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THE WHITE HOUSE

WASHINGTON

February 10, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Chief Justice's Proposals

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

It is difficult to develop compelling arguments either for or against the proposal to create another commission to study problems of the judiciary. The Freund and Bruska 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

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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.

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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.