimized by the contractors timely submission of a certified claim.

Based on the above comments, the Department of Defense is opposed to section 2(a) of HR 3668 which would eliminate the requirement that contract claims be certified.

In addition to the above comments concerning certification, I would like to comment briefly on section 2 (c) of HR 3668 which would change the standard for judicial review on appeal of an agency board decision.

As currently written, section 10(b) of the act (41 U.S.C. 609(b)) is consistent with the well-established, judicially judicially-recognized practice of according finality to findings of fact made by agency boards of contract appeals:

> "...the decision on any question of fact shall not be set aside unless the decision is fraudulent, or arbitrary, or capriciious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence."

Since the decision of the United States Supreme Court in United States v. Carlo Bianchi & Co., 373 U.S. 709 (1963), judicial review of board fact findings has been limited by this "substantial evidence" standard, as provided in the Wunderlich Act, 41 U.S.C. 321,322. Under the Bianchi rule, the contractor has his "day in court" in proceedings before the board of contract appeals.

Section 2 (c) would delete the Wunderlich standard of judicial review and substitute a new standard of "clearly erroneous". The Wunderlich standard is a time-tested judicially approved test that is fair and well understood by the contracting community. The Department of Defense favors retention of this standard and is opposed to enactment of a new standard that will provide a source for unnecessary litigation while new precedents are established as to the nature of the "clearly erroneous" judicial review standard.

As a final matter, I would like to comment on section 2 (b) of HR3668. Since enactment of the Contract Disputes Act of 1978 there have been some problems with establishing appointment procedures similar to those used to select administrative law judges. One of the issues, as I understand the matter, is that under current statutes there is no authority for the Office of Personnel Management to examine potential appointees to the agency boards of contract appeals. It would appear that section 2 (b) would provide such authority. I do not believe that the

structured examination procedures used in the selection of administrative law judges are necessary or desirable for selecting Contract Appeals Board judges. I submit that the requirement in section 8(b)(1) of the Contract Disputes Act should be deleted.

That concludes my prepared statement. I would be happy to answer any questions that the members of the Committee may have.

THE WHITE HOUSE

WASHINGTON

February 27, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Statement of Jonathan Rose Before the House Judiciary Committee on November 10, 1983 Concerning the Intercircuit Tribunal (With Fielding-Schmults Changes)

On February 9, 1984, OMB circulated for comments a proposed Justice Department report on S. 645, the Intercircuit Tribunal bill. I reviewed the report in a memorandum for you dated February 13, noting that it was essentially identical to the Jon Rose testimony delivered on November 10. You will recall that we cleared that testimony, with final revisions worked out in a telephone conversation between you and the Deputy Attorney General. By memorandum dated February 13 to OMB, you noted no legal objection to the proposed Justice report.

The people at OMB and Michael Uhlmann, however, are a little discombobulated by the proposed Justice report. They were never privy to the changes made in the Fielding-Schmults telephone call, and consider the proposed report inconsistent with Rose's testimony as cleared by OMB. The Fielding-Schmults revisions were not cleared through OMB.

The practical differences between the Rose position as delivered (with the Fielding-Schmults revisions) and as cleared by OMB strike me as insignificant, as we discussed at the time. You and Schmults settled the long-simmering dispute between Justice and the White House on this issue by agreeing that we could support the Intercircuit Tribunal only if more basic reforms were tried "before, or at least at the same time as" the Intercircuit Tribunal. As cleared by OMB, the Rose testimony committed us to study the proposal further after more basic reform. Since Congress is unlikely to repeal diversity and restrict prisoner petitions -- the more significant examples of basic reform -- the two positions, in practical terms, struck me (and I presume you) as the same. I have explained this in the attached memorandum to OMB.

Attachment

THE WHITE HOUSE

WASHINGTON

February 27, 1984

MEMORANDUM FOR BRANDEN BLUM
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

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

SUBJECT: Statement of Jonathan Rose Before the House Judiciary Committee on November 10, 1983 Concerning the Intercircuit Tribunal (With Fielding-Schmults Changes)

As noted in my memorandum to you of February 13, 1984, Counsel's Office has no objection to the proposed Justice report on S. 645. The Rose testimony delivered on November 10, 1983, represented the resolution of the long dispute between the White House and the Justice Department on the Intercircuit Tribunal proposal. I do not consider there to be any significant practical difference between the Rose testimony as cleared by OMB and as delivered, with the revisions agreed to by me and the Deputy Attorney General with the acquiescence of the White House Senior Staff. As delivered, the Rose testimony conditioned possible support for the Intercircuit Tribunal on at least concurrent enactment of more basic reform long sought by the Administration -- such as repeal of diversity jurisdiction and restrictions on prisoner petitions. The cleared testimony called for further study after such basic reform. Since Congress is unlikely to enact the requisite basic reform in the foreseeable future, however, the Administration's opposition to the Tribunal was effectively communicated. To cite just one example, The New York Times reported on Rose's testimony by noting "[t]he Reagan Administration, which for months has been avoiding comment on the proposal, also came out in opposition today."

FFF:JGR:aea 2/27/84
cc: FFFielding/JGRoberts/Subj/Chron

February 13, 1984

MEMORANDUM FOR BRANDEN BLUM
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

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

SUBJECT: Revised Draft DOJ Report on S. 645, The Courts Improvement Act Regarding Intercircuit Tribunal

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

FFF:JGR:aea 2/13/84
cc: FFFielding/JGRoberts/Subj/Chron

The New York Times

DATE: 11-11-83
PAGE: A-32

New Appeals Court Opposed by Stevens At a House Hearing

By LINDA GREENHOUSE
Special to The New York Times

WASHINGTON, Nov. 10 — Associate Justice John Paul Stevens of the Supreme Court has told the House Judiciary Committee that he opposes a bill to create a new Federal appellate court to help the High Court with its workload.

The bill, similar to a proposal made by Chief Justice Warren E. Burger, was the subject of hearings today before a Judiciary subcommittee. Justice Stevens described his opposition in a letter to the subcommittee chairman, Representative Robert W. Kastenmeier. Mr. Kastenmeier, a Wisconsin Democrat who is also the bill's sponsor, put the letter into the record.

Justice Stevens was the only member of the Court to accept the subcommittee's invitation to comment on the bill. Associate Justices Lewis F. Powell Jr., William H. Rehnquist and Sandra Day O'Connor, in addition to the Chief Justice, have endorsed the general concept of the new court without commenting on specific proposals before Congress.

The Reagan Administration, which for months has been avoiding comment on the proposal, also came out in opposition today.

Jonathan C. Rose, an Assistant Attorney General, told the subcommittee that before making a "structural change of perhaps major magnitude" in the Federal judicial system, Congress should explore less drastic ways of easing the Supreme Court's workload. He said the Court itself was partly to blame for its workload because its expansive interpretation of legal and constitutional rights has encouraged more litigation.

In his letter, Justice Stevens said the proposed new court "would do nothing to alleviate the workload of this Court, and would increase the burdens of our already overworked courts of appeals."

The new court, which would be formally known as the intercircuit tribunal, would decide cases referred to it by the Supreme Court. As described by Chief Justice Burger in a speech last winter to the American Bar Association, the court's principal job would be to resolve "conflicts," issues of law on which the existing Federal courts of appeals were in dispute.

Chief Justice Burger said that dozens of such cases now clogging the Supreme Court's argument calendar could be eliminated by referring them to the new court.

But Justice Stevens said that in his view the number would be much smaller.

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Subject: Jonathan Rose's statement of Nov. 10, 1983 Concerning the Inter-Circuit Tribunal as presented to the House Judiciary Committee with Fielding-Schmults changes

ROUTE TO: Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	ACTION Type of Response	Code	DISPOSITION Completion Date YY/MM/DD
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OFFICE OF MANAGEMENT AND BUDGET

ROUTE SLIP

TO	Mike Uhlmann	Take necessary action ☐
	Fred Fielding	Approval or signature ☐
	John Cooney	Comment ☐
	Karen Wilson	Prepare reply ☐
		Discuss with me ☐
		For your information ☐
		See remarks below ☐
FROM	Branden Blum BB	DATE 2/23/84

REMARKS

S. 645, The Courts Improvement Act

Attached are portions of Jonathan Rose's statement of 11/10/83 discussing the Inter-circuit Tribunal. On February 9, I circulated the Rose statement as cleared by OMB and asked that you compare it with the proposed Justice report on S. 645 (Title VI - Inter-circuit Tribunal).

Per discussions between D.A.G. Schmults and Mr. Fielding, Justice revised the Rose statement after obtaining OMB clearance, but did not so advise OMB. The attached reflects the changes made pursuant to the Schmults - Fielding agreement and is what was presented to the House Judiciary Committee in November.

Please advise me of any additional comments on Justice's draft report on S. 645 by COB Wednesday, February 29.

OMB FORM 4
Rev Aug 70

Department of Justice

STATEMENT

OF

JONATHAN C. ROSE
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL POLICY

CONCERNING

THE WORKLOAD OF THE SUPREME COURT

BEFORE

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

NOVEMBER 10, 1983

Mr. Chairman and Members of the Subcommittee:

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

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

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

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

IV. The Intercircuit Tribunal Proposal

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

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

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

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

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

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

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

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

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

* * *

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

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

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

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

THE WHITE HOUSE

WASHINGTON

February 13, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Revised Draft DOJ Report on S. 645, The Courts Improvement Act Regarding Intercircuit Tribunal

OMB has asked for our views by close of business February 14 on a proposed revised version of the Department of Justice report on S. 645, the Court Improvements Act of 1983. When Justice submitted its first proposed report on S. 645 for OMB clearance, we noted no objection to most of the positions taken in the report. These included support for (1) elimination of Supreme Court mandatory appellate jurisdiction, (2) repeal of civil litigation priorities, (3) a federal courts study commission, and (4) a Chancellor of the United States; opposition to (1) the State Justice Institute and (2) a judicial disqualification amendment; and "deference to Congress" concerning increased judicial survivors' annuities.

The sticking point, of course, was Justice's proposed support for Title VI, the Intercircuit Tribunal. An Administration position on the Intercircuit Tribunal was hammered out last fall, in the course of clearing testimony Jonathan Rose eventually delivered before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Committee on November 10, 1983. The proposed report is presented by Justice as being consistent with the cleared testimony by Rose.

The section on the Intercircuit Tribunal, pages 5-8, is consistent with Rose's testimony, and I have no objections to it. Rose's testimony concluded that reforms such as abolition of diversity jurisdiction and restrictions on prisoner petitions "should be tried before, or at least at the same time as, a structural change of perhaps major magnitude." The proposed report contains essentially identical language (p. 7, ll. 5-7).

Attachment

February 13, 1984

MEMORANDUM FOR BRANDEN BLUM
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Revised Draft DOJ Report on S. 645, The Courts Improvement Act Regarding Intercircuit Tribunal

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

FFF:JGR:aea 2/13/84
cc: FFFielding/JGRoberts/Subj/Chron

ID # _____ CU

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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Subject: Revised Draft DOJ Report on S 645, The Courts Improvement Act re: Intercircuit Tribunal.

ROUTE TO: Office/Agency (Staff Name)	ACTION Action Code	Tracking Date YY/MM/DD	DISPOSITION Type of Response	Code	Completion Date YY/MM/DD
WHOLL	ORIGINATOR	84/02/13			/ /
	Referral Note:				
CMAT 18	D	84/02/13		S	84/02/14
	Referral Note:				
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C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet to be used as Enclosure
I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

DISPOSITION CODES:
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C - Completed
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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET

ROUTE SLIP

TO Mike Uhlmann	Take necessary action	☐
Fred Fielding	Approval or signature	☐
John Cooney	Comment	☐
Karen Wilson	Prepare reply	☐
	Discuss with me	☐
	For your information	☐
	See remarks below	☐
FROM Branden Blum	DATE 2/9/84	

REMARKS

Revised draft DOJ report on S. 645, The Courts Improvement Act

Attached is a revised version of the Justice report on S. 645. An earlier version circulated for comment on August 11, 1983, was not cleared because Justice supported (albeit conditionally) Title VI which would establish the Intercircuit Tribunal.

In the DOJ transmittal memo dated 1/24/84 (attached) Justice indicates that disagreement over the Intercircuit Tribunal was resolved in the OMB cleared Jonathan Rose statement concerning Workload of the Supreme Court before the House Judiciary Committee. I have included the relevant portions of the Rose statement as cleared, so that you may compare the position stated therein with that contained in the attached Justice draft report.

Please provide me with any comments by COB Tuesday, February 14.

Attachment

OMB FORM 4
Rev Aug 70

Office of the Assistant Attorney General

Washington, D.C. 20530

24 JAN 1984

Mr. Branden Blum
Legislative Attorney
Legislative Reference Division
Office of Management and Budget
Washington, D.C. 20503

Dear Branden:

Attached is the Department's revised report on S. 645, a bill to establish an Intercircuit Tribunal and for other purposes.

Portions of this report, with the exception of the section on Title VI (Intercircuit Tribunal) are substantially the same as the corresponding portions of an earlier draft report we submitted to OMB on S. 645. That report was cleared by OMB, except the section on Title VI.

As you know, the disagreement over the Intercircuit Tribunal proposal has finally been resolved and a cleared position was presented by Jonathan Rose before the House Subcommittee on Courts, Civil Liberties and the Administration of Justice on November 10, 1983.

Sincerely,

Yolanda Branche
Attorney-Advisor
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable Strom Thurmond
Chairman
Committee on the Judiciary
Washington, D. C. 20510

Dear Mr. Chairman:

This is in response to your request for the views of the Department of Justice on S. 645, the Court Improvements Act of 1983, which was reported on June 29, 1983, by the Subcommittee on Courts of the Senate Judiciary Committee. 1/ In brief, our position on the various titles of the bill is as follows:

The Department of Justice supports the enactment of Title I (Supreme Court Review), Title II (Civil Priorities), Title V (Federal Courts Study Commission), and Title VII (Chancellor of the United States). 2/ We would support the enactment of Title VI (Intercircuit Tribunal) only if certain other reforms addressing the caseload problem in the federal courts were adopted in advance or at the same time. We defer to Congress's judgment on the matters addressed in Title III (Judicial Survivors' Annuities).

The Department opposes the enactment of Title IV (State Justice Institute). We have stated opposition in the past to proposals similar to Title VIII (Judicial Salaries), but note that the change it proposes may already have been made by legislation enacted in 1981. We oppose enactment of Title IX (Disqualification of Judges) as presently formulated, but reserve

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1/ References to S. 645 hereafter are to the version of the bill adopted by the Subcommittee on Courts, unless otherwise indicated.

2/ We have certain recommendations concerning the design or drafting of the proposals of Title V and Title VII. See sections V and VII of this report.

judgment concerning the desirability of enacting a more narrowly formulated version of that title's proposal.

Our comments on the various titles are as follows:

I. TITLE I -- SUPREME COURT REVIEW

Title I of the bill would generally convert the Supreme Court's mandatory appellate jurisdiction to jurisdiction for discretionary review by certiorari, except for appeals from three judge district courts.

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

Title I is an effective partial response to the workload problem of the Supreme Court. It would relieve the Court of the need to decide cases that would not warrant the grant of a writ of certiorari but must now be accepted for review because they fall within the categories that presently qualify for review by appeal. The grounds of our support for this reform are fully set out in our prior statements on the proposal. 3/

II. TITLE II -- CIVIL PRIORITIES

Title II would abolish most priority or expediting provisions applicable to civil proceedings and enact a general rule for expediting particular cases when "good cause" for doing so is shown. The proposal of Title II was initially introduced as H.R. 4396 in the 97th Congress and was passed by the House of Representatives as Title III of H.R. 6872 in that Congress.

3/ See Mandatory Appellate Jurisdiction of the Supreme Court - Abolition of Civil Priorities - Jurors Rights: Hearing on H.R. 2406, H.R. 4395, and H.R. 4396 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary 110-11, 113-21, 266-70 (1982) [hereafter cited as "1982 House Hearing"]; Court Reform Legislation: Hearing on S. 1529, S. 1531 and S. 1532 Before the Subcomm. on Courts of the Senate Comm. on the Judiciary 125-30 (1981); Statement of Assistant Attorney General Jonathan Rose Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary Concerning the Workload of the Supreme Court 22-23 (Nov. 10, 1983).

Title II is a sensible response to the problems of judicial administration created by the proliferation of uncoordinated and frequently inconsistent priority provisions. The grounds of our support for this reform are fully set out in our prior testimony on the proposal. 4/

III. TITLE III -- JUDICIAL SURVIVORS' ANNUITIES

Title III of the original version of S. 645 contained a proposal increasing the annuities for surviving dependents of federal judges. The version of the bill adopted by the Courts Subcommittee has substituted a directive to the Office of Personnel Management, in consultation with the Department of Health and Human Services and the Administrative Office of the United States Courts, to carry out a general study of judicial benefits. The study is to be completed by April 1, 1984, and is to include recommendations for making survivors' benefits for federal judges substantially the same as those for survivors of members of Congress. We consider it most appropriate to defer to the judgment of Congress and the Judiciary on the matters addressed in this title.

IV. TITLE IV -- STATE JUSTICE INSTITUTE

Title IV of the bill would create a State Justice Institute to administer a national funding program for state court improvement. The appropriations authorized for the initial three years of the Institute's operation would be $20,000,000, $25,000,000 and $25,000,000.

While we recognize that the proposal of Title IV is well-intentioned and that improving the administration of justice in the state courts is an important public interest, we do not believe that the expenditure of federal funds for this purpose proposed in Title IV can be justified. The grounds of our opposition are set out in our statements and testimony on earlier bills incorporating the State Justice Institute proposal. 5/

4/ See 1982 House Hearing, supra note 3, at 111-12, 121-26.

5/ See Letter of Assistant Attorney General Robert A. McConnell to Honorable Strom Thurmond Concerning S. 537 (July 29, 1981); Statement of Assistant Attorney General Jonathan C. Rose Concerning H.R. 2407 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary (Sept. 15, 1982).

V. TITLE V -- FEDERAL COURTS STUDY COMMISSION

Title V of the bill would create a Federal Courts Study Commission. The Commission would be bipartisan in composition and would have equal representation from the three branches of government with more limited representation from the state judiciaries. The Commission would exist for a period of ten years. Its function would be to carry out a comprehensive study of the work and operation of the federal courts and to develop a general plan addressing their problems and guiding their future development.

The idea of creating an interbranch body of this type was initially advanced by Chief Justice Burger in 1970. 6/ It was later endorsed by the Bork Committee of the Levi Justice Department. 7/ The Chief Justice has recently reiterated support for the creation of such a commission as a means of developing a long-term solution to the Supreme Court's caseload problem. 8/ The proposal of Title V is most directly derived from S. 675, which was passed by the Senate in the 97th Congress. 9/

While there have been many studies of the federal courts, Title V goes beyond earlier efforts in proposing a fully comprehensive and integrated response to the problems of federal adjudication. The proposed Commission would, moreover, create a useful mechanism for interbranch and federal-state cooperation involving the principals whose coordinated effort is essential to the enactment of significant judicial improvement measures. We therefore support the creation of a Federal Courts Study Commission.

While we support the basic proposal of Title V, we have doubts concerning the wisdom of establishing the Commission for a period of ten years. This is far longer than the normal duration of study and advisory groups. The time required for the Commission to carry out its mandate cannot be anticipated with certainty; its establishment for a full decade accordingly raises concerns that it may outlive its usefulness. We also think that a study commission's work is likely to be more focused and

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6/ See U.S. News and World Report, Interview with Chief Justice Warren E. Burger, at 44 (Dec. 14, 1970).

7/ See The Needs of the Federal Courts, Report of the Department of Justice Committee on Revision of the Federal Judicial System 16-17 (Jan. 1977).

8/ See Chief Justice Warren E. Burger, Annual Report on the State of the Judiciary 8-11 (Feb. 6, 1983).

9/ See generally To Establish a Commission to Study the Federal Courts: Hearing on S. 675 and S. 1530 Before the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. (1982).

productive if a reasonably circumscribed time is set for carrying it out.

In the development of the proposal of Title V certain justifications were advanced for creating a long-term or permanent Commission. 10/ Frequently, the recommendations of a study commission attract a brief flurry of attention after it has issued its final report, and then are largely forgotten or ignored. It was felt that a Commission established for a long period of time would be able to function as an effective advocate for the adoption of its recommendations, and would also be able to monitor and assess the operation of the reforms it had proposed following their implementation.

These points have force, but we do not think they justify the establishment of the Commission proposed in Title V for a period as long as ten years. If Congress concluded at a later point that work remained to be done by a Commission established initially for a shorter period, the Commission could be continued beyond its initially specified termination date through new legislation. A shorter period would only have the desirable effect of ensuring that the operation of the Commission and the need for continuing it will be re-assessed at reasonable intervals by the full Congress and the Executive. Our specific recommendation is that the Federal Courts Study Commission be established for a period of three years.

VI. TITLE VI -- INTERCIRCUIT TRIBUNAL

Title VI of the bill would create an Intercircuit Tribunal to make nationally binding decisions in cases referred to it by the Supreme Court. The Tribunal would receive and decide cases for a five year period commencing with the initial reference of a case to the Tribunal by the Supreme Court. The Tribunal could not receive new cases after five years had elapsed from the initial reference date, but would remain in existence beyond that point until it had disposed of cases pending at the end of the five-year period.

The Tribunal would consist of a panel of nine regular judges and four alternates who would be chosen by the Supreme Court; both active and senior circuit judges would be eligible for assignment to the Tribunal. Judges would normally serve three year terms on the Tribunal with some variation in the length of the initial assignments to the Tribunal to achieve a staggering of the terms of service. The Tribunal would share a clerk's office and other support facilities with the Federal Circuit Court of Appeals.

10/ See id.

Following Chief Justice Burger's endorsement of this type of reform in February of 1983, 11/ the Intercircuit Tribunal proposal has attracted a degree of public attention that is rarely seen in the area of court reform. We have carefully examined the statements and arguments that have been advanced in support of the proposal 12/ and in opposition to it, 13/ including the extensive testimony that has been presented before both Houses of Congress.

While we believe that this reform, as formulated in S. 645, would have the intended effect of reducing the Supreme Court's workload and enlarging the appellate capacity at the national level, we retain doubts concerning the wisdom of experimenting with a structural modification of the federal judicial system when more modest reforms addressing the caseload problem have been awaiting action by Congress for a number of years. We are also concerned that this type of reform, if enacted in isolation, could reduce the impetus for enactment of other measures which have less dramatic appeal but address the causes of the caseload problem at a more basic level. The specific measures that we believe should be taken include generally eliminating the Supreme

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11/ See Chief Justice Warren E. Burger, Annual Report on the State of the Judiciary 9-11 (Feb. 6, 1983).

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

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

Court's mandatory appellate jurisdiction, as proposed in Title I of this bill; establishing reasonable constraints on prisoner petitions as proposed, for example, in S. 1763, which has been approved by this Committee; 14/ and limiting or abolishing diversity jurisdiction. 15/ These reforms should be tried before, or at least at the same time as, a structural change of possibly major magnitude.

If Congress sees fit to adopt a temporary Intercircuit Tribunal proposal under the circumstances we have described, we believe that the proposal in Title VI of S. 645 for the selection by the Supreme Court of a single-panel Tribunal 16/

14/ See S. Rep. No. 226, 98th Cong., 1st Sess. (1983) (Committee Report on S. 1763).

15/ The optimum approach would be the complete abolition of federal jurisdiction based on diversity of state citizenship, with the exception of statutory interpleader. See Diversity of Citizenship Jurisdiction--1982: Hearing on H.R. 6691 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary 7-12 (1982) (testimony of Assistant Attorney General Jonathan C. Rose). The complete abolition approach has been followed in such bills as H.R. 6816, which was voted out by the House Judiciary Committee in the 97th Congress; H.R. 9622, which was passed by the House of Representatives in the 95th Congress; and S. 679 and S. 2389, which were the subject of hearings before this Committee in the 96th and 95th Congresses respectively.

Several alternative reform options appear in a series of bills that were recently introduced by Chairman Kastenmeier of the House Subcommittee on Courts, Civil Liberties and the Administration of Justice. See 129 Cong. Rec. H 6023 (daily ed. July 29, 1983). We expect to advise Congress in the near future of our views concerning these alternatives.

16/ Regardless of the prior or concurrent adoption of other caseload reduction proposals, we would oppose the creation of an Intercircuit Tribunal consisting of a larger pool of judges that would hear cases in shifting panels. A multi-panel Tribunal would simply generate new conflicts and instabilities, defeating the proposal's objectives of caseload reduction and increased decisional uniformity. We would also oppose selecting the Tribunal by a procedure involving the judges of the inferior federal courts, or on the basis of an arbitrary factor, such as seniority in service as a circuit judge. Since the Tribunal's

(Footnote Continued)

that would hear all cases en banc 17/ is generally sound. The principal change that we recommend would be to shorten the length of the basic period for which the Tribunal is established from five to three years, 18/ with each judge serving for the entire three-year period. 19/

(Footnote Continued)
achievement of its objective of reducing the Supreme Court's caseload would depend on the willingness of the Supreme Court to refer cases to the Tribunal and to let its decisions stand, there is obvious value in having the Justices select the Tribunal, thereby assuring that its judges would enjoy their confidence.

17/ S. 645 qualifies the single-panel character of the Tribunal by providing for service by four alternates, who would participate in the decision of cases when judges of the regular panel were disqualified or absent. This basic approach has been endorsed by the Chief Justice. See Remarks of Chief Justice Warren E. Burger at the 60th Annual Meeting of the American Law Institute 5 (May 17, 1983). We would have no objection to this design so long as it were made clear that participation by alternates outside of disqualification situations would be limited to cases where the absence of judges of the regular panel was unavoidable. It would not, for example, be consistent with the functioning of the Tribunal as a unitary court if judges of the regular panel were to absent themselves so as to allow alternates to participate as a matter of courtesy, or were absent because they preferred spending more time hearing cases in their circuit courts.

18/ Subject to a reduction of the basic period to three years, we would have no objection to the provision in S. 645 for the exclusion of start-up time from the period and the continuation of the Tribunal beyond the end of the period for the time needed to conclude pending cases.

19/ We would also note briefly three more technical design questions that merit consideration by the Committee:

First, the bill provides that both active and senior judges may be assigned to the Tribunal. While some allowance for assignment of senior judges is appropriate, we have concerns over the operation and public perception of a Tribunal composed largely or predominantly of senior judges. We recommend that the bill provide that the nine-judge regular panel of the Tribunal must include at least six judges in regular active service.

(Footnote Continued)

VII. TITLE VII -- THE CHANCELLOR PROPOSAL

Title VII would create the office of "Chancellor of the United States." The Chancellor would be a circuit judge in active service who would be designated by the Chief Justice to serve in that position. The Chancellor would serve at the pleasure of the Chief Justice. The Chancellor would oversee administrative matters in the judiciary assigned to him by the Chief Justice and would assist the Chief Justice in the performance of the non-judicial functions of his office. The vacancy created on a court by designation of one of its judges as Chancellor would be filled through the normal judicial appointment process. If a judge's return to his court following service as Chancellor resulted in a number of judges on the court beyond that normally authorized, the court would be allowed to return to its normal size through attrition.

This proposal is responsive to the heavy burdens of the office of the Chief Justice, who functions both as presiding judge of the Supreme Court and as administrative head of the judicial branch. 20/ We support the enactment of Title VII and believe that its definition of the Chancellor's office and its functions is essentially correct. Our comments concern some possible improvements in the design or drafting of the proposal:

(Footnote Continued)

Second, the bill makes no provision for removal of judges from the Tribunal in case of misconduct or incapacity. This could be easily corrected by providing that the Supreme Court may remove a judge from the Tribunal.

Third, the bill contemplates that the Tribunal will issue rules of procedure for its proceedings. Considering the relationship of the Tribunal and the Supreme Court, it would be desirable to provide that the Supreme Court may modify or repeal rules adopted by the Tribunal and may issue additional rules and orders governing the Tribunal's proceedings and activities.

20/ See generally Meador, The Federal Judiciary and its Future Administration, 65 Va. L. Rev. 1031, 1041-44, 1055-59 (1979).

The office of Chief Justice and the Chancellor proposal were the subject of a conference at the White Burkett Miller Center of Public Affairs on October 15, 1982. Financial support for the conference was provided by the Federal Justice Research Program of the Department of Justice. Professor Meador, who conceived and organized the conference, has indicated that a publication of the proceedings at the conference

(Footnote Continued)

First, since the purpose of the Chancellor proposal is to provide the Chief Justice with assistance in carrying out his administrative responsibilities, there would be no point in requiring the selection of a Chancellor if a particular incumbent in the office of Chief Justice did not believe that he needed such assistance. It would accordingly be preferable to provide that the Chief Justice may designate a circuit judge to serve as Chancellor in place of the mandatory language that currently appears in the bill.

Second, Title VII contains provisions stating that the Chancellor would continue to accumulate years of judicial seniority and would be entitled to the normal travel expenses of judges. These provisions are overly narrow, since it is presumably intended, for example, that the Chancellor would also continue to receive his normal compensation and be eligible for the normal judicial retirement programs and benefits. A broader provision is called for, which should indicate that a judge's service as Chancellor does not adversely affect his compensation, benefits, expenses and allowances, seniority and other entitlements as a circuit judge.

Third, Title VII now states that the Chief Justice may assign the Chancellor to supervise any administrative matters. It might be preferable to state that the Chief Justice may delegate the performance of any administrative function or duty to the Chancellor, clarifying that the Chancellor's role is not limited to supervision in any narrow sense.

Fourth, it is not apparent why the Chief Justice should be limited to judges in active service in his selection of the Chancellor; his range of options should include senior judges and retired Justices who are interested in taking on that role. The service of Justice Clark, Judge Alfred Murrah, and Judge Walter Hoffman as the first three Directors of the Federal Judicial Center provides precedent for service by retired Justices and senior judges in an administrative capacity.

Finally, since the Chancellor would be the highest administrative officer in the judicial branch after the Chief Justice, it seems appropriate to provide for his being a member ex officio of the principal administrative bodies of the judiciary at the national level, the Judicial Conference and the Board of the Federal Judicial Center.

(Footnote Continued)
will be sent to the members of the Judiciary Committees.

VIII. TITLE VIII -- JUDICIAL SALARIES

Title VIII contains an amendment to 28 U.S.C. § 461 that would exempt judges from the effect of administrative salary adjustments, requiring Congressional action to raise judges' salaries. We have opposed similar proposals in the past, noting that this reform would increase the difficulty of recruiting highly qualified attorneys for service on the federal bench. 21/ In light of legislation adopted in 1981, however, it is not clear that Title VIII would significantly change current law. 22/

IX. TITLE IX -- DISQUALIFICATION OF JUDGES

Title IX contains an amendment to the judicial disqualification statute, 28 U.S.C. § 455. It provides that disqualification would not occur in class actions prior to certification of the class. If a judge became aware of a disqualifying circumstance after class certification, he could divest the disqualifying interest within two weeks rather than disqualify himself, and if he did disqualify himself, the validity of rulings made prior to the disqualification would not be adversely affected. Title IX was added at the Subcommittee's mark-up of S. 645 and has not been the subject of prior consideration or study by Congress or the Administration.

We are advised that this amendment is addressed to situations in which, for example, it appears unexpectedly after class certification that a judge's spouse is a member of the class and consequently has some minor pecuniary interest in the case. The amendment would allow divestment of the spouse's interest as an alternative to disqualification of the judge.

While the general purpose suggested by the example appears benign, the current formulation of Title IX is clearly too broad. It would mean, for example, that a judge would not initially be disqualified in a class action where his spouse appeared at the outset as an attorney or a class representative in the case. We reserve judgment concerning the general type of reform proposed in Title IX pending the proposal of a formulation that more clearly sets out its intended scope and an opportunity to consider the effect of such an amendment.

* * *

In sum, the Department of Justice believes that many of the proposals of S. 645 are important and beneficial measures that merit speedy adoption by Congress. We support specifically the

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21/ See Letter of Assistant Attorney General Robert A. McConnell to Honorable Strom Thurmond Concerning S. 1847 (March 15, 1982).

22/ See Section 140 of P.L. 97-92, 95 Stat. 1200.

proposals designated Supreme Court Review (Title I), Civil Priorities (Title II), Federal Courts Study Commission (Title V), and Chancellor of the United States (Title VII).

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

STATEMENT

OF

JONATHAN C. ROSE

ASSISTANT ATTORNEY GENERAL

OFFICE OF LEGAL POLICY

CONCERNING

THE WORKLOAD OF THE SUPREME COURT

BEFORE

THE COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES

AND THE ADMINISTRATION OF JUSTICE

OF THE

UNITED STATES HOUSE OF REPRESENTATIVES

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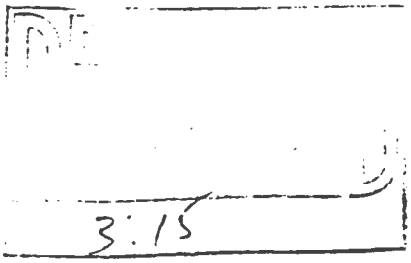

Mr. Chairman and Members of the Subcommittee:

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

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

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

In the fourth and final part of my testimony, I will address the Intercircuit Tribunal proposal. ~~To summarize our conclusion, we do not believe that a sufficient case has been made that the creation of an adjunct tribunal to the Supreme Court is necessary as a long-range solution to the Court's~~

~~workload problem. We do, however, support the creation of a temporary, properly designed Intercircuit Tribunal as an immediate response to the current workload crisis. Such temporary assistance would provide Congress with the time to develop and enact more effective solutions to the explosive growth of federal litigation.~~

I. The Supreme Court's Workload and Government Litigation

A. The Supreme Court's Workload

In recent public statements, the Justices of the Supreme Court have been essentially unanimous in their view that there is a serious workload problem in the Court and that remedial measures are necessary. The statistics concerning cases given plenary review by the Court provide independent support for the Justices' statements. Over the past few years, there has been a large increase in the number of cases argued before the Supreme Court -- increasing from 156 in the 1979 Term to 183 in the 1982 Term. This increase in cases argued each Term has also been accompanied by a large increase in accepted cases carried over from Term to Term. 1/

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

taken no action. We strongly urge that action be taken in the near future to create these positions.

IV. The Intercircuit Tribunal Proposal

A final legislative option to reduce the workload of the Supreme Court that has received considerable public and Congressional attention in the past year is the proposal to provide the Court with an adjunct tribunal to which cases could be referred for a nationally binding decision.

A. General Considerations

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

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

Court could refer any type of case to the Tribunal for a nationally binding decision. The decisions of the Tribunal would be reviewable by certiorari in the Supreme Court.

Delete through p.44, and insert (A) in lieu thereof.

~~For reasons to be discussed below, we believe that~~ creation of a properly designed Tribunal of this type would have the intended effect of reducing the Supreme Court's workload. The initial question, then, is whether other policy concerns outweigh the value of the Tribunal in achieving this objective.

We would see such overriding concerns if the proposal were for a permanent Tribunal. The basic objection to a permanent Tribunal is that it does not go to the root of the problem. No long-term solution to the excessive workload of the Supreme Court can be achieved unless steps are also taken to decrease the intake of cases at the lower levels of the judiciary. There are, moreover, other important grounds supporting a broader approach to the problem.

The recent history of the federal judiciary has been one of explosive growth. The external manifestations are apparent to any observer of the judicial system -- the continued rise in the number of judgeships, which invariably lags behind the still more rapid rise in caseloads; the increased reliance on adjuncts and other support personnel; and the development of ever more elaborate administrative and management apparatus in the judicial branch. These obvious external changes are accompanied

Insert (A)

"The Department has reviewed and carefully weighed the substantial amount of testimony that has been presented before both houses of Congress on the Intercircuit Tribunal proposal. The recommendation of Chief Justice Burger and the favorable comments of several scholars of the federal judiciary must be given great weight. However, ~~the support~~ no consensus has been formed on the proposed ~~for the~~ Intercircuit Tribunal, ~~is not unanimous,~~ and a number of serious concerns have been expressed about the impact that such a tribunal would have on the operation of the federal judiciary. 58/

"The Department is not able to endorse the Intercircuit Tribunal proposal at a time when it is not clear that a significant structural change to the federal judiciary is needed to alleviate the admittedly serious workload problem in the Supreme Court. ~~We could endorse this proposal only after~~ We will continue to study this proposal after Congress has acted on a number of the court reform proposals currently before it, which would address the underlying problem of the caseload explosion in the Supreme Court and lower federal courts. Existing proposals to repeal the Court's mandatory appellate jurisdiction, limit or repeal diversity jurisdiction, and restrict prisoner petitions should be tried before ~~or at least at the same time as~~ a structural change of uncertain impact.

58/ Judge J. Clifford Wallace, _____, ___ Cal. L.R. ___ (1983); [adverse testimony]

~~Third, the legislative proposals contemplate that the~~ Tribunal will devise and promulgate rules of procedure for its proceedings. Considering the close relationship of the Supreme Court and the Tribunal and the fact that the Tribunal's caseload will consist entirely of cases referred to it by the Supreme Court, it may be useful to provide that the Supreme Court may modify or repeal rules adopted by the Tribunal and may issue additional rules governing the Tribunal's proceedings and activities.

* * * *

To summarize, while the volume of federal government litigation in the Supreme Court has not increased in the past ten years, the tremendous growth of litigation in the federal courts over the same period has resulted in a workload problem in the Court. A response that only addressed and temporarily accommodated the effects of this litigation explosion would be inadequate. It is essential that the growth in the caseload of the Supreme Court and the lower federal courts be addressed by a broad based set of reforms. Generally, the courts must exercise judicial restraint and the Congress must act in a manner that will decrease rather than increase the incentives to litigation.

Specific measures that should be adopted in response to the caseload problem include completing the evolution of the Supreme Court's jurisdiction toward discretionary review,

limiting or eliminating diversity jurisdiction, addressing the problem of prisoner petitions, and developing, in appropriate areas, administrative alternatives to litigation. Insert (B) ~~While we reject the permanent establishment of an adjunct tribunal to the Supreme Court as a part of this general response, we think that creation of such a tribunal is desirable as a temporary measure addressing an immediate problem.~~

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

(B)

We believe that these proposals will go a long way toward eliminating the underlying cause of the Court's caseload crisis -- the burgeoning federal caseload. Therefore, we are unable to endorse the Intercircuit Tribunal at the present time, but will continue to study the proposal and the need for additional reform after ~~until~~ Congress has taken action on these less fundamental but likely more effective changes.