The original documents are located in Box 22, folder "Judicial System - Report on Needs of the Federal Courts" of the Philip Buchen Files at the Gerald R. Ford Presidential Library.

mtg to be rescheduled later

July 1, 1975

MEMORANDUM FOR: THE ATTORNEY GENERAL

FROM: RODERICK HILLS

Attached is an interesting memorandum which I find quite helpful. It was prepared by Ken Lazarus. Our present thought is to give consideration to a number of matters affecting the federal court system and to discuss with you a set of priorities. Potential subjects include:

(1) Possible reductions in the use of three-judge courts;
(2) The expanded use of Magistrates;
(3) Limitations on diversity jurisdiction;
(4) "Pooling" of judicial resources;
(5) Cooperative federal/state initiatives;
(6) Additional judgeships;
(7) Judicial salaries and benefits;
(8) The respective roles of the Judiciary and the Congress in the rule-making process;
(9) The possible introduction of "judicial impact statements;"
(10) Greater administrative efficiency.

Obviously, you may be well started on some of these matters and we may have little to add, others may be the subject of an inter-agency effort to which we will have little to add, and others may not be worth doing. I would, however, appreciate a chance to discuss it with you at your convenience to determine aintelligent approach.

Sent 7/14/75

Court System

THE WHITE HOUSE

WASHINGTON

July 1, 1975

MEMORANDUM FOR: JACK MARSH
MAX FRIEDERSDORF
JIM LYNN
PAUL O'NEILL
CAL COLLIER
JIM CANNON
DICK PARSONS
DOUG BENNETT

FROM: PHIL BUCHEN P.W.B.
ROD HILLS R.H.
KEN LAZARUS

SUBJECT: Meeting -- Needs of the Federal Court System

The meeting set for 2:30 p.m. Wednesday, July 2, on the referenced subject has been postponed temporarily in order to allow time for the preparation of additional background materials. These additional materials will be made available for your review prior to the rescheduling of the meeting.

Thank you.

THE WHITE HOUSE

WASHINGTON

June 30, 1975

MEMORANDUM FOR: JACK MARSH
MAX FRIEDERSDORF
JIM LYNN
PAUL O'NEILL
CAL COLLIER
JIM CANNON
DICK PARSONS
DOUG BENNETT

FROM: PHIL BUCHEN P.W.B.
ROD HILLS
KEN LAZARUS

SUBJECT: Meeting -- Needs of the Federal Court System

As you may know, the President has expressed an interest in developing a program to meet the expanding needs of the Federal judicial system.

Attached is a memorandum which treats the Federal judicial appointment process and is intended to serve as a preliminary work basis for: (1) a review and improvement of the mechanics of the personnel process; and (2) consideration of the need for basic reform in the area.

Obviously, the need for quality appointments to the Federal bench is but one dimension of the total demands of the Federal judicial system. Consideration should also be given to a broad range of options including: (1) possible reductions in the use of Three-Judge Courts; (2) the expanded use of Magistrates; (3) limitations on diversity jurisdiction; (4) "pooling" of judicial resources; (5) cooperative Federal/State initiatives; (6) additional judgeships; (7) judicial salaries and benefits; (8) the respective roles of the Judiciary and the Congress in the rule-making process; (9) the possible introduction of "judicial impact statements"; and (10) greater administrative efficiency.

We have scheduled a meeting at 2:30 p. m. on Wednesday, July 2 in the Roosevelt Room in order to begin consideration of a program in this area and hope you will be able to attend.

Thank you.

THE WHITE HOUSE

WASHINGTON

MEMORANDUM

FEDERAL JUDICIAL APPOINTMENTS

This is to set forth both formal and informal aspects of the Federal judicial selection and appointment process with a view toward a review and possible improvement of the process and thus of the quality of the Federal bench.

I. Organization of Courts

The President is authorized by law to fill 596 judgeships in 10 Federal court systems across the country. The organization and composition of these courts may be summarized as follows:

A. Article III Courts. The following are Article III courts involving lifetime judicial appointments.

1. Supreme Court: Chief Justice and 8 Associate Justices (28 U.S.C. Sec. 1).

2. United States Courts of Appeals: 97 judgeships in the 11 judicial circuits of the United States (28 U.S.C. Sec. 41, et. seq.). Note that Congress is currently considering the creation of two new circuits to be accomplished by a division of both the Fifth and Ninth Circuits, and the addition of 11 new circuit court judgeships. There is currently only one vacancy in the circuit courts (Fifth Circuit).

3. United States District Courts: 396 judgeships in 95 judicial districts of the United States (28 U.S.C. Sec. 81, et. seq.). This number includes two temporary judgeships which cannot be filled should vacancies arise (28 U.S.C. Sec. 372(b)). Note that Congress is currently considering the recommendation of the Judicial

Conference to create 51 new district court judgeships across the country (next quadrennial survey and recommendation of the Judicial Conference regarding judgeships is due in 1976). There are currently a total of 15 vacancies in the various district courts.

4. United States Court of Claims: A chief judge and six associate judges (28 U.S.C. Sec. 174 et. seq.).

5. United States Court of Customs and Patent Appeals: a chief judge and four associate judges (28 U.S.C. Sec. 215, et. seq.).

6. United States Customs Court: a chief judge and eight associate judges (28 U.S.C. Sec. 251, et. seq.).

B. Other Courts. The following courts are solely creatures of statute and do not involve lifetime judicial appointments.

1. United States Tax Court: a chief judge and 15 judges (26 U.S.C. Sec. 7441, et. seq.). Pub. L. 91-172 (1969) established the Tax Court as a Constitutional court under Article I (independent "legislative" court within the Executive Branch). Term of office is 15 years (28 U.S.C. Sec. 7443(e)).

2. Territorial Courts: a total of 4 judges are appointed for terms of eight years each to the District Courts of Guam (48 U.S.C. Sec. 1424(b)), the Virgin Islands (48 U.S.C. Sec. 1614) and the Canal Zone (48 U.S.C. Sec. 1301(y)).

3. District of Columbia Court of Appeals: nine judges appointed for a term of 15 years (with automatic reappointment if found to be well-qualified or extremely well-qualified after first term) upon the recommendation of D. C. Judicial Nomination Commission (Pub. L. 93-198, Sec. 433).

4. Superior Court of the District of Columbia: 44 judges appointed for a term of 15 years (with provision for automatic reappointment as noted above) upon the recommendation of D. C. Judicial Nomination Commission (Pub. L. 93-198, Sec. 433).

United States Magistrates are appointed by the judges of the various district courts (28 U.S.C. Sec. 631).

II. Judicial Vacancies

Apart from the creation of new judgeships, judicial vacancies arise as the result of:

A. Death.

B. Resignation: voluntarily any time -- if 70 years of age and ten years service, continues to receive salary he received for remainder of life. (28 U.S.C. 371(a))

C. Retirement: if 70 and ten years service or 65 and 15 years service, retains office but retires from active service (senior judge) continues to receive salary of office for remainder of life. (28 U.S.C. 371(b)) Retirements may be upon a fixed date or to take effect upon appointment and qualification of successor.

D. Disability: (1) Voluntary - Disabled judge and Chief Judge of the Circuit (or disabled Chief Judge of Circuit or Associate Justice of the Supreme Court and the Chief Justice of the United States) certify disability to President. Ten years service receives salary of office for life; less than ten years one-half salary of office for life (28 U.S.C. 372(a)).

(2) Involuntary - Disability certified to President by majority of judicial council of Circuit. President makes finding of disability and additional judge necessity. Vacancy created

by death, resignation or retirement of disabled judge cannot be filled. Disabled judge receives full pay for life. (28 U.S.C. 372(b))

E. Expiration of term: as noted above.

F. Impeachment: (Article I, Sec. 3) Senate has sat as a court of impeachment on Federal judges on none occasions. Four were removed from office, four were acquitted and one resigned during impeachment proceeding. The last court of impeachment occurred in 1936.

The Office of the Deputy Attorney General compiles lists of vacancies and distributes them on a weekly basis to the Attorney General and the Chairman of the ABA Judicial Qualification Committee. On occasion, the White House also receives these compilations.

III. Candidate Selection

To my knowledge, there are no general ground rules for the selection of nominees to the Supreme Court, the various specialty courts or the territorial courts. However, basic operating principles have developed over the years with respect to the selection of candidates for appointment to the circuit and district courts (494 of total 596 judgeships). These procedures are summarized below.

A. Theory -vs- Practice. In theory, the Department of Justice receives and evaluates the recommendations of relevant segments of society prior to recommending a judicial candidate to the President for nomination. In practice, however, a very limited number of people are involved in any meaningful way.

B. Patronage. The traditional patronage rules governing the selection of district and circuit court judges are fairly well settled.

1. State Jurisdiction. District court appointments fall within the patronage of the Republican or Democratic leadership of the relevant state (district and circuit court judges must reside, within the territorial jurisdiction of their courts 28 U.S.C. Secs. 44 and 134). As to circuit court appointments, the patronage ground rules become more complex. In recent years, there has evolved a rough formula which allows for the allocation of a portion of a circuit court's seats to each of the various states within its jurisdiction. The formula gives consideration to three factors: (a) the percentage of seats on the court which are currently held by residents of each state; (b) the percentage of the circuit's total population accounted for by each state; and (c) the percentage of total appeals arising from each state.

2. Senatorial Courtesy. Assuming only one Senator from the relevant state is of the same political party as the Administration in power, the choice of a candidate rests almost solely with that Senator. In the event that both Senators from a relevant state are members of the same political party as the Administration, they share the power of selecting judicial candidates -- typically they will alternate the selection power. This "courtesy" is jealously guarded and supported in principle by Senators of both parties as an institutional prerogative.

C. Power Vacuums. In instances where no Senator has a clear claim to the selection of a judicial candidate, a variety of secondary political forces are brought to bear on the appointment. Thus, a Governor, Congressman or State Chairman of the same party as the Administration may become dominant. Frequently, powerful members of the opposition party will use the occasion to assert their interests. As a corollary to this diffusion of political power, the role of the Department of Justice (traditionally the Office of the Deputy Attorney General) in the selection process is expanded greatly.

D. Note: No Senator or Congressman can be appointed to a position created during the term for which he was elected or the emoluments increased. (Art. I, Sec. 6, cl. 2)

IV. Clearance Process

Before a judicial nomination is forwarded to the Senate, a series of clearances are conducted by the Department of Justice and by the White House.

A. Justice Department. As noted above, the Deputy Attorney General traditionally has taken the lead within the Department on judicial appointments. Spaces are allotted in files in the Deputy's File Room for candidates for every district and circuit court, for specialty courts, and for District of Columbia courts. Everyone recommended has a file. Under law and regulations, these files are maintained by the Department for five years.

1. Initial Screening. The Deputy Attorney General or his Executive Assistant generally reviews available internal and public information (Martindale-Hubbell, Who's Who, etc.) on recommended candidates.

2. Informal Evaluation. At such time as the selection process has centered on one candidate, the Department conducts an informal evaluation of his credentials.

   (a) A personal data questionnaire is sent to the candidate and reviewed by the Deputy or his Executive Assistant.

   (b) The Department receives the informal comments of the Chairman and appropriate circuit representative of the ABA Standing Committee on the Federal Judiciary.

(c) The preliminary conclusion of the Department is communicated to the Senator or other supporter(s) of the candidate.

3. Formal Evaluation. Assuming the informal evaluation is satisfactory, the Department requests:

(a) a full-field investigation of the candidate by the FBI; and

(b) a formal report of the ABA Committee.

4. Recommendation. Provided the ABA Committee finds the candidate qualified and the FBI investigation does not uncover any substantial problems, the Attorney General forwards a letter of recommendation and nomination papers to the White House.

B. White House. Judicial nominations are processed by the White House Personnel Office under the immediate control of Peter McPherson. The security investigations and conflicts clearances are conducted by the Department of Justice and are not reviewed by the Counsel's office.

1. Preliminary clearances. Checks are made at the RNC, the opinions of the members of the appropriate state delegation are solicited and a draft memo to the President presenting the nomination is generally reviewed by Counsel's office and other interested members of the White House staff.

2. Presentation to the President. The candidate's name is presented to the President along with the views expressed by supporters and opponents of the nomination. I might note that I am not aware of any situation in which the recommendation of the Department of Justice has been reversed.

3. Nomination. Prior to transmittal of the formal nomination documents to the Senate, advance notice is given to the Senator or other supporter(s) of the candidate and to key members of the Senate Judiciary Committee.

C. Time Frame. The clearance process at the Department of Justice normally involves a few months. White House clearances can take another 1-2 months. Despite attempts by many to hold in confidence the development of a candidate's nomination, key supporters normally have little difficulty in ascertaining the status of a nomination in order to nudge it along the treadmill.

V. Confirmation and Appointment

Upon receipt of a judicial nomination by the Senate, it is referred to the Committee on the Judiciary.

A. Blue Slips. Chief Counsel of Committee sends "blue slip" to Senators of same state as nominee. If blue slip is returned with "objection" by either Senator, no action takes place. If position of Senator is maintained throughout session, fate of nomination is in hands of Chairman of full committee (Senator Eastland) and for all practical purposes is dead. Discharge petition rarely attempted.

B. Notice of Hearing. If "no objection" blue slips are returned, Chief Counsel, after consultation with Minority Counsel and with approval of Chairman, places notice in Congressional Record scheduling hearing on the nomination. Seven days must be allowed between the date of notice and date of hearing.

C. Subcommittee Hearing. Chairman Eastland routinely appoints a special subcommittee (Eastland, McClellan and Hruska) to hear district and circuit court nominations (only Supreme Court nominations or particularly controversial matters, e.g. Meskill nomination, are heard by full committee). Hruska

is normally the only member of the special subcommittee to attend and conducts a pro forma proceeding. (Justice official briefs Eastland and Hruska before hearing.) Upon conclusion of hearing, nomination is referred by Hruska to full committee.

D. Full Committee Action. Nominations are considered en bloc by full committee in closed session (not regularly scheduled). Normally, no discussion of district or circuit court appointments. In recent years practice has developed of approving nominations in advance of hearing subject to right of any member to assert objection for period of 24 hours after hearing. "Hold rule" allows any member to postpone consideration of any nomination for seven days without discussion and as a matter of right.

E. Floor Action. After full committee approval, favorable report on nomination is filed on same day at the desk of the Senate. Absent unanimous consent request, nomination must lay at desk for 24 hours. Thereafter, it is called up for Senate confirmation upon request to proceed to Executive Calendar.

F. Appointment. President's signature on commission is act of appointment.

G. Effect of Adjournments. Nominations, not acted on by the Senate during a session, die with the adjournment of the session. Motion to carry over nominations to next session permissible. Must receive unanimous consent -- rarely used. Additionally, at any time the Senate stands in recess for more than thirty days, pending nominations are returned to the President.

H. Recess Appointments. President can appoint during recess of Senate.

1. No salary can be paid appointee, however, if vacancy existed during prior session, until appointee confirmed by Senate.

2. Payment of salary prohibition not applicable if:

(a) vacancy arose within 30 days of end of prior session; or

(b) nomination was pending before Senate at the time of adjournment (except a nomination of a person who had been appointed during the preceeding recess of Senate); or

(c) a nomination had been rejected by the Senate within 30 days of the end of the session and a person other than the one who had been rejected is given the recess appointment; and, if

(d) nomination to fill vacancy under (a), (b) or (c) is submitted to Senate not later than 40 days after beginning of next session.

VI. Quality Controls

Senators and others involved in the process of selecting candidates for appointment to the Federal bench generally take great pride in their efforts and tend to promote individuals whom they perceive to possess superior legal skills. On an institutional level, however, there are at best only two sources of practical pressure for quality appointments.

A. Local Committees. Some Senators (e.g. Percy, Buckley) have formed local committees, formal and informal, within their states to select a slate of candidates from which the Senator selects his choice.

B. ABA Committee. The so-called "veto right" of the ABA Standing Committee on the Federal Judiciary was established through an exchange of letters with then-Attorney General Mitchell in 1969. Prior to that time, they only presented their evaluation and recommendation upon request. In 1972, this "veto right" was withdrawn as to Supreme Court nominees.

1. Organization. The Committee has a chairman and 11 members, each of whom assumes primary responsibility for appointments in one of the 11 Federal judicial circuits.

2. Standards. The ABA standards for appointment to the Federal bench may be summarized as follows:

   (a) fifteen years as a member of the bar;

   (b) substantial litigation experience for district court appointments;

   (c) less than sixty years of age (64 if found to be well qualified or extremely well qualified);

   (d) political activity or office is neither an obstacle to appointment nor a substitute for experience in the actual practice of law;

   (e) adequate ability, judiciousness and reputation.

3. Ratings. Candidates are rated as (a) extremely well qualified; (b) well qualified; (c) qualified; or (d) not qualified.

The ABA ratings of the judicial appointments of recent Administrations may be summarized as follows:

A. Kennedy. Appointed a total of 128 Federal judges.

21	--	extremely well qualified
58	--	well qualified
38	--	qualified
7	--	not qualified
4	--	not requested

B. Johnson. Appointed a total of 181 Federal judges.

17	--	extremely well qualified
82	--	well qualified
76	--	qualified
4	--	not qualified
2	--	not requested

C. Nixon. Appointed a total of 238 Federal judges.

15	--	extremely well qualified
106	--	well qualified
117	--	qualified
0	--	not qualified
0	--	not requested

Thus, it would appear that the principal contribution of the ABA Committee has been to week out clearly unacceptable candidates. However, there would appear to be absolutely no utility in their categorization of various degrees of qualified candidates.

VII. Recommendations

There are, of course, many options open to this Administration which hold some potential for improving the quality of the Federal bench and the Federal judicial system. Consider the following:

A. Options. The President could form an advisory group to select a preliminary slate of candidates for appointment to the Supreme Court. The role of the ABA Committee could be modified perhaps to reflect their principal purpose, i.e. weeding out incompetents, and their standards could be reconsidered. Additional Administration criteria for appointment could be formulated. Clearly, our processing of judicial candidates could be improved.

B. Meeting. It would be helpful to arrange a meeting with interested representatives of the Administration in order to begin to develop a program of review in this area.

C. Presidential Speech. The President might take the opportunity of the upcoming dinner with members of the Federal judiciary to set the tone for future developments.

THE WHITE HOUSE
WASHINGTON

This copy is for PWB's file.

d

THE WHITE HOUSE

WASHINGTON

September 18, 1976

MEMORANDUM FOR THE PRESIDENT

FROM: PHILIP W. BUCHEN

SUBJECT: Special Message to Congress on "The Needs of The Federal Courts"

This memorandum seeks your guidance with respect to: (i) whether you desire to send a message to Congress before the close of this session on the needs of the Federal courts; and (ii) your views on the matters to be covered in such message.

OVERVIEW

In your speech to the Sixth Circuit Judicial Conference on July 13, 1975, you called for an effort within your Administration to find ways to improve the Federal judicial system. As you recognized there, respect for law is inevitably diminished by the overburdened administration of justice in the Federal courts. In response to your initiative, the Department of Justice formed the Attorney General's Committee on the Revision of the Federal Judicial System, chaired by Solicitor General Bork. That Committee, subject to the review of the Attorney General and Counsel's Office, has drafted a special message to the Congress for your consideration.

A working draft of a proposed message (at Tab A) points to the virtual explosion of Federal litigation in recent years. It identifies the major themes of the statement: (1) that the crisis of the Federal courts must be overcome not only for the sake of the courts alone, but because their crisis is also a crisis for litigants who seek justice, for claimants of human rights, for the rule of law, and thus is of concern to the nation; and (2) that our solutions to this problem must be vigorous enough to give the courts what they need, but moderate enough to preserve their excellence.

The message proposes a broad range of solutions to ensure that our courts are reasonably accessible to the American people at a price within reach, and that justice is dispensed evenly and decently within a reasonable time frame. It concentrates primarily on reducing the

jurisdiction of the Federal courts in selected areas. It also supports the creation of additional Federal judgeships, recommends certain efficiencies within the Federal judicial system and proposes new initiatives in the judicial selection process. Several of these proposals can be put in motion by Executive action. Necessary implementing legislation would be introduced early in the next session. See supporting Fact Sheet (at Tab B).

OPEN ISSUES

The draft message raises a series of issues in three distinct areas with respect to which your guidance is required. These are treated herein as follows:

Tab C -- Ensuring quality on the Federal bench. The Department of Justice and Counsel's Office recommend the creation of a Commission on the Judicial Selection Process.

Tab D -- Reducing the Scope of Federal Jurisdiction. The Department of Justice and Counsel's Office recommend: (1) the eliminiation of most of the remaining areas of mandatory appellate jurisdiction of the Supreme Court; (2) a reduction in the scope of diversity jurisdiction; (3) a requirement that prisoners exhaust available state remedies prior to filing civil rights petitions attacking penal conditions; and (4) a requirement that collateral attacks on judgments of conviction be permitted only when the alleged constitutional defect affects the integrity of the truth-finding process and thus may be causing the punishment of an innocent person.

Tab E -- Promoting judicial effectiveness. The Department of Justice and Counsel's Office recommend: (1) support for the creation of a small agency to plan for the future of the Federal court system [additionally, the Department supports the immediate appointment of a commission to serve as a forerunner of the planning agency]; (2) deferring for the present time a proposal to create a National Court of Appeals; and (3) general support for the concept of special administrative tribunals to hear routine regulatory matters currently heard by the District courts.

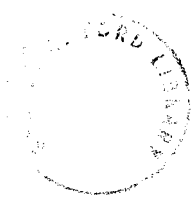
RECOMMENDATIONS

(1) Although it may seem late in the session for this proposed message to go to Congress, the Attorney General and I think it is the best way to document and publicize your views on this important subject.

Approve _____ Disapprove _____

(2) If you approve the idea of sending a message prior to the close of this session of Congress, it would be necessary to resolve the issues treated herein within the upcoming week. Accordingly, the Attorney General and I recommend a brief meeting to discuss the matter and to resolve the pending issues.

Approve _____ Disapprove _____



TAB
A

TO THE CONGRESS OF THE UNITED STATES:

This message to Congress concerns a serious threat to one of our priceless national assets: the federal court system. What makes the threat serious is that it imperils the ability of the courts to do justice of the quality that is the people's due.

Our federal courts have served us so well for so long that we have come to take their excellence for granted. We can no longer afford to do so. The court system and the administration of justice in this nation need our attention and our assistance. Law and respect for law are essential to a free and democratic society. A strong and independent federal judicial system is essential to maintaining the rule of law and respect for it.

In this century, and more particularly in the last decade or two, the amount of litigation we have pressed upon our federal courts has skyrocketed. In the 15-year period between 1960 and 1975 alone, the number of cases filed in the federal district courts has nearly doubled, the number taken to the federal courts of appeals has quadrupled, and the number filed in the Supreme Court has doubled. Along with the sharp inflation in the volume of cases has come an increase in the complexity of a growing fraction of them.

Despite this rising overload, we are asking the judges of the federal courts to perform their duties as well as their predecessors did with essentially the same structure and essentially the same tools. They are performing wonders in coping with the rising torrent of litigation, but we cannot expect that they will do so forever without our assistance. It is up to the Congress and the President to see that they receive it.

The central functions of the federal courts established under Article III of the Constitution of the United States are to protect the individual liberties and freedoms of every citizen of the nation, give definitive interpretations to federal laws, and to ensure the continuing vitality of democratic processes of government. These are functions indispensable to the welfare of this nation and no other institution of government can perform them as well as the federal courts.

THE GROWING JUDICIAL WORKLOAD

The federal courts now face a crisis of overload, a crisis so serious that it threatens the capacity of the federal system to function as it should. I stress that this is not a crisis for the courts alone. It is a crisis for litigants who seek justice, for claims of human rights, for the rule of law, and it is therefore of great concern to the nation.

Overloaded courts are not satisfactory from anyone's point of view. For litigants they mean long delays in obtaining a final decision and additional expense as procedures become more complex in the effort to handle the rush of business. We observe the paradox of courts working furiously and litigants waiting endlessly. Meanwhile, the quality of justice must necessarily suffer. Overloaded courts, concerned to deliver justice on time insofar as they can, begin to adjust their processes, sometimes in ways that threaten the integrity of law and of the decisional process.

District courts have delegated more and more of their tasks to magistrates, who handled over one-quarter of a million matters in fiscal 1975 alone. Time for oral argument is steadily cut back and is now frequently so compressed in the courts of appeals that most of its enormous value is lost. Some courts of appeals have felt compelled to eliminate oral arguments altogether in many classes of cases. Thirty percent or more of all cases are now decided by these courts without any opportunity for the litigant's counsel to present his case orally and to answer the court's questions. More disturbing still, the practice of delivering written opinions is

declining. About a third of all courts of appeals' decisions are now delivered without opinion or explanation of the results.

These are not technical matters of concern only to lawyers and judges. They are matters and processes that go to the heart of the rule of law. The American legal tradition has insisted upon practices such as oral argument and written opinions for very good reason. Judges, who must be independent and are properly not subject to any other discipline, are required by our tradition to confront the claims and the arguments of the litigants and to be seen by the public to be doing so. Our tradition requires that they explain their results and thereby demonstrate to the public that those results are supported by law and reason and are not merely the reflection of whim, caprice, or mere personal preference. Continued erosion of these practices could cause a corresponding erosion of the integrity of the law and of the public's confidence in the law. We cannot afford that.

I have cited only a few of the most visible symptoms of the damage that is being done to our federal court system by having more and more cases thrust upon it. There are others. Courts are forced to add more clerks, more administrative personnel, to move cases faster and faster. They are losing time for conferences on cases, time for deliberation, time for the give and take and the hard thinking that are essential to mature judgment. We are, therefore, creating a workload that is changing the very nature of courts, threatening to convert them from deliberative institutions to processing institutions, from a judiciary to a bureaucracy. It is this development, dangerous to every citizen in our democracy, that must be arrested and reversed. And it must be done in ways that will not lower the quality of justice received by any citizen of this country.

Our courts must be reasonably accessible to the American people at a price within reach. Justice must be dispensed evenly and decently within a reasonable time frame. In moving to ensure that these goals are met, we must employ methods which are vigorous enough to give the courts what they need but moderate enough to preserve their excellence.

ADDITIONAL FEDERAL JUDGESHIPS

One response to this crisis of overload could lie in the appointment of more federal judges. A bill creating more judgeships for our District Courts and Courts of Appeals (S.) has been pending in Congress for approximately four years. Certainly this measure should be enacted as an immediate response to the present needs of our judicial system.

An effective judiciary, as Justice Felix Franfurter once observed, is necessarily a small judiciary. That is so for several reasons. Large numbers dilute the attraction to first-rate men and women of a career on the federal bench. We must not create conditions that require us to settle for second best in the federal courts.

Swelling the size of the federal judiciary indefinitely would damage collegiality, an essential element in the collectice evolution of sound legal principles, and diminish the possibility of personal interaction throughout the judiciary. These developments would be harmful to the quality of judicial decision.

Excellence on the Bench

The quality of federal justice depends directly on the quality of federal judges. There are currently 596 Article III judgeships in the various Federal court systems including the Supreme Court, the Circuit Courts of Appeals, the District Courts, the Court of Claims, the Court of Customs and Patent Appeals and the Customs Court. Although

the quality of the Federal bench is generally high and perceived to be high, few would deny that there is room for improvement on both the trial and appellate levels. We must therefore bend our efforts to assure the greatest excellence in judicial appointments.

No process of judicial selection can completely ensure the appointment of highly qualified judges. However, despite the fact that there are no magic formulas in the area of judicial selection, it is certainly appropriate to question whether the method of selection that currently exists moves in the direction of achieving optimum results.

As a matter of law, Federal judges are appointed by the President, "by and with the advice and consent of the Senate." However, in point of fact there has developed over the years a system of judicial selection which has come to be known as "Senatorial courtesy." This term refers to a veiled selection process which is heavily political and grounded in outdated notions of Senatorial patronage. I question whether this system is consistent with the interests of the American public and the needs of the federal judicial system. A greater degree of public visibility would, I believe, enhance the process.

In order to provide an independent working basis for a fundamental reassessment of the judicial appointment process, I am creating a Commission on the Judicial Appointment Process. This group will include representatives from all segments of the legal community and the public at large. Its mandate will call for recommendations on: (1) the standards to be utilized in the selection of candidates for judicial appointment; (2) the proper roles of the various individuals and institutions concerned with the selection of judicial candidates; and (3) procedures and structures to attract and retain highly qualified judicial personnel.

Thus, although it is clearly essential today that Congress increase the number of judges to cope with the rising tide of litigation, and that they be judges of high quality, such an approach does not promise a long-term solution. Indeed, continual increases in the size of the judiciary to cope with the continual increases in cases filed could eventually prove a calamitous answer to our problem.

But over the long run, we need more than additional judgeships. We cannot go on expanding the size of the federal judiciary indefinitely. We must also reexamine the responsibilities with which our courts are charged to ensure that this precious and finite resource can continue to function in the best interests of all our citizens.

REDUCING THE SCOPE OF FEDERAL JURISDICTION

Another dimension of the solution to the problem of overload lies in reform of the jurisdiction of our federal courts. This has been done on several occasions in our history and I am convinced it is now necessary again and that the result will benefit everyone concerned.

The adoption of my proposals should safeguard the central and crucial function of the federal judiciary under the Constitution and laws of the United States.

I will deal with the problems of the Supreme Court separately from those of the courts of appeals and district courts because the immediate causes and effects of its overload are different and the responses must differ.

A. Supreme Court: Elimination of Mandatory Appellate Jurisdiction.

The business of the Supreme Court, like that of the other federal courts, has expanded significantly in recent years. After growing steadily for three decades, the number of filings in the Supreme Court began to accelerate ten years ago, increasing from 2,744 cases in the 1965 Term to 4,186 in 1974. Fortunately, Congress has given the Court discretionary (or certiorari) jurisdiction over much of its docket, enabling the Court to keep nearly constant the number of cases (from 150 to 160) decided on the merits after oral argument. These are the cases that necessarily consume the bulk of the Justices' time. Nevertheless, the rapid growth in filings inevitably places additional burdens on the Justices and forces them to be increasingly selective about the petitions they accept. It is necessary to provide relief from those problems now before they threaten the capacity of the Court to consider thoughtfully the most important legal issues of our time.

Despite the broad scope of its discretionary jurisdiction, the Supreme Court is needlessly burdened by appeals the Court has no power to decline.

Since Congress several years ago provided much needed relief by drastically reducing direct appeals in Interstate Commerce Commission and antitrust cases, the large majority of cases argued in the Court on mandatory review have been appeals in cases required to be brought before three-judge district courts. During the 1974 Term, approximately 35 argued cases -- or one of every five

cases heard by the Court -- fell into this category. In recent years cases on direct appeal from three-judge district courts have made up between 20 and 25 percent of those given full review by the Supreme Court. That is a substantial burden by any standard.

I recently signed into law a measure (S. 537, Pub. L. 94- ____) to change the requirement for three-judge courts in cases in which the constitutionality of a Federal or state statute is in question; to clarify the composition of and procedures for convening three-judge courts; and to insure the right of states to intervene in cases where the constitutionality of state law is challenged.

Besides clarifying the process, the new law will:

> -- eliminate the requirement for three-judge courts except in cases challenging the constitutionality of any statute apportioning Congressional or state legislative districts. A three-judge court would also be convened when required by an Act of Congress such as under certain provisions of the Voting Rights Act of 1965 and the Civil Rights Act of 1964.

I hope this measure will provide much-needed relief to the overcrowded docket of the Supreme Court. But more remains to be done.

With two exceptions, Congress should also act promptly to eliminate the remaining sections of the United States Code providing for three-judge courts and mandatory direct review in the Supreme Court as well as those requiring review of appeals from state courts and subordinate federal courts. The two exceptions are cases arising under Title VII of the Civil Rights Act and cases arising under the Voting Rights Act. The special history and nature of those cases justifies retention of these special procedures. Otherwise, there is no basis for a conclusive presumption that issues raised on appeal are more important than issues raised on certiorari. We trust the Supreme Court to decide important issues; we should trust it to decide which cases are most in need of review.

B. The District Courts and Courts of Appeals

In order to provide essential relief to the lower federal courts, I propose that (1) the scope of diversity jurisdiction be reduced; (2) state prisoners must exhaust their state remedies before starting a federal suit to attack prison conditions; and (3) collateral attacks on judgments of conviction (habeas corpus petitions) be limited to those involving alleged constitutional defects which affect the integrity of the truth-finding process and thus may be causing the punishment of an innocent person.

1. Reduction of Diversity Jurisdiction

The vast majority of lawsuits in this country are based on claims under state law. When the litigants are residents of the same state, these cases are decided in state tribunals, and no one objects to that. However, when the litigants are citizens of different states, such suits have long been allowed to enter the federal courts, even though they involve only questions of state law. These diversity cases account for a large part of the federal district courts' caseload.

More than 30,000 diversity cases were filed in the district courts during fiscal 1975, constituting almost one-fifth of the total filings. During the same year, diversity cases accounted for more than 25 percent of all jury trials and a remarkable 68 percent of all civil jury trials. Appeals from diversity cases constitute slightly more than 10 percent of the filings in the courts of appeals.

A. [The burden that diversity jurisdiction currently imposes on the federal courts can no longer be justified. In particular, there is no reason to allow persons and corporations to bring diversity suits in federal district court within the state in which they reside. The historic argument for diversity jurisdiction -- the potential bias of state courts or legislatures against persons from other states -- does not apply to persons

and corporations engaged in litigation in their home state, and admission to federal court should only be granted at the request of the out-of-state party. This measure will lessen the burden of diversity jurisdiction on the federal courts, while giving state courts additional authority over matters of state law.]

[The burden that diversity jurisdiction currently imposes on the federal courts cannot be justified.

B. At present two significant reductions in diversity jurisdiction should be enacted. First, I propose that corporations who have been incorporated in, or have a principal place of business in, a particular state no longer be permitted to file diversity suits in federal court within that state but be left to pursue their remedies in state courts. The historic justification for diversity jurisdiction -- the potential bias of state courts or legislatures against persons from other states -- does not apply to such corporations, and admission to federal court should only be granted at the request of a truly out-of-state party. Second, I propose that automobile tort cases (and suits on insurance policies) be left to state courts. These cases present no federal issues and yet comprise a significant part of the district courts' civil caseload.]

These changes should permit federal judges to give greater attention to tasks only federal courts can handle or tasks to which they bring special expertise.

2. Require Exhaustion of State Remedies in Prisoner Civil Rights Act Cases

The consideration of prisoner cases now constitutes a significant part of the district courts' job. In fiscal 1975, prisoners filed 19,307 petitions, approximately 16 percent of the new civil filings or 12 percent of the total filings. Of these, 11,215 were habeas corpus petitions or motions to vacate sentence. The remainder consisted primarily of civil rights actions, normally attacking prison conditions.

Most civil rights actions of this type are filed by state prisoners. While less than 500 federal prisoners filed civil rights suits in fiscal 1975, more than 6,000 state prisoners did so. That number is triple the number filed five years ago and 27 times the number filed in 1966. Only a small percentage go as far as an actual trial, but the burden on the federal courts from these cases is significant and it appears to be growing.

H.R. 12008, introduced on February 19, 1976, authorizes the Attorney General of the United States to institute suits on behalf of state prisoners, after notice to prison officials, and to intervene in suits brought by private parties upon a certification by the Attorney General "that the case is of general public importance." The bill also provides that "/r/elief shall not be granted" in individual actions under 42 U.S.C. 1983 "unless it appears that the individual has exhausted such plain, speedy, and efficient State administrative remedy as is available."

An exception is made when "circumstances /render/ such administrative remedy ineffective to protect his rights."

I have already expressed support for H.R. 12008. When prisoner complaints are based on allegations of system-wide problems, representation by the Attorney General should correct the situation. Exhaustion of state administrative remedies would eliminate from the federal courts at least those cases decided favorably to the prisoner. Unsuccessful litigants might continue to press their claims in federal court, but the court should then have the benefit of a more complete record and more focused issues. The bill will also encourage the states to develop more responsive grievance procedures. It is the responsibility of the states to provide adequate penal facilities and treatment for state prisoners and the administrative process is, at least in the initial stages, far better suited than a federal court to handle typical prisoner complaints. Indeed, new procedures instituted by the Federal Bureau of Prisons seem to be supplying a useful grievance mechanism for federal prisoners and reducing the number of federal suits.

3. Limit Collateral Attacks on Judgments of Conviction

In fiscal 1975, more than 11,000 habeas corpus petitions were filed in the federal district courts by prisoners seeking to have their state or federal convictions overturned. These collateral attacks begin when the criminal process should be at an end. After trial, conviction, sentencing, appeal and denial of review by the Supreme Court, the need for generally allowing still further

rounds of litigation simply cannot be justified in light of the very meager benefits and of the strain this puts on the already overburdened federal courts and the damage it causes to our system of criminal justice.

Under existing practice, the filing of collateral attacks on convictions has become so commonplace that it is now a routine part of prison life. The state or federal prisoner, instead of taking the first step toward rehabilitation by accepting his punishment as justly imposed, spends his time devising legal arguments that have little, if anything, to do with his guilt or innocence. All of us, of course, want to guard against the imprisonment of the innocent but as the system has operated the occasional meritorious petition by an innocent prisoner is likely to be buried in a landslide of worthless petitions seeking to relitigate issues unrelated to the question of guilt or innocence.

What is sorely needed is legislation providing that, with few exceptions, collateral attacks on state criminal convictions will be permitted in Federal courts only when the alleged constitutional defect may affect the integrity of the truth-finding process and thus be causing the punishment of an innocent person. For example, a claim that a

particular search and seizure violated the Fourth Amendment is not such a constitutional defect, and the Supreme Court has recently cut back the opportunity for state prisoners to relitigate such claims in federal court.

This recommendation that I make today follows a path mapped out by some of the country's most distinguished jurists, including the late Supreme Court Justice Hugo Black and Judge Henry J. Friendly. Such legislation would reduce the number of petitions seeking post-conviction relief and would at the same time focus judicial attention where it is most crucial, thus eliminating the needle-in-the-haystack problem that now exists. Just as important, it would restore finality to criminal convictions, which we must have if the guilty are to realize that punishment will be sure.

PROMOTING JUDICIAL EFFECTIVENESS

We must strive to ensure that the nation receives maximum efficiency from its judicial resources. In this regard, I propose a review of programs to strengthen the continuing educational programs for Federal court personnel and the development of a strong planning capability within our judicial system. Within the context of a program to explore the future needs of our Federal courts, we should continue to probe the utility of various proposals on court reorganization.

A. Continuing Educational Requirements.

The Federal Judicial Center, the Judicial Conference of the United States, the Law Enforcement Assistance Administration, the American Bar Association, the American Judicature Society and the Institute for Judicial Administration and other public and private organizations have made notable contributions in the development of programs to ensure that the continuing educational and training requirements

of the judicial branch are met. These programs have covered substantive and procedural law as well as court administration and management.

The utilization of innovative technology and advanced management techniques is essential to the prompt resolution of disputes before our courts. Study institutes and advanced instruction for court personnel increase both the quality and speed of delivery of justice in the United States.

Under the inspiration and guidance of the late Chief Justice Warren and Chief Justice Burger, the wholesome trend toward continuing education for judges and other court personnel has accelerated. I trust that this trend will continue.

B. A Planning Capability For The Federal Court System.

The experience of recent decades teaches that the work of the federal courts will continue to change rapidly and substantially, as in the past. If we are to act responsibly in meeting the new problems that will arise, we must alter our approach from a fire-fighting and crisis-managing strategy to a strategy of anticipation, one that will develop suitable remedies before the difficulties confronting the courts reach an advanced stage. We could then pursue consistent and constant policies and programs.

To satisfy the immense demands on them, the federal courts need the very best structure and the most effective procedures the nation can provide. They need a capacity to respond in a flexible manner as soon as trends in the volume and nature of the courts' work can be identified. To accomplish these crucial tasks, the courts will need a permanent agency that has the responsibility for making proposals to the Congress and to the Judicial Conference of the United States, to plan ahead and design responses before the problems reach critical dimensions.

The concept of creating a planning capability for the third branch of government is by no means novel. Six years ago the Chief Justice of the United States urged consideration of the idea of creating a Judiciary Council of six members, comprised of two appointees of each of the three branches of Government. The Council would report to the Congress, the President and the Judicial Conference on the wide spectrum of developments that affect the work of the federal courts.

A slightly different version of the proposal was advanced in 1975 by the Commission on Revision of the Federal Court Appellate System, headed by Senator Roman L. Hruska, which supported creating a standing body to study and make recommendations regarding the problems of the federal courts.

The planning capability can be placed in the hands of an agency designed on any of a variety of models. The mechanism, whatever its form, will be responsible for projecting trends, foreseeing needs and proposing remedial measures for consideration by the profession, the administration, the Congress and judicial groups. Among the kinds of problems the agency will consider are those relating to the nature of the business going into the federal courts; the need, if any, to enlarge the federal courts; capacity to settle the national law; the structure and interrelationship of the courts in the system; and the factors that affect our ability to recruit the ablest judges to the federal bench.

Other significant court-related problems that arise from time to time will also fall within the responsibility of the agency. The criterion will be whether the matter is one that involves deficiencies and possible improvements in the functioning of the federal judicial system.

The need has been amply demonstrated for the federal courts to develop an office for planning and programs of the kind other branches of government find indispensable. The role of systematically auditing the functions of the federal courts should not be performed casually, sporadically or haphazardly. It must be an

ongoing effort that permits the members of a permanent panel to develop deep, expert knowledge and a sure feel for what the courts need today and are likely to need tomorrow. The judicial planning agency could draw on work done by Committees on the Judiciary of both Houses, the Federal Judicial Center, the Judicial Conference of the United States, the Department of Justice and private groups.

This is not now being done in any coordinated or coherent way. It is imperative that it be done through a responsible agency so that we can discontinue the practice of reacting instead of anticipating, a practice that obviously cannot provide timely or effective help for the great and changing needs of the federal courts.

I shall submit legislation carrying forward this proposal early in the next session of Congress.

C. Court Reorganization. Two proposals for reorganizing portions of our total judicial system merit discussion here.

1. National Court of Appeals. The relief described in this message should make it unnecessary, at least for the present time, to create a new National Court of Appeals. The Commission on Revision of the Federal Court Appellate System, after a thorough and thought-provoking study, has recommended that such a court be placed between the present Circuit Courts of Appeals and the Supreme Court.

Before we create a new national court with power and prestige exceeded only by the Supreme Court itself, we must be able to say that we are taking this momentous

step because other remedial measures have been found wanting and because the gains clearly offset the costs. The subject may warrant further study after the other proposals in this message have been implemented; until then, consideration of the National Court of Appeals proposal should be referred to the judicial planning agency I propose to create.

2. New Tribunals

We need new federal tribunals to make justice prompt and affordable for average persons with claims based on federal laws. Perhaps the proposal with the most significance for the future of our federal court system is that we create new tribunals to shoulder the enormous and growing burden of deciding the mass of uncomplicated, repetitious factual issues generated by federal regulatory and other agency-administered programs, e.g., welfare claims.

Few changes in our government during the past 50 years have been so remarkable as the growth of federal welfare and regulatory programs. Federal legislation now addresses our most basic needs.

Special federal programs provide assistance for the poor, the jobless, the disabled, and other needy citizens. These crucial matters deserve special attention. Yet this vast network of federal law has been entrusted, in large part, to a judicial system little changed in structure since 1891. Review of agency action, and lawsuits arising directly under federal statutes, now constitute as much as one-fifth of the business of the federal courts and litigation under new legislation could make the effect even more substantive. For example, the Mine Safety Act potentially could generate more than 20,000 full jury trials each year in the District Courts, a burden that would overwhelm the courts and defeat the very rights that the new legislative programs are designed to extend.

I am hopeful that this process of adding new unnecessary federal programs that create masses of cases will end. However, regardless of one's view of this trend and the consequent steady accretion of power in the hands of the federal government, we should at a minimum take care that we do not swamp the federal courts and with them the needs of the litigants. It can only be disheartening for a litigant whose claim requires no more than a thoughtful and disinterested factfinder to be placed on a lengthy docket of civil and criminal cases, all competing for the limited time of a District Court judge.

Serious thought should now be given to the creation of a new system of tribunals that can handle the 20,000 or so routine claims under many federal welfare and regulatory programs as well as the Article III courts and with greater speed and lower cost to litigants. The shifting of these cases to the new tribunals could also preserve the capacity of the Article III courts to respond, as they have throughout our history to the claims of human freedom and dignity.

Specialized courts and boards already play an important role in our governmental system. The Tax Court, for example, has provided a useful alternative to suits in federal District Courts. The Armed Services Board of Contract Appeals and other similar boards resolve the great majority of contract disputes involving the government. The Board of Immigration Appeals provides valuable service in the specialized matters within its jurisdiction. Administrative tribunals have long been used in countries abroad, with excellent results.

This proposal holds the potential for providing prompt, affordable justice for the average person and at the same time avoiding a crushing burden on the federal courts. It is essential that litigation under future federal programs be directed to the tribunal in which it can be handled most effectively. For too long, Congress has ignored the effect of new federal programs on our overworked judicial system.

This proposal is simple in concept and may prove to be necessary. However, implementing it will require developing the specifics and testing them carefully before they are put into effect. For that reason, I propose that the concept be referred to the planning agency for the judicial system that I have proposed. As it monitors the impact of the other measures I have proposed in this message, the agency will have in view the possibility of creating new tribunals.

Conclusion

In speaking about improving the Federal courts, we are considering how we can make a great institution greater. The plain answer is to give the courts the capacity to do the vital work the country expects of them. This work has been expanding dramatically in quantity during the last 30 to 40 years, and it has also been changing drastically in quality. Both increases -- in volume and in the complexity of the cases -- have come about because of new Federal statutes and programs that affect broad areas of people's lives, and new court decisions that announce additional legal rights or duties.

I have in the past called attention to the fact that we are turning too often to our Federal courts for solutions to conflicts that should be resolved by other agencies of government or the private sector. It is becoming increasingly important for the Congress to consider in some detail the potential judicial impact of new legislation and to minimize the occasions for resort to a full-blown adjudicatory process.

The boom in the business of the nation's courts is in one sense, however, very good and very reassuring. It shows that we as a people believe in the rule of law and trust our courts to give us justice under law. It also shows that in the 200th years of the country's life we are still devoted to the Constitution's basic concept that the judicial branch is an equal partner in our government.

But the Federal courts are now in trouble and urgently need help. They cannot continue to meet the obligations that society has thrust upon them without improving their resources. The crisis of volume has exposed many unmet needs in the Federal court system.

Basically, the American people expect that the courts will be reasonably accessible to them if they have claims they want judged. They also expect that the courts will not

be so costly they price justice out of reach. And they expect, too, that the courts will not be so slow that justice will come too late to do any good. People also have a right to expect that when they go into the Federal courts, whether as litigant, witness or juror, they will be treated with decency and dignity. In short, they are entitled to believe that the courts will be humane as well as honest and upright.

To ensure that the Federal court system continues to meet these legitimate expectations, I urge adoption of the recommendations I have made. I am confident that they are necessary and will immeasurably strengthen our system of justice.

Gerald R. Ford

* * * *

TAB
B

FOR IMMEDIATE RELEASE

Office of the White House Press Secretary

THE WHITE HOUSE

FACT SHEET

SPECIAL MESSAGE TO THE CONGRESS ON
"THE NEEDS OF THE FEDERAL COURTS"

The President today forwarded to the Congress a Special Message on "The Needs of The Federal Courts". Pointing to an "explosion" in Federal litigation, he called for substantial reductions in the scope of Federal jurisdiction. Also included in the message are a series of proposals intended to promote maximum judicial effectiveness and provision for a basic reassessment of the judicial appointment process.

BACKGROUND

In a speech before the Sixth Circuit Judicial Conference on July 13, 1975, the President called for a comprehensive review of the needs of the Federal judicial system.

In response to the President's directive, the Department of Justice formed the Attorney General's Committee on the Revision of the Federal Judicial System which was chaired by Solicitor General Robert Bork. The studies conducted by this Committee provided the analytical base for the President's message.

GROWING JUDICIAL WORKLOAD

In recent years, there has developed a crisis of overload within the Federal judicial system.

A. In the 15-year period between 1960 and 1975 alone, the number of cases filed in the Federal district courts has nearly doubled, the number taken to the Federal courts of appeal has quadrupled, and the number filed in the Supreme Court has doubled.

B. This increase in litigation has led to certain adjustments in judicial process including the delegation of tasks to magistrates, a cut back or elimination of time allotted for oral arguments, a declining number of written opinions, etc.

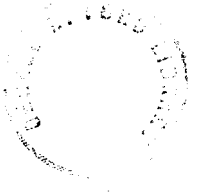
C. The problems arising from this enormous increase in workload are not mere technical matters of concern only to lawyers and judges. They involve processes that go to the heart of the rule of law.

PROPOSED SOLUTIONS

The Message proposes a comprehensive package of solutions to the growing needs of the Federal courts.

A. Judgeships. A modest increase in the size of the Federal judiciary is recognized as a necessary immediate response to the problem. Therefore, the President supports enactment of pending legislative proposals to create additional Federal judgeships. Over the long run, however, we cannot go on expanding the size of the judiciary indefinitely.

more



B. Judicial Excellence. The President will create a Commission on the Judicial Appointment Process which would conduct a fundamental reassessment of the current system governing judicial selections, loosely referred to as "Senatorial courtesy", and recommend (1) standards to be utilized in the selection of candidates for judicial appointment; (2) the proper roles of the various individuals and institutions concerned with the selection of judicial candidates; and (3) procedures and structures to attract and retain the best qualified judicial personnel.

C. Reducing the scope of Federal jurisdiction. Four legislative proposals are advanced to reduce the numbers of cases coming before the courts. These call for:

1. the elimination of most of the remaining areas of mandatory appellate jurisdiction of the Supreme Court;

2. the reduction of diversity jurisdiction;

3. a requirement that prisoners exhaust available state remedies prior to filing civil rights petitions attacking penal conditions; and

4. a requirement that federal collateral attacks on judgments of conviction be based on alleged constitutional defects that affect the integrity of the truth-finding process and thus may be causing the punishment of an innocent person.

D. Promoting judicial effectiveness. Three principal points are made regarding the effective use of judicial resources:

1. The President recommends legislation to create a small agency to plan for the future of the Federal court system.
2. Support is given to the necessity for increased educational and training requirements for court personnel.

3. Until such time as the relief prescribed in the Message is given an opportunity to work, we should postpone active consideration of proposals to create a National Court of Appeals.

4. The President generally supports the concept of special administrative tribunals to hear routine regulatory matters currently heard by the District courts.

TIMING

The legislative proposals which are made will be forwarded to the Congress in January, 1977.

TAB
C

Ensuring Quality on the Federal Bench

A recommendation is advanced to support the creation of a Commission on the Judicial Selection Process.

A. Background. As you know, there are 596 Article III judgeships in the various Federal court systems including the Supreme Court, the Circuit Courts of Appeal, the District Courts, the Court of Claims, the Court of Customs and Patent Appeals and the Customs Court. Although the quality of the Federal bench is generally high and perceived to be, few would deny that there are inadequate judges at both the district and appellate levels. It is possible that some modifications of the current selection system could reduce the number of inadequate appointments.

There is no clearly developed pattern for the selection of nominees to the Supreme Court or to the various specialty courts. There are, however, fairly well settled procedures, with which you are familiar, governing the selection of nominees to the District Courts and the Circuit Courts of Appeal (497 of the total 596). We are here concerned only with the selection of those judges. The system is heavily political and grounded in senatorial patronage. It has come to be known as one of "Senatorial courtesy".

B. Discussion. Although there is no accepted definition of what is a "good" or a "bad" judge, it is clear that the quality of the Federal bench could be improved.

Three issues should be central to an analysis of available systems of judicial selection and appointment:

First, what standards can be utilized in the selection of candidates for judicial appointment.

Second, what are the proper roles of the various individuals and institutions concerned with the selection of judicial candidates.

Third, what procedures and structures can be utilized to attract and retain qualified judicial personnel?

The basic quality controls which currently govern the selection of judicial candidates are set forth in an exchange of letters between the Attorney General and the ABA in 1969. As implemented, the ABA standards may be summarized as follows:

(a) 15 years as a member of the bar;

(b) substantial litigation experience for district court appointments;

(c) less than 60 years of age (64 if found to be well qualified or extremely well qualified);

(d) political activity or office is neither an obstacle to appointment nor a substitute for experience in the actual practice of law;

(e) adequate ability, judiciousness and reputation.

Although it is, of course, impossible to create empirical criteria for the selection of judicial candidates, the standards set forth above should be reevaluated with a view toward a broad range of issues including:

(a) Age. By virtue of the 15-year practice requirement and the general prohibition on the selection of candiates over a given age, the current standards allow for the consideration of only those lawyers between the ages of 40 and 60. Perhaps this range should be widened, e.g., to cover lawyers between the ages of 35 and 65.

(b) Litigation experience. The current standards require litigation experience in the case of appointees to either the circuit or district courts. In "exceptional" cases, candidates for the circuit courts may be approved without trial experience. Candidates for the district courts are required to have "substantial" litigation experience. First, one might question the need for substantial litigation

experience on the part of circuit court candidates -- if law schools provide any practical experience, it is certainly most relevant to the work of an appellate judge. Secondly, one would prefer a focus on the qualitative, rather than quantitative, aspects of trial experience -- routine trial matters, e.g., automobile insurance cases, provide little in the way of judicial perspective while many pro bono cases provide experience that is truly relevant.

(c) Academic requirements. The current standards make no reference to the academic background of candidates. Shouldn't law school performance and scholarly pursuits be relevant to the selection process?

(d) Elected officials/academicians. The current standards provide that ". . . political activity or office is neither an obstacle to appointment nor a substitute for experience in the actual practice of law". Thus, the term of a Congressman or a Senator is deemed totally inapposite to his qualifications for judicial appointment. What distorted logic compels this result? Given the nature of Federal litigation, such service can often be relevant, especially in instances where the experience includes some background in judiciary matters. Similarly, the standards make no reference to the desirability of legal teaching experience and the partial utilization of such experience in lieu of the more traditional practice of law.

(e) Political affiliation. Appointments to the Federal courts have traditionally been partisan in nature. Recent history may be summarized as follows:

Roosevelt	97% Democratic
Truman	92% Democratic
Eisenhower	95% Republican
Kennedy	89% Democratic
Johnson	95% Democratic
Nixon	92% Republican
Ford	77% Republican

It should be noted that when political affiliation is an important factor in appointments to the Federal judiciary, state judges who have withdrawn from political activities during their judicial tenure are rarely considered for such appointments. More importantly, many qualified persons are precluded from serving on the Federal judiciary simply because their own party was not in control of the Presidency during their promising years.

The partisan nature of judicial appointments also fosters the notion of "Senatorial courtesy" and thus reduces Executive control over the selection process. Finally, the current system oftentimes is contrary to the ongoing needs of the Federal courts relative to the creation of necessary additional judgeships.

(f) Minority representation. Currently there are only about 20 blacks and 10 women serving in a total of 494 circuit and district court judgeships around the country. The question arises whether an effort should be made to increase thepercentage of minority representation on the Federal bench.

(g) Rating system. There would appear to be no purpose served by the use of the four-level ABA rating system. Perhaps it would be preferable to implement a simple "qualified" or "not qualified" rating scheme.

Apart from any standards which may be adopted relative to the judicial selection process, the more basic question involves the appropriate roles of Members of Congress, the Department of Justice, the White House and other institutions in the application of such standards and the ultimate selection of candidates for judicial appointment.

Judges, of course, are de jure Presidential appointees. However, they are de facto the appointees of Senators, other political officials or the Department of Justice. The ABA, by virtue of its veto rights, is also a party to the selection process. For all

practical purposes, the Presidency serves only a ministerial function in judicial selections.

If the President's appointment power in this area is to be revitalized, the roles of Senators and other political officials, the Department of Justice and the ABA will have to be brought within proper perspective. Consideration should be given to the following:

(a) Senatorial courtesy. The roles of Senators and other political officials could be limited to a substantial extent by requiring the establishment of formal Federal judicial selection panels in every state.

It should be noted that some Senators (e.g., Percy and Buckley) have already formed local committees, formal and informal, within their states to select a slate of candidates from which the Senator selects his choice. However, the quality of existing judicial selection panels has been very uneven. These existing shortcomings might be improved by requiring: (1) only one panel per state; (2) bipartisan appointments to the panels; and (3) consultation with the Department of Justice.

(b) Justice's role. The Department of Justice should maintain the lead responsibility within the Administration on judicial appointments. However, such responsibility should not contemplate a usurpation of Presidential power.

Despite the seemingly perverse blend of politics and professionalism inherent in the judicial selection process, the exercise of ultimate judgment in this area is conferred by the Constitution upon the President. Moreover, contrary to

fact, the public no doubt perceives that this is currently a viable Presidential power. Ideally, the relationship between the Department and the White House in this area should be characterized by a healthy spirit of joint effort.

(c) The ABA veto. Three alternatives might be considered with respect to the proper role of the ABA in the selection of judicial candidates. First, with necessary changes to current standards and perhaps some changes in the composition of the review committee, the ABA veto could be continued in force. Secondly, its role could be diminished by the substitution of an "advisory" authority and/or the power diffused by also allowing other organized bars, e.g., the National Bar Association, Federal Bar Association, to comment on prospective candidates. Finally, the President could choose to create an advisory board or commission to evaluate potential judicial candidates in place of the ABA.

A number of political considerations should be brought to bear upon this matter including:

(a) Public perception. In the context of a "Special Message on the Needs of the Federal Courts", any serious attempt to reform the current process of judicial selection and appointment should meet with favorable public reaction. Obviously, care must be taken to avoid allegations by the ABA, Members of Congress, or other dissatisfied participants in the current process, to the effect that the Administration is attempting to further "politicize" the selection of judges.

(b) Senate Judiciary Committee. The committee serves as the principal guardian of "Senatorial courtesy". It might be possible to make certain

inroads on Senator prerogatives with the current membership if, at the same time, the role of the ABA is diminished and the standards for selection are modified to recognize the relevance of certain types of elective office to judicial qualifications.

With the announced or anticipated retirements of many senior members, it is anticipated that Senator Kennedy will be chairman and Senator Mathias will be the ranking Republican after the '78 elections. As the committee assumes a very liberal bent, possibilities for reform in this area will increase greatly.

(c) ABA. In reevaluating current procedures, it will be difficult but necessary to convince officials of the ABA that our motives are salutary.

C. Recommendation. In order to provide an independent working basis for a fundamental reassessment of the judicial appointment process and to expose this system to public scrutiny, the Attorney General and I recommend the creation of a Commission on the Judicial Appointment Process. This group would include representatives from all segments of the legal community and the public at large. It would be charged with the responsibility for making recommendations on: (1) the standards to be utilized in the selection of candidates for judicial appointment; (2) the proper roles of the various individuals and institutions concerned with the selection of judicial candidates;and (3) procedures and structures to attract and retain qualified judicial personnel. This Commission could be established for a period of one year without the necessity of authorizing legislation.

Approve _____ Disapprove _____

TAB
D

Reducing the Scope of Federal Jurisdiction

Four separate proposals to reduce the jurisdiction of the Federal courts are recommended.

1. Elimination of the remaining areas of mandatory review jurisdiction of the Supreme Court.

   A. Background. The business of the Supreme Court, like that of other federal courts, has expanded significantly in recent years. After growing steadily for three decades, the number of filings in the Supreme Court began to accelerate ten years ago, increasing from 2,744 cases in the 1965 Term to 4,186 in 1974. Fortunately, Congress has given the Court discretionary (or certiorari) jurisdiction over much of its docket, enabling the Court to keep nearly constant the number of cases (from 150 to 160) decided on the merits after oral argument. These are the cases that necessarily consume the bulk of the Justices' time. Nevertheless, the rapid growth in filings inevitably places additional burdens on the Justices and forces them to be increasingly selective about the petitions they accept.

   B. Discussion. It is necessary to provide relief from these problems now before they threaten the capacity of the Court to consider thoughtfully the most important legal issues of our time.

      Despite the broad scope of its discretionary jurisdiction, the Supreme Court is needlessly burdened by appeals the Court has no power to decline. These appeals frequently require the Court to expend energy and scarce time in deciding insignificant cases. Congress has provided much-needed relief by drastically reducing direct appeals in Interstate Commerce Commission and antitrust cases, while giving the Supreme Court power to refer such cases to the Courts of Appeals, and by abolishing direct appeals in criminal cases.

Recently, you signed into law legislation which eliminated most of the mandatory review jurisdiction of the Supreme Court with respect to Three-Judge Court proceedings. This should eliminate the bulk of the mandatory review burden of the Court (approximately one of every five cases heard by the Court) but more can be done.

Mandatory Supreme Court review of appeals from the state courts and the subordinate federal courts should also be abolished. This was the conclusion of the Federal Judicial Center's Study Group on the Caseload of the Supreme Court four years ago. While these cases account only for a small percentage of the Supreme Court's business, there is no reason why they should be subject to special treatment. Moreover, the Supreme Court is still required to hear direct appeals from three-judge courts convened under special statutes (Title VII of the Civil Rights Act, the Voting Rights Act, the Regional Railway Reorganization Act, and the Presidential Election Campaign Fund Act). Although elimination of all three-judge courts would increase judicial efficiency and permit the Supreme Court discretionary control over its entire docket, retaining the three-judge court mechanism only in those cases brought under the Civil Rights Act and Voting Rights Act will demonstrate a concern for those important rights without needlessly burdening the federal court system.

C. Recommendation. The Attorney General and I recommend retention of the three-judge court provisions in the Civil Rights and Voting Rights Acts and elimination of the remaining areas of mandatory review jurisdiction of the Supreme Court.

Approve _____ Disapprove _____

2. The reduction or abolition of diversity jurisdiction.

A. Background. A large portion of the business of the federal district courts stems from diversity jurisdiction which requires federal courts to decide questions of state law solely because the litigants are citizens of different states. (This business is not allocated on the basis of subject matter; when the litigants are residents of the same state, which is true in the vast majority of cases, state courts decide their state law claims.) More than 30,000 diversity cases were filed in the

district courts during Fiscal 1975, constituting almost one-fifth of the total filings. During the same year, diversity cases accounted for a

remarkable 68 percent of all civil jury trials. Appeals from diversity cases constitute slightly more than 10 percent of the filings in the courts of appeals.

B. Discussion. This jurisdiction can be eliminated in whole or in part. Federal judges have no special expertise in such matters, and the effort diverts them from tasks only federal courts can handle or tasks they can handle significantly better than the state courts. Federal courts are particularly disadvantaged when decision is required on a point of state law not yet settled by the state courts. The possibilities both of error and of friction between state and federal tribunals are obvious.

The historic argument for

diversity jurisdiction--the potential bias of state courts or legislatures--derives from a time when transportation and communication did not effectively bind the nation together and the forces of regional feeling were far stronger. As the Chief Justice has remarked, "[c]ontinuance of diversity jurisdiction is a classic example of continuing a rule of law when the reasons for it have disappeared." Other Justices of the Court, as well as prominent legal scholars and practitioners, agree. Diversity cases involving less than $10,000 have been left to the states for many years without noticeable difficulty and admission to the federal courts should no longer be a matter of price. The additional burden on the state courts would be small since the cases would be distributed among the 50 state systems.

Supporters of diversity jurisdiction, including the American Trial Lawyer's Association and other elements of the organized bar, argue that cases involving significant sums should be tried in the best courts available--the Federal courts--if possible, and that the law is better served when state and federal judges cross-fertilize ideas on the same subject matter. For selfish reasons, such practitioners would rather litigate in federal court, where judges and procedures are usually better than those of the states. Returning larger cases to the state courts, however, may help to improve the quality of their judges

If complete elimination of diversity jurisdiction appears too controversial, partial elimination could still provide significant relief. The American Law Institute recommended in 1969 that persons and corporations be barred from bringing diversity actions in the district court of a state in which they reside or conduct business. A resident plaintiff generally will not be prejudiced by regional biases, a fact already recognized by the statutes barring resident defendants from removing state cases to federal court. (Civil rights groups, however, apparently believe that federal juries, which are chosen from a larger geographical base, are less biased than state juries.) Figures contained in the ALI report indicated that this proposal would reduce diversity cases by about 50 percent; if these figures are still representative, approximately 10 to 15 percent of the total civil caseload would be removed from the district courts.

Alternatively, you could recommend that corporations be barred from bringing or removing diversity suits in a state where they are incorporated or have a principal place of business, without comparable limitations on individual suits. This would eliminate about 5 percent of the total civil filings. In addition, you could propose aboliton of diversity jurisdiction for automobile tort cases (and actions on insurance policies). Eliminating these tort actions would reduce the Federal civil caseload by another 5 to 6 percent and would not be as vigorously opposed by the organized bar since the cases removed, though numerous, are typically not "big" cases.

You should be aware that Senator Eastland has introduced a bill in the Senate to raise the jurdisctional amount for diversity from $10,000 to $25,000. This proposal suggests favoritism for wealtheir litigants, and your support is not recommended.

C. Recommendation. The Solicitor General recommends that abolition of diversity jurisdiction. The Attorney General prefers only a modest cutback in diversity jurisdiction and recommends that persons and corporations be barred from bringing diversity actions

in the district court of the state in which they reside or conduct business (the ALI proposal). I recommend that corporations (but not individuals) be so barred and that diversity jurisdiction also be abolished for automobile tort cases (and actions on insurance policies).

Approve:

Option #1 (eliminate diversity jurisdiction) _____

Option #2 (ALI proposal) _____

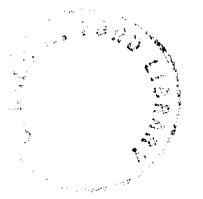
Option #3 (bar suits by resident corporation and auto tort cases) _____

3. Requirement that state prisoners exhaust available administrative remedies prior to filing civil rights petitions attacking penal conditions.

A. Background. Cases filed by state and federal prisoners now constitute a significant part of the district courts' job. In Fiscal 1975, prisoners filed 19,307 petitions, approximately 16 percent of the new civil filings or 12 percent of the total filings. Of these, 11,215 were habeas corpus petitions or motions to vacate sentence. The remainder consisted primarily of civil rights actions under 42 U.S.C. 1983.

Most civil rights actions of this type are filed by state prisoners. While less than 500 federal prisoners filed civil rights suits in Fiscal 1975, more than 6,000 state prisoners did so. That number is triple the number filed five years ago and 27 times the number filed in 1966. Only a small percentage go as far as an actual trial, but the burden on the federal courts from these cases is significant and it appears to be growing.

H.R. 12008, introduced on February 19, 1976, authorizes the Attorney General of the United States to institute suits on behalf of state prisoners, after notice to prison officials, and to intervene in suits brought by private parties upon a certification by the Attorney General "that the case is of general public importance." The bill also provides that "[r]elief shall not be granted" in individual actions under 42 U.S.C. 1983 "unless it appears that the individual has exhausted such plain, speedy, and efficient State administrative remedy as is available." An exception is made when "circumstances [render] such administrative remedy ineffective to protect his rights." This administration has already expressed support for H.R. 12008.



B. Discussion. Since the Administration has already expressed its support for this idea, the question is only whether or not that support should be highlighted by inclusion in the Message.

The concept is a relatively non-controversial one. Mr. Justice Powell has commented that the Supreme Court might well require exhaustion if it had not backed into a contrary position in the course of several cases in which the issue was not directly raised.

Exhaustion of state administrative remedies would eliminate from the federal courts at least those cases decided favorably to the prisoner. Unsuccessful litigants might continue to press their claims in federal court, but the court should then have the benefit of a more complete record and more focused issues. The bill will also encourage the states to develop more responsive grievance procedures. It is the responsibility of the states to provide adequate penal facilities and treatment for state prisoners and the administrative process is, at least in the initial stages, far better suited than a federal court to handle typical prisoner complaints. Indeed, new procedures instituted by the Federal Bureau of Prisons seem to be supplying a useful grievance mechanism for federal prisoners while slightly reducing the number of federal suits.

C. Recommendation. The Attorney General and I support inclusion of a requirement that state prisoners exhaust available state remedies prior to filing civil rights petitions attacking penal conditions.

Approve _____ Disapprove _____

4. Requirement that collateral attacks on judgments of conviction assert a colorable claim of innocence.

A. Background. In Fiscal 1975, more than 11,000 habeas corpus and so-called Section 2255 petitions were filed in the federal district courts by prisoners seeking to have their state or federal convictions overturned. This all occurs when one would think the criminal process should be at an end -- after trial, conviction, sentencing, appeal, and denial of review by the Supreme Court.

Under existing practice, the filing of collateral attacks on convictions has become so commonplace that it is now part of prison life. The state or federal prisoner, instead of taking the first step toward rehabilitation by accepting his punishment as justly imposed, spends his time devising legal arguments that have little, if anything, to do with his guilt or innocence. Only a tiny fraction are ever successful and success in this context generally means simply a retrial, which comes years after the offense and inevitably is based on stale evidence.

This practice wastefully consumes not only the time and energy of judges and court personnel, but also that of prosecutors and attorneys appointed to aid the accused.

B. Discussion. Legislation should be proposed which limits collateral attacks in federal courts. All of us, of course, want to guard against the imprisonment of the innocent but as the system has operated the occasional meritorious petition by an innocent prisoner is likely to be buried in a landslide of worthless petitions seeking to relitigate issues unrelated to the question of guilt or innocence. What is sorely needed is legislation providing that, with few exceptions, collateral attacks on criminal convictions will be permitted in the federal courts only when the alleged constitutional defect affects the integrity of the truth-finding process and thus may be causing the punishment of an innocent person. For example, a claim that a particular search and seizure violated the Fourth Amendment is not such a constitutional defect, and the Supreme Court has recently cut back the opportunity for state prisoners to relitigate such claims in the federal courts.

The late Mr. Justice Hugo Black and Judge Henry J. Friendly are among the distinguished jurists who have endorsed this proposal. At a time when mounting dockets threaten to overwhelm the federal judicial system, this proposal would reduce the number of petitions seeking post-conviction relief and would at the same time focus judicial attention where it is most crucial, thus eliminating the needle-in-the-haystack problem that now exists.

C. Recommendation. The Attorney General and I support a requirement that collateral attacks on criminal convictions be permitted in federal courts only when the alleged constitutional defect affects the integrity of the truth-finding process and thus may be causing the punishment of an innocent person.

Approve _____ Disapprove _____

TAB
E

Promoting Judicial Effectiveness

The Attorney General and I advance three recommendations to improve the effectiveness of the federal judicial system.

1. Support the creation of an agency that will allow the federal court system to plan for its changing needs.

A. Background. The experience of recent decades teaches that the work of the federal courts will continue to change rapidly and substantially, as in the past. If we are to act responsibly in meeting the new problems that will arise, we must alter our approach from a fire-fighting and crisis-managing strategy to a strategy of anticipation, one that will develop suitable remedies before the difficulties confronting the courts reach an advanced stage. We could then pursue consistent and constant policies and programs.

The concept of creating a planning capability for the third branch of government is by no means novel. Six years ago the Chief Justice of the United States urged consideration of the idea of creating a Judiciary Council of six members, comprised of two appointees of each of the three branches of Government. The Council would report to the Congress, the President and the Judicial Conference on the wide spectrum of developments that affect the work of the federal courts.

A slightly different version of the proposal was advanced in 1975 by the Commission on Revision of the Federal Court Appellate System, which supported creating a standing body to study and make recommendations regarding the problems of the federal courts.

The judicial planning agency could draw on work done by Committees on the Judiciary of both Houses, the Federal Judicial Center, the Judicial

Conference of the United States, the Department of Justice and private groups such as the American Bar Association, the American Law Institute, the Institute of Judicial Administration and the American Judicature Society. This is not now being done in any coordinated or coherent way.

B. Discussion. There appear to be two options in this area, but the second option is illusory.

First, you could support the creation of a new planning agency. Regardless of the exact form it would take, recent experience has amply shown the need for planning and programs of the kind other branches of government find indispensable.

To satisfy the immense demands on them, the federal courts need the very best structure and the most effective procedures the nation can provide. They need a capacity to respond in a flexible manner as soon as trends in the volume and nature of the courts' work can be identified. To accomplish these crucial tasks, the courts will need a permanent agency that has the responsibility for making proposals to the Congress and to the Judicial Conference of the United States, to plan ahead and design responses before the problems reach critical dimensions.

The planning capability can be placed in the hands of an agency designed on any of a variety of models. The mechanism, whatever its form, will be responsible for projecting trends, foreseeing needs and proposing remedial measures for consideration by the profession, the administration, the Congress and judicial groups. Among the kinds of problems the agency would consider are those relating to the nature of the business going into the federal courts; the need, if any, to enlarge the federal courts' capacity to settle the national law; and the structure and interrelationship of the courts in the system.

Other significant court-related problems that arise from time to time will also fall within the responsibility of the agency. The criterion will be whether the matter is one that involves deficiencies and possible improvements in the functioning of the federal judicial system.

Although in theory the proposed planning functions could be delegated to an existing agency such as the Federal Judicial Center, that course is probably not realistic. The Center's board of directors and chief administrative officer are judges. It would be highly desirable to have non-judges in the planning agency. Furthermore, the Center's work has focused on applied research rather than basic studies of the type this proposal envisions. Finally, the Chief Justice, who, as chairman of the Center's board is in a position to know whether it could serve effectively as a planning resource, has urged creation of a new body. That is persuasive evidence that no existing body, including the Judicial Conference of the United States, of which he is also chairman, can fill the planning need. Total costs for such a project would not exceed $1 million.

C. Recommendations:

1. The Attorney General and I recommend your support for the creation of a small agency to help plan for emerging needs of the federal judicial system.

Approve _____ Disapprove _____

2. The Attorney General additionally recommends that you announce immediately the appointment of a Commission to serve as a forerunner of the planning agency.

Approve _____ Disapprove _____

2. Defer consideration of a proposal to create a National Court of Appeals

A. Background. The Commission on Revision of the Federal Court Appellate System has proposed the creation of a new tier of federal courts--a National Court of Appeals with jurisdiction to hear cases referred to it by the Supreme Court and, in the original proposal though not in the legislative embodiment, cases transferred to it from the various federal appellate courts.

B. Discussion. The proposal is controversial both as to whether there is a problem and as to whether the new court would provide net benefit. Most observers agree that its effect would not be to reduce the federal judicial workload (it might actually increase that load) but merely to permit resolving more questions at a national level.

Many observers argue that the Supreme Court cannot decide all the legal questions that need answering on a national basis, but this is disputed. Even if an enlarged capacity to settle national law is found to be necessary, there is considerable disagreement as to what form such a court should take and what jurisdiction it should have. We believe that the pressure for such a drastic step as creating a fourth tier in the federal court system will cease if the reforms proposed in this message are enacted, and that the less drastic steps should be taken before turning to an extreme alternative.

Meantime, hearings are being held on a modified version of the Commission's National Court proposal and the debate over the need and the best solution continues. We suggest that you praise the good work of the Commission and defer expressing views on the various National Court of Appeals proposals until more modest remedies have been tried and found wanting. The judicial planning agency discussed in the previous option could keep the question under consideration in the interim. This course would avoid the necessity of taking sides in this dispute while reserving the option to do so at some other time.

C. Recommendation. The Attorney General and I recommend that you outline the National Court of Appeals problem in the message but defer action on the proposal for the present time.

Approve _____ Disapprove _____

3. Support the concept of special administrative tribunals to hear routine cases currently within the jurisdiction of the District Courts.

A. Background. A proposal with great significance for the future of our federal court system is that we create new tribunals to shoulder the enormous and growing burden of deciding the mass of uncomplicated, repetitious factual issues generated by federal regulatory and other agency-administered programs, e.g., welfare claims.

As you know, few changes in our government during the past 50 years have been so remarkable as the growth of federal administrative agency programs. Federal legislation now addresses our most basic needs: air, water, fuel, electric power, medicines, food, education, and safety, to name some. Special federal programs provide assistance for the poor, the jobless, the disabled, and other needy citizens. These crucial matters deserve special attention. Yet superintendence of this vast network of federal law has been entrusted, in large part, to a judicial system little changed in structure since 1891. Review of agency action, and lawsuits arising directly under federal statutes, now constitute as much as one-fifth of the business of the federal courts, and litigation under new legislation will make the effect even more substantial. For example, the Mine Safety Act potentially could generate more than 20,000 full jury trials each year in the District Courts, a burden that would overwhelm the courts and defeat the very rights that the new legislative programs are designed to extend.

While the federal District Courts are uniquely capable of protecting individual freedoms, interpreting federal laws, and preserving democratic processes of government, they are not unique in their ability to adjudicate relatively simple, repetitious factual disputes. The idea here is that a new system of tribunals can be created which can handle claims under many federal welfare and regulatory programs as well as the District Courts and with greater speed and lower cost to litigants.

B. Discussion. The cases that would be transferred to new tribunals are those that involve repetitious factual disputes and rarely give rise to

precedent-setting legal questions. Among these are, for example, claims arising under the Social Security Act, the Federal Employers Liability Act, the Consumer Products Safety Act, and the Truth-in-Lending Act. These matters have great individual and social significance but the questions they raise could be handled as effectively and justly by trained administrative judges as by Article III judges burdened with the pressing business of a general criminal and civil jurisdiction.

None of the special competence of our present district courts would be lost to litigants in these new tribunals. If a substantial question of constitutional or statutory interpretation arose in the administrative system, that question could be brought before the district courts for decision. Litigants would retain every important right they now possess and the simpler procedures in the new courts would result in much saving of time and money.

While the idea of an administrative court is simple in concept, its implementation would have to proceed by careful steps to avoid injury to people's rights. Care would need to be exercised in selecting the categories of claims that would be brought into the new tribunals, and in designing the simplified procedures they will utilize.

One option is to introduce legislation to be offered in January, identifying a few categories of cases, for example, Social Security disability and Mine Safety Act claims, to be referred. The jurisdiction of the new courts could be incrementally expanded as experience warrants. This option has the strength of testing feasibility and gathering needed knowledge as time goes on, without harm to the people's rights or to any institutions.

A second option is to include language in the message supporting the concept and the need to act on it if other remedies are not responsive, but deferring the introduction of any possible legislation in the immediate future. The concept could then be under continuing review by the judicial planning agency noted earlier herein. This option

would recognize that support for legislation incorporating this idea at the current time could affect your credibility elsewhere with older citizens and minority groups which press claims of this sort.

C. Recommendation. The Attorney General and I recommend you support the latter option to defer action at the present time. [Solicitor General Bork recommends legislation incorporating the concept, perhaps incrementally.]

Approve _____ Disapprove _____

THE WHITE HOUSE

WASHINGTON

December 6 , 1976

MEMORANDUM FOR THE PRESIDENT

FROM: PHILIP W. BUCHEN

SUBJECT: Justice Department Report:
"The Needs of the Federal Courts"

This memorandum seeks your acknowledgment and general endorsement of a report recently prepared by the Department of Justice on the comprehensive needs of our Federal court system.

BACKGROUND

In your speech to the Sixth Circuit Judicial Conference on July 13, 1975, you called for an effort within your Administration to find ways to improve the Federal judicial system. You emphasized that respect for law is inevitably diminished by the overburdening of the Federal courts' capacity to administer justice effectively. In response to your initiative, the Department of Justice formed the Attorney General's Committee on the Revision of the Federal Judicial System, with Solicitor General Robert Bork as chairman. That Committee, subject to the review of the Attorney General and Counsel's Office, has now completed its report.

OVERVIEW

A draft of the report (at Tab A) points to the virtual explosion of Federal litigation in recent years. It identifies the major themes of the statement: (1) the crisis of the Federal courts must be overcome not only for the sake of the court system, but because the courts' crisis raises a threat for litigants who seek justice, for claims of basic human rights and for the rule of law; the problem must therefore be of concern to the nation; and (2) our responses to this problem must be vigorous enough to give the courts what they need, but moderate enough to preserve their excellence.

The report, which is subject to change in relatively minor respects, proposes a comprehensive package of solutions

to the growing needs of the Federal courts, including:

- Judgeships. A modest increase in the size of the Federal judiciary is recognized as a necessary immediate response to the problem. Therefore, the report supports enactment of pending legislative proposals to create additional Federal judgeships. It is also recognized, however, that in the long run we cannot go on expanding the size of the judiciary indefinitely.

- Judicial Excellence. The report proposes the creation of a Commission on the Judicial Appointment Process which would conduct a fundamental reassessment of the current practice governing judicial selections, loosely referred to as "Senatorial courtesy", and recommend: (1) standards to be utilized in the selection of candidates for judicial appointment; (2) the proper roles of the various individuals and institutions concerned with the selection of judicial candidates; and (3) procedures and structures to attract and retain the best qualified judicial personnel. This recommendation carries forward a view which you recently expressed to the American Judicature Society.

- Reducing the scope of Federal jurisdiction. Four proposals are advanced to reduce the numbers of cases coming before the courts. These call for:

  1. the elimination of most of the remaining areas of mandatory appellate jurisdiction of the Supreme Court;

  2. the reduction of diversity jurisdiction;

  3. a requirement that prisoners exhaust available state remedies prior to filing civil rights petitions attacking penal conditions; and

  4. a requirement that Federal collateral attacks on judgments of convictions be grounded on alleged constitutional defects that affect the integrity of the truth-finding process and thus may be causing the punishment of an innocent

person, although this no longer is particularly significant because this principle has been largely established by the recent Supreme Court decision in Stone v. Powell.

- o Promoting judicial effectiveness. Four principal points are made regarding the effective use of judicial resources:

  1. The report recommends the creation of a small agency to plan for the future needs of the Federal court system.

  2. Support is given to the necessity for increased educational and training requirements for court personnel.

  3. Until such time as the relief prescribed in the report is given an opportunity to work, we should postpone active consideration of proposals to create a National Court of Appeals.

  4. The report generally supports the concept of special administrative tribunals to hear routine regulatory matters currently heard by the District Courts.

RECOMMENDATIONS

(1) The Attorney General, the Solicitor General, the Domestic Council and Counsel's Office recommend that you approve the release of this report by the Department of Justice in response to your call for a comprehensive review of the needs of the Federal courts.

Approve _____ Disapprove _____

(2) The Attorney General, the Solicitor General, the Domestic Council and Counsel's Office also recommend that you make favorable reference to the report in your State of the Union message and that you particularly endorse the proposed Commission on the Judicial Appointment Process and the Federal courts planning agency.

Approve _____ Disapprove _____

Draft 12/3/76

REPORT OF THE ATTORNEY GENERAL"S COMMITTEE ON REVISION OF THE FEDERAL JUDICIAL SYSTEM

The Attorney General's Committee on Revision of the Federal Judicial System was established [at the request of President Ford] to study the serious and immediate problems facing our federal courts. The Committee consisted of the Attorney General, the Deputy Attorney General and the Assistant Attorneys General within the Department of Justice and was chaired by Solicitor General Bork.

I

This report concerns a serious threat to one of our priceless national assets: the federal court system. What makes the threat serious is that it imperils the ability of the courts to do justice of the quality that is the people's due.

The central functions of the federal courts established under Article III of the Constitution of the United States are to protect the individual liberties and freedom of every citizen of the nation, give definitive interpretations to federal laws, and ensure the continuing vitality of democratic process of government. These are functions indispensable to the welfare of this nation and no institution of government other than the federal courts can perform them as well.

Our federal courts have served us so well for so long that we have come to take their excellence for granted. We can no longer afford to do so. The court system and the administration

of justice in this nation need our attention and our assistance. Law and respect for law are essential to a free and democratic society. Only a strong and independent federal judicial system can maintain the rule of law and respect for it.

In this century, and more particularly in the last decade or two, the amount of litigation we have pressed upon our federal courts has skyrocketed. In the 15-year period between 1960 and 1975 alone, the number of cases filed in the federal district courts has nearly doubled, the number taken to the federal courts of appeals has quadrupled, and the number filed in the Supreme Court has doubled. Along with the sharp inflation in the volume of cases has come an increase in the complexity of a growing proportion of them.

Despite this rising overload, judges of the federal courts are being asked to perform their duties as well as their predecessors did with essentially the same structure and essentially the same tools. They are performing wonders in coping with the rising torrent of litigation, but they cannot do so forever without assistance. Congress must give high priority to legislation that will redefine the responsibilities of our federal courts and enable them, now and in the future, to continue to carry out their essential mission.

THE GROWING JUDICIAL WORKLOAD

The federal courts now face a crisis of overload, a crisis so serious that it threatens the capacity of the federal system to function as it should. This is not a crisis for the courts alone. It is a crisis for litigants who seek justice; for claims of human rights; and for the rule of law. It is therefore of great concern to the nation.

Overloaded courts are not satisfactory from anyone's point of view. For litigants they mean long delays in obtaining a final decision and additional expenses as procedures become more complex in the effort to handle the rush of business. We observe the paradox of courts working feverishly and litigants waiting endlessly. Meanwhile, the quality of justice must necessarily suffer. Overloaded courts, concerned to deliver justice on time insofar as they can, begin to quicken their steps, sometimes in ways that threaten the integrity of law and of the decisional process.

District courts have delegated more and more of their tasks to magistrates, who handled over one-quarter of a million matters in fiscal 1975 alone. Time for oral argument is steadily cut back and is now frequently so compressed in the courts of appeals that most of its enormous value is lost. Some courts of appeals have felt compelled to eliminate oral arguments altogether in many classes of cases. Thirty percent or more of

all cases are now decided by these courts without any opportunity for the litigants' counsel to present the case orally and to answer the court's questions. More disturbing still, the practice of articulating reasons for decisions is declining. About a third of all courts of appeals' decisions are now delivered without opinion or explanation of the results.

These are not technical matters of concern only to lawyers and judges. They are matters and processes that go to the heart of the rule of law. The American legal tradition has insisted upon practices such as oral argument and written opinions for very good reason. Judges, who must be independent and are properly not subject to any other discipline, are required by our tradition to confront the claims and the arguments of the litigants and to be seen by the public to be doing so. Our tradition requires that they explain their results and thereby demonstrate to the public that those results are supported by law and reason and are not merely the reflection of whim, caprice, or mere personal preference. Continued erosion of these practices could cause a corresponding erosion of the integrity of the law and of the public's confidence in the law.

The problems addressed so far are but a few of the most visible symptoms of the damage being done to our federal court system by overloading it with more and more cases. There are others. Courts are forced to add more clerks, more administrative personnel, and install more depersonalized procedures. They are

losing time for conferences on cases, time for deliberation, time for the give and take and the hard thinking that are essential to mature judgment. They are, in short, encountering a workload that is changing the very nature of courts, threatening to convert them from deliberative institutions to processing institutions, from a judiciary to a bureaucracy. It is this development, dangerous to every citizen in our democracy, that must be arrested and reversed. And it must be done in ways that will not lower the quality of justice received by any citizen of this country.

Our courts must be reasonably accessible to the American people at a price within reach. Justice must be dispensed evenly and decently within a reasonable time. In moving to ensure that these goals are met, we must employ methods which are vigorous enough to give the courts what they need but moderate enough to sustain their excellence. The proposals presented here accomplish that: they will at once preserve our federal courts for their central task of guarding human rights and democratic government while improving the quality of justice and cutting the time and cost of securing it, for every person who goes to federal court.

ADDITIONAL FEDERAL JUDGESHIPS

One traditional response to the crisis of overload lies in the appointment of more judges. A bill creating more judgeships for our District Courts and Courts of Appeals

has been pending in Congress for approximately four years. Certainly this measure should be enacted as an immediate measure for relief of our judicial system. Moreover, the Committee proposes that additional measures be taken to upgrade the quality of our federal judges.

The quality of federal justice depends directly on the quality of federal judges. There are currently 596 judgeships in the various Federal court systemsunder Article III of the Constitution,including the Supreme Court, the Circuit Courts of Appeals, the District Courts, the Court of Claims, the Court of Customs and Patent Appeals and the Customs Court. Although the quality of the Federal bench is in fact high and is perceived to be high, few would deny that there is room for improvement on both the trial and appellate levels. We must bend our efforts to assure the greatest excellence in judicial appointments.

No process of judicial selection can completely ensure the appointment of highly qualified judges. However, despite the fact that there are no magic formulas in the area of judicial selection, it is certainly appropriate to question whether the method of selection that currently exists moves in the direction of achieving optimum results.

As a matter of law, Federal judges are appointed by the President, "by and with the advice and consent of the Senate." However, in point of fact there has developed over the years a process of judicial selection under a practice which has

come to be known as "Senatorial courtesy." This term refers to a veiled selection process which is heavily political and grounded in outdated notions of Senatorial patronage. This system is not consistent with the interests of the American public and the needs of the federal judicial system. A greater degree of public visibility would enhance the process.

In order to provide an independent working basis for a fundamental reassessment of judicial selection procedures, there should be created a Commission on the Judicial Appointment Process. This group should include representatives from diverse segments of the legal community and the public at large. It should recommend: (1) standards to be utilized in the selection of candidates for judicial appointment; (2) useful roles for the various individuals and institutions concerned with the selection of federal judicial candidates; and (3) procedures and structures to attract and retain highly qualified judicial personnel.

Although it is clearly essential today that Congress increase the number of judges to cope with the rising tide of litigation, and that they be judges of high quality such an approach does not promise a long-term solution.

An effective judiciary, as Justice Felix Frankfurter once observed, is necessarily a small judiciary. Large numbers swelling the size of the federal judiciary indefinitely not only dilutes the attraction to first-rate men and women of a career on the federal bench but damages collegiality, an essential

element in the collective evolution of sound legal principles, and diminishes the possibility of personal interaction throughout the judiciary. Thus we need to do more than add new judges: we must also reexamine the responsibilities with which our courts are charged to ensure that this precious and finite resource can continue to function in the best interests of all our citizens.

REDUCING THE SCOPE OF FEDERAL JURISDICTION

Another hopeful response to the problem of overload lies in reform of the jurisdiction of our federal courts. This has been done on several occasions in our history, always with beneficial results. It is now necessary again.

The solutions offered here are broad in concept and in effect because remedies of smaller scope, remedies that tinker here and there for the sake of minor and temporary relief, are simply not adequate to meet a problem of the dimensions presented. Caseloads will continue to increase dramatically according to almost all predictions. The solutions offered, therefore, are designed not only to afford immediate relief to the courts and the public but to provide for the future.

A. Supreme Court: Elimination of Mandatory Appellate Jurisdiction.

The business of the Supreme Court, like that of the other federal courts, has expanded significantly in recent years. After growing steadily for three decades, the number of filings in the Supreme Court began to accelerate ten years ago, increasing from 2,744 cases in the 1965 Term to 4,186 in 1974. Fortunately,

Congress has given the Court discretionary (or certiorari) jurisdiction over much of its docket, enabling the Court to keep nearly constant the number of cases (from 150 to 160) decided on the merits after oral argument. These are the cases that necessarily consume the bulk of the Justices' time. Nevertheless, despite the broad scope of its discretionary jurisdiction, the Supreme Court is needlessly burdened by appeals the Court has no power to decline. The Committee therefore recommends that the remaining mandatory appellate jurisdiction of the Supreme Court be abolished.

During the past several years Congress has taken significant steps to reduce the burden of the Supreme Court's mandatory docket, most importantly by eliminating in large part the cases heard by three-judge district courts and appealed directly to the Supreme Court. The Court is still required, however, to consider on the merits cases from the state court systems in which a federal law has been invalidated or a state law upheld in the face of a federal constitutional attack. In addition, the Court must consider on the merits appeals from federal courts of appeals and, more importantly, from district courts where a federal statute has been held to be invalid.

This mandatory Supreme Court review of appeals from the state courts and the federal courts of appeals should be eliminated, as the Federal Judicial Center's Study Group on the Caseload of the Supreme Court concluded four years ago. While these cases have typically accounted for only a small percentage of the Supreme Court's business, the number of cases appealed from

the federal district courts and court of appeals will increase as a result of the virtual elimination of three judge district courts. The Committee believes there is no reason why they should be subject to special treatment.

Nor is there sufficient reason to require the Supreme Court to review on the merits all cases in which the highest possible state court invalidates a federal law or upholds a state statute in the face of a federal constitutional attack. Mandatory Supreme Court review in these circumstances implies that we cannot rely on state courts to reach the proper result in such cases. This residue of implicit distrust has no place in our federal system. State judges, like federal judges, are charged with upholding the federal constitution. Indeed, the Supreme Court itself now summarily disposes of nearly all these state cases, deciding them without briefing or argument. In effect the Supreme Court is exercising discretionary jurisdiction although the statute makes review mandatory. It is time that we conform the law to the reality.

Congress should, therefore, eliminate those sections of the United States Code imposing mandatory review jurisdiction and make the certiorari practice applicable throughout the Supreme Court's jurisdiction. There is no basis for a conclusive presumption that issues raised on appeal are more important than issues raised on certiorari. We now trust the Supreme Court to decide important issues; we should trust it to decide which cases are most in need of review.

B. NATIONAL COURT OF APPEALS

The considerations that demand relieving the Supreme Court of its mandatory appellate jurisdiction do not support creating a National Court of Appeals such as that proposed last year by the Hruska Commission and now under review by a Senate sub-committee in the form of two bills (S. 2762, S. 3423). The need for such a new, national tribunal between the courts of appeals and the Supreme Court simply has not been demonstrated and the additional burdens it would create for litigants and the Supreme Court cannot be justified.

Although the Supreme Court's workload is heavy, the National Court of Appeals is not intended to - and would not - provide any relief. It is aimed instead at increasing national appellate capacity in order to decide cases that involve conflicts in the circuits and significant issues that the Supreme Court, at least for a time, would not address.

While the Supreme Court has doubtless left some inter-circuit conflicts unresolved, there is little evidence that these involve recurring issues or questions of general importance. A high proportion of the cases deemed suitable for the National Court of Appeals involve specialized areas of tax or patent law. But if more nationally-binding decisions are needed in these fields the proper approach is to create national courts of tax and patent appeals. This not only would increase national appellate capacity for tax and patent cases, but also would remove

such cases from the courts of appeals and thereby give those courts some much-needed relief. The remaining cases, while not insignificant, could be handled under the existing system if - as we recommend - the Supreme Court were given certiorari jurisdiction over cases presently brought by appeal.

On the other hand, the National Court of Appeals almost surely would place an increased burden on the Supreme Court. The Justices, experienced at simply granting or declining cases for review, would have to decide whether cases should be accepted for review by the Supreme Court, referred to the National Court of Appeals, or denied outright. The problems inherent in that process are considerable and the large increase in Supreme Court filings would become substantially more of a burden than it now is.

Moreover, each decision on the merits by the National Court of Appeals would have to be scrutinized very carefully by the Supreme Court, to ensure than an issue had not been definitely resolved, or even dicta pronounced, in a manner contrary to its own views. The necessity of granting plenary review of a decision of the national court might arise frequently, particularly if the judicial philopsophies of the two benches should differ to any significant degree. That would impose upon many litigants four separate tiers of federal adjudication, and the result might be a still further increase in the burden upon the Supreme Court.

In light of these dangers, a new, national court should be created only if the need is clear and compelling. It is not. The modest advantages of the National Court of Appeals are insufficient to overcome its disadvantages and Congress should reject it.

B. The District Courts and Courts of Appeals

In order to provide essential relief to the lower federal courts, it is proposed that (1) diversity jurisdiction be abolished; (2) state prisoners be required to exhaust their state remedies before starting a federal suit to attack prison conditions; and (3) new tribunal be established to handle routine cases arising under federal regulatory programs.

1. Elimination of Diversity Jurisdiction

The vast majority of lawsuits in this country are based on claims under state law. When the litigants are residents of the same state, these cases are decided in state tribunals, and no one objects to that. However, when the litigants are citizens of different states, such suits have long been allowed to enter the federal courts, even though they involve only questions of state law. These diversity cases account for a large part of the federal district courts' caseload.

More than 30,000 diversity cases were filed in the district courts during fiscal 1975, constituting almost one-fifth of the total filings. During the same year, diversity cases accounted for more than 25 percent of all jury trials and, notably 68 percent of all civil jury trials. Appeals from diversity cases constitute slightly more than 10 percent of the filings

in the court of appeals.

The burden diversity jurisdiction imposes on the federal courts can no longer be justified. State courts, not federal courts, should administer and interpret state law in all such cases. Federal judges have no special expertise in such matters, and the effort diverts them from tasks only federal courts can handle or tasks they can handle significantly better than the state courts. Federal courts are particularly disadvantaged when decision is required on a point of state law not yet settled by the state courts. The possibilities both of error and of friction between state and federal tribunals are obvious.

The modern benefits of diversity jurisdiction are hard to discern. The historic argument for diversity jurisdiction - the potential bias of state courts or legislatures - derives from a time when transportation and communication did not effectively bind the nation together and the forces of regional feeling were far stronger. As the Chief Justice has remarked, "[c]ontinuance of diversity jurisdiction is a classic example of continuing a rule of law when the reasons for it have disappeared." Other Justices of the Court, as well as prominent legal scholars and practitioners, agree. Diversity cases involving less than $10,000 have been left to the States for many years without noticeable difficulty and admission to the federal courts should no longer be a matter of price. The additional burden on the state courts would be small since the cases would be distributed among the fifty state systems.

These changes should permit federal judges to give greater attention to tasks only federal courts can handle or tasks to which they bring special expertise.

2. Require Exhaustion of State Remedies in Prisoner Civil Rights Act Cases

The consideration of prisoner cases now constitutes a significant part of the district courts' job. In fiscal 1975, prisoners filed 19,307 petitions, approximately 16 percent of the new civil filings or 12 percent of the total filings. Of these, 11,215 were habeas corpus petitions or motions to vacate sentence. The remainder consisted primarily of civil rights actions which normally attack the deficiencies of prison conditions.

Most civil rights actions of this type are filed by state prisoners. The 6,000 filings by state prisoners are more than triple the number filed five years ago and 27 times the number filed in 1966. Only a small percentage go as far as an actual trial, but the burden on the federal courts from these cases is significant and it appears to be growing.

H.R. 12008, introduced on February 19, 1976, authorizes the Attorney General of the United States to institute suits on behalf of state prisoners, after notice to prison officials, and to intervene in suits brought by private parties upon a certification by the Attorney General "that the case is of g neral public importance." The bill also provides that "[r]elief

shall not be granted" in individual actions under 42 U.S.C. 1983 "unless it appears that the individual has exhausted such plain, speedy, and efficient State administrative remedy as is available. An exception is made when "circumstances [render] such administrative remedy ineffective to protect his rights."

When prisoner complaints are based on allegations of system-wide problems, representation by the Attorney General should correct the situation. Exhaustion of state administrative remedies would eliminate from the federal courts at least the cases decided favorably to the prisoner. Unsuccessful litigants might continue to press their claims in federal courts, but the court should then have the benefit of a more complete record and more focused issues. The bill will also encourage the states to develop more responsive grievance procedures. It is the responsibility of the states to provide adequate penal facilities and treatment for state prisoners and the administrative process is, at least in the initial stages, far better suited than a federal court to handle typical prisoner complaints. Indeed, new procedures insitituted by the Federal Bureau of Prisons seem to be supplying a useful grievance mechanism for federal prisoners and reducing the number of federal suits.

3. New Tribunals

We need new federal tribunals to make justice prompt and affordable for average persons with claims based on federal laws.

Perhaps the proposal with the most significance for the future of our federal court system is that we create new tribunals to shoulder the enormous and growing burden of deciding the mass of uncomplicated, repetitious factual issues generated by federal regulatory and other agency-administered programs, e.g., welfare claims.

Few changes in our government during the past 50 years have been so remarkable as the growth of federal welfare and regulatory programs. Federal legislation now addresses our most basic needs.

Special federal programs provide assistance for the poor, the jobless, the disabled, and other needy citizens. These crucial matters deserve special attention. Yet this vast network of federal law has been entrusted, in large part, to a judicial system little changed in structure since 1891. Review of agency action, and lawsuits arising directly under federal statutes, now constitute as much as one-fifth of the business of the federal courts and litigation under new legislation could make the effect even more substantive. For example, the Mine Safety Act potentially could generate more than 20,000 full jury trials each year in the District Courts, a burden that would overwhelm the courts and defeat the very rights that the new legislative programs are designed to extend.

We can hope that this process of adding new federal programs that create unnecessary masses of cases will end. However, regardless of one's view of this trend and the consequent steady accretion of power in the hands of the federal government, we should at a minimum take care that we do

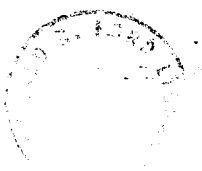
not swamp the federal courts and with them the needs of the litigants. It can only be disheartening for a litigant whose claim requires no more than a thoughtful and disinterested factfinder to be placed in competition with a lengthy docket of civil and criminal cases, all competing for the limited time of a District Court judge.

Serious thought should now be given to the creation of a new system of tribunals that can handle the 20,000 or so routine claims under many federal welfare and regulatory programs as well as the Article III courts, and with greater speed and lower cost to litigants. The shifting of these cases to the new tribunals could also preserve the capacity of the Article III courts to respond, as they have throughout our history to the claims of human freedom and dignity.

Specialized courts and boards already play an important role in our governmental system. The Tax Court, for example, has provided a useful alternative to suits in federal District Courts. The Armed Services Board of Contract Appeals and other similar boards resolve the great majority of contract disputes involving the government. The Board of Immigration Appeals provides valuable service in the specialized matters within its jurisdiction. Administrative tribunals have long been used in countries abroad, with excellent results.

This proposal holds the potential for providing prompt, affordable justice for the average person and at the same time avoiding a crushing burden on the federal courts. It is essential that litigation under future federal programs be directed to the tribunal in which it can be handled most effectively. For too long, Congress has ignored the effect of new federal programs on our overworked judicial system.

This proposal is simple in concept and may prove to be necessary. However, implementing it will require developing the specifics and testing them carefully before they are put into effect. For that reason, the concept should be referred to the planning agency for the judicial system that has been proposed. As it monitors the impact of the other measures proposed in this message, the agency will have in view the possibility of creating new tribunals.



PROMOTING JUDICIAL EFFECTIVENESS

We must strive to ensure that the nation receives maximum efficiency from its judicial resources. In this regard, we should review programs to strengthen the continuing educational programs for Federal court personnel and the development of a strong planning capability within our judicial system. Within the context of a program to explore the future needs of our Federal courts, we should continue to probe the utility of various proposals on court reorganization.

A. Continuing Educational Requirements.

The Federal Judicial Center, the Judicial Conference of the United States, the Law Enforcement Assistance Administration, the American Judicature Society and the Institute for Judicial Administration and other public and private organizations have made notable contributions in the development of programs to ensure that the continuing educational and training requirements of the judicial branch are met. These programs have covered substantive and procedural law as well as court administration and management.

The utilization of innovative technology and advanced management techniques is essential to the prompt resolution of disputes before our courts. Study institutes and advanced instruction for court personnel increase both the quality and speed of delivery of justice in the United States.

Under the inspiration and guidance of the late Chief Justice Warren and Chief Justice Burger, the wholesome trend toward continuing education for judges and other court personnel has accelerated. This trend should be encouraged.

B. A Planning Capability for The Federal Court System.

The experience of recent decades teaches that the work of the federal courts will continue to change rapidly and substantially, as in the past. If we are to act responsibly to meet the new problems that will arise, we must alter our approach from a fire-fighting and crisis-managing strategy to a strategy of anticipation, one that will develop suitable remedies before the

difficulties confronting the courts reach an advanced stage. We could then pursue consistent and constant policies and programs.

To satisfy the immense demands on them, the federal courts need the very best structure and the most effective procedures the nation can provide. They need a capacity to respond in a flexible manner as soon as trends in the volume and nature of the courts' work can be identified. To accomplish these crucial tasks, the courts will need a permanent agency that has the responsibility for making proposals to the Congress and to the Judicial Conference of the United States, to plan ahead and design responses before the problems reach critical dimensions.

The concept of creating a planning capability for the third branch of government is by no means novel. Six years ago Chief Justice Burger urged consideration of the idea of creating a Judiciary Council of six members, comprised of two appointees of each of the three branches of Government.

The Council would report to the Congress, the President and the Judicial Conference on the wide spectrum of developments that affect the work of the federal courts.

A slightly different version of the proposal was advanced in 1975 by the Commission on Revision of the Federal Court Appellate System, which supported creating a standing body to study and make recommendations regarding the problems of the federal courts.

The planning capability can be placed in the hands of an agency designed on any of a variety of models. The mechanism, whatever its form, will be responsible for projecting trends, foreseeing needs and proposing remedial measures for consideration by the profession, the administration, the Congress and judicial groups. Among the kinds of problems the agency will consider are those relating to the nature of the business going into the federal courts; the need, if any, to enlarge the federal courts; capacity to settle the national law; the structure and interrelationship of the courts in the system; and the factors that affect our ability to recruit the ablest judges to the federal bench.

Other significant court-related problems that arise from time to time will also fall within the responsibility of the agency. The criterion will be whether the matter is one that involves deficiencies and possible improvements in the functioning of the federal judicial system.

The need has been amply demonstrated for the federal courts to develop an office for planning and programs of the kind other branches of government find indispensable. The role of systematically auditing the functions of the federal courts should not be performed casually, sporadically or haphazardly. It must be an ongoing effort that permits the members of a permanent panel to develop deep, expert knowledge and a sure feel for what the courts need today and are likely to need tomorrow. The judicial planning agency could draw on work down by Committees on the Judiciary of both Houses, the Federal Judicial Center, the Judicial Conference of the United States, the Department of Justice and private groups.

This is not now being done in any coordinated or coherent way. It is imperative that it be done through a responsible agency so that we can discontinue the practice

of reacting instead of anticipating, a practice that obviously cannot provide timely or effective help for the great and changing needs of the federal courts.

Conclusion

In speaking about improving the Federal courts, we are considering how we can make a great institution greater. The plain answer is to give the courts the capacity to do the vital work the country expects of them. This work has been expanding dramatically in quantity during the last 30 to 40 years, and it has also been changing drastically in quality. Both increases -- in volume and in the complexity of the cases -- have come about because of new Federal statutes and programs that affect broad areas of people's lives, and new court decisions that announce additional legal rights or duties.

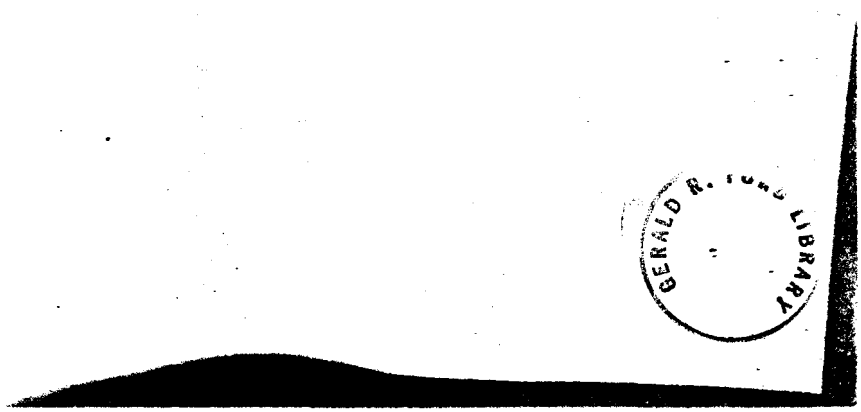
President Ford has in the past called attention to the fact that we are turning too often to our Federal courts for solutions to conflicts that should be resolved by other agencies of government or the private sector. It is becoming increasingly important for the Congress to consider in some detail the potential judicial impact of new legislation and to minimize the occasions for resort to a full-blown adjudicatory process.

The boom in the business of the nation's courts is in one sense, however, very good and very reassuring. It shows that we as a people believe in the rule of law and trust our courts to give us justice under law. It also shows that in the 201st year of the country's life we are still devoted to the Constitution's basic concept that the judicial branch is an equal partner in our government.

But the Federal courts are now in trouble and urgently need help. They cannot continue to meet the obligations that society has thrust upon them without improving their resources. The crisis of volume has exposed many unmet needs in the Federal court system.

Basically, the American people expect that the courts will be reasonably accessible to them if they have claims they want judged. They also expect that the courts will not be so costly they price justice out of reach. And they expect, too, that the courts will not be so slow that justice will come too late to do any good. People also have a right to expect that when they go into the Federal courts, whether as litigant, witness or juror, they will be treated with decency and dignity. In short, they are entitled to believe that the courts will be humane as well as honest and upright.

To ensure that the Federal court system [illegible] meet these legitimate expectations, serious consideration should be given to the recommendations made herein. These are necessary and will immeasurably strengthen our system of justice.



FILE
Justice

THE WHITE HOUSE

WASHINGTON

December 11, 1976

ADMINISTRATIVELY CONFIDENTIAL

MEMORANDUM FOR: PHIL BUCHEN

FROM: JIM CONNOR JEC

SUBJECT: Justice Department Report
"The Needs of the Federal Courts"

The President reviewed your memorandum of December 6 on the above subject and approved the following:

(1) Release report by the Department of Justice in response to his call for a comprehensive review of the needs of the Federal courts.

(2) Favorable reference should be made to the report in the State of the Union message and that he particularly endorses the proposed Commission on the Judicial Appointment Process and the Federal courts planning agency.

Please follow up with appropriate action.

Ed:
I called Maurice Rosenberg at Justice to advise him. You probably should check on this in my absence.
P.

cc: Dick Cheney
Bob Hartmann

I checked - they are on track!

12/22

Justice

Thursday 12/23/76

9:30 I called Maurice Rosenberg to let him know that you will be out of the office until next Wednesday 12/29 but that we will call your attention to his letter as soon as you get to the office.

Office of the Attorney General
Washington, D. C. 20530

December 21, 1976

Honorable Philip W. Buchen
Counsel to the President
The White House
Washington, D.C.

Dear Phil:

Enclosed is a draft of statement about the pedigree of the report on the federal judicial system the Department of Justice will be completing soon.

Today I circulated a revised draft of the report for comments, asking that these be expedited so we can wrap up the project by the end of next week. With it went the draft transmittal letter of which the enclosed is a copy, and an alternative version, virtually identical in content, in the form of a prefatory note to the report. I am not sure which version will be preferred here in the last analysis. Kindly give me any comments you care to make.

I may not see or speak to you before the holidays, so let me now wish you a very happy Christmas and a bright, great 1977.

Sincerely,

Maurice Rosenberg

cc to: Ken Lazarus

Revised Draft

Office of the Attorney General
Washington, D. C. 20530

December 21, 1976

The President
The White House
Washington, D.C.

Dear Mr. President:

I am pleased to transmit to you herewith the Report of the Department of Justice on The Needs of the Federal Courts. This Report is the product of studies done at your direction on the problems of the federal judicial system. Your concern about those problems was strongly conveyed in your address to the Sixth Circuit Judicial Conference on July 13, 1975, when you drew attention to the overburdened condition of the federal courts and the threat this raised to their ability to administer justice effectively.

The Report embodies the studies and deliberations of the Committee on Revision of the Federal Judicial System, which I set up in the Department of Justice with Solicitor General Robert H. Bork as Chairman. In 1975 the Committee began the work you called for and continued research and discussion on various proposals through June, 1976. Since then, some of the Committee's proposals have been modified to take account of recently-enacted laws and other developments. These changes are reflected in the recommendations offered in the Report, which we in the Department trust will be a productive response to your initiative in this area of great importance to the Nation.

Respectfully,

Edward H. Levi
Attorney General