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THE WHITE HOUSE
PRESS CONFERENCE
OF
ROMAN L. HRUSKA
SENATOR FROM THE STATE OF NEBRASKA
AND
A. LEO LEVIN
EXECUTIVE DIRECTOR
COMMISSION ON REVISION OF THE
FEDERAL COURT APPELLATE SYSTEM

THE BRIEFING ROOM

12:05 P.M. EDT

MR. NESSEN: As you know, the President this morning accepted the final report of the Commission on Revision of the Federal Court Appellate System. This Commission was set up under an act of Congress of 1972 to study the Federal court appellate system.

The members were appointed in early 1973. Four of them were appointed by the President, four by the Chief Justice, four from the Senate and four from the House. Senator Hruska, whom many of you know, was elected the chairman.

They have turned in their final report to the President. We have given you, I believe, a statement by the President on the acceptance of this report.

Senator Hruska will answer your questions as to the contents of the report, and immediately after, I will have my regular briefing.

SENATOR HRUSKA: Thank you, Mr. Nessen.

Here with me is Professor Levin, who has been the Director of our Commission.

The Commission did make its report and tender copies of the report to all four sources -- to the President, to the Senate, to the House, and also to the Chief Justice, who was present at the ceremony.

We feel that it is a report that will remove the general subject of improvement of the Federal appellate court system from the general realm of rhetoric to specifics.

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That is very much needed because this is the fourth body--the first official body, but it is the fourth body--considering this subject that has come forward with a proposal for a national court. In our case we call it the National Court of Appeal.

So, that is the proposition which has our attention in this second phase of the report.

The first phase of our report was rendered in December 1973, at which time we undertook to redraw the boundaries, or propose the redrawing of the boundaries of the fifth and ninth circuits, but this one has for its lead article the proposal of the National Court of Appeal, although there are eight or ten proposals for interior workings of the Federal Circuit Courts of Appeal.

Our work was limited to the Courts of Appeal. We did not get into, and were not allowed by the statute to get into, district court problems, nor into the Supreme Court problems, as such, only where they do make contact and affect each other directly.

I am open for questions, if you have any.

Q Senator, are you going to sponsor legislation for the National Court of Appeals?

SENATOR HRUSKA: I am, indeed. There is already in process the drafting of bills that will be drawn on the basis of this report, both for a National Circuit Court of Appeals and for the other changes that are proposed, which will require legislation.

Q Senator, the Chief Justice and some of the other Justices have suggested this ought to be tried out for a few years on an experimental basis. What is your reaction to that idea?

SENATOR HRUSKA: That was considered by the Commission. We felt that we ought to propose it on a permanent basis. After all, nothing is permanent insofar as court structure is concerned, with one exception.

The Constitution says there shall be a Supreme Court. The Congress cannot touch that court, but it can abolish, or it can alter, or it can create new courts at its pleasure.

We recognize, of course, as a Commission, that that question is a question of policy. If the Congress in its best judgment says it should be on an experimental basis, five years, seven years, ten years, that will be a decision that they can make, and, of course, that will be it.

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On the other hand, if it is put on a permanent basis, at the end of five years, the matter can be reviewed, and it can be abolished and the judges of the court can be assigned to other circuits and the effort would have been made.

Q Senator Hruska, is it your expectation that the Congress will complete action on this proposal in the present Congress, and if that is your expectation, is it a reasonable one?

SENATOR HRUSKA: We would expect that bills will be introduced, available for introduction, and introduced shortly after the August recess, this fall, and hopefully even arrange for some preliminary hearings.

Q Senator Hruska, Chief Justice Burger pleaded for a raise in salary for Justices around the country because they were having trouble getting them. How will this be funded, and to what extent?

SENATOR HRUSKA: You mean, how is it treated in here?

Q . Yes.

SENATOR HRUSKA: We recommend it and say two things. First, there should be an adequate supply of judges to accommodate the ever increasing case loads, and secondly, that there should be salary adjustments not only to attract judges of quality and of good standing, but to keep those that are presently on the Circuit Court.

Q Senator, what is wrong with the system as it exists today?

SENATOR HRUSKA: The basis of the National Court of Appeals is this: You will find the best discussion of it in the testimony of Ervin Griswold, who served for nine years as Solicitor General. The Supreme Court is doing well. This is not for the purpose of relieving the burden of the Supreme Court. It is for the purpose of furnishing greater appellate capacity within the Federal judicial system.

There are many cases Dean Griswold said -- and other cases, as well -- which are deserving of attention, by the Supreme Court, but they sheer do not have time to consider them.

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Consider these figures. They are very brief and simple.

Some 20 years ago, or 30 years ago, there were about 1,000 cases docketed in the Supreme Court. Now there are between 4,500 and 5,000, notwithstanding that differential. Thirty years ago the Supreme Court was deciding and rendering written opinions in about 140 to 150 cases a year. That is still the range, so that over the last 30 or 40 years, they have decided that many cases.

Obviously, with that great increase in litigation, there are many problems to which they cannot address themselves. They sheer do not have time. That would not mean, necessarily, that the National Court of Appeals would consider real national policy questions or deep, profound Constitutional questions.

Those still can be decided by the Supreme Court and would, but it would enlarge the capacity of the court in tax cases, for example, or Social Security cases, or environmental cases that no longer require Constitutional consideration, but just a decision on one side or the other of the two contesting parties.

Q This would come between the circuit courts and Supreme Court?

SENATOR HRUSKA: That is right.

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Q Senator, I am not clear whether you believe this legislation can be passed by the present Congress, or not.

SENATOR HRUSKA: Well, I don't know. We will have to await the reaction to the report and await the time that the issues contained in this report will be addressed by the committees, and with what diligence we can pursue the matter.

Mechanically, yes, it is possible. I would say probably, and we will certainly work towards that end.

Q Senator, did the President endorse your recommendations?

SENATOR HRUSKA: He said that he was going to devote, as he indicated in his statement, devote a good deal of time to study and consideration of it, and he would cooperate with us in processing the proposals so that they can be considered for legislation.

Q How much would this court cost, Senator?

SENATOR HRUSKA: It would involve seven additional judges who would be on the same pay scale that circuit courts are now, as I understand it.

MR. LEVIN: Subject to the will of Congress.

SENATOR HRUSKA: Subject to the will of Congress, but we recommend they be considered as circuit judges. Of course, they would have to be staffed, have quarters, and so on. I don't know what the cost is but it is minimal considering the cost of the entire judicial system.

Q Senator, couldn't cases that went to this National Court of Appeals be appealed further on up to the Supreme Court? This would really not be the last step going to the National Court of Appeals. Cases could be appealed higher to the Supreme Court?

SENATOR HRUSKA: Absolutely. Any case decided by the National Court of Appeals would be subject to a writ of certiorari. They would petition for a writ of certiorari. The granting of that petition would then allow the Supreme Court to review the work of the National Circuit Court.

Q So it might not necessarily reduce the Supreme Court's workload?

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SENATOR HRUSKA: On the contrary. I think in due time, it was considered on the Commission that very few of those cases would be accepted in the Supreme Court for review because they are of high caliber. They are devoting their time to it. After all, the case does have to be decided one way or another, and sometimes soon. So it is considered it would relieve the Court in that way.

Q Are you really doing a favor to litigants by establishing another layer of appellate courts and prolonging the appellate process?

SENATOR HRUSKA: No, not at all. In fact, it would reduce the volume of litigation for this reason. Now we have many instances, and tax law is one of the chief offenders. There would be one rule on tax law in the Ninth Circuit, another one in the Second Circuit, in New York, and its neighborhood. Citizens of the United States who are entitled to a national law on taxes and pay the same kinds of taxes under the same kinds of circumstances, they are not getting that.

The appearance on the scene of a National Circuit Court of Appeals would be that they would be able to take those conflicts and decide them, and thereby eliminate the necessity for proliferation of litigation, and for the searching for a new district or a new circuit court that would hold differently in that same case.

So the national issues would be resolved sooner and in larger number, and it would really reduce litigation.

Q What are the steps, Senator, if the case is there? Does it go directly to this court, or have to go up the steps to get there?

SENATOR HRUSKA: There are two sources of cases -- for cases to be decided by the National Court. One would be by assignments from the Supreme Court, specific assignments. Case number one, two, three, would go to the National Court for decision. Then the Supreme Court could take from the docket itself, 4,500 cases, any number of cases it wanted to, and refer them to the National Court for its selection from that list.

So that is one source, to refer from the Supreme Court.

The other source of cases for this National Court would be transferred, cases transferred from circuit courts to the National Courts, and the National Court could either accept the case for decision or say, no, you decide it on the circuit basis first.

So there are those two sources for cases.

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Q Senator Hruska, only one Justice on the present Court has endorsed, even luke warmly, the idea of transferring cases from the present Courts of Appeals. Five of the other Justices have said they are opposed to that. I know, however, in the final report the Commission did not abandon the transfer of jurisdiction.

Can you tell me why you did not in the face of that kind of opposition?

SENATOR HRUSKA: There is another thing in this report that says by way of a particular detail, that is set in concrete. The reason we put it in was that there are some who believe it would be a valid and a very effective way of dealing with part of the problem.

On the other hand, it is what we would call, if we were at the council table or conference table, it is a negotiable point. If there is too great an opposition to it, obviously Congress will not approve it, and they will try out first the source of litigation being only by reference from the Supreme Court, find out how it works, and then after some years find out if there would be room for reinstatements of the transfer of jurisdiction.

Q How do you feel about it, Senator, as a Member of Congress?

SENATOR HRUSKA: I think it would be well to try it. It would be subject to rules that would be developed by the Supreme Court. Guidelines here by the circuit courts could transfer those cases, and that is also the case with reference to the reference class of cases.

The idea is that the Supreme Court will be the one that will supply those reference cases, but the rules whereby they will be governed in that regard will be formulated by the Supreme Court in keeping with the rule-making power.

Q Senator, is there any way of gauging how much of a speed-up there would be under this new court for getting a final decision?

SENATOR HRUSKA: I don't like to think of it in terms of a speed-up. That has a connotation that there is delay now in the Supreme Court. There isn't, but there is an inadequate output from the Supreme Court from sheer lack of time.

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So there would be an elimination of delay in this way, however, that now when there are inter-circuit conflicts it takes a long time before those inter-circuit conflicts are settled, and sometimes they are never settled because the Supreme Court will not take cognizance of them. By eliminating those inter-circuit conflicts there will be less litigation on that point because whatever is decided by the National Court and not disturbed by the Supreme Court--that would be a relatively short space of time--that becomes national law.

Q Senator, Justice Douglas is conspicuous for proposing this kind of plan and yet you cite his dissent from denial of certiorari as an **example of weakness in the system**, the inadequacy of the Supreme Court's ability to pour out this national law.

How can you use Douglas for one proposition and not accept his other proposition that the Supreme Court could handle these cases?

SENATOR HRUSKA: After all, that is like comparing a zebra with a race horse, really, because in the one case he is acting on certiorari, and in another case he is dealing with the concept that is developed in the report.

He has taken the position that no change is necessary, that the way the Supreme Court is functioning now is ample, and that he doesn't see any necessity for this new concept. However, the other Justices have indicated either that they favor the concept or that they say it is workable, and they do go into the question of timing. They say maybe this is not the time to do it.

Q Then, you reject Justice Douglas's position that the court could accommodate this need for national law. His position is the Supreme Court could.

SENATOR HRUSKA: He doesn't say that the Supreme Court can take on more work and decide more cases. He doesn't do that.

Q Justice Douglas does not do that?

MR. LEVIN: Justice Douglas quite supports, with his repeated dissents--which we have discounted because he seems to be idiosyncratic, and the report so indicates--but he certainly documents the need for the Supreme Court to take additional cases. He is constantly saying we should take additional cases.

Q He says you can't.

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MR. LEVIN: At this juncture, after asserting and underscoring the needs for the Supreme Court to take additional cases, he is divided from his brethren in terms of their capacity, or the court's capacity, to accommodate it.

There is always two questions. First is, is there need. Justice Douglas is always in support of the needs. Second, can the Supreme Court do it. You can take a look at the letters. Douglas says, "I can keep working. I can work more than this. I can work faster, turn out more opinions."

His colleagues, however, are less positive that he himself can do it. But he is a very unusual man. Read carefully what his colleagues say, what time is left for them. And second, the risk of the erosion of the process because they are doing things too fast. They put it very softly.

All I said was risk. Read Justice White's letter. He is a very thoughtful person. They would like to cut back to where they were two years ago in terms of volume.

Read Justice Black's letter. On this thing, the issue of whether they have time to do the additional work which Justice Douglas agrees ought to be done, it is on that point the brethren divides from Justice Douglas, and what the Commission has done is look at all of the evidence according to each one, or the weight, according to each effort involved.

THE PRESS: Thank you, Senator.

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(AT 12:24 P.M. EDT)