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Name of Correspondent: James Murr

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Subject: Department of Justice Report on S. 645 the Courts Improvement Act of 1983

ROUTE TO: / **ACTION** / **DISPOSITION**

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CUH011	ORIGINATOR	831050 4		C	831050 4
	Referral Note:				
CUAT18	D	831050 4		C	831050 4
	Referral Note:				
CUFIEL	S	831050 4	FF	A	831050 4
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ACTION CODES:
A - Appropriate Action
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:
A - Answered
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MEMORANDUM

THE WHITE HOUSE

WASHINGTON

May 4, 1983

FOR: JAMES MURR
OFFICE OF MANAGEMENT AND BUDGET

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

SUBJECT: Department of Justice Report on S. 645, the Courts Improvement Act of 1983

Counsel's Office has reviewed the proposed report of the Department of Justice on S. 645, and finds no objection to it from a legal perspective.

FFF:JGR:ph 5/4/83
cc: FFFielding
JGRoberts
Subject
Chron.

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

May 4, 1983

FOR: FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Department of Justice Report on S. 645, the Courts Improvement Act of 1983

Jim Murr from OMB's Legislative Reference shop has provided a copy of the Department of Justice's proposed letter to Chairman Thurmond on the above-referenced bill. Of particular interest is Title VI of the bill, which would establish the temporary Intercircuit Tribunal. Justice's letter simply notes that "[d]ue to the complex policy issues that are presented in title VI, the Department requests permission to submit its comments on this title at a later date." I see no objection to this.

Justice supports titles I, II, III, and V. Title I abolishes the mandatory appellate jurisdiction of the Supreme Court, making the appellate docket entirely discretionary. The Administration has supported this provision in the past. It would eliminate the requirement that the Court decide certain cases on the merits regardless of their general significance, easing the Court's workload.

Title II, also supported by the Administration in the past, eliminates the 50-odd provisions according priority on court dockets to certain types of cases. This is a "good government" reform, since there is generally no rhyme or reason to the priorities, which simply reflect each legislative committee's view that cases under the statutes it drafted are the most important cases in the courts. Indeed, there are about a dozen types of cases which must be given priority on the docket over all other cases. This raises an interesting conundrum when a judge has four different cases, each one of which is to be given priority over all others -- including the other three.

Title III upgrades judicial survivors benefits, to alleviate at least partially the state of affairs captured by former Judge Mulligan's statement that he "could live on his judicial salary, but couldn't die on it."

Title IV would create a State Justice Institute, to fund improvements in state court systems. We have opposed this in the past, primarily on budgetary grounds, and Justice's letter does so again. The letter also appropriately objects to the scheme for appointing members to the contemplated State

Justice Institute Board. Under the bill the President would appoint 7 members from a list of only 14 submitted by the Conference of Chief Justices.

Title V would create a commission to render advice on the jurisdiction of state and federal courts. The commission would have sixteen members, four appointed by the President, President pro tempore of the Senate, the Speaker and the Chief Justice, respectively. Since the commission is only advisory, this raises no appointment clause concerns.

I have drafted a no objection memorandum to Murr for your signature.

Attachment

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
ROUTE SLIP

TO Mike Uhlmann	Take necessary action ☐
Sherrie Cooksey	Approval or signature ☐
	Comment ☐
	Prepare reply ☐
	Discuss with me ☐
	For your information ☐
	See remarks below ☐

FROM Jim Murr TM X4870 DATE 5/2/83

REMARKS

Justice Report -- S. 645, the "Courts Improvement Act of 1983"

There are no substantive agency objections to clearance of the subject report (attached). S. 645 has six titles:

I - Eliminates mandatory jurisdiction of Supreme Court.

II - Eliminates priorities for court review of certain civil cases.

III - Upgrades judicial benefits program.

IV - Establishes State Justice Institute.

V - Establishes a Federal Jurisdiction Revision Commission.

VI - Establishes a temporary Intercircuit Tribunal.

OMB FORM 4
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The DOJ report favors titles I, II, III, and V, and opposes title IV. Justice requests additional time to comment on title V/.

If you have no objections, we are prepared to clear the DOJ report. Please let me have your comments by c.o.b. WEDNESDAY, MAY 4. Thanks.

cc: H. Schreiber
K. Wilson
A. Curtis

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
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 Courts Improvement Act of 1983. The Department supports the enactment of title I, title II, title III and title V. The Department opposes the enactment of title IV. Due to the complex policy issues that are presented in title VI, the Department requests permission to submit its comments on this title at a later date.

Title I of S. 645 eliminates the mandatory jurisdiction of the Supreme Court. The general effect of this legislation would be to convert the mandatory appellate jurisdiction of the Supreme Court to jurisdiction for review by certiorari, except in connection with review of decisions by three-judge district courts.

We believe that the changes effected by this title are long overdue, and will bring about a substantial improvement in the administration of justice in the federal courts. The essential defect of the current system is that the Supreme Court is required to devote a large portion of its time to deciding, on the merits, cases of no special importance because they happen to fall within the categories which qualify for review by appeal under the current statutes. There is no necessary correlation between the difficulty of the legal questions in a case and its public importance. When the Justices are uncertain concerning the appropriate disposition of a case presented on appeal, they are obliged to devote time and energy to reaching a decision on the merits -- including, in many cases, full briefing and oral argument -- though all may agree that it raises no question of general interest and does not warrant the granting of a writ of certiorari. 1/

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

The present system also interferes with the ability of the Court to select appropriate cases to decide recurrent legal questions of public importance. A particular case may raise an important issue, but the record on it may be unclear. The Court's ability to reach a sound decision with respect to a complex and significant issue may be facilitated by first letting several lower courts explore the ramifications of the problem. 2/ By forcing the Court to decide the merits of dispositive issues whenever they may arise, in a case presented for review by appeal, the current system interferes with the Court's ability to pass on issues at a time and in a context most conducive to the sound development of federal law.

Commentators and commissions that have studied the jurisdiction of the Supreme Court have generally agreed that the categories defined by the existing appeal provisions are essentially arbitrary. Innumerable cases of the greatest significance have been brought under the certiorari jurisdiction of the Supreme Court. 3/ Conversely, the statutory categories qualifying for appeal encompass broad classes of cases of no special importance. This point may be appreciated more fully in the context of a detailed consideration of the principal jurisdictional provisions that would be affected by Title I -- 28 U.S.C. § 1257(1)-(2), 28 U.S.C. § 1254(2), and 28 U.S.C. § 1252:

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

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

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

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

As a practical matter, the categories defined by § 1257 do not restrict appeal to cases of general import or unusual significance. The term "statute of any state," as used in § 1257(2), is not confined to laws of statewide applicability, but includes municipal ordinances 4/ and all administrative rules and orders of a "legislative" character. 5/ In light of the doctrine of Dahnke-Walker Milling Co. v. Bondurant, 6/ qualification for appeal under this provision does not require that a challenge be rejected to challenge the general validity of a state law. It is sufficient, if a claim was rejected, that the application of the state law under the facts of the particular case was barred on federal grounds. Hence, the ability of a litigant to obtain review on appeal depends, to a very large degree, on his attorney's ability to describe the outcome of the case as a rejection of a challenge to the validity of a state law as applied, rather than on any substantive difference between his case and state cases falling under the certiorari jurisdiction of the Supreme Court described in § 1257(3). 7/

28 U.S.C. § 1254(2). 28 U.S.C. § 1254(2) authorizes appeal by a party relying on a state statute held to be invalid on federal grounds by a federal court of appeals. The category specified in this provision also does not define a class of cases of unique importance either to the individual states or to the nation. As in § 1257, the notion of a "statute" in this provision applies to municipal ordinances 8/ and administrative orders, 9/ and it suffices if a state law is held to be invalid as applied. 10/

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

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

6/ 257 U.S. 282 (1921).

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

8/ See City of New Orleans v. Dukes, 427 U.S. 297, 301 (1976).

9/ See Public Service Comm'n of Indiana v. Batesville Telephone Co., 284 U.S. 6 (1931) (assuming that order of state Public Service Commission invalidated by court of appeals is a "statute," but dismissing appeal on other grounds); Stern & Gressman, Supreme Court Practice, 64 (5th ed., 1978).

10/ See Dutton v. Evans, 400 U.S. 74, 76 note 6 (1970); Stern & Gressman, Supreme Court Practice, 65 (5th ed., 1978).

28 U.S.C. § 1252. 28 U.S.C. § 1252 provides for direct appeal to the Supreme Court of decisions of lower federal courts holding acts of Congress unconstitutional in proceedings in which the United States or its agencies, officers, or employees are parties. Ordinarily, lower federal court decisions invalidating acts of Congress present issues of great public importance warranting Supreme Court review. We doubt, however, that the Supreme Court would frequently refuse to grant a discretionary writ of certiorari in such a case. In addition, in cases in which expedited consideration by the Supreme Court is required, it is possible for the litigants to apply to the Supreme Court for a writ of certiorari before final judgment in the court of appeals, as the government recently did in Dames & Moore v. Regan, No. 80-2078 (July 2, 1981). 11/ Hence, elimination of "direct appeals" under 28 U.S.C. § 1252 need not prove an obstacle to expeditious review in cases of exceptional importance.

The existing grounds of Supreme Court appellate jurisdiction are essentially arbitrary or unnecessary. We also do not believe that alternative broad rules of mandatory review could be devised that would assure consideration of important cases in a principled and consistent way, but would avoid the types of problems that have arisen under the current system.

We do not anticipate that the proposed changes in Title I will present any problems from the perspective of the operations of the Department of Justice. For many years Supreme Court practice has tended to minimize differences between application for appeals as of right and review by certiorari. Parties (including the government) wishing to invoke the Supreme Court's appellate jurisdiction have been required, as a practical matter, to draw up jurisdictional statements similar in character to petitions for certiorari. Hence, the statutory reform that is proposed should not substantially change our practice before the Supreme Court.

It should be noted that title I will entail no costs or expenditures. The effect of title I will only be to allow the Supreme Court to utilize the resources it presently possesses in a more rational manner.

Title II eliminates over 50 different provisions that are scattered throughout the United States Code which require that particular classes of civil cases be given priority by the courts

11/ The same procedure was employed in the Nixon tapes case, United States v. Nixon, 418 U.S. 683 (1974).

over other cases. In lieu of these provisions, the bill requires the courts to expedite the consideration of any action "if good cause therefor is shown." The bill also requires expedition of "any action for temporary or permanent injunctive relief."

This title is an effective response to the problems of judicial administration that have been created by the proliferation of priority provisions throughout the United States Code. Congress has, through the years, enacted a large number of priority provisions in widely varying terms intended to govern actions under a bewildering array of federal statues. These provisions have been enacted in a piecemeal fashion over the years with no attention to their cumulative impact on the courts and no effort to create an integrated, internally consistent set of instructions that can be effectively implemented by the courts. Thus, for instance, there are a number of provisions which require the court to hear particular categories of cases before all others, with no indication of how conflicts between such categorical priorities are to be resolved. The sheer number of cases afforded some kind of priority assures frequent conflict among priorities, and can substantially limit the intended effect of a priority provision.

The various problems presented by civil priorities led the American Bar Association to adopt a resolution calling for the abolition of all civil priorities except habeas corpus. 12/ A particularly serious problem discussed at that time was the delay to non-priority actions caused by these provisions in courts experiencing substantial backlogs. In the late 1970's, for instance, the number of priority civil and criminal cases continually filed in the heavily backlogged Fifth Circuit was so great that for several years the court heard nothing but priority cases. This raised a real fear that non-priority cases might never be heard. Even today, in courts much less heavily backlogged, the priority cases can significantly delay the progress of non-priority cases. Thus, a report of the New York City Bar Association noted that non-priority cases in the Ninth Circuit in 1981 were, on the average, heard 6-8 months after priority cases. 13/

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

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

Existing priority provisions are based on the premise that it is possible for Congress to predict in advance that expeditious resolution of one entire class of cases is more important than it is in other classes of cases. Such generalizations are obviously, extraordinarily difficult. Most existing priority provisions define broad classes of cases in which expeditious treatment is sometimes especially important, but often is not. Though some priority provisions properly allow the court some discretion to distinguish among those cases which do or do not require expedited treatment, most priority provisions can be mechanically invoked. It is, obviously, unfair and a waste of resources to allow a case in which there is no special need for expedition -- but which falls in a broad "priority" class -- to take precedence over other cases in which the need is more compelling but no statutory priority is applicable. That is the frequent effect of the current law.

We believe that the approach taken by Title II to this problem is fundamentally correct. We believe that all but the most clearly necessary and justifiable priority provisions should be revoked and replaced with a single standard which the courts can apply to all cases to determine the need for expedition. The courts are, in general, in the best position to determine the need for expedition in of a particular case, to weigh the relative needs of various cases on their dockets, and to establish an order of hearing that treats all litigants fairly. Litigants who can persuasively assert that there is a special public or private interest in expeditious treatment of their case will be able to use the general expedition provision provided in Title II to the same effect as existing priority provisions.

We would also like to note one additional concern with this title. As it is presently drafted, Title II would require the court to expedite "any action for temporary or permanent injunctive relief." It is clearly desirable to retain existing rules of expedition applicable to certain injunctions under the Federal Rules of Civil Procedure and to require that injunctive actions be expedited "if good cause therefor is shown." As drafted, however, we believe that the title is overly broad. This broad priority for any injunctive action would be subject to manipulation, providing litigants with an incentive to include a claim for injunctive relief simply to obtain expedited consideration. Certainly not all cases in which an injunction can be plausibly claimed have a special need for expedited treatment.

On balance, we believe, however, that Title II represents an important and needed reform to the existing law of civil priorities.

Title III upgrades the judicial benefits program. We are concerned that federal judges are becoming increasingly dissatisfied with the program that provides benefits to the survivors of deceased judges. The Department wholeheartedly supports the proposed changes in this program. These changes will help attract skilled lawyers to the bench and eliminate the concern that judges now serving have for the security of their families.

We would like to offer one amendment that is designed to increase participation by the judges in the benefits program. The attached amendment would allow the judges to borrow against the equity that they have in the benefits fund. This is a feature that is common in most private insurance plans. Given the fact that in 1957, the first year that the program was in operation, 86 percent of the judges joined. In 1982, only 78 percent of the judges were participants. By making this program similar to private insurance plans it is hoped that participation in the benefits program will increase.

Title IV creates a State Justice Institute that would direct a national program of assistance for state court improvements by providing funds to state courts and other appropriate organizations. The Department opposes the enactment of Title IV.

The Institute would be headed by a Board of Directors whose voting members would be six judges, one state court administrator, and four public members. The President would appoint the Board members with the advice and consent of the Senate. The President's choices in nominating the six judges and the state court administrator for membership on the Board would be limited to a list of at least fourteen candidates submitted by the Conference of Chief Justices.

The provisions of Title IV relating to grants and contracts state that Institute funds are to be used primarily for research, demonstrations, innovative projects, and other justice improvement measures, and are not to be employed to support basic court services. Matching funds equal to 25% of the total cost of a grant to, or contract with, a state or local judicial system must normally be provided by the recipient. The Institute is generally barred from involvement in litigation and political activities. The funding authorized for the Institute is $20,000,000 in 1984, $25,000,000 in 1985, and $25,000,000 in 1986.

The goals that the Institute is designed to further are obviously important, and the specific arrangements set out in Title IV seem generally well designed to advance these objectives. However, we have concluded that we cannot support this legislation. The reasons for this conclusion are largely budgetary. The proposal does not bear any of the earmarks of a necessary funding project in this time of austerity. It does not relate specifically to an area that has been made the responsibility of

the federal government by the Constitution or federal law; it does not relate specifically to a stated priority of the Administration or the Department of Justice; and it does not address a problem of national scope that the states are inherently incapable of dealing with on their own. Indeed, it is far from clear to us that the state courts are the element of state justice systems most urgently in need of additional funding. A discussion of these three points follows:

(i) Federal Interest and Responsibility. The proponents of the State Justice Institute have argued that the propriety and desirability of federal funding for state court improvement projects follow from the fact that the state courts are, in a sense, federal courts. The state courts, under the Supremacy Clause, are required to enforce federal law, and a substantial portion of their time and resources is taken up in doing so. The state courts are also required to comply with the constitutional requirements of due process. The costs of discharging both of these responsibilities have increased greatly in recent decades as a result of the decisions of Congress in expanding the scope of federal law and the decisions of the Supreme Court in interpreting the federal Constitution. It is argued that some level of federal funding for state court activities is required as a matter of fairness, or is at least appropriate, given the general federal interest in the adequate administration of federal law, and the burdens which the state courts bear in discharging their federal responsibilities.

These considerations are not without force. However, certain countervailing considerations should also be noted. In forming the United States the individual states made the judgment that the general benefits of national government would outweigh the resulting costs to them. The same judgment was made subsequently by the remaining states in joining the union. The quid pro quo for the burdens resulting from the responsibilities of statehood -- including enforcement and compliance with federal law -- need not take the form of reimbursement to the states for the specific expenditures incurred in discharging these responsibilities, but may be found in the general functions which the federal government carries out, to the benefit of the states, such as national defense and the regulation of interstate commerce.

It may also be noted that the federal courts bear certain burdens which would otherwise be borne by the state courts, though no reimbursement is expected from the states in return for such activities. For example, when jurisdiction is based on diversity of citizenship, the federal courts hear state law cases which would otherwise have to be handled by the state courts. Essentially, the same point can be made in relation to the full range of subjects which are currently regulated by federal laws

whose enforcement is partially or wholly committed to the federal courts. In the absence of the assumption of responsibility by the federal government for regulation and enforcement in these areas -- for example, patents, bankruptcy and antitrust -- the states would need to undertake their own regulation, and the resulting burden of enforcement would fall on the state courts.

Finally, while the federal interest in the adequate administration of federal law does provide some support for the propriety or desirability of federal assistance to state courts in enforcing and complying with federal law, the State Justice Institute Act is not especially designed to further this interest. Title IV does not require that funds disbursed by the Institute be used exclusively or primarily to assist state courts in enforcing or complying with federal law, but authorizes support of projects relating to nearly all aspects of state court improvement.

(ii) Relationship to Administration Priorities. The Administration has identified violent crime as an area of priority and concern. This priority has been reflected in the creation of the Attorney General's Task Force on Violent Crime. The State Justice Institute proposal does have some general relationship to this priority, since many of the projects funded by the Institute would presumably contribute, directly or indirectly, to the improvement of the ability of state courts to deal with violent crime, and crime in general. However, this legislation does not create any presumption in favor of the allocation of Institute funds to projects concerned with violent crime, or any other Administration priority. By design, decisions concerning grants and contracts are left to the Institute's Board of Directors which would operate free of federal control.

(iii) State Competence. The principal functions of the State Justice Institute would be to make decisions concerning the disbursement of federal funds to state court improvement efforts, and to handle the award and monitoring of such grants and contracts. At least in theory, the same type of Institute might be created by all the states, or a group of interested states, with funds contributed by the subscribing states substituting for the federal money authorized in Title IV. Supporters of Title IV have responded to this objection by pointing to the uneven commitment of the various states to providing sufficient support for the operation and improvement of their own court systems, and the difficulty of securing state funding for national organizations -- such as the National Center for State Courts -- which provides important services to the state judiciaries. Problems of this sort may make a state-based alternative less effective than a federally supported State Justice Institute, or perhaps simply unfeasible. However, the proponents of the Institute have only claimed that the states have been unwilling to provide adequate overall support for state court improvement efforts --

not that they are incapable of doing so -- and a statebased system would offer certain advantages over the federal funding approach. In particular, a state-based system would remove all elements of federal influence and control from decisions concerning the allocation of funds to state court systems, and would allow each state to decide whether the benefits to it from participation in the system justify the cost of subscription or membership.

In sum, the Administration opposes Title IV and equivalent proposals for the creation of a federally funded State Justice Institute. 14/

14/ There is a specific feature of Title IV which merits separate comment. As noted earlier, the President's choices for seven of the members of the Board of Directors of the State Justice Institute would be limited to a list of candidates submitted by the Conference of Chief Justices. This provision raises serious constitutional doubts. We recognize that Congress can impose qualifications for the persons whom the President seeks to appoint and define the general class of persons from which the President may make an appointment, including the requirement that appointees to certain offices must be selected from lists submitted by the Conference of Chief Justices. See Myers v. United States, 252 U.S. 52, 265-74 (1926) (Brandeis, J., dissenting). On the other hand, the power of Congress to impose qualifications for appointments does not mean that the President can be compelled to appoint persons whom he considers unsuitable for the position. In other words, the qualification provision of the type in Title IV means that the appointee must be acceptable to the Conference of Chief Justices as well as to the President. A list submitted to the President therefore must contain a sufficient number of candidates to afford the President "ample room for choice." 13 Op. A.G. 516, 525 (1871); see also 29 Op. A.G. 254, 256 (1911); 41 Op. A.G. 291, 292 (1956). A provision for a list containing "at least" fourteen names for seven appointments, i.e., two for each vacancy, does not in our view comply with that requirement, unless it is assumed implicitly, in order to save the constitutionality of the provision, that the President has the right to reject a list which does not contain any acceptable nominees. See § 4(b)(2) of the Pacific Northwest Electric Power Planning and Conservation Act, 94 Stat. 2702. This section provides explicitly that under the appointing authority, the Secretary of Energy, "may decline to appoint for any reason a Governor's nominee for a position and shall so notify the Governor. The Governor may thereafter make successive nominations within forty-five days of receipt of such notice until nominees acceptable to the Secretary are appointed for each position."

Title V establishes a Federal Jurisdiction and Revision Commission. The Department supports the enactment of this title. The functions of the Commission would be to study the jurisdiction of State and Federal courts and to report to the President and Congress on any revisions in the Constitution and laws of the United States deemed advisable on the basis of the study. The commission would be composed of sixteen members, four to be appointed by the President, President pro tempore of the Senate, Speaker of the House, and Chief Justice of the United States respectively. Each member would serve a term for the life of the Commission, and vacancies would be filled in the same manner in which the original appointment was made. The Commission would select a Chairman and a Vice Chairman. Within two years after its first meeting, the Commission would be required to transmit to the President and to Congress a final report containing a detailed statement of its findings and conclusions. Ninety days after the submission of its final report to Congress, the Commission would be terminated.

The Commission would be granted a wide range of powers. It would be permitted to hold hearings, administer oaths, and enter into contracts with public and private institutions. The Chairman of the Commission would be authorized to appoint and fix the compensation of an Executive Director and additional staff personnel. The Commission would also be empowered to require, by subpoena or otherwise, the attendance and testimony of witnesses and the production of documentary materials. Members of the Commission would be authorized to sign and serve the subpoenas, which would be enforceable in district court by the Attorney General. At the Commission's request, Executive branch agencies would be required to furnish information, "consistent with applicable provisions of law."

In the Department's view, the proposed Commission would be a useful method of obtaining information and ideas on possible revisions in federal law. The subjects of congressional power over the jurisdiction of the federal and state courts, and the proper exercise of that power, are important and difficult ones that merit careful study. The Department of Justice thus agrees with the basic goals of Title V.

We do not believe that any serious constitutional questions are raised by Title V. Congress is plainly authorized, in furtherance of its legislative function, to create entities performing advisory responsibilities. Since the Commission would not be "exercising significant authority pursuant to the laws of the United States," Buckley v. Valeo, 424 U.S. 1, 126 (1976), its members would not be "Officers of the United States" within the meaning of the Appointments Clause. U.S. Const. Art. II, § 2, cl. 2. Cf. Buckley v. Valeo, supra, at 125-42. Moreover, the powers granted to the Commission do not intrude upon the Executive's constitutional duty to "take care that the Laws be faith-

fully executed." U.S. Const. Art. II, § 3. The bill expressly provides that the Commission's authority to obtain information and assistance from the Executive branch must be exercised in a manner "consistent with applicable provisions of law," including constitutional law. Title V thus accords the Commission no power to obtain materials protected by Executive privilege. Nor is Congress prohibited from authorizing the Chairman of the Commission to appoint an Executive Director and other staff members.

Finally, we believe that the grant of subpoena power to the Commission is within Congress' authority. In Buckley v. Valeo, supra, the Court stated that any appointee exercising significant authority pursuant to the law of the United States must be appointed in the manner prescribed by the Appointments Clause. Id. at 126. At the same time, the Court stated that with respect to powers "essentially of an investigative and informative nature, falling in the same category as those powers which Congress might delegate to one of its own committees, there can be no question that [a body whose members were not appointed in accordance with the Appointments Clause] may exercise them." Id. at 137. According to the Court, "'A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect . . . . Experience has taught that mere requests for such information often are unavailing . . . .; so some means of compulsion are essential to obtain what is needed.'" Id. at 138, quoting McGrain v. Daugherty, 273 U.S. 135, 175 (1927). The Court thus concluded that the functions "relating to the flow of necessary information -- receipt, dissemination, and investigation," id. at 139, may be vested in a Commission whose members were not officers of the United States, unlike "more substantial powers," such as litigating authority or power to enforce the subpoena in court. Id.

We believe that Buckley stands for the proposition that Congress may delegate its authority to issue subpoenas to an entity whose members are not officers of the United States within the meaning of the Appointments Clause. We conclude, therefore, that the subpoena provisions of the this Title are constitutional.

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
Office of Legislative Affairs

Attachment

Proposed Amendment to Title III of S. 645

Section 376 of Title 28, United States Code, is amended by adding the following section:

(s)(1) While in office a judicial official may receive an advance of any amount that has been deducted and withheld from his or her salary and credited to Judicial Survivors' Annuities Fund. Provided, That (a) the judicial official submitted a loan agreement that was approved by the Comptroller General of the United States, and (b) all outstanding installment payments have been deducted from the amount advanced.

(2) Interest on the loan shall accrue from day to day at a rate that will be determined by the Comptroller General of the United States and shall constitute an indebtedness to the Judicial Survivors Annuities Fund as and when it accrues. Interest shall be payable on each anniversary of the date of the loan until such loan is repaid, and if such interest is not paid when due it shall be added to and form a part of the loan and bear interest at the same rate. All interest shall be paid into the Survivors' Annuities Fund in accordance with such procedures as may be prescribed by the Comptroller General of the United States.

(3) All or any part of the loan may be repaid, with accrued interest on the amount so repaid, at any time that the judicial official is in office. If the judicial official dies before repaying the loan and accrued interest, this debt will be deducted from the survivors' annuity. If the judicial official retires before repaying the loan and the accrued interest, this debt will be deducted from the "retirement salary".

ID # 10915 CU
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Subject: Department of Justice Report on Subcommittee markup of S. 645, the "Courts Improvement Act of 1983"

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CU H011		ORIGINATOR ~~DD~~	83/08/12			_	1 1
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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

SPECIAL

August 11, 1983

LEGISLATIVE REFERRAL MEMORANDUM

163915

TO: LEGISLATIVE LIAISON OFFICER
Administrative Office of the United States Courts
Office of Personnel Management (Transmittal letter and Sec. 302)
Department of Health and Human Services (Transmittal letter and Sec. 302)

SUBJECT: Department of Justice report on subcommittee markup of S. 645, the "Courts Improvement Act of 1983."

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 August 25, 1983.

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

James C. Murr for
Assistant Director for
Legislative Reference

Enclosure
cc: Mike Uhlmann
Karen Wilson
John Cooney
Hilda Schreiber, w/o attachment
Fred Fielding

U.S. Department of Justice
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 voted out on June 29 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/ The Department also supports the enactment of Title VI (Intercircuit Tribunal) subject to certain amendments and understandings set out below. 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 an adequately formulated version of that title's proposal.

Our detailed 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 enacted 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 define qualification 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.

Title II is a sensible response to the problems of judicial administration created by the proliferation of uncoordinated and

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

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 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 the same as those for 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/

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

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4/ See the testimony concerning H.R. 4396 cited in note 3 supra.

5/ See 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); Letter of Assistant Attorney General Robert A. McConnell to Honorable Strom Thurmond Concerning S. 537 (July 29, 1981).

judiciaries. The Commission would exist for a period of ten years. Its general 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 companion measure to the Intercircuit Tribunal proposal. The Commission would address at a more basic level the workload problems which are addressed provisionally and partially by the creation of an Intercircuit Tribunal. 8/ The proposal of Title V is most directly derived from S. 675, which passed the Senate in the 97th Congress.

While there have been many past 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 productive if it is set a reasonably circumscribed time within which to carry it out.

In the development of the proposal of Title V certain justifications were advanced for creating a long-term or permanent

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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).

Commission. 9/ Frequently, the recommendations of a study commission attract a brief flurry of attention after it has issued its final report, and then are generally 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 the same period of time as the Intercircuit Tribunal proposed in Title VI of the bill. This approach would be consistent with the Chief Justice's conception of the Commission proposal as a complementary measure concerned with long-term solutions to the caseload problems that the Tribunal proposal addresses in a temporary and partial way. It would also give the Commission sufficient time to carry out its function of monitoring and assessing the Tribunal's performance. 10/ For reasons discussed in section VI of this report, we believe that the basic period for the initial establishment of the Intercircuit Tribunal should be three years. The same approach would be appropriate for the Federal Courts Study Commission.

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

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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).

10/ The Commission's study mandate, as described in Title V, would extend to all aspects of federal adjudication. One of its specific functions would be to "evaluate the Intercircuit Tribunal of the United States Courts of Appeals...."

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 cases pending at the end of the five year period had been disposed of.

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.

A. Considerations of Policy

The Intercircuit Tribunal proposal has attracted a degree of public attention that is rarely seen in the area of court reform. The Administration's study of this proposal has also been extraordinary in character. The time and attention devoted to this question have been greater than that previously spent in this Administration -- and perhaps in any recent Administration -- in examining a measure affecting the structure and jurisdiction of the federal courts. In our study we have been mindful of the apparently unanimous view of the Justices of the Supreme Court that the Court's workload has reached unmanageable levels, and of the broad support in the Supreme Court and Congress for the creation of an Intercircuit Tribunal as an initial response to this problem. To provide a clear understanding of our conclusions it is necessary to set out some general considerations on the federal caseload problem and the effects of this reform.

The current overload of the Supreme Court has not arisen in a vacuum. It is a direct result of the rise in the number of potentially appealable decisions generated in the lower courts. Between 1979 and 1982, for example, the number of cases brought in the district courts grew from 187,000 to 239,000. This increase in district court filings, as great as it is, pales in comparison with the astronomical growth rate for cases in the courts of appeals, which in the same four years rose from 20,000 to 28,000.

In general, 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 by more subtle yet profoundly important qualitative changes in

the exercise of the judicial function. The traditional values of reflection and deliberation, articulation of the grounds of decision, and personal decision-making by a small corps of life-tenured judges have begun to give way to the need to move cases through the system as quickly as possible. The quality of judges, no less than the quality of their decisions, is threatened by this development. As the judiciary progresses in its evolution into a mass bureaucracy, the prospect of service on the federal bench loses its lustre. The difficulty of interesting attorneys of the highest capabilities in such service increases accordingly.

The Department of Justice and the Administration cannot accept the limitless continuation of this trend, accompanied by ad hoc structural reforms addressing the problems it engenders, as the future of the federal judiciary. For this reason and others the Department of Justice has opposed and continues to oppose the creation of a permanent fourth tier in the judicial branch. The largest concern raised by the proposal to create a "National Court of Appeals" is that such a reform would have precisely the effects its proponents have claimed for it -- its enlargement of the appellate capacity at the national level would accommodate the expansion of the federal judicial function that has occurred so far, and would open the way for further expansion in the future. The concerns raised by the continuation of this trend include -- in addition to the destruction of the traditional character of the judiciary discussed above -- basic concerns for federalism and the separation of powers. The extension of the federal courts' role is necessarily at the expense of the function of the state judiciaries and of the Constitutional prerogatives of the political branches of government. In this regard we cannot overlook the fact that the judiciary itself has contributed to the current caseload problem through innovations expanding access to the federal courts and other decisions and actions that exceed the proper limits of the judicial function.

In considering the implications of these concerns for the Intercircuit Tribunal proposal, the address of the Chief Justice which gave rise to the current interest in the proposal merits careful attention. 11/ In the Chief Justice's statement it was clearly set out that the Tribunal is to be a temporary response to the immediate problem of Supreme Court overload, whose creation would provide time for the development of long-term solutions to the caseload problem. While the pending legislative proposals also contemplate a temporary reform, the provisional character of the Tribunal in the Chief Justice's proposal and the need to proceed concurrently with other reforms have perhaps not been adequately appreciated. The Department of Justice considers these features of the proposal to be essential.

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

It will benefit no one -- not the government, not the public, not the courts themselves -- if creation of an adjunct Tribunal to the Supreme Court only opens the way for further extensions of the apparently limitless growth and aggrandizement of the federal judiciary. We recognize the need for the creation of an Intercircuit Tribunal as a response to the immediate problem of overload in the Supreme Court. Our support for this reform is, however, dependent on its provisional character and on the understanding that other reforms must now be pursued which do not merely accommodate the effects of judicial overload but attack its underlying causes.

Specific measures that should be adopted include the general elimination of mandatory appeals to the Supreme Court proposed in Title I of this bill; the abolition of diversity jurisdiction; 12/ the establishment of reasonable constraints on federal habeas corpus for state prisoners and other prisoner petitions; 13/ increased utilization of administrative processes in place of litigation in appropriate areas; 14/ and enactment of pending proposals to raise the number of district and circuit judgeships to the levels needed to meet current needs. If significant measures addressing the causes of the caseload problem are not adopted during the period for which the Tribunal is initially established, we would oppose its continuation beyond that period.

A more specific implication of our general views concerning the Tribunal proposal is the desirability of limiting its duration. The Tribunal should not be allowed to become an entrenched institution or be regarded as a steppingstone to the inevitable establishment of a permanent National Court of Appeals. Congress should pursue aggressively other reforms addressing the caseload problem; should review the continued need for the Tribunal

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12/ See Testimony of Assistant Attorney General Jonathan C. Rose Concerning Legislation on Federal Diversity of Citizenship Jurisdiction Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary (July 14, 1982).

13/ See Formal Statement of the Department of Justice on S. 829 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary 63-70 (May 4, 1983); William French Smith, "Proposals for Habeas Corpus Reform," in P. McGuigan & R. Rader, eds., Criminal Justice Reform: A Blueprint (Free Congress Research and Education Foundation 1983).

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

frequently; and should terminate it as soon as other measures have reduced the Supreme Court's docket to manageable dimensions. For these purposes the basic five year period presently proposed in Title VI is more than adequate. We believe that a three-year period would be more appropriate. Additional grounds for this conclusion appear in the ensuing analysis of the design of the Tribunal.

B. Questions of Design

1. Duration of the Tribunal

The version of Title VI adopted by the Courts Subcommittee increases the effective duration of the Tribunal in comparison with the original version of the bill. We believe that this change is unwarranted. The original bill provided for the initial establishment of the Tribunal for a five-year period running from October 1, 1983 to September 30, 1988. The revised bill refers similarly to a five-year period, but starts the running of the five-year period at the time a case is initially referred to the Tribunal by the Supreme Court. The revised bill also extends the effective duration of the Tribunal at the other end by providing that it is not to terminate immediately five years after the initial reference date, but is to continue as long as necessary to dispose of cases pending at that time. Hence, the effective duration of the Tribunal in the Subcommittee's version of the proposal would not be five years, but probably between six and seven years. The three-year basic period we favor, together with the same provisions concerning the exclusion of start-up time and finishing of cases pending at the end of the three-year period, would provide an effective duration for the Tribunal comparable to that proposed in the original version of S. 645.

A significant advantage of the three year approach is that it offers a preferable alternative to some difficult choices required under the current formulation of Title VI concerning the length of terms of service on the Tribunal. This point is discussed in the next part.

2. Length of Service on the Tribunal

At the hearings on S. 645 before the Subcommittee on Courts, authorities whose views merit respect expressed conflicting views concerning the proper length of terms of service on the Tribunal. There was support both for assigning judges to the Tribunal for the full period for which it is initially established and for the alternative of having judges serve on the

Tribunal for three-year staggered terms. 15/ The Subcommittee adopted the latter approach.

Each of these approaches offers certain advantages and disadvantages. A fully stable composition for the Tribunal would produce the greatest degree of consistency and predictability in its decisions. This would best serve the proposal's objective of increasing the uniformity and certainty of federal law. It would also minimize the incentive for litigants to pursue appeals in the hope that an earlier adverse precedent of the Tribunal will be distinguished or limited in a later case.

Conversely, shorter terms of service also offer certain benefits. They would enable the Supreme Court to assess the performance of the various judges on the Tribunal at reasonable intervals and to make appropriate decisions concerning each judges' suitability for continued service. This approach does raise larger concerns over potential instability in the Tribunal's caselaw resulting from changes in its composition from year to year. However, this concern would be minimized if the Supreme Court were to re-appoint the same judges to successive terms on the Tribunal unless some reason appeared for replacing a particular judge.

An approach that combines the advantages and avoids the disadvantages of the preceding options would be to establish the Tribunal for three years, as suggested earlier, and to provide that judges are to serve on the Tribunal for the full period. This would result in a temporary Tribunal with a stable composition, avoiding concerns over unpredictability or inconsistency in the Tribunal's decisions. Since Title VI presently contemplates normal three year terms of service, there should be no objection that a Tribunal of stable composition established for a basic three year period would involve overly long terms of service. 16/

15/ Compare Testimony of A. Leo Levin on S. 645 Before the Subcomm. on Courts of the Senate Comm. on the Judiciary 17-18 (March 11, 1983) with Statement of Daniel J. Meador on S. 645 Before the Subcomm. on Courts of the Senate Comm. on the Judiciary 6, 8 (April 8, 1983).

16/ The current formulation of the proposal contemplates that normal terms of service would be three years and that some judges would initially serve for terms considerably longer than three years. Specifically, five judges would initially be designated to serve for five years plus the time preceding the initial reference of a case to the Tribunal and four judges would initially be designated to serve for three years plus the time preceding the initial reference.

3. Selection of the Tribunal

The original version of Title VI provided for selection of the Intercircuit Tribunal by the judicial councils of the various circuits. We are in full agreement with the general view of the participants in the hearings on S. 645 that it would be unsound to involve the judges of the inferior courts in the selection of the Tribunal. It has been aptly observed that election of judges to a higher position by their peers is not likely to be a happy process. Nor is it apparent how selection of the Tribunal by the circuit and district judges comprising the circuit councils would advance the proposal's objectives.

Given the relationship between the Tribunal and the Supreme Court contemplated by the proposal, there is obvious value in utilizing a selection procedure which ensures that the judges on the Tribunal enjoy the confidence of the Supreme Court. The extent to which the creation of the Tribunal achieves its purposes -- reducing the workload of the Supreme Court and enlarging the appellate capacity at the national level -- will depend on the willingness of the Court to refer cases to the Tribunal and to let its decisions stand. The bill's current provision for assignment of judges to the Tribunal by the Supreme Court ensures that the Tribunal will enjoy the confidence of the Court and constitutes an appropriate approach to the selection of the temporary Tribunal proposed in Title VI. 17/

4. The Structure of the Tribunal

In the original version of the bill the Intercircuit Tribunal would have consisted of a pool of 26 circuit judges hearing cases in shifting five judge panels. We fully agree with the predominant view of the participants in the hearings on S. 645 that this structure would be unsound and that the Tribunal should consist of a single panel hearing all cases en banc. A multi-panel Tribunal would simply generate new conflicts and instabilities, and would be fundamentally inconsistent with the proposal's objective of increasing the uniformity and certainty

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17/ An alternative possibility suggested in the course of the hearings on S. 645 -- selection by the Chief Justice subject to confirmation by the Supreme Court -- would be equally appropriate.

Our endorsement of selection of the Tribunal by the Justices of the Supreme Court is contingent on its provisional character. If a long-term or permanent version of the Tribunal is proposed at a later point, we would reserve the right to insist that its members be chosen by the President subject to Senate confirmation.

of federal law. Moreover, broad participation by circuit judges in the Tribunal's work is not inherently desirable. Making nationally binding decisions in every area of federal law should not be the occasional avocation of a large part of the federal appellate bench, but should be limited to those judges who are most highly qualified to assume this momentous responsibility.

In its current formulation Title VI provides for a Tribunal composed of a single panel of nine judges plus four alternate judges. This approach was endorsed by the Chief Justice in a recent address before the American Law Institute. 18/ How well this approach comports with the concern that the Tribunal function as a unitary court depends on the circumstances in which the alternates would be allowed to participate.

The bill now provides that an alternate could participate if (i) a regular judge is disqualified because he had participated in the same case while sitting in his circuit court, (ii) a regular judge is disqualified under the general judicial disqualification statute (28 U.S.C. § 455), or (iii) a regular judge is absent. The departure from a fully unitary court involved in allowing alternates to participate under conditions (i) and (ii) seems minor. Allowing alternates to participate in other narrowly defined circumstances -- e.g., where a regular judge is incapacitated by illness -- would also seem of minor import. In general, in any single-panel court cases will sometimes arise in which regular judges are legally barred from participating or unavoidably absent. Whether these cases are handled through decision by a reduced number of judges or through the use of alternates, they must be decided by a court with something other than its normal composition.

However, the third condition under which an alternate could be designated to sit on the Tribunal -- any case in which a regular judge is absent -- has an open-ended character and raises larger concerns. It would not, for example, be consistent with the operation of the Tribunal as a unitary court if regular judges were to absent themselves from the Tribunal so as to allow alternates to participate as a matter of courtesy, or if regular judges were to absent themselves because they preferred spending more time hearing cases in their circuit courts. Hence, we recommend that participation by alternates be limited to cases in which regular judges are disqualified, or at least that participation by alternates outside of disqualification situations be limited to a narrowly defined set of circumstances.

18/ See Remarks of Chief Justice Warren E. Burger at the 60th Annual Meeting of the American Law Institute 5 (May 17, 1983).

5. Judges Eligible for Assignment to the Tribunal

The bill provides that both circuit judges in regular active service and senior circuit judges would be eligible for assignment to the Tribunal. We think that the unrestricted authorization for assignment of senior judges to the Tribunal merits further consideration by the Committee. A Tribunal composed largely or predominantly of senior judges could well encounter public image problems. While there are many highly capable senior judges who might be considered for assignment to the Tribunal, some weight should attach to the fact that the decision to assume senior status usually reflects a need or desire to carry something less than the full workload of an active judge. Since senior judges do not normally participate in the en bancs of the circuits, a Tribunal with a heavy concentration of senior judges would be less in touch with the current development of federal law in the courts of appeals than a Tribunal in which active judges predominate. It seems desirable for these reasons to impose some constraint on the use of senior judges. Our specific recommendation is that the bill provide that the nine judges constituting the regular panel of the Tribunal must include at least six judges in active service.

6. Other Questions of Design

Two final issues merit some brief discussion. First, the bill currently makes no provision for removal of judges from the Tribunal in case of incapacity or misconduct. This omission could be easily remedied by providing that the Supreme Court may remove a judge from the Tribunal.

Second, the bill contemplates 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.

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 overload 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. 19/ 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:

First, 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. The selection of these topics for mention is somewhat haphazard. It would be equally pertinent to state, for example, that the Chancellor would continue to receive his normal compensation and be eligible for the normal judicial retirement programs and benefits. A broader provision is called for indicating 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.

Second, 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.

Third, 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

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19/ 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 will be sent to the members of the Judiciary Committees.

Center provides precedent for service by retired Jus
senior judges in an administrative capacity.

Finally, since the Chancellor would be the high
trative officer in the judicial branch after the Chi
it seems appropriate to provide for his being a memb
of the principal administrative bodies of the judici
national level, the Judicial Conference and the Boar
Federal Judicial Center.

VIII. TITLE VIII -- JUDICIAL SALARIES

Title VIII contains an amendment to 28 U.S.C. §
would exempt judges from the effect of administrativ
adjustments, requiring Congressional action to raise
salaries. We have opposed similar proposals in the
that this reform would increase the difficulty of re
highly qualified attorneys for service on the federa
In light of legislation adopted in 1981, however, it
that Title VIII would significantly change current l

IX. TITLE IX -- DISQUALIFICATION OF JUDGES

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

We are advised that this amendment is addresse
in which, for example, it appears unexpectedly afte
certification that a judge's spouse is a member of
consequently has some minor pecuniary interest in t
amendment would allow divestment of the spouse's in
alternative to disqualification of the judge.

While the general purpose suggested by the ex
benign, the current formulation of Title IX is cle
It would mean, for example, that a judge would not
disqualified in a class action where his spouse ap

20/ See Letter of Assistant Attorney General Rob
to Honorable Strom Thurmond Concerning S. 18
1982).

21/ See P.L. 97-92, 95 Stat. 1200.

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 operation and an opportunity to consider the effect of such an amendment.

* * *

In sum, the Department of Justice believes that most of the proposals of S. 645 are important and beneficial measures that merit speedy adoption by Congress. We support specifically the proposals designated Supreme Court Review (Title I), Civil Priorities (Title II), Federal Courts Study Commission (Title V), Intercircuit Tribunal (Title VI), and Chancellor of the United States (Title VII), with the reservations concerning the Intercircuit Tribunal proposal noted in section VI of this report.

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

Intercircuit Tribunal

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

August 29, 1983

TO: RICHARD A. HAUSER

FROM: JOHN G. ROBERTS

SUBJECT: S. 645 - Courts Improvement Act of 1983

I discussed the latest version of Justice's proposed report on S. 645 with Mr. Fielding earlier this morning. (The report was analyzed in my memorandum of August 22, a copy of which is attached.) Mr. Fielding concluded that we should reiterate our philosophic objection to the Intercircuit Tribunal, and a memorandum doing so is attached for your review and signature.

Attachments

THE WHITE HOUSE

WASHINGTON

August 22, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Department of Justice Report on Subcommittee Markup of S. 645, the "Courts Improvements Act of 1983"

OMB has sent us the Justice Department's proposed report to Senator Thurmond on S. 645, the so-called "Court Improvements Act of 1983." This omnibus bill has cleared the Subcommittee on Courts and is now before the Judiciary Committee. The Administration has previously supported Title I (abolition of mandatory jurisdiction of the Supreme Court) and Title II (abolition of civil priorities), and has previously opposed Title IV (creation of a State Justice Institute). These positions are reiterated in the proposed letter, and I have no objection to them.

Title III would direct OPM to conduct a study of judicial benefits. The original bill increased judicial survivors annuities, but the subcommittee switched to the general study approach. The letter takes no position, stating that it is "most appropriate" for the Executive to defer to the Congress and Judiciary on such matters. I do not know why that is so. The Executive has a critical interest in attracting candidates for the bench, and should assume a larger role in improving judicial benefits. Title III in its present version only calls for a study, however, so I see no need to object to Justice's approach at this time.

Title V would create a bipartisan Federal Courts Study Commission, with representatives from each of the three branches and the state judicial systems, to sit for ten years. Justice supports such a commission - long a pet proposal of the Chief Justice - but supports reducing its life-span to three years. My own view is that the one thing that is not needed in this area is more study, but it is always difficult to resist the call for more research and evaluation. I see no reason not to defer to Justice on the desirability of a commission. The commission would be purely advisory and accordingly the fact that some members would be appointed by the Chief Justice and congressional leaders presents no difficulty.

Title VII would exempt juidicial salaries from standard administrative adjustments, requiring specific legislation to effect any increase. This proposal is a reaction to United States v. Will, 449 U.S. 200 (1980), in which the Supreme Court ruled that increases in judicial salaries which automatically went into effect under general provisions could not be rolled back as with other federal employee salaries. You will recall that existing legislation calls for substantial annual increases under comparability provisions unless Congress acts before a specified date to reduce the increase. Congress invariably rolls back such increases, but, with its typical slippage, usually not until a day or two after they go into effect. In Will, the Justices - in a rare display of unanimity - discharged the distasteful but profitable task of ruling that the increases for federal judicial salaries could not be revoked, citing the judicial compensation clause of the Constitution. Avoiding such back-door increases in judicial salaries strikes me as a good government reform, not because the salaries should not be augmented but because such action should not be taken through inadvertance with constitutional ramifications. Justice opposes the provision, however, on the ground that it will make judicial salary increases harder to obtain. Congress has already taken action in appropriations bills to avoid the Will decision, so the matter is not of sufficient consequence to justify an objection.

Title IX amends the judicial disqualification statute to provide that disqualification not occur until after certification in class action suits. Justice's letter points out that while some reform may be desirable, to address particular problems which have arisen, the proposal as drafted is too broad. I have no objection.

Title VII, perhaps the silliest of the provisions of the bill, would create a new office with the Anglomaniacal title of "Chancellor of the United States." The proposal is another of the Chief Justice's pet projects, so it is not surprising that the new American Chancellor would be appointed by and serve at the pleasure of the Chief, and have the duty of assisting the Chief in the performance of his non-judicial functions. The Chief would select the Chancellor from among Courts of Appeals judges. Justice essentially supports the proposal, suggesting only a few minor modifications. The bill does not specify whether the Chancellor will wear a powdered wig.

Any time a new office is created, and appointment to that office is not by the President, there is an appointments clause issue. Art. II, § 2. The appointments clause does permit appointment of inferior officers by "the Courts of Law", but this would not cover appointment by the Chief Justice alone. The question, therefore, is whether the Chancellor is an "Officer of the United States", who must

accordingly be appointed by the President, with the advice and consent of the Senate. I have no difficulty concluding that he is not, since his duties are purely internal matters of judicial administration, perhaps equivalent to the Clerk of the House. The title "Chancellor of the United States" suggests something more, but that appears to be a function of the pretentiousness of the title rather than the substance of the job. I see no need to create the office of "Chancellor", but also no serious reason to oppose it if it will make the Chief Justice happy.

Title VI of the bill would establish the Intercircuit Tribunal, composed of nine regular judges and four alternates, chosen by the Supreme Court for three-year terms from among active and senior circuit judges. The Tribunal would receive cases referred by the Supreme Court for five years, and sit until it had disposed of all cases referred to it. You are familiar with this proposal, and my objections to it. (See attached memoranda.) Justice supports the proposal, but its support is contingent on the provisional character of the Tribunal and the pursuit of reforms to attack the underlying causes of the Supreme Court's alleged caseload problem. Justice also favors limiting the Tribunal's lifespan to three years. It is my understanding that this modified support position is the result of the deliberations conducted under the auspices of the Cabinet Council. This approach is a significant improvement over Justice's original position, although I would still prefer outright opposition. It is, however, probably not fruitful to continue to pursue our objections at this point. We should discuss.

Attachments

JGR:aea 8/22/83

cc: Subj.
Chron

THE WHITE HOUSE

WASHINGTON

August 29, 1983

MEMORANDUM FOR BRANDEN BLUM
LEGISLATIVE ATTORNEY
OFFICE OF MANAGEMENT AND BUDGET

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

SUBJECT: S. 645 - Courts Improvement Act of 1983

Counsel's Office has reviewed the proposed Justice Department report on S. 645, the "Courts Improvement Act of 1983." We continue to think that support for Title VI of the bill, which would establish the Intercircuit Tribunal, is ill-advised. The draft Justice Department report itself recognizes the danger that "enlargement of the appellate capacity at the national level would accommodate the expansion of the federal judicial function that has occurred so far, and would open the way for further expansion in the future." Creating an Intercircuit Tribunal to ease the perceived caseload problem of the Supreme Court would simply mask symptoms rather than cure the underlying disease that has resulted in the shifting of so many disputes away from the politically accountable branches or the states to the federal judiciary.

The proposed Justice Department report recognizes this problem, but nonetheless supports creation of a temporary Intercircuit Tribunal on the condition that more basic reforms are also pursued. It makes far more sense to pursue the basic reforms first and then consider whether additional appellate capacity is still needed. Creation of additional appellate capacity will relieve the pressure to pursue more basic reform.

We also question how easy it will be to terminate the Intercircuit Tribunal once it has become a feature of the federal judiciary, particularly if, as seems likely, the Justices simply replace the cases referred to the Tribunal with new ones they otherwise would not have heard. The Intercircuit Tribunal could begin as a temporary expedient but quickly become a necessary crutch.

FFF:JGR:aea 8/29/83

cc: FFFielding
JGRoberts
Subj.
Chron

THE WHITE HOUSE

WASHINGTON

August 29, 1983

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FFF:JGR:aea 8/29/83

cc: FFFielding
JGRoberts
Subj.
Chron

ID # _____ CU

WHITE HOUSE
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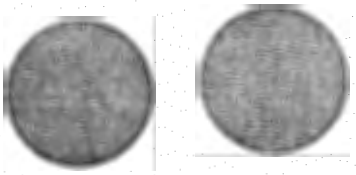

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Subject: S. 645 -- Courts Improvement Act of 1983

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*CU011	ORIGINATOR	830526			/ /
	Referral Note:				
CU018	D	830526			S 830829
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