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WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

Roberts FG051

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COPY

Name of Correspondent: Jonathan C. Rose

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

Subject: Creation of an Interciraid Tribunal

ROUTE TO:		ACTION			DISPOSITION		
Office/Agency	(Staff Name)	Action Code	Tracking Date YY/MM/DD		Type of Response	Code	Completion Date YY/MM/DD
CU	Holland	ORIGINATOR	830412	DB		C	830419 JV
CU	AT 18	Referral Note: A	830412	DB		C	830419
CU	File	Referral Note: I	830419	JV		C	830419 JV
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5/81

THE WHITE HOUSE

WASHINGTON

April 19, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Department of Justice Recommendations on Creation of an Intercircuit Tribunal

Jonathan Rose has transmitted for your consideration the conclusions of the Department of Justice with respect to the Chief Justice's proposal to create an intercircuit tribunal between the Courts of Appeals and the Supreme Court. Shortly after the Chief Justice announced his proposal the Attorney General formed a committee within the Department, chaired by Paul Bator and composed of most of the Assistant Attorneys General, to formulate a Department position. The committee has now completed its work, and issued a ten-page report.

In a marked departure from previous Department positions on national court of appeals proposals, the committee recommended that the Department support creation of a temporary (five year) intercircuit tribunal to hear cases referred by the Supreme Court. The decisions of the tribunal would be nationally binding, subject to further review by the Supreme Court. The committee proposed that the tribunal be composed of 7 or 9 court of appeals judges, rather than, as currently proposed in the pending bills, shifting panels of 5 or 7 drawn from a pool of 28 court of appeals judges. The committee also recommended that the Chief Justice select the judges to sit on the new court, subject to approval by the Supreme Court. The current bills provide for selection of the judges by Circuit Councils. Assistant Attorney General for Civil Rights Reynolds dissented from the committee report and filed a statement detailing his reservations.

As I explained in my February 10 memorandum to you on this subject, I think creation of a new intercircuit tribunal is exceedingly ill-advised. Nothing in the Department of Justice committee report dissuades me from this view. The President we serve has long campaigned against government bureaucracy and the excessive role of the federal courts, and yet the Department committee would have his Administration support creation of an additional bureaucratic structure to permit the federal courts to do more than they already do. What is particularly offensive from the unique

perspective of our office is the committee recommendation that judges be appointed to the new tribunal in a manner that not only constitutes an unprecedented infringement on the President's appointment powers, but would go far in undermining the significance of our prior judicial appointments.

The basic reason given by the committee to support creation of an intercircuit tribunal is the excessive workload on the Supreme Court. While some of the tales of woe emanating from the Court are enough to bring tears to the eyes, it is true that only Supreme Court Justices and schoolchildren are expected to and do take the entire summer off. Even assuming that the Justices have reached the limit of their capacity, it strikes me as misguided to take action to permit them to do more. There are practical limits on the capacity of the Justices, and those limits are a significant check preventing the Court from usurping even more of the prerogatives of the other branches. The generally-accepted notion that the Court can only hear roughly 150 cases each term gives the same sense of reassurance as the adjournment of the Court in July, when we know that the Constitution is safe for the summer. Creating a tribunal to relieve the Court of some cases -- with the result that the Court will have the opportunity to fill the gap with new cases -- augments the power of the judicial branch, ineluctably at the expense of the executive branch. In this respect it is highly significant to note that the committee conceded that the executive branch is <u>not</u> adversely affected by the Court's workload: "The Department has a high success rate with its petitions for certiorari; and no Division reports substantial dissatisfaction with its ability to get conflicts resolved."

It is also far from certain that the proposed tribunal will in fact reduce the workload of the Court. As noted above, it seems probable (to me, at least) that if the new tribunal relieves the Court of 40 cases, the Court's eventual response will be to take 40 new cases it otherwise would not have to fill the void. Even aside from this, the new scheme will increase the workload by (1) making initial review of a petition more complicated and time-consuming, since a new option -- referral to the tribunal -- must be considered; (2) requiring review of the decisions of the new tribunal; and (3) increasing filings as lawyers perceive increased opportunities for review after decision by the Court of Appeals. In his memorandum to you, Rose states that "Only actual experience with such a tribunal can take the arguments for and against an enlarged appellate capacity at the national level out of the realm of conjecture and provide a

concrete evidentiary basis for assessing this approach." This is total abdication of reason, tantamount to arguing that the only way to determine if a bridge can hold a 10-ton truck is to drive one across it. And the critical assumption -- that this is only a five-year experiment -- strikes me as unfounded. Once the tribunal becomes a part of the federal judicial bureaucracy there will be no chance to abolish it, particularly if, as I strongly suspect, the Supreme Court promptly fills its caseload to capacity even with the aid of the tribunal.

The most objectionable aspect of the committee's report is its recommendation that the Chief Justice select the members of the new court, subject to approval by the Supreme Court. The power of the tribunal -- to reverse Courts of Appeals and provide nationally-binding legal interpretations -- is significantly different from the power currently exercised by sitting Court of Appeals judges. When those judges were appointed and confirmed it was not envisioned that they would exercise such power. The proposal would create essentially new and powerful judicial positions, and the President should not willingly yield authority to appoint the members of what would become the Nation's second most powerful court. The "precedents" cited by the committee -- appointment of district judges to sit on circuit courts, and selection of members of specialized judicial panels -- strike me as qualitatively different from the proposal under consideration. Such "precedents" do not, in any event, explain why we should sacrifice the Constitutionally-based appointment power of the President.

Further, requiring approval of the Supreme Court for appointments ensures that the new tribunal will be either bland or polarized, depending on whether the Court splits the seats (a Bork for Rehnquist, a Skelly Wright for Marshal) or proceeds by consensus (I cannot immediately think of an example agreeable to both Rehnquist and Marshal). In either case the new court will assuredly not represent the President's judicial philosophy -- and will have the authority to reverse decisions from courts to which the President has been able to make several appointments that do reflect his judicial philosophy. Under the committee proposal a Carter-appointed judge (there definitely will have to be some on the new court) could write a nationally-binding opinion reversing an opinion by Bork, Winter, Posner, or Scalia -- something that cannot happen now.

The Justice Department must soon respond to inquiries from the Senate subcommittee considering the pertinent bills, and Rose accordingly would appreciate "a prompt White House response." I await your guidance on what type of response to prepare.

THE WHITE HOUSE

WASHINGTON

February 10, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Chief Justice's Proposals

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

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

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

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

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

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

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

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

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

U.S. Department of Justice
Office of Legal Policy

Assistant Attorney General

Washington, D.C. 20530

MEMORANDUM

April 12, 1983

136504

TO: Fred F. Fielding
Counsel to the President

FROM: Jonathan C. Rose
Assistant Attorney General

SUBJECT: Creation of an Intercircuit Tribunal

It has become increasingly clear in recent years that the Supreme Court is struggling under a workload that threatens the Court's ability to discharge its functions in a timely and efficient manner. Last year, for example, the Court was unable to decide all of the cases it had accepted for review and over 100 accepted cases were carried over for consideration this Term. Moreover, the Court completely filled its argument calendar for the present Term within two and one-half months after returning in session.

Because of this overload, the Chief Justice and a majority of the other members of the Court have taken the unprecedented step of publicly recommending major changes in the Supreme Court's jurisdiction. The most important of the Chief Justice's recommendations would be the creation of an intercircuit tribunal as an adjunct of the Supreme Court. Although proposals for the tribunal have varied in detail, they generally agree that the intercircuit tribunal would be composed of judges selected from the various courts of appeals and would hear cases referred to it by the Supreme Court. The tribunal's decisions would be nationally binding, but would be reviewable (by writ of certiorari) by the Supreme Court itself. The tribunal would automatically lapse at the conclusion of a five-year trial period.

The Department of Justice has traditionally opposed the creation of a new appellate court standing between the Supreme Court and the courts of appeals. However, the intercircuit tribunal proposal differs from earlier national court proposals both in its temporary, experimental character and in its use of sitting judges drawn from the courts of appeals. The development of a backlog in the Supreme Court and the recent statements of the Justices concerning the workload problem also present a markedly different external situation from that obtaining at the time earlier proposals were presented for our consideration.

Following the Chief Justice's advocacy of the intercircuit tribunal concept in an address before the American Bar Association, the Attorney General convened a committee composed of the heads of the Department's litigating divisions and major offices, chaired by Deputy Solicitor General Paul Bator, to study the proposed intercircuit tribunal in depth. Among the issues the committee considered were whether the Supreme Court's workload was indeed excessive; whether there is a need for an enlarged appellate capacity at the national level; what effect the tribunal would have on the Supreme Court; and whether there are preferable alternative solutions to the current problems. In addition, the committee considered the design of the proposal, including the manner in which the tribunal would be constituted and how it would be chosen.

With the exception of one dissenting vote, the committee unanimously recommended in favor of establishing an intercircuit tribunal on an experimental, five-year basis. The committee concluded that the Supreme Court genuinely faces a serious workload problem. We also concluded that the long-range possibility of other reforms addressing the problem does not justify opposition to this constructive and sensible experimental measure. On the question of design, the committee concluded that the tribunal should be composed of 7 or 9 circuit judges hearing all cases en banc. The committee also recommended that the members of the tribunal should be selected by the Chief Justice, subject to the approval of the Supreme Court.

A number of reservations concerning the proposal were noted in the course of the committee's discussions. There was a general view that the Supreme Court is to some extent the author of its own problems. Certainly some part of the current problem is the result of innovations of the Court resulting in broad and easy access to the federal courts, including, for example, expansive allowance of habeas corpus proceedings and suits under 42 U.S.C. § 1983. The current situation has been aggravated by more mundane failings of the Court, such as its recent penchant for decisions involving long, numerous and conflicting multiple opinions which provide uncertain guidance to the lower courts and the bar and foster litigation. Reforms in the Supreme Court's internal procedures could provide partial relief for its workload problem. The problem could also be reduced by reforms reducing the influx of cases and the incidence of conflicts at lower levels of the judicial hierarchy. The possibilities include limitations on habeas corpus and § 1983 suits and increased use of appellate tribunals having exclusive nationwide jurisdiction in certain subject matter areas.

Notwithstanding our view that the Supreme Court is not without fault in the present situation and the desirability of pursuing other reforms, the Department believes that the intercircuit tribunal is one element in a general response to the federal caseload problem that deserves our support. Only actual experience with such a tribunal can take the arguments for and

against an enlarged appellate capacity at the national level out of the realm of conjecture and provide a concrete evidentiary basis for assessing this approach. It also seems of particular importance that we take a position on the current legislative proposals -- which enjoy the support of the key members of both Judiciary Committees -- that does not cast us in an obstructionist role, but enables us to exert effective influence in securing needed improvements in the design of the pending proposals.*

Since we are obliged to respond to the Senate Courts Subcommittee within a week or so, a prompt White House response would be greatly appreciated. I am attaching for your information the following items:

(i) the final report of the committee to the Attorney General; and

(ii) a statement circulated to the committee by its chairman which contains more detailed discussion of the issues raised in the committee's report.

Attachments

cc: Edward C. Schmults
Deputy Attorney General

Rex E. Lee
Solicitor General

Paul M. Bator
Deputy Solicitor General

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* The pending bills -- S. 645 and H.R. 1970 -- would create a tribunal of 26 or 28 judges sitting in shifting panels of 5 or 7. This approach to composition is wholly unacceptable from the perspective of the Justice Department. The bills also contemplate the highly undesirable procedure of selection of the tribunal by the circuit councils. The discussion at recent hearings on S. 645 before the Senate Courts Subcommittee suggests that the Subcommittee is receptive to the type of design changes we would like to see in the proposal.

file: interim tribunal

ID # 152885 CU

F6051

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Name of Correspondent: Paul M. Baton / Yolanda Branche

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

Subject: Testimony re HR 1968 and HR 1970, by Paul M. Baton, Apr 27 83

ROUTE TO: Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Completion Code	Completion Date YY/MM/DD
CUHolland	ORIGINATOR	83/04/25		C	83/04/25
	Referral Note:				
CUAT18	A	83/04/25		C	83/04/25
	Referral Note:				
CUFIEL	I	83/04/25		C	83/04/25
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THE WHITE HOUSE

WASHINGTON

April 26, 1983

Not sent—

MEMORANDUM FOR WILLIAM A. MAXWELL
LEGISLATIVE ANALYST
OFFICE OF MANAGEMENT AND BUDGET

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: Testimony Clearance
H.R. 1968 - Mandatory Appellate Jurisdiction of the Supreme Court and
H.R. 1970 - Intercircuit Tribunal

After review of the proposed testimony, I am not personally convinced that the Intercircuit Tribunal concept is a solution to the problem. However, given the time, and study and analysis devoted to this subject by the Department of Justice attorneys, I defer to their judgment and have no objections to the proposed testimony.

3pm — they called John for comments — still on hold "4"

Maxwell

FFF

Re:

After review of the proposed testing, I am not personally ~~not~~ convinced that ~~this~~ the Intercircuit Tribunal concept is a solution to the problem. However, given the time, ~~and~~ study and analysis devoted to this subject by the Department of Justice attorneys I defer to their judgment and have no objection to the proposed testing.

U.S. Department of Justice

APR 22 1983

Assistant Attorney General
Legislative Affairs

April 22, 1983

152885

TO: Bill Maxwell
OMB

FR: Yolanda Branche
OLA (633-2111)

RE: Testimony for Clearance

cc: Fred F. Fielding

STATEMENT

OF

PAUL M. BATOR
DEPUTY SOLICITOR GENERAL

BEFORE

THE

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

CONCERNING

H.R. 1968 - MANDATORY APPELLATE JURISDICTION
OF THE SUPREME COURT

H.R. 1970 - INTERCIRCUIT TRIBUNAL

ON

APRIL 27, 1983

Mr. Chairman and Members of the Committee:

I appreciate the opportunity to appear before this Subcommittee to state the views of the Department of Justice concerning H.R. 1968 and H.R. 1970.

H.R. 1968 would generally convert the mandatory appellate jurisdiction of the Supreme Court to jurisdiction for discretionary review by certiorari. Our strong support for this proposal, and the grounds for our support, are well-known to this Subcommittee from hearings on substantially identical legislation in the 97th Congress. 1/ I would add only that the present overload of the Supreme Court heightens the urgency of this reform.

H.R. 1970 would create an Intercircuit Tribunal with power to make nationally binding decisions in cases referred to it by the Supreme Court. A similar proposal, appearing as Title VI of S. 645, was the subject of recent hearings before the Subcommittee on Courts of the Senate Committee on the Judiciary.

1/ See Statement of Deputy Assistant Attorney General Timothy J. Finn Concerning H.R. 2406, H.R. 4396, and H.R. 4395 Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary, at 1-9 (June 22, 1982).

In the past, the Department of Justice has opposed proposals to create a National Court of Appeals. However, the Intercircuit Tribunal proposal differs significantly from earlier national court proposals. This proposal does not create a separate tier of new judges above the courts of appeals; the Tribunal would be staffed by sitting court-of-appeals judges. It would also not be a permanent institution but would be established initially for a five-year period.

Moreover, circumstances have changed. Virtually all the Justices of the Supreme Court have now agreed that the workload of the Court has become unmanageable; and the Chief Justice has explicitly endorsed the creation of a Tribunal of this sort.

The Department of Justice accordingly undertook a reexamination of this question. The conclusions of our study are as follows:

(a) The Department of Justice supports the creation of an appropriately designed Intercircuit Tribunal on a five-year experimental basis.

(b) We consider it essential that the Tribunal consist of a single panel of 7 or 9 judges hearing all cases en banc. We oppose the creation of a Tribunal consisting of a larger pool of judges sitting in a number of panels.

(c) We also oppose the suggestion that the judges of the new Tribunal be chosen by the circuit councils. We favor the proposal that judges be assigned to the Tribunal by the Chief Justice, subject to confirmation by the Supreme Court. However,

our endorsement of this approach is contingent on the temporary, experimental character of the Tribunal. If such a Tribunal is eventually established on a permanent or long-term basis following the initial trial period, we would not necessarily find acceptable any approach other than appointment of its judges by the President subject to Senate confirmation.

(d) We have three additional recommendations on the question of design. First, we believe that it would be wise to place some limitation on the number of senior judges who may be assigned to the Tribunal. Second, we prefer that judges be assigned to the Tribunal for the full five-year trial period, as H.R. 1970 proposes, rather than being assigned on a rotating basis for more limited terms. Third, we see merit in the suggestion that the Tribunal share the clerk's office and the other support personnel and facilities of the Federal Circuit Court of Appeals, rather than being required to retain its own support personnel.

(e) We are in general agreement with the other basic design features of H.R. 1970. The Supreme Court should have authority to refer to the Tribunal any case presented to the Court (other than original jurisdiction cases). The Tribunal should have authority to make nationally binding decisions in cases so referred. Decisions of the Tribunal should be reviewable on certiorari by the Supreme Court.

In the remainder of my testimony I will initially discuss the basic considerations supporting the Tribunal experiment: the workload problem of the Supreme Court; the need for an

enlarged appellate capacity at the national level; the likely effect of the creation of the Tribunal; and the possibility of alternative reforms. I will then discuss in greater detail our recommendations concerning the design of the Tribunal.

I. The Need for an Intercircuit Tribunal and Its Likely Effect

A. The Supreme Court's Workload Problem

Almost all the Justices of the Supreme Court are now agreed that the Supreme Court's workload has become unmanageable and threatens the effective functioning of the Court. Confirmation is provided by statistical evidence. Over 4,400 new cases were filed with the Court in the 1981 term, compared to about 4,000 in the 1979 term and 3,400 in the 1970 term. Last year the Court was unable to decide all of the cases it had accepted for review and over 100 accepted cases were carried over for consideration this term. In the present term, the Court has completely filled its argument calendar within two and a half months of returning in session.

We note that the Court has itself contributed to the current problems. The Court has, for instance, eased access to the federal courts in habeas corpus cases and in suits under 42 U.S.C. §1983, thus increasing the federal caseload. The problem has been aggravated by the Court's tendency to write long, numerous and conflicting multiple opinions which provide uncertain guidance to the lower courts and the bar and foster litigation.

Nevertheless, the workload problem is largely the result of factors beyond the Court's control: the proliferation of federal causes of action, the expanding ambit of federal statutory law, increases in population, and the general litigiousness of contemporary society. Although the causes are complex, the problem of overload at the top of the judicial hierarchy is real; and, if remedial measures are not taken, it can only worsen. The Intercircuit Tribunal experiment offers one promising approach to the formulation of a solution.

B. Alternative Solutions

There are various other reforms which would contribute directly or indirectly to the solution of the problem. The elimination of mandatory appeals to the Supreme Court proposed in H.R. 1968 is an important measure which the Department of Justice has long supported. Other reforms -- such as establishing reasonable constraints on prisoner petitions -- would reduce the inflow of cases into the federal courts. Increased use of appellate courts with exclusive nationwide jurisdiction in certain subject matter areas would alleviate the problem. 2/ Reforms in the Court's screening practices and other internal procedures could also be helpful.

Although these other approaches should be considered, we do not believe that they justify deferring or opposing the creation of a temporary Intercircuit Tribunal. A long-term solution is in fact likely to require a combination of measures;

2/ For example, patent appeals have recently been consolidated in the Federal Circuit Court of Appeals.

further, many of these alternatives may be theoretical because of the chronic difficulty and delay that attends the enactment of significant court reform legislation. The Tribunal proposal is responsive to the immediate problem of Supreme Court overload, and its creation on a temporary basis provides breathing space during which other reforms may be explored and implemented.

C. The Probable Effect of the Intercircuit Tribunal on the Supreme Court's Workload

We believe that the creation of an Intercircuit Tribunal would make a substantial contribution to alleviating the Supreme Court's workload. About 30-50 cases a year -- roughly 20-30% of the argument calendar in a typical year -- should disappear from the Supreme Court's docket.

It has been argued that this gain would be offset if the Supreme Court were to monitor the decisions of the Tribunal closely and grant review of its decisions in many cases. It is unlikely, however, that the Supreme Court would frequently grant certiorari in cases coming back to it from the Tribunal, since these would be cases the Justices had already decided did not need a Supreme Court decision.

Creation of the Tribunal will probably result in an increase in the number of certiorari petitions filed with the Supreme Court, since the likelihood of obtaining further review would have increased. This would to some extent offset the economies resulting from the Court's ability to refer cases to the Tribunal.

It should be noted, however, that the work of screening cases could itself be partially delegated to the new Tribunal. The Justices may find that they can quickly determine that certain petitions do not require decision by the Supreme Court itself. They could refer such cases to the Tribunal without further study, leaving it to the Tribunal to determine whether review is warranted because there is an intercircuit conflict or because there are other grounds supporting a nationally binding decision by the Tribunal. 3/

A final misgiving that has been expressed is that deciding whether to refer cases to the Tribunal could complicate the screening process. It is not apparent, however, that choice among three options (grant, deny, or refer) is substantially more difficult than the current choice between two options (grant or deny). The possibility of reference to the Tribunal could actually smooth the screening process by providing a third option in cases that are marginal candidates for Supreme Court review and occasion disagreement or uncertainty among the Justices.

D. The National Appellate Capacity

The Supreme Court's workload is generated primarily by the enormous rise in the number of filings in the district courts and courts of appeals. 4/ The fact that the Supreme Court cannot decide more than about 150 cases on the merits a year means that

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3/ It should also be noted that screening work currently comprises only a limited portion of the Justices' workload.

4/

	Courts of Appeals	District Courts
1979	20,000	187,000
1982	28,000	239,000

an ever-smaller proportion of cases in the federal courts can be reviewed. This shortage of national appellate capacity increases the likelihood that conflicts among lower courts will remain unresolved.

It has been noted that intercircuit conflicts are not always undesirable: It may be wise to allow lower courts to continue to explore various approaches to an issue, often enhancing the quality of the ultimate decision. However, this "simmering" process would not be ended by creation of the Tribunal. Reference to the Tribunal would be in the discretion of the Supreme Court; if the Court believed that an issue was not ripe for a nationally uniform decision, it would retain the option of denying review, rather than referring the case to the Tribunal for a premature decision. Similarly, the Tribunal would itself have the option of denying review on this ground unless directed to decide a case by the Supreme Court.

The fact is that there exists an increasing number of cases that present issues which are fully ripe for a nationally uniform decision, but which will remain unresolved and subject to continued litigation in the lower courts simply because the Supreme Court cannot decide them. We believe that the Tribunal's contribution to expanding the national appellate capacity will help resolve conflicts and thus contribute to the administration of justice. 5/

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

Some of the alternative reform options discussed in connection with the Supreme Court's workload problem would also be responsive to the problem of inadequate appellate capacity at the national level. As before, however, the existence of other approaches does not significantly weaken the case for proceeding with the Tribunal experiment. It would be regrettable if this constructive and sensible experimental measure were not pursued because of the availability of alternatives which are, at this point, largely theoretical. If we do not proceed with the Tribunal now, we will probably be compelled to do so later, when the situation is even more critical. The sensible time to experiment with remedial measures is before the system has reached the point of collapse.

The temporary character of the Tribunal is also attractive in this context. Work can continue on the development and enactment of alternative responses during the five-year trial period, and their adequacy can be assessed in the context of Congress's consideration of the continuation of the Tribunal at the end of that period.

E. The Effect of the Tribunal on Government Litigation

The Supreme Court's workload problem does not now substantially prejudice the Justice Department in its representation of the government before the Court. We have a high success rate with our petitions for certiorari and no Division of the Department reports substantial dissatisfaction with its ability to get conflicts resolved.

We believe, however, that it would be shortsighted to conclude that the Supreme Court bottleneck will not soon begin to have an adverse effect on government litigation. It is inevitable that, unless there is relief, more government petitions will be denied and more will be resolved summarily. There may also be an increase in litigation resulting from uncertainty in the law.

Adoption of the proposal will probably cause some increase in the workload of the litigating Divisions of the Department and a substantial increase in the workload of the Solicitor General's office. However, we do not foresee any substantial adverse impact on our representation of the government. A positive contribution of the Tribunal to government litigation is that it will enable us to seek review of some additional appellate decisions we consider erroneous or undesirable, where we would not currently seek review on account of the limitations of the Supreme Court's capacity. 6/

II. The Design of the Tribunal

A. Duration of the Trial Period

As the foregoing discussion indicates, our support for the Tribunal depends on its temporary, experimental nature. A five-year trial period, as proposed in H.R. 1970, should provide an adequate basis for assessing the Tribunal's performance. We

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6/ See generally Griswold, Rationing Justice - The Supreme Court's Caseload and What the Court Does Not Do, 60 Cornell L. Rev. 335, 341-44 (1975).

are concerned that a Tribunal initially established for a longer period could become too "entrenched," and might be continued regardless of its success or failure, and regardless of the adequacy of other reforms enacted during the trial period. We would accordingly oppose a trial period lasting longer than five years.

B. A Unitary Tribunal

The bill as presently drafted contemplates a Tribunal composed of a large pool of judges sitting in seven-judge panels. We strongly oppose this approach. A multi-panel Tribunal would simply generate new conflicts and instabilities in the law. The point was well-stated by Professor Leo Levin at the recent Senate hearings on the Intercircuit Tribunal proposal:

> Stability and predictability in the law are important values. Absent such stability and predictability, there can be no clarity in the law. Indeed, concern with intercircuit conflicts and with the inability of lawyers to advise clients as to how the United States Supreme Court will ultimately resolve the underlying issues is a major motivation for this legislation. It is wasteful to continue our present system which invites relitigation of the same narrow issues of statutory construction in circuit after circuit, either in the attempt to create a conflict or to take advantage of a conflict already created. It would be ironic indeed if the provisions governing the creation of the new tribunal were to continue to invite such relitigation. Yet, if panels of the Intercircuit Tribunal are to be picked by lot from a predesignated group more than four times the size of any individual panel, there is the risk of an implicit invitation to litigants to attempt to raise the same issue, or one closely related, in the hope that the "luck of the draw" will yield a panel willing to distinguish an earlier precedent and to arrive at an opposite conclusion.

> To foster stability and predictability it is suggested that the bill provide for an Intercircuit Tribunal consisting of nine judges who shall always sit en banc. 7/

We agree fully with these views, and believe that the Tribunal should consist of a single panel of 7 or 9 judges hearing all cases en banc.

C. Assignment to the Tribunal

The bill currently provides for assignment of judges by the circuit councils. We believe that election of judges to a higher position by their peers is not likely to be a very happy process. 8/ Nor is it apparent how the objectives of the proposal would be advanced by committing the Tribunal's selection to the circuit and district judges comprising the circuit councils.

At the Senate hearings Professor Levin and Senator Roman Hruska suggested an alternative: 9/ Members of the Tribunal should be assigned by the Chief Justice, subject to

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7/ Testimony of A. Leo Levin Concerning S. 645 Before the Subcommittee on Courts of the Senate Committee on the Judiciary, at 16-17 (March 11, 1983).

This approach was also supported at the Senator hearings on the proposal by Professor Daniel Meador and Senator Roman Hruska.

8/ See id. at 18.

9/ Professor Meador recommended similarly at the Senate hearings that the Tribunal be selected by the Chief Justice or the Supreme Court.

confirmation by the Supreme Court. 10/ We favor this approach. It would be comparable to the normal assignment procedure for temporary and special courts -- assignment by the Chief Justice -- but would also assure that the judges of the Tribunal enjoy the confidence of the Supreme Court. This makes particular sense here, because the value of the Tribunal would depend on the willingness of the Supreme Court to refer cases to it and to let its decisions stand. 11/

I would emphasize, however, that our endorsement of this approach depends on the limited, experimental character of the Tribunal. We would seriously question bypassing Presidential and Senatorial scrutiny in connection with the selection of judges for a permanent Tribunal established at the conclusion of the trial period.

10/ In practical terms, this would probably mean assignment of each judge on the Tribunal by the Chief Justice with the concurrence of at least four Associate Justices, though the Court would have the option of requiring the concurrence of a larger number of Associate Justices in each assignment if it preferred a procedure requiring a higher degree of unanimity.

11/ This approach presents no constitutional difficulty. There is ample precedent for temporary assignment of judges to new responsibilities without Presidential or Senatorial scrutiny. District judges can be assigned by the Chief Justice to sit temporarily on the courts of appeals. During World War II, sitting judges were assigned to constitute the Emergency Court of Appeals (with important nationwide responsibilities over the wartime stabilization program) on a temporary basis. Assignments are currently made to the Temporary Emergency Court of Appeals.

D. The Reference Procedure

We agree with the bill's formulation that the Tribunal should have jurisdiction only of cases referred to it by the Supreme Court, and that the Supreme Court should have discretion to refer to the Tribunal any case presented to it for appellate review. Specifying that only cases involving intercircuit conflicts can be referred would create a litigable threshold issue that could confound and complicate the reference process. This concern is heightened by the fact that it is not at all easy to define cases in which there is a true conflict. Moreover, since the Tribunal is designed as an experiment, it seems desirable to give the Supreme Court some latitude in trying out reference of different types of cases and making adjustments in its reference practices in light of experience with the Tribunal's operation. The bill correctly provides that the Tribunal should be required to decide referred cases brought up to the Supreme Court as mandatory appeals, but should have discretion to decline review of certiorari cases referred to it, unless directed to decide such a case by the Supreme Court.

E. Length of Assignment

Differing views have been expressed as to whether judges assigned to the Tribunal should serve for the full trial period or for shorter terms on a rotating basis. 12/ Although we

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12/ At the Senate hearings on the proposal Professor Meador suggested a rotation system under which the normal length of a term of service would be three years.

would not find a rotation system unacceptable, we believe that H.R. 1970's approach of assigning judges for the full five years is preferable.

We would have some concern about the stability of the caselaw created by a Tribunal whose composition could change substantially from year to year. Further, the rotation approach could cloud the results of the experiment: if the Tribunal failed to perform as expected, the argument would remain that its failings were the result of its unstable composition and that a Tribunal whose judges served for longer terms would perform adequately. A Tribunal of stable composition, by contrast, would provide a clear test of the basic soundness and value of an auxiliary Tribunal having jurisdiction over cases referred to it by the Supreme Court.

F. Use of Senior Judges

The bill provides that senior circuit judges, as well as active circuit judges, are eligible for assignment to the Tribunal. This seems wise. Use of senior judges could reduce the burden on the courts of appeals resulting from the diversion of judges to the Tribunal. Senior circuit judges include some of the most eminent and capable judges in the country.

We believe, however, that there should be a limit on the use of senior judges. The decision to assume senior status reflects a need or desire to carry something less than the full workload of an active judge. Further, senior judges do not participate in the en banc hearings of the circuit courts and do not serve on the circuit councils. They are therefore not in

direct contact with some important processes in the current development of federal law and the operation of the judicial system.

We would accordingly be opposed to a Tribunal composed largely or primarily of senior circuit judges. Our recommendation is that the bill provide that the Tribunal must include at least six active circuit judges at any time if it is set up with nine members, and at least five active circuit judges if it is set up with seven members. 13/

G. Sharing of Facilities with the Federal Circuit

It has been suggested that the Intercircuit Tribunal share the use of the clerk's office and other support personnel and facilities of the Federal Circuit Court of Appeals. 14/ This

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13/ Professor Meador proposed a different type of limitation in his testimony at the Senate hearings on the proposal, under which judges who had served for less than five years on the courts of appeals would not be eligible for assignment to the Tribunal. We do not favor such a limitation. The Justices may believe in particular cases that limited length of service on a court of appeals is outweighed by other factors, such as distinction in legal scholarship prior to appointment to the bench, distinguished performance as a district judge prior to elevation to a court of appeals, or lengthy experience as an appellate judge in a state court system prior to appointment to a federal appeals court. The Justices should be free to decide what weight is to be given to length of service on a federal circuit court in conjunction with all other factors bearing on fitness for service on the Tribunal.

14/ This has been recommended by the Chief Justice, and by Professor Meador at the Senate hearings on the proposal.

recommendation seems sensible. It could reduce the cost of operating the Tribunal, minimize start-up time, and minimize disruption among support personnel if the Tribunal is not continued beyond the end of the trial period.

In sum, the Department of Justice supports the general elimination of mandatory appeals to the Supreme Court, as provided in H.R. 1968, and also supports the proposal for the creation of an Intercircuit Tribunal subject to the recommended changes in design. These proposals are responsive to the serious and pressing problem of overload in the Supreme Court.

I greatly appreciate the opportunity to express our views on these important bills.

Appendix: Government Applications to the Supreme Court

The invitation to testify on H.R. 1968 and H.R. 1970 was accompanied by a request for information on the contribution of the Solicitor General's office to the Supreme Court's workload. The attached table shows for the past ten years the number of government applications to the Court for review, classified as appeals and petitions for certiorari, and the number of government petitions for certiorari granted by the Court. Fully detailed information on government litigation in the Supreme Court is published regularly in the portion of the Annual Report of the Attorney General describing the work of the Solicitor General's office.

GOVERNMENT APPLICATIONS TO THE SUPREME COURT

	1981	1980	1979	1978	1977	1976	1975	1974	1973	1972
Petitions for certiorari	57	50	55	52	57	48	50	66	61	52
Certiorari petitions granted	45	31	43	37	33	37	38	47	39	36
Appeals	17	10	10	8	11	17	11	14	14	21
Total government applications for review	74	60	65	60	68	65	61	80	75	73