THE WHITE HOUSE

WASHINGTON

CABINET COUNCIL ON LEGAL POLICY

June 20, 1983

3:30 P.M.

Roosevelt Room

directive to agencies from AG re settlts involving atty's fees

AGENDA

1. Legal Fee Cap Proposal (CM#378)
2. Pornography Briefing (CM#383)
3. Coordination of Federal Law Enforcement Authorities (CM#384)
   1. freeze all law enf auth immed. (do not expand law enf auth's)
   2. form law enf wkg gp (re authorities)
   3. rec's back to CCLP w/in 30 days

Timing of Legis?
still to be wkd out

no chance
worth making statement
given point "down" side
= Alt means of doing
(admin — ?)

CABINET COUNCIL ON LEGAL POLICY

June 20, 1983

PARTICIPANTS

The Attorney General, Chairman Pro Tempore

Secretary Watt
Edwin Harper
Loren Smith, Administrator, ACUS
Deputy Secretary McNamar
(Representing Secretary Regan)
Deputy Director Wright
(Representing Director Stockman)
Richard Hauser, Deputy Counsel to the President
William Niskanen
(Representing Chairman Feldstein)

Michael Uhlmann, Executive Secretary
Becky Norton Dunlop, Director, Office of Cabinet Affairs

For Presentation:

Edward Schmults, Deputy Attorney General

Additional Attendees:

Kenneth Cribb, Assistant Counsellor to the President
Nancy Risque, Special Assistant to the President for Legislative Affairs

Lionel Olmer, Under Secretary of Commerce for International Trade Administration
John Knapp, General Counsel, HUD
Jonathan Rose, Assistant Attorney General, Office of Legal Policy
Ford B. Ford, Under Secretary of Labor, Designate
Dan McGovern, Acting Legal Advisor

THE WHITE HOUSE
WASHINGTON

CABINET AFFAIRS STAFFING MEMORANDUM

DATE: 6/17/83 NUMBER: 118765CA DUE BY: _____

SUBJECT: Cabinet Council on Legal Policy - Monday, June 20, 1983
3:30 p.m. in the Roosevelt Room

	ACTION	FYI
ALL CABINET MEMBERS	☐	☐
Vice President	☑	☐
State	☑	☐
Treasury	☑	☐
Defense	☐	☑
Attorney General	☑	☐
Interior	☑	☐
Agriculture	☐	☑
Commerce	☑	☐
Labor	☑	☐
HHS	☑	☐
HUD	☑	☐
Transportation	☑	☐
Energy	☐	☑
Education	☐	☑
Counsellor	☑	☐
OMB	☑	☐
CIA	☐	☑
UN	☐	☑
USTR	☐	☑
CEA	☐	☑
CEQ	☐	☐
OSTP	☐	☐
ACUS	☑	☐
_____	☐	☐

	ACTION	FYI
Baker	☑	☐
Deaver	☐	☐
Clark	☐	☑
Darman *(For WH Staffing)*	☑	☐
Harper	☑	☐
Jenkins	☐	☑
Fielding	☑	☐
_____	☐	☐
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CCCT/Gunn	☐	☐
CCEA/Porter	☐	☐
CCFA/Boggs	☐	☐
CCHR/Carleson	☐	☐
CCLP/Uhlmann	☑	☐
CCMA/Bledsoe	☐	☐
CCNRE/Boggs	☐	☐

REMARKS: The Cabinet Council on Legal Policy will meet on Monday, June 20, at 3:30 p.m. in the Roosevelt Room.

The agenda is as follows:

Legal Fee Cap Proposal (CM#378) paper is attached
Pornography Briefing (CM#383)
Coordination of Federal Law Enforcement Authorities (CM#384)

(No paper will be distributed in advance of the meeting for the last two agenda items.)

RETURN TO:

☐ Craig L. Fuller
Assistant to the President
for Cabinet Affairs
456-2823

☑ Becky Norton Dunlop
Director, Office of
Cabinet Affairs
456-2800

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

MEMORANDUM TO: The Cabinet Council on Legal Policy

FROM: William French Smith
Attorney General

SUBJECT: Attorneys' Fee Cap Legislation

The Cabinet Council on Legal Policy must decide whether the Administration should propose legislation to limit awards of attorneys' fees against federal, state, or local governments under federal law and, if so, what kind of "fee cap" should be proposed.

I. BACKGROUND

Currently, there are over 120 federal statutes that permit courts to award attorneys' fees to private parties who prevail against the federal government in litigation. In addition, federal civil rights laws allow federal courts to assess attorneys' fees against state and local governments in favor of prevailing plaintiffs. Despite the number and breadth of these fee-shifting statutes, only the Equal Access to Justice Act provides any guidance to the courts as to how "reasonable attorneys' fees" are to be calculated. In provisions of the Equal Access to Justice Act, passed in 1980, Congress imposed a maximum hourly rate of $75 an hour.

Under all other "fee-shifting" statutes, courts have been free to set compensation rates according to their own perception of the local market rates, the quality of the attorney's work, and the risk factors incurred by the attorney in undertaking representation. Though the formulas have varied considerably, courts have often allowed hourly compensation levels between $100 and $200 and have adjusted even these high hourly rates upward by "multipliers" or bonus factors to reflect exceptional performance or contingency/risk factors. In some cases, this has resulted in exceedingly high hourly attorneys' fee awards: by applying multipliers some courts have awarded fees in the range of $300-$400 per hour. Excessive attorneys' fee awards are a matter of considerable concern not only to the federal government, but also to state and local governments who have been forced to pay large attorneys' fee awards to plaintiffs under federal civil rights statutes.

II. LEGISLATIVE PROPOSALS

The Office of Management and Budget has drafted legislation to "cap" allowable attorneys' fees at reasonable hourly rates. Drafts of this legislation have been discussed informally within the Administration and with Congress over the past year, but no Administration bill has been sent to Congress. OMB's current draft bill includes provisions which would: (1) set the cap for attorneys' fees charged against the government at the average hourly pay level for senior government litigators (GS-15, step 5) plus an additional 50% of this rate for overhead (for a total rate of about $53 per hour); (2) limit the hourly compensation paid for attorneys who are salaried employees of a litigant to their hourly salary rate plus an overhead factor; and (3) impose the same limits on attorneys' fees assessed against state and local governments.

Proposals to "cap" attorneys' fee awards against the federal government, and state and local governments under civil rights statutes, have generated considerable controversy and opposition from civil rights and "public interest" groups over the past year. Attorneys' fee cap proposals are thought by public interest litigating organizations to strike at a vital source of their financial support. Accordingly, these groups have characterized fee cap proposals as "anti-civil rights" or "anti-environmental" proposals meant to "defund" public interest litigators. A proposal introduced last year to limit attorneys' fees assessed against state and local governments under federal civil rights statutes (by eliminating multipliers and bonuses) had no success in Congress -- even though it was supported strongly by the National Association of Attorneys General -- because it was successfully characterized by its opponents as "anti-civil rights" legislation.

The Department of Justice agrees with OMB that there is a real need for statutory guidance to the courts in this area. Exploration by various sources, including officials at the state level, reveals, however, little enthusiasm in the House of Representatives for action on this type of legislation during this Congress.

Consequently, the Department of Justice believes that the bill should be approached, not as an entry into a negotiation, but rather as a statement of the Administration's position. Thus, we would hope that our version does not unnecessarily open us up to attack, particularly by civil rights and environmental groups, as being obviously unreasonable. It is in this spirit that our two options are put forward. Indeed, perhaps the CCLP will wish to consider the question of whether the timing of this bill makes sense for the Administration at this point in the congressional cycle.

III. AREAS OF DISAGREEMENT BETWEEN DOJ AND OMB

If CCLP decides to recommend introducing an Administration bill, two questions concerning the specific content of the bill must be decided: (1) whether the fee cap should be tied to a government scale pay rate or simply set at the Equal Access to Justice Act rate of $75, and (2) whether hourly compensation to salaried attorneys should be limited to their hourly rate plus an overhead factor.

A. Issue 1 - Fee Cap Level

OMB has proposed setting the cap at the average level for senior government litigators (GS 15, step 5) plus 50% for overhead. This would amount to about $53 per hour. OMB believes that the fee cap should be tied to a government pay rate because many fee-shifting statutes are premised on the theory that people who sue the government for public benefit purposes are acting as "private attorneys general" and that compensation should, therefore, be consistent with rates paid to public attorneys. If $53 is deemed insufficient, OMB would, alternatively, propose that the legislation allow an additional 20% profit factor to raise the rate to about $64.

The Department of Justice proposes using the $75 per hour level that has recently been endorsed by the Congress in the Equal Access to Justice Act.

OMB Argues:

- It is a better strategy to start with a lower figure to leave room for negotiating on the Hill.
- The $53 figure has a rational basis (tied to government salaries), whereas $75 used by Congress in the Equal Access to Justice Act is somewhat arbitrary. Its use may make it more difficult to hold the line against increases in the future.
- The Equal Access to Justice Act is not a good analogue because it has a higher threshhold requirement for obtaining a fee award. Under that statute, awards are precluded even where the government loses the case if the government's action is "substantially justified."

DOJ Argues:

- The $75 figure is more defensible than the OMB formula because it has been endorsed recently by Congress in the Equal Access to Justice Act and because it makes allowance for contingency or risk factors (arising from the fact that fee awards are available only to prevailing parties) above and beyond an attorney's salary and overhead expenses.

- We should not approach the Congress with a low "negotiating position," because the House of Representatives will not give serious consideration to such a proposal and will refuse to negotiate on the bill.

- The primary purpose of this legislation is to eliminate the use of bonuses and multipliers. Unless the fee cap is set at a level which seems reasonable and includes an allowance for contingency factors above the government pay rate, Congress may be induced to add an amendment authorizing judges to use multipliers and bonuses.

- The "fee cap" found in the Equal Access to Justice Act provides a good analogue for setting a broader, general fee cap. Even though attorneys' fees are allowed under the Equal Access to Justice Act only where the government's position is "substantially unjustified," the calculation of the fee award is meant to be compensatory, not punitive. Congress did not intend that fees should be greater under EAJA than other statutes, but imposed a $75 cap as its judgment of the proper limit for reasonable attorneys' fees in the broad range of cases to which EAJA applies.

B. Issue No. 2 -- Salaried Attorneys

OMB has proposed that, where litigants use in-house attorneys and the $53 fee cap level is "significantly greater" than the litigant's actual attorneys' fee costs, fee awards should be limited to the actual costs, with an allowance for overhead. This limitation would apply to organizations in proceedings under the Equal Access to Justice Act. The rationale for this proposal is that attorneys' fee awards should be related to actual costs and should not confer a windfall on litigants. This limitation would have a significant impact on public interest organizations -- who often litigate with low-paid staff attorneys -- and could be criticized as an effort to defund public interest litigators.

If it is deemed advisable to mitigate such criticism, OMB would, alternatively, allow an additional 20% factor for profit, and expand the coverage of the provision to include all salaried attorneys, including associates in law firms. If the limitation were applied to all salaried attorneys, it could not be criticized as aimed primarily at public interest litigators.

The Department of Justice believes that neither version of this limitation should be included.

OMB Argues:

- Such a limitation in one or the other formulation is necessary to avoid windfalls to organizations using salaried attorneys.

DOJ Argues:

1. With respect to the first version applying only against in-house counsel of a litigant:

- The limitation would appear to bear most heavily on public interest groups and thus generate excessive controversy.

- Organizations with staff attorneys could often circumvent the limitation by restructuring their participation relationships with counsel in litigation. For instance, a public interest organization could avoid this provision by determining not to appear itself as a party litigant represented by its own attorneys but to represent another party with its attorneys.

2. With respect to the second version of this limitation applied to all salaried attorneys:

- Expansion of the limitation to salaried law firm attorneys could fail to silence the objections of public interest organizations while increasing the objections of private law firms.

- The limitation might draw strong opposition from the small business interests that the Equal Access to Justice Act was enacted to protect.

- The limitation, focusing on the hourly rates of private attorneys, could generate litigation over what the hourly rate of an individual attorney is (when benefits are calculated) and what constitutes an amount "significantly in excess" of that rate.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

MEMORANDUM

June 20, 1983

To: Joe Wright
Fred Fielding
Ken Cribb
Jim Cicconi
Mike Uhlmann
Nancy Risque

From: Mike Horowitz

Subject: Fee Reform Bill

On late Friday, in a further effort to close the gap with Justice on a jointly supportable bill, we proposed the following revisions, intended to address all of the concerns raised by Justice:

- fee cap for civil cases raised to $75;
- all CJA fees doubled;
- in civil cases only, fee cap for salaried attorneys at their hourly rate (annual salary divided by 2,080) plus 100% overhead allowance (raised from draft's 50%) plus 20% "profit factor" called for in Judge Wilkey's dissent in the Copeland case.

I am now hopeful that all parties can happily support a fee reform bill which: has the support of the overwhelming number of state Attorneys General, doubles CJA fees, and corrects a set of extraordinary abuses now prevalent, some of which are set forth in Joe Wright's CCLP memo.

I should be hearing from Justice this morning and will continue to make every effort to assure a CCLP meeting at which all parties are in agreement and are prepared to discuss tactics and processes by which we can move the bill as quickly and as far as possible.

THE WHITE HOUSE
WASHINGTON

CABINET AFFAIRS STAFFING MEMORANDUM

DATE: 6/17/83 NUMBER: 118765CA DUE BY: _____

SUBJECT: Cabinet Council on Legal Policy - Monday, June 20, 1983

3:30 p.m. in the Roosevelt Room

	ACTION	FYI
ALL CABINET MEMBERS	☐	☐
Vice President	☑	☐
State	☑	☐
Treasury	☑	☐
Defense	☐	☑
Attorney General	☑	☐
Interior	☑	☐
Agriculture	☐	☑
Commerce	☑	☐
Labor	☑	☐
HHS	☑	☐
HUD	☑	☐
Transportation	☑	☐
Energy	☐	☑
Education	☐	☑
Counsellor	☑	☐
OMB	☑	☐
CIA	☐	☑
UN	☐	☑
USTR	☐	☑
CEA	☐	☑
CEQ	☐	☐
OSTP	☐	☐
ACUS	☑	☐
_____	☐	☐

	ACTION	FYI
Baker	☑	☐
Deaver	☐	☐
Clark	☐	☑
Darman *(For WH Staffing)*	☑	☐
Harper	☑	☐
Jenkins	☐	☑
Fielding	☐	☐
_____	☐	☐
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CCCT/Gunn	☐	☐
CCEA/Porter	☐	☐
CCFA/Boggs	☐	☐
CCHR/Carleson	☐	☐
CCLP/Uhlmann	☑	☐
CCMA/Bledsoe	☐	☐
CCNRE/Boggs	☐	☐

REMARKS: The Cabinet Council on Legal Policy will meet on Monday, June 20 at 3:30 p.m. in the Roosevelt Room. Attached is an additional paper on Legal Fee Cap. (CM#378) The first paper was distributed to you earlier today.

RETURN TO:

☐ Craig L. Fuller
Assistant to the President
for Cabinet Affairs
456-2823

☑ Becky Norton Dunlop
Director, Office of
Cabinet Affairs
456-2800

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

June 17, 1983

MEMORANDUM

TO: THE CABINET COUNCIL ON LEGAL POLICY

FROM: Joe Wright

SUBJECT: Attorney's Fee Reform Legislation

1. Justice and OMB agree that courts have generally abused their broad discretion in providing awards of attorney's fees under federal fee-shifting statutes, and that there is a real need for statutory standards for awards of attorney's fees.

2. The disagreements between Justice and OMB regarding the two provisions in the proposed bill are well summarized in Mike Uhlmann's memorandum. Further discussion through the A-19 process and otherwise should result in a common position. The primary point, however, is that the Administration should take the initiative and submit a fee cap bill now.

3. Over 100 fee-shifting statues, other than the Equal Access to Justice Act, provide for awards of "reasonable attorney's fees" without standards for courts to follow in determining such awards. As the Attorney General notes in his memorandum, courts are now frequently awarding attorney's fees at hourly compensation rates of between $100 and $200, and have often adjusted these awards by "multipliers" resulting in some cases in fee awards in the $300-$400 per hour range.

4. In all, the federal fee-shifting statutes operate to oversubsidize attorneys who litigate in civil cases not only against the federal government but also, in a broadening variety of cases, against State and local governments.

5. While civil attorneys have increasingly used federal fee-shifting statutes as a means of obtaining excessive awards against federal, State, and local government defendants, defense attorneys for indigent criminal defendants have been limited to maximum hourly compensation of $20 for time out of court and $30 for time in court and total ceilings, such as $1,000 for a felony case, under provisions of the Criminal Justice Act ["CJA"] that have not been changed since 1970.

6. The proposal for substantial fee increases for Criminal Justice Act representations converts the bill from a fee cap into a fee reform bill. This should result in significant support within the legal community.

7. While the proposed bill will be vigorously attacked by various "public interest" groups, it is directed toward what are really taxpayer and federalism issues. In times of acute fiscal austerity, the federal, State and local government taxpayers cannot afford and should not be required to finance private attorneys at excessive rates which greatly exceed what the government pays its own attorneys. Furthermore, it is inappropriate for the federal government to impose statutory requirements on State and local governments to pay awards of attorney's fees, without providing standards to control such awards. It is entirely consistent with the President's program for the Administration to introduce a bill to set standards on the amounts to be paid by taxpayers for attorney's fees, rather than to continue to vest open-ended discretion in the courts. The bill reflects the Administration's concern about oversubsidization of attorneys at taxpayers' expense and should be attractive to the larger constituency of persons who share this concern and who are concerned about rising legal costs in general.

8. The following are a few examples of recent abuses:

o In the leading case in the D.C. Circuit, the Court awarded $160,000 for the work of two young associates of the firm of Wilmer, Cutler and Pickering although the relief received by the clients only amounted to some $33,000 in backpay, promotion of four employees and approval of an Affirmative Action Plan developed internally by DOL. On appeal -- where the sole question was the reasonableness of the $160,000 fee award -- the attorneys sought another $100,000 for handling the fee award litigation. The fee award was settled for $75,000, resulting in a total award of $235,000 to the attorneys.

o Currently pending in the Office of the U.S. Attorney for the District of Columbia are two employment discrimination cases in which requests have been made by downtown Washington law firms for attorney's fees in excess of $4.3 million and $1.6 million, respectively.

o In February, 1982, a public interest group, the Greater Los Angeles Council on Deafness, Inc., brought a successful lawsuit challenging government discrimination against the handicapped by failing to require a Los Angeles public television station to provide sign language interpreters for deaf viewers. The Court found the reasonable hourly rate for the plaintiff's attorney to be $175 per hour, and awarded a bonus multiplier factor of 2, resulting in an hourly rate award of $350 and a total fee award of $436,000.

- o A recent award of nearly $2 million was made to two Minneapolis law firms who won a federal class action sex discrimination case against the University of Minnesota. The court awarded $375 per hour to one firm and $240 per hour to the other. Both hourly rate awards were triple the firms' normal hourly charges.

- o In Keith v. Volpe, (C.D. Cal. 1980), the court applied a multiplier of 3.5 to reasonable hourly rates of from $25 to $117.50, for effective hourly rates of from $87.50 to $411.25, and a total award of $2,204,535 in attorney's fees.

- o In Regina v. Dalsheim, (S.D.N.Y.), the court rejected the prisoner's numerous challenges to the condition of the prison hospital. The court did direct the prison to install an electric buzzer over the prisoner's bed, and, in light of that incidental relief, the court awarded $13,383.22 in attorney's fees.

- o In a lawsuit challenging prison conditions in Texas, the court awarded attorney's fees to 13 attorneys at rates ranging from $45 per hour to $150 per hour, and awarded a bonus multiplier factor of 2, resulting in effective hourly rates of $90 to $300, and a total fee award which exceeded $1.66 million.

- o In Oniskor, Logan and Dock v. Milliken, (D. Utah 1980), each of three mentally ill prison inmates received $500 while their three lawyers received approximately $22,000 in fees.

- o The D.C. Circuit has awarded attorney's fees to unpaid law students and to pro se prisoners who obtained documents in suits under the Freedom of Information Act.

- o The growing size of the fee award industry can be seen from the federal fee award treatises now beginning to appear; there is also a bi-monthly Harcourt Brace publication, "Federal Attorney Fee Awards Reporter." A D.C. law firm recently sent out a general mailing to the bar soliciting retention on the basis of its special expertise in obtaining high attorney fee awards against the government. Large law firms now view what had previously been pro bono work for young inexperienced associates as a lucrative form of practice.

9. There are good reasons why now is the time for the Administration to introduce the bill:

- o There is support in the Senate for an attorney's fee bill. Senator Hatch's staff estimates that his Subcommittee will pass the bill with a clear majority, and that the full Committee vote will be close but winnable with Administration support.

- o Commitments have been made to various State AG's that we would support a fee reform bill capping civil fee awards against State and local governments.

- o Given considerable pressure for CJA fee increases, the draft bill's chances will be materially improved. Without our bill, CJA increases might pass this session and thereby sharply limit any future prospect for Congress to take up an overall fee reform bill limiting civil awards.

- o If the attorney's fees issue is seen as an overall reform and taxpayer issue, the Administration can and should do reasonably well. There was considerable press following the inclusion of an attorney's fees initiative in the President's FY 83 budget. Given its presentation as an omnibus approach to attorney's fees, press treatment was fair, indeed, quite favorable.

- o While, as the Attorney General states, the House poses serious problems, Senate enactment of a bill will trigger many options to force House action. (House interest in CJA increases enhances this prospect.) At the very least, a Senate passed bill will serve as a model for amendments to fee-shifting provisions in individual statutes as they are reviewed by Congress.

- o The bill represents good and important public policy. If the Reagan Administration can't support a modest fee reform bill backed by a bi-partisan coalition of State AG's (as well as business and taxpayer groups), who ever will?

10. The time is ripe for the Administration to submit legislation to set standards for all attorneys who litigate against the government under federal civil or criminal statutes. As a pro-taxpayer/anti-windfall to attorneys initiative, and one that increases CJA awards, the proposal is sound. The matter should no longer be left to the courts.

Document No. _____

WHITE HOUSE STAFFING MEMORANDUM

DATE: May 12, 1983 ACTION/CONCURRENCE/COMMENT DUE BY: ----------

SUBJECT: MEETING OF THE CABINET COUNCIL ON LEGAL POLICY - INTERCIRCUIT TRIBUNAL PROPOSAL -- With the President, May 19, 1983 2:00 p.m.

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☐	☐	GERGEN	☐	☐
MEESE	☐	☐	HARPER	☑	☐
BAKER	☑	☐	JENKINS	☐	☐
DEAVER	☑	☐	MURPHY	☐	☑
STOCKMAN	☐	☐	ROLLINS	☑	☐
CLARK	☑	☐	WHITTLESEY	☐	☑
DARMAN	☐P	☒SS	WILLIAMSON	☑	☐
DUBERSTEIN	☑	☐	VON DAMM	☑	☐
FELDSTEIN	☐	☐	BRADY/SPEAKES	☑	☐
FIELDING	☐	☐	ROGERS	☐	☐
FULLER	☐	☐	BAROODY	☑	☐
			SMALL		✓

Remarks:

Action assignees are invited. Please inform Patsy Faoro (x2800) in the Office of Cabinet affairs if you will attend.

Attached is a paper on the Intercircuit Tribunal Proposal. This issue is scheduled for a Cabinet Council on Legal Policy meeting with the President May 19, 1983. Please review the attached paper and submit comments to the Office of Cabinet Affairs by Noon, Tuesday May 17, 1983.

Richard G. Darman
Assistant to the President
(x2702)

Response:

EXECUTIVE SUMMARY

- Some have argued that in recent years the workload of the Supreme Court has become so heavy that it threatens the ability of the Court to discharge its functions in a timely manner.

- The Chief Justice and other members of the Court have publicly recommended the creation of an intercircuit tribunal as an adjunct of the Supreme Court. A number of bills have been introduced that would create such a tribunal, and while the details of these bills vary, in general they would create for a five-year trial period a national appellate court below the Supreme Court that would hear cases referred to it by the Supreme Court and issue nationally binding decisions.

- An internal Department of Justice committee considered the various proposals and, with Brad Reynolds dissenting, decided to recommend establishing an experimental intercircuit tribunal whose judges would be sitting circuit court judges selected by the Chief Justice with the approval of the Supreme Court.

Issues

The case for the intercircuit tribunal is set forth in the Justice Department committee's memo by Paul Bator and is based largely on statistical analyses of the Supreme Court's workload.

However, the proposal raises a number of more profound philosophical and policy issues, some of which are touched upon in Brad Reynolds' "reservations" attached to the Bator memo:

- To a large extent, the Supreme Court may be the author of its own problems. Recent liberal decisions by the Court have greatly expanded judicial power and the judiciary's workload by expanding access to the federal courts, habeas corpus proceedings, private rights of action, Section 1983 suits, supervising state criminal proceedings, and proliferating multiple and inconsistent judicial opinions that provide no guidance to lower courts.

- One of the few limits on the power of the federal judiciary today is the limited nature of judicial resources. In many cases, it is the prospect of a judicial overload that gives liberal justices pause about expanding federal causes of action. Increasing judicial resources may simply exacerbate the current tendency toward judicial aggrandizement. It does not appear that the Department of Justice committee considered this issue in any detail.

- Some critics of the Court have asked how a body that takes two-and-a-half months of vacation a year can be said to be overworked.

- Giving nationwide decision-making power to judges who were appointed and confirmed for regional circuit courts of appeal arguably infringes the prerogatives of the President and the Senate; attention should be given to the constitutional arguments for Presidential appointment of tribunal judges.

- Any tribunal appointed by the Chief Justice with approval of the full Supreme Court would lead either to a polarized tribunal (one judge to satisfy Marshall, one to satisfy Rehnquist, etc.) or to a bland one tending toward mediocrity as a means to offend no one. Worse, if a strong working majority develops on the Supreme Court at any time in the future, the intercircuit tribunal could be used as an arm to augment Supreme Court power and further enforce the policy preferences of the Supreme Court majority.

THE WHITE HOUSE

WASHINGTON

May 13, 1983

MEMORANDUM FOR JAMES A. BAKER, III

FROM: Jim Cicconi

SUBJECT: Intercircuit Tribunal Proposal

For your information:

As you know, the Chief Justice has proposed a type of intercircuit tribunal which would, among other duties, resolve conflicts between circuit courts. The objective is to partially relieve the Supreme Court's case overload.

After an internal committee review, DOJ had planned to testify in support of this proposal several weeks ago. However, when the matter was brought to Ed Meese's attention, he ordered that the testimony not be cleared. At the time, it was felt that the proposal should be given more thorough consideration within the Administration than was afforded by the DOJ committee's review.

Various forms of Burger's proposal have been introduced in the Congress. One by Kastenmeier, which is typical, would set up nine judges to serve for five-year terms; these would be appointed by the Supreme Court from among present circuit court judges.

Papers are now being circulated arguing the pros and cons. Having reviewed the various points involved, I feel we should be reluctant to endorse this proposal. I could detail various reasons, but mainly, I do not feel a convincing case has been made that such a tribunal is needed. Even if one accepts the premise that the Supreme Court is severely overloaded (and many dispute this), a major structural change such as this is not justified by workload alone when there are simpler alternatives (abolition of diversity jurisdiction, for example). Brad Reynolds, who disagrees with the DOJ committee's recommendation, also makes a convincing argument that workload pressures, which are due in no small part to the Court's expansion of federal causes of action, will serve as a curb on further judicial activism.

Plans are for CCLP to discuss this subject with the President on May 19. However, Fred Fielding and I talked with Fuller this morning and pointed out that DOJ will be testifying on Kastenmeier's bill May 18; thus, some adjustments will have to be made.