THE WHITE HOUSE

WASHINGTON

June 9, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Justice Report on S. 1156, the "Ninth Circuit Court of Appeals Reorganization Act of 1983"

James Murr of OMB has asked for our views on a proposed letter from Assistant Attorney General McConnell to Chairman Thurmond, conveying the Justice Department's views on S. 1156. S. 1156 would create a new Twelfth Circuit Court of Appeals by spinning Alaska, Idaho, Montana, Oregon, and Washington off of the Ninth Circuit. Justice would like to oppose the bill, primarily because the bill would not solve the basic problems of the existing Ninth Circuit, which are its size and California's dominance. Arizona, Nevada, and Hawaii would feel that dominance to an even greater extent if the bill were enacted. The letter also notes that the Ninth Circuit has adopted procedural devices to ease the problems of managing a 23-judge court. Congress should wait to see how these devices work before taking the fairly drastic step of further balkanizing the circuits to reduce the size of the Ninth Circuit. The letter reports that the bill is opposed by the Ninth Circuit judges, including Chief Judge Browning, who is from Montana but apparently would like his chambers as well as his heart to remain in San Francisco.

S. 1156 was proposed by Senator Gorton (R-Wash.), probably out of parochialism, although it does address the very serious problem of the size of the existing Ninth Circuit. A 23-judge appellate court (28-judge if our bill to add new judgeships is passed) is a jurisprudential nightmare, giving rise to frequent conflicts among different panels and a total lack of coherent legal interpretations. Not too long ago a distinguished Second Circuit judge, when asked by a litigant to overrule a decision by a previous Second Circuit panel, retorted "This is not the Ninth Circuit, counsel." A conflict between the circuits is a recognized basis for the grant of certiorari, but the Supreme Court in recent years has received numerous petitions asserting (correctly) a conflict within the Ninth Circuit. The conundrum, of course, consists in the fact that any effective reduction in the size of the Ninth Circuit would involve splitting

California between different circuits, which raises problems of its own.

These problems will probably have to be resolved at some point, but for now it is enough to agree with Justice that S. 1156 does not adequately resolve the issues, and that more study is needed. In any event, the precise division of the circuits does not affect the President's powers as, for example, the Intercircuit Tribunal proposal would, and we can appropriately defer to Justice's judgment.