

THE WHITE HOUSE
WASHINGTON

HOCD

April 19, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS *JGR*

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 not 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 *grr*

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 certiorari, 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.