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Action: Remarks by Mr. DeConcini

THE NEW INTERCIRCUIT TRIBUNAL

● Mr. DECONCINI. Mr. President, the Courts subcommittee will shortly be marking up a comprehensive court reform bill which I strongly support. However, title VI of the S. 645, has been a cause of great concern to me and other commentators on the Federal courts. I have received a number of adverse comments to title VI, which creates a new Intercircuit Tribunal interposed between the Supreme Court and the regional courts of appeal.

The bench and bar of my home State have reservations about the need for this new court and question who it is designed to help. Serious concern also exists with many judges of the ninth Circuit Court of Appeals, the circuit which stretches from Arizona to Alaska to Guam. Among the most eloquent statements setting forth the pros and cons of the proposed Intercircuit Tribunal is a set of comments prepared by Judge Sneed of the ninth circuit. I commend them to my colleagues and ask that they be placed in the RECORD.

The material follows:

COMMENTS ON H.R. 1970 AND S. 645

(By Judge Joseph T. Sneed)

My text is simple. H.R. 1970 and Title VI of S. 645 constitute improperly designed solutions to an indistinctly perceived set of problems.

Before developing my text let me acknowledge quickly that the federal judiciary confronts an enormous set of problems arising from the mounting case load. Each level of the judiciary is under enormous pressure to devise the means by which its specific problems can be solved. District courts seek more

judges, more courtrooms, expanded powers for magistrates, larger staffs, and more sophisticated office equipment. Circuit courts similarly seek more judges, increased numbers of chambers, devices by which the time devoted to individual appeals may be reduced, larger staffs, etc. And, as H.R. 1970 and S. 645 indicate, the Supreme Court also seeks to design the means by which it can deal with the growing number of cases that deserve review. The instrument chosen is a body called the Intercircuit Tribunal.

Let me also acknowledge that as a circuit judge I am uncomfortable in addressing myself to a proposal that Justices of the Supreme Court believe would provide assistance to them. My plea easily could be attributed either to ignorance, officiousness, or envy. I believe that this is not the case. I write only in the public interest as I perceive it.

I. WHAT PROBLEMS MIGHT THESE BILLS SOLVE?

The problems these bills are designed to solve are indistinct. It is true that a cluster of objectives have been identified by those who support these measures, but it is also true that the structure necessary to accomplish a particular objective most effectively very often does not function nearly as well with respect to another objective. For example, a structure to relieve the Supreme Court of a portion of its burden to resolve intercircuit conflicts might not be suitable as the means to relieve the Supreme Court of its entire burden other than to decide only approximately one hundred cases a term. Or a structure designed to do the latter might not be the best way to relieve it of its burden of deciding cases involving such special areas as tax law, environmental law, administrative law, etc. And a structure designed to be an additional tier in the appellate structure of the federal judiciary would not be the most efficient means of resolving intercircuit conflicts or being a helpmate by relieving the Supreme Court of a substantial part of its burden.

II. DO THESE BILLS SOLVE ANY OF THESE PROBLEMS?

A. Specialist court or helpmate court?

The possible objectives just described, as well as others that might be imagined, constitute a spectrum ranging from a tribunal having the narrow function of a specialist court, somewhat similar to the new Federal Court of Appeals, to the broad function of serving as a general helpmate to the Supreme Court. Considering these extremes for a moment, it is obvious that the Intercircuit Tribunal as designed by these bills serves neither objective well. A specialist court, properly constructed, would neither be drawn from existing circuit judges nor be staffed with judges having a tenure of only five years. However, this is what these bills provide. The same can be said of the helpmate function. To serve this end well would require a fixed body of judges having limited tenure, appointed to that court by the Chief Justice with the consent of the Supreme Court. An ad hoc body of circuit judges, selected by circuit judicial councils obviously is unsuited for this function.

B. A court of last resort?

The Intercircuit Tribunal also is not clearly designed to be a court of last resort. Its decisions are reviewable by way of a petition for certiorari by the Supreme Court. Judges with life tenure appointed by the President with the consent of the Senate would be appropriate for a court of last resort. A court of last resort, of course, would create a "three-and-a-half-tier" judiciary with a body similar to the Intercircuit Tribunal functioning as does a dead end siding for railroads.

C. Resolving unimportant circuit conflicts?

The function as Tribunal, such as H.R. 1970 and S. 645 envision, most effectively would serve as probably that of resolving such relatively unimportant intercircuit conflicts as the Supreme Court might refer to it. John Frank recognizes this and has recommended that the work of the Tribunal be limited to this function. Assuming that such assistance is needed, an issue about which many have serious doubts, the proposed tribunal is nonetheless both malformed and unnecessary. Because it is staffed by two circuit judges from each circuit, it under-represents the larger circuits, and is not necessary because circuit conflicts can be more easily resolved.

Let me expand on this last point. The solution to intercircuit conflicts that do not merit Supreme Court attention can be left to the circuits in conflict. This could be done by a statute that authorizes the Supreme Court to certify conflicts to a panel drawn from the regular active judges of the conflicting circuits in a manner that fairly, although not equally in all instances, represents the circuits involved. The certification would state the issue, or issues, in conflict and the circuits perceived to be in conflict. The resolution of the conflict by the intercircuit panel would be binding on the circuits certified by the Supreme Court as being in conflict. In this manner the lesser conflicts would be eliminated. Review by the Supreme Court of this resolution would be by certiorari. A draft of a statute authorizing this procedure appears as an appendix to this statement.

D. Choice of function is delegated to Supreme Court.

Because of the east by which aid to the Supreme Court in resolving lesser conflicts between circuits can be extended, it appears likely that some additional functions are intended to be given the proposed Intercircuit Tribunal. What these are, as already pointed out, is unclear. One might supose that these bills would carefully delineate the functions that the proposed tribunal would perform. Rather than do this, H.R. 1970 and S. 645 in effect delegate this task to the Supreme Court by vesting it with authority to refer such cases as it wishes to the Tribunal. No one, other than possibly the Justices of the Supreme Court, can describe the intended functions of this body.

HOW THE HELPMATE COURT MIGHT FUNCTION

A. Early steps

A few guesses about how a helpmate court might function, however, perhaps would be useful. It is likely one Justice or another has pondered about the utility of such a court. Rather simple statutory interpretation cases as well as conflicts of lesser importance between circuits very likely would make up the Tribunal's initial business. Should these pass muster with the Supreme Court (which they might not should the Tribunal consist of judges not jurisprudentially in sympathy with the majority of the Supreme Court) more important cases very likely would appear on the Tribunal's docket. These cases probably would be ones about which the Supreme Court is either indifferent as to the results, sufficiently uncertain about the proper result to wish to defer final action on the issue until it has received additional guidance, or sufficiently certain about how the Tribunal would decide the case to permit it to act as the Supreme Court's surrogate. In any event, the Supreme Court would not surrender to the Tribunal constitutional cases of a major magnitude.

B. The helpmate court should help, not hinder

Thus, it is fair to say that the Tribunal would function best were it in harmony with the majority of the Supreme Court and had referred to it only those cases just described. A lack of jurisprudential harmony, as well as bickering, between the Supreme Court and the Tribunal would seriously impair its usefulness.

Consider, for example, petitions for certiorari referred to the Tribunal by the Supreme Court. Many of these would not be reviewed by the Tribunal because both H.R. 1970 and S. 645 permit the Tribunal either to accept or deny a petition unless the Supreme Court directs that a decision be reached. A rebellious Trbunal might be inclined to accept those petitions that the Supreme Court thought it should reject and to reject those the Court thought it should accept. The latter possibility could be forestalled, of course, by the Court directing that a decision be reached. The substance of such direction, however, would be for the Supreme Court to grant the petition for certiorari and to assign the writing of the opinion to the Tribunal subject, of course, to the Court's final review by way of certiorari. Under these circumstances the Tribunal in fact would function as a group of highly talented, long-term law clerks to the Justices of the Supreme Court.

The importance of compatibility explains S. 645's creation of the position of Chancellor who would be appointed by the Chief Justice and would preside over the Tribunal. The interests of compatibility, on the other hand, are not served well by the process by which circuit judges are selected to serve on the Tribunal. Both the Senate and House versions, as already mentioned, provide that the judicial council of each circuit would appoint two judges to serve on the Tribunal. Compatibility in the sense here being discussed would be little better than accidental with the body selected in this manner. Aside from other defects of this method of selection (such as its under-representation of larger circuits, its failure to provide for additional circuit judges to replace those placed on the Tribunal, and the absence of a clear reason for placing the duty of selection on the councils, where district judges serve in varying proportions, rather than on the circuit courts) it is undeniable that it serves poorly the helpmate function. Selection by the Chief Justice, with the consent of the entire Court, would best serve that function.

C. The bills' compromise between helping and hindering

The failure of either version of the Tribunal structure to provide for selection by the Chief Justice and the Court reflects uncertainty about the purpose, or purposes, the Tribunal should serve. The roots of this uncertainty are not difficult to discover. They lie amidst one's views concerning the Supreme Court as it has functioned since World War II. Those quite satisfied with the work of the present Court, at least in a broad jurisprudential sense, and convinced that the Court needs help, will tend to favor a Tribunal in which its jurisdiction, its work and the selection of its personnel would be subject to strict Supreme Court control. To such proponents the issue is simple. Help is needed. The best help comes from those in whom trust can be placed. Structure should promote this end. Those less content with the present Court, but happier with the Warren Court, or distrustful of all Courts since World War II, will not embrace a structure that maximizes the control of the Tribunal by the Supreme Court—at least

not at the present time, if ever. Not only will those less content require substantial proof that the Supreme Court needs help but they also will not permit the Supreme Court to select the judges of the Tribunal and will tend to favor reduced control of the Tribunal's work by the Supreme Court. Thus, they very well might favor some combination of assigning by law specific areas of jurisdiction to the Tribunal and limiting the power of the Supreme Court to review decisions of the Tribunal in certain areas. John Frank's recommendation, referred to earlier, is instructive. An intercircuit body fashioned in this manner to some degree would leave us with two courts of last resort, one lesser, the other greater.

IV. IS A TRUE HELPMATE COURT DESIRABLE?

The structures of H.R. 1970 and S. 645, nonetheless, reflect a balance that favors Supreme Court control. Assuming that this control is necessary to serve the helpmate function and that it can be made operational over time, the question then becomes whether it would serve the public interest. A strong argument can be made that it would not. A "responsible" helpmate court, I suggest, could evolve over time to become a court that handled substantially all the non-constitutional litigation. The Supreme Court, under these assumptions, would become a true constitutional court. No one can be certain, of course, but my strong belief is that this would be an unfortunate development. Others, such as Professor Arthur Hellman, have taken this position. The authority of the Supreme Court rests in large measure on the fact that it is a court, not an unrepresentative constitutional convention in perpetual session. To be a court it must take and decide all sorts of cases. To fail to do so would imperil its authority and very few want this to occur.

Even a "true" helpmate court, therefore, would have to be employed very carefully and only to a limited extent. When this constraint is fully appreciated, and it is further realized that the creation and maintenance of such a court will be extremely difficult, the wisdom of creating a body to serve that function becomes highly questionable. The risks incurred to obtain some increased appellate capacity at the national level suggest that other means to provide assistance to the Supreme Court be found wanting or non-existent before either H.R. 1970 or S. 645 is enacted. Others, including Chief Judge Feinberg of the Second Circuit, and Milton Handler, have suggested some means that should be explored.

V. SHOULD WE EXPERIMENT?

To all of this some will say that these bills are mere "experiments" and that their enactment will permit us to learn how a helpmate court will function. This is a beguiling but essentially spurious argument. This is true because, first, the participants, aware that an "experiment" is in progress, will behave somewhat abnormally (Tribunal judges will be more docile and Supreme Court Justices will be more tolerant), and, second, the time of the "experiment" is too short to permit its thorough evaluation. At the end of the five year "experimental" period little will be known that is not already at hand. True, some decisions will have been rendered by the Tribunal, referred petitions of certiorari will have been denied, and perhaps a few decisions will have been reviewed and reversed by the Supreme Court and almost certainly there will have been a dissent by an individual Justice or two to the failure to review a Tribunal decision. Also, it is predictable that within the footnotes of a few Supreme Court decisions will be seen sniper fire directed at either a Tribunal decision, or its use by another Justice, or both. These fairly easily foreseeable developments will contribute little to our ability to determine whether an Intercircuit Tribunal functioning as a helpmate is a good idea. Therefore, analysis of H.R. 1970 and S. 645 should not be suspended pending an "experiment."

Finally, it should be noted that the Federal Judicial Center, at the request of Chief Justice Burger, undertook a study on the subject of experimentation on the law. That study was completed nearly two years ago and recommended that the decision-maker consider four questions when proposing experiments. These four questions are:

1. Do the circumstances justify the experiment?
2. What experimental design will be adequate to produce the required information?
3. What ethical problems might these experimental designs present and how can they be resolved?
4. What authority and procedures are necessary for undertaking the experiment?

These factors, particularly the second, have not been adequately addressed by the proponents of the two bills.

VI. THE NEED FOR COMMISSION STUDY

When all is said and done the crisis the federal judiciary confronts is generated by an enormous increase in federal jurisdiction, inflicted in some instances by the Supreme Court itself, and increased case filings at all levels. We need to restructure both jurisdication and the entire federal judiciary in a comprehensive and compatible manner. This would be the task of a Commission, such as is proposed by Title V of S. 645. Ad hoc adjustments, but which, as said before, are improperly designed solutions to an indistinctly perceived set of problems, are not the answer.

APPENDIX

DRAFT INTERCIRCUIT PANEL STATUTE

I.

When a petition for certioral asserts a conflict in the interpretation of applicable law between or among the circuit courts on a particular issue or issues, the Supreme Court of the United States may certify the issue or issues to an intercircuit panel for resolution. The panel shall be composed of judges from the circuits having ruled on the disputed issue or issues, and the panel's decision shall be binding only on the circuits certified as being in conflict.

II.

The intercircuit panel shall consist of two regular active judges from each of the circuits in conflict, and one additional judge from the circuits involved. The two judges serving on the panel from each circuit shall be chosen by lot from the regular active judges of their respective circuits, and the additional judge shall be chosen by lot from the regular active judges of all circuit involved.

III.

In the event the panel fails to arrive at a majority decision, the holding will not be binding upon the circuit courts represented.

IV.

Review of the intercircuit panel's decisions by the Supreme Court shall be by writ of certiorari.●