STATEMENT OF

NOEL ANKETELL KRAMER
AND
ELLEN BASS
ON BEHALF OF
DIVISION IV OF THE
DISTRICT OF COLUMBIA BAR

BEFORE THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE
OF THE COMMITTEE ON THE JUDICIARY

U.S. HOUSE OF REPRESENTATIVES

on

H.R. 1968 AND H.R. 1970

NOVEMBER 10, 1983

My name is Noel Anketell Kramer, and I am the Chair of the Division IV Steering Committee of the District of Columbia Bar, which is concerned with courts, lawyers and the administration of justice. With me is Ellen Bass, who serves as the Chair of Division IV's Legislation Committee. That Committee prepared, and the Steering Committee adopted, a position paper sent to members of the House Judiciary Committee endorsing the proposals of H.R. 1968 and H.R. 1970 to remove the Supreme Court's mandatory jurisdiction and to establish an Intercircuit Tribunal for a 5-year experimental period. In addition, the position paper made a number of practical suggestions concerning the functioning of the proposed Tribunal.

Ms. Bass and I welcome this opportunity to summarize for this Committee the points made in Division IV's position paper. Rather than reiterate those points in this written statement, however, we believe it would be more useful to this Committee to attach the Division IV position paper for the Committee's review.

Let me make clear that we are presenting the views only of Division IV of the D.C. Bar, and not those of the D.C. Bar as a whole. The D.C. Bar has no authority to take public positions (except upon a referendum of all of its members), but each of the Bar's Divisions -- which are devoted to different subject matter areas -- can do so, as Division IV has done on the issues before your

Committee today. Nevertheless, Division IV's position paper was submitted to the D.C. Bar's Board of Governors, in accordance with regular procedures, and the Board expressed no disapproval of the position taken by Division IV.

Thank you for this opportunity to present the views of Division IV of the D.C. Bar.

POSITION PAPER OF THE LEGISLATION COMMITTEE, DIVISION IV, D.C. BAR REGARDING H.R. 1968, A BILL TO ELIMINATE THE MANDATORY APPELLATE JURISDICTION OF THE SUPREME COURT, AND H.R. 1970, A BILL TO ESTABLISH AN INTERCIRCUIT TRIBUNAL AND FOR OTHER PURPOSES

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POSITION PAPER OF THE LEGISLATION COMMITTEE, DIVISION IV, D.C. BAR REGARDING H.R. 1968, A BILL TO ELIMINATE THE MANDATORY APPELLATE JURISDICTION OF THE SUPREME COURT, AND H.R. 1970, A BILL TO ESTABLISH AN INTERCIRCUIT TRIBUNAL AND FOR OTHER PURPOSES.

The Legislation Committee of Division IV of the District of Columbia Bar, which is concerned with courts, lawyers and the administration of justice, has studied H.R. 1968 and H.R. 1970, pending bills which relate to the work-load of the United States Supreme Court. The Committee endorses H.R. 1968 which would eliminate most of the Court's mandatory jurisdiction, and H.R. 1970, which would create a temporary Intercircuit Tribunal of the United States Court of Appeals. The Steering Committee of Division IV has approved and adopted these positions.

I. The Bar's Interest In Legislation Affecting The Workload of the Supreme Court.

The D.C. Bar, perhaps more than any other local Bar, is affected by the cases and issues before the Court. Many of the Bar's active members are engaged in some form of Federal practice, and members often receive referrals of cases for the purpose of bringing them before the Supreme Court. The Bar therefore has a unique interest in assuring that the Court can accept all appropriate cases for review and resolve them expeditiously after full deliberation.

II. The Need for Legislation.

The history of the Supreme Court after the Civil War has been marked by workload crises and intermittent

legislative responses. Since 1925, when the last major statute addressing the Court's workload was enacted,[1] the number of new cases filed with the Court each term has increased six fold.[2] The urgency of the present caseload problem has been documented in two major studies[3] and has been publicly discussed by the Chief Justice and various legal scholars, including some who have testified before this Subcommittee. Significantly, all of the sitting Justices now recognize that a serious problem exists.[4] There is no need to elaborate upon, or reason to doubt, the conclusion of these authorities that further remedial legislation is required. The practicing bar is concerned that, absent such legislation, there will be a perceptible sacrifice in the quality of justice.

III. H.R. 1968: Supreme Court Review.

Decisions subject to the Court's mandatory jurisdiction may originally have been perceived by Congress as involving the public, rather than a private, interest.[5] The public interest today, however, lies with the expeditious resolution of meritorious cases. As early as 1921, Justice Brandeis recognized that not all of the cases which can be appealed as of right are meritorious and that their number can unduly burden the Court.[6] In the 1981 term, a fourth of the argued cases and over half of the cases disposed of

on the merits were mandatory appeals.[7/] Elimination of mandatory jurisdiction will free the Court to decide more worthy cases presented by petitions for certiorari.

The removal of mandatory jurisdiction is a proven means of addressing the Court's workload problems. It has the general endorsement of legal commentators and the Court. The Legislation Committee can discern no reason why H.R. 1968 should not be enacted.

IV. H.R. 1970: Intercircuit Tribunal.

While enactment of H.R. 1968 may temporarily ease the Court's current workload pressures, it is unlikely to provide a satisfactory long term solution. Presumably, some of the cases subject to this provision will still be accepted for review on merit. The discretionary docket will not be affected at all. Legislation is therefore still required for increasing the Court's capacity to accommodate the growing number of lower court decisions worthy of review. The present Bill's proposal for a temporary Intercircuit Court of Appeals is one of the least radical measures that has been advanced and reflects a sensible, measured approach to the overall caseload problem. This particular proposal includes two important safeguards absent in previous recommendations for a national court of appeals.

First, the Supreme Court would retain total control over the Tribunal's caseload. The Tribunal's jurisdiction would depend entirely on referrals by the Court on a vote of at least five justices. Should the Court find that its own workload has become manageable or, for whatever reason, perceive the Tribunal as ineffective, it need simply cease to make referrals and, as a practical matter, the Tribunal's jurisdiction would be terminated well before the statutory sunset date.

Second, unless extended by Congress, the Tribunal would expire after five years under an automatic sunset provision. Thus, the Tribunal is only an experiment and its creation does not imply or require a commitment to continued existence beyond the trial period.

The Legislation Committee supports H.R. 1970 as a worthwhile experiment that will afford a national forum of appellate review for meritorious cases which the Supreme Court would have denied because of workload constraints. The Supreme Court also can refer cases which it would have decided only because a uniform national decision was necessary. However, the Committee wishes to make the following practical suggestions regarding the new Tribunal.

1. A court with the national importance of the Tribunal should not be left to the happenstance of shifting

panels under a lottery system as is proposed. As Professor Daniel Meador of the University of Virginia Law School has stated to this subcommittee, the Tribunal must be both stable and predictable if it is to be perceived as a national court. These objectives will not be achieved under a system where the Tribunal's rulings might vary with the composition of randomly selected panels. They can only be achieved through a settled tribunal of the same judges hearing each case en banc. Moreover, an en banc tribunal would burden the circuit courts less than the proposed panel system.

We suggest that the Tribunal be composed of five members who would be designated by the Supreme Court. The Court should also designate an alternate member who could sit when a member had to recuse himself (because he participated in the decision below) or was otherwise incapacitated. Allowing the Court to select the judges should help ensure that the Tribunal reflects the philosophy of the Court, encourage the Court to refer cases, and make Court review of Tribunal decisions less likely.

Ideally, the judges would be appointed for the full five-year term. In addition to ensuring that the philosophy of the Tribunal would not shift periodically, retaining the same judges for the life of the Tribunal should minimize disruption of the circuit courts' own workloads. The Supreme

Court should, of course, be able to fill vacancies as they arise. If the Tribunal proves successful, serious consideration should be given to the appointment of new Article III judges.

2. In order that the Tribunal be given a full trial period, its five years should not begin to run until the date of its first argument. Further, the Bill should allow the Tribunal to dispose of any cases remaining on its docket on the sunset date, or otherwise provide for their disposition. Without such provision, the Supreme Court may not want to refer any cases during the Tribunal's last year.

3. The Chief Justice has proposed attaching the Tribunal administratively to the clerk's office and physical facilities of the United States Court of Appeals for the Federal Circuit. This proposal has merit. It offers the most economical and efficient way to administer this experiment. More permanent administrative arrangements can be made should the new court prove successful.

4. To preclude an opportunity for delay, the mandate from the Intercircuit Tribunal should be directed to the District Court and issue within five days of the date of judgement. Mandate should be stayed only upon the extraordinary order of the Supreme Court.

5. Careful study of the results of the experiment is necessary. We suggest that a specially-appointed body, such as the Federal Courts Study Commission proposed under Title V of S. 645, be directed to evaluate the Tribunal and submit a recommendation to Congress as to whether the new Court should be extended beyond the sunset date.

The Legislation Committee of the D.C. Bar appreciates the opportunity to express its views on these important issues.

Legislation Committee
Division IV
The District of Columbia Bar

FOOTNOTES

1/ The Judiciary Act of 1925, 43 Stat. 936 (Feb. 13, 1925).

2/ In the 1926 term, 718 cases were filed. In the 1981 term, there were 4,422 new cases. Source: Clerk's Office, United States Supreme Court.

3/ The Freund Committee Report, 57 F.R.D. 573 (1972) and the Hruska Commission Report, 67 F.R.D. 195 (1974).

4/ See Rx For An Overburdened Supreme Court: Is Relief In Sight?, 66 Judicature 394, 404 (April 1983) and remarks of Justices Marshall and Brennan to the Hruska Commission, n.3, supra, 67 F.R.D. at 403, 405.

5/ Cf. Justice Brandeis' dissent in Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 294 (1921).

6/ Id., 257 U.S. at 298.

7/ Burger, 69 ABAJ 442, 443 (April 1983).