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COMMENT

Article III En Banc: The Judicial Conference as an Advisory Intercircuit Court of Appeals

Many judges and commentators have advocated for an Intercircuit Court of Appeals to resolve circuit splits. In recent years, the Judicial Conference of the United States has publicly endorsed one circuit's interpretation of the law over another's, as an Intercircuit Court of Appeals might, but without binding effect. This Comment calls for a reevaluation of the Judicial Conference's role in the federal judicial system. It concludes that although Conference support of legislation codifying one circuit's view over another's may enhance the efficiency and consistency of the legal system, such activity is inconsistent with judicial precepts of independence, impartiality, and nonpartisanship, and should therefore be avoided.

I. THE ORIGINS OF THE JUDICIAL CONFERENCE AS AN ADVISORY BODY

In 1922, Congress created the Conference of Senior Circuit Judges, a modest bureaucracy that would later evolve into the principal policymaking body of the federal judiciary. The organizing statute obliged the Chief Justice to summon the "senior circuit judge of each judicial circuit" to an annual meeting.[1] It also required each member of the Conference to identify the needs of his circuit and to advise the Chief Justice "as to any matters in respect of which the administration of justice in the courts of the United States may be improved."[2] The statute formalized intercircuit communication and

1. Act of Sept. 14, 1922, ch. 306, § 2, 42 Stat. 837, 838 (current version at 28 U.S.C. § 331 (2000)).

2. *Id.*

administrative integration of the federal appellate courts, but it suggested neither that the Conference should approach Congress with requests or advice, nor that the Conference should avoid the legislature.[3] In fact, Congress is not mentioned in the 1922 Act.

Contemporary records reveal a newly corporate judiciary cautiously exploring its authority to speak on legislative matters. While Chief Justice Taft regarded discretionary legislative recommendations as part of the judiciary's inherent powers and understood the Conference as a natural mouthpiece for those recommendations,[4] Chief Justice Hughes feared that organized legislative campaigns by the third branch would jeopardize judicial independence.[5] Hughes's Judicial Conference, anxious that uninvited comment on pending legislation or proposals for new legislation would antagonize Congress, began asking directly for an invitation. For four consecutive years beginning in 1930, the Conference sought the authority to recommend "such changes in statutory law affecting the jurisdiction, practice, evidence, and procedure of . . . the different district courts and circuit courts of appeals as may to the conference seem desirable."[6]

Such authority was not formally granted until 1948, when Congress gave the newly renamed Judicial Conference of the United States explicit authority to "submit to Congress . . . its recommendations for legislation."[7] In the years since, members of Congress have frequently requested that the Conference express its views on pending legislation,[8] and Congress has given substantial

3. *See* PETER GRAHAM FISH, THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION 35, 39 (1973).

4. *Id.* at 62.

5. *See* Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 277 (2003).

6. ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES FOR THE FISCAL YEAR 1930, at 8 (1930); *see also* ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES FOR THE FISCAL YEAR 1931, at 12 (1931); ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES FOR THE FISCAL YEAR 1932, at 12 (1932); ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES FOR THE FISCAL YEAR 1933, at 5 (1933).

7. Act of June 25, 1948, Pub. L. No. 80-772, § 331, 62 Stat. 683, 902 (codified as amended at 28 U.S.C. § 331 (2000)). Despite its anxieties, the Judicial Conference had commented on legislative proposals prior to 1948. One scholar has considered whether the 1948 legislation expressed approval of existing practices or was instead intended to empower the Conference to engage prospectively in the legislative process. Resnik, *supra* note 5, at 281.

8. *See* FISH, *supra* note 3, at 301.

weight to the Conference's views,[9] even to the exclusion of other lobbyists' voices.[10]

II. THE NEED FOR DIALOGUE BETWEEN CONGRESS AND THE COURTS

In the 1980s and 1990s, legal scholars and jurists expressed concern that ambiguous statutory language presented an increasing burden on the federal courts, often leading to interpretive disagreements among the courts of appeals.[11] These scholars and jurists considered creating a National Court of Appeals that would resolve intercircuit conflicts and promote uniformity in federal law.[12]

At the same time, the Governance Institute, a Washington, D.C.-based think tank, initiated a formal program to increase communication between the courts and Congress and improve statutory drafting.[13] Under this program, opinions in which judges highlighted ambiguous, poorly drafted, or otherwise unclear statutes were forwarded to Congress. Chief Justice Rehnquist praised the project, stating that it would make "it easier for judges to alert legislators to statutory drafting problems identified in the course of adjudication."[14]

Though the Judicial Conference supported such dialogue, recommending that "[a]ll courts of appeals . . . participate in the pilot project to identify technical deficiencies in statutory law and to inform Congress of [the] same,"[15] Congress was not fully attentive to the courts. According to Representative

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9. *See id.*

10. *See id.* at 304-05; *see also* Judith Resnik & Lane Dilg, *Responding to a Democratic Deficit: Limiting the Powers and the Term of the Chief Justice of the United States*, 154 U. PA. L. REV. 1575, 1607 (2006) ("While the Judicial Conference once categorized a range of matters as issues of 'legislative policy' about which it should not comment, the Conference now regularly lets Congress know its views on an array of pending bills. The Chief Justice and the Conference have become important presences in the legislative process.").

11. *See, e.g.*, Ruth Bader Ginsburg & Peter W. Huber, *The Intercircuit Committee*, 100 HARV. L. REV. 1417, 1420 (1987).

12. *See* FED. JUDICIAL CTR., STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS: REPORT TO THE UNITED STATES CONGRESS AND THE JUDICIAL CONFERENCE OF THE UNITED STATES 75-83 (1993).

13. *See* Cris Carmody, *Congress and the Courts: Branches Try To Communicate*, NAT'L L.J., July 19, 1993, at 3.

14. William H. Rehnquist, *Chief Justice Issues 1992 Year-End Report*, THIRD BRANCH, Jan. 1993, at 1, 4.

15. JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS 127 (1995).

Robert W. Kastenmeier, who served from 1959 to 1991, "congressional attention has moved away from the judiciary."[16]

Conditions indicated a need for dialogue between the courts and Congress. Ignorant of most court-identified ambiguities, the first branch was aware of only high-profile decisions and Supreme Court cases.[17] Congress therefore tended to focus on a ruling's effect on particular constituents or interest groups rather than on a statute's underlying linguistic problems.[18] In 1996, Kastenmeier opined that "[c]ommunication to get Congress re-interested in the judiciary as an institution is needed."[19] The Governance Institute's project sought to address these issues, but after 1999 the project "slipped into a state of partial desuetude . . . . in part because the project had not been institutionalized."[20]

III. THE JUDICIAL CONFERENCE AS AN ADVISORY INTERCIRCUIT COURT OF APPEALS

If the legislature ignores highlighted statutory ambiguities, and the Judicial Conference is authorized to recommend legislation, then shouldn't the Conference support legislation to eliminate these ambiguities? The Conference has recently done exactly this. In Fall 2001, for instance, the Conference recommended amending 28 U.S.C. § 1332(c) because "courts have disagreed on how to interpret it."[21] The Conference's endorsement stated that the existing statute "was originally adopted to . . . restrict[] the scope of diversity jurisdiction," but because of confusing language, some courts had interpreted the statute as "expan[ding] the availability of diversity jurisdiction for corporations with foreign contacts."[22]

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16. *Perspectives on Court-Congress Relations: The View from the Hill and the Federal Bench*, 79 JUDICATURE 303, 306 (1996) [hereinafter *Perspectives*] (quoting Rep. Kastenmeier).

17. *See* ROBERT A. KATZMANN, COURTS AND CONGRESS 69-74 (1997).

18. *See id.*

19. *Perspectives*, *supra* note 16, at 306 (quoting Rep. Kastenmeier).

20. E-mail from Russell Wheeler, President, Governance Inst., to author (Mar. 16, 2007, 11:04 EST) (on file with author).

21. *Federal Courts Jurisdiction Clarification Act: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. 4 (2005) [hereinafter *Jurisdiction Hearing*] (statement of Judge Janet C. Hall, Judicial Conference of the United States).

22. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 56 (Sept./Oct. 2001) [hereinafter JUDICIAL CONFERENCE REPORT].

Testifying before Congress on behalf of the Judicial Conference, Judge Janet Hall noted that equivocal capitalization caused the ambiguity. Specifically, § 1332(c)(1) provides that in civil actions involving corporations, a corporation is a citizen of any "State" where it has been incorporated "and of the State where it has its principal place of business."[23] The statute does not clarify whether the term "State" includes foreign countries.[24] The difficulty arises when a civil action involves a U.S. corporation with foreign contacts, because nearby § 1332(e) defines (capital-S) "States" as including "the Territories, the District of Columbia, and the Commonwealth of Puerto Rico."[25] Judge Hall summarized the split in authority:

> Some courts have noted that because the word "States" in the subsection begins with a capital "S," it applies only to the fifty states and the other places specified in the definition and therefore does not apply to citizens of foreign states (or countries) . . . . Other courts . . . have concluded that the word "States" should mean foreign states, as well as States of the Union.[26]

One interpretation would allow federal jurisdiction over suits brought by aliens against U.S. corporations that have business centers abroad, while the other would deny such jurisdiction.

In its presentation, however, the Conference went beyond merely highlighting an ambiguity in federal law: it endorsed one circuit's interpretation and rejected another's. While the Fifth Circuit deemed a U.S. corporation with its principal place of business abroad to be a citizen of the state of its incorporation, the Ninth Circuit determined that a foreign corporation was a citizen of *both* its principal place of business and its state of incorporation.[27] At the hearing, the Conference advocated codifying the Ninth Circuit's interpretation.[28] Judge Hall may have been trying to avoid the appearance of resolving a circuit split when she stated that the Ninth Circuit's treatment of the law was "technically dicta."[29] But this "dicta" looks more like a

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23. 28 U.S.C. § 1332(c)(1) (2000).

24. *Jurisdiction Hearing*, *supra* note 21, at 8.

25. 28 U.S.C. § 1332(e).

26. *Jurisdiction Hearing*, *supra* note 21, at 8.

27. *See id.*

28. *Id.*

29. *Id.*

directive in light of her observation that "the Ninth Circuit's approach has been applied to U.S. corporations in a number of district court decisions."[30]

Acting as a representative of the entire federal judiciary,[31] the Judicial Conference drafted and proposed legislation to resolve a disagreement among the federal courts.[32] Split-resolving legislative proposals are rare, but several proposals to resolve conflicting authority by codifying one lower court's view of the law appear in the Federal Courts Jurisdiction Clarification Act proposed by the Conference.[33] While Conference-endorsed legislative proposals opining on splits seem to be limited to those arising out of statutory ambiguities, "statutory ambiguity" is hardly a constraining limitation.

The Conference has traditionally understood itself as, at most, an advocate for national consistency, not an arbiter of how an ambiguity should be resolved. When the Conference participated in the Governance Institute's project, it was careful to limit its case selection guidelines "to ensure that the interbranch communication will focus on technical issues, not substantive issues of law."[34] The goal was to "contribute to informed decision making by the judiciary and the Congress," not to present Congress with an answer.[35]

But stating the "correct" answer to intercircuit disagreements moves the Conference well beyond simply seeking consistency. In these instances, the Judicial Conference resembles the Article III judiciary sitting en banc in an advisory capacity. Conference commentary favoring one circuit's legal interpretation over another's creates tension between the Conference's policymaking function and the Article III adjudicative function of its

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30. *Id.*; *see also* Judicial Conference Comm. on Fed.-State Jurisdiction, Agenda F-10, Report of the Judicial Conference Committee on Federal-State Jurisdiction (Sept. 2001) (unpublished manuscript, on file with author).

31. *See* JUDICIAL CONFERENCE OF THE U.S., *supra* note 15, at 80-81 ("The officially adopted policies of the Judicial Conference represent the view of the judicial branch on all matters.").

32. *See Conference Proposes Legislation To Reduce Needless Litigation*, THIRD BRANCH, Dec. 2005, at 5.

33. In one instance, Conference-proposed legislation "essentially embrace[d] the Fourth Circuit's view" in *McKinney v. Board of Trustees*, 955 F.2d 924, 925-28 (4th Cir. 1992), which rejected the Fifth Circuit's view articulated in *Getty Oil Corp. v. Insurance Co. of North America*, 841 F.2d 1254, 1262-63 (5th Cir. 1988). *Jurisdiction Hearing*, *supra* note 21, at 11. In another instance, Conference-proposed legislation would "resolve [a] conflict" among district courts across the United States. *Id.* at 12. Though not an intercircuit split in full bloom, some courts have held that the one-year time limit on removal in diversity cases is not subject to equitable exceptions, while others have held the contrary. *Id.* (describing Conference-proposed legislation that would permit equitable exceptions). This split in authority is outlined in *Tedford v. Warner-Lambert Co.*, 327 F.3d 423, 426 n.4 (5th Cir. 2003).

34. FED. JUDICIAL CTR., *supra* note 12, at 92.

35. *Id.*

constituent circuits. When the Conference prefers a particular interpretation and lobbies Congress to intervene, it acts as an *advisory* Intercircuit Court of Appeals.[36]

IV. ASSESSING THE CONFERENCE'S ROLE

While there are important structural differences between the Judicial Conference and a true Intercircuit Court of Appeals, the Conference's advisory resolution of circuit splits is nevertheless significant. An Intercircuit Court of Appeals would have binding authority over the lower courts, a special ability to resolve splits nationally, and the ability to reduce the Supreme Court's caseload as well as the number of circuit splits. The Judicial Conference possesses these three attributes in an advisory capacity: soft authority over the lower courts, a special political ability to implement its legislative recommendations to resolve splits nationally, and the ability to act strategically with the Supreme Court to control the certiorari process and relieve pressure on the Court's docket while reducing the number of circuit splits.

Although Conference pronouncements on circuit splits carry no formal weight, they may significantly influence other institutions and adjudicative processes. First, the Conference's pronouncements may affect lower court judges. For example, when the Conference recommends a particular resolution to an intercircuit disagreement, a lower court with a contrary interpretation will likely approach the issue with heightened caution because "an agency of the federal judiciary has already spoken with authority if not with finality on the subject."[37] Second, because the Conference speaks for the courts, its pronouncements carry particular weight with Congress. As the representative of a sister branch of government, the Conference enjoys unique access to

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36. Though simultaneous display of "advisory" and "court-like" characteristics unsettles traditional conceptions of the federal judiciary's role, these characteristics exist simultaneously elsewhere in the American judicial system. According to Robert H. Kennedy, state supreme courts occasionally act in an advisory capacity. When they do, they are often at pains to assert that such opinions are nonfinal, nonbinding, and even nonjudicial. Robert H. Kennedy, *Advisory Opinions: Cautions About Non-Judicial Undertakings*, 23 U. RICH. L. REV. 173, 185 (1988). When the Judicial Conference comments on circuit splits, it acts in an analogous manner. It is a body of the federal judiciary's high officials that issues opinions on legislation that are supposedly nonfinal, nonbinding, and nonjudicial—but these opinions derive persuasive power from their institutional judicial origins. *See* FISH, *supra* note 3, at 436 (stating that, although federal courts refrain from giving advisory opinions, Conference policies "may, in effect, constitute such opinions").

37. FISH, *supra* note 3, at 436.

legislators and special consideration of its requests.[38] Finally, Conference pronouncements may affect the certiorari process and convince the Supreme Court to decline cases that the Conference can easily refer to Congress. Given its limited resources, the Court is unlikely to resolve circuit splits that can be resolved more efficiently by another branch.

The fact that the Judicial Conference can choose which issues to pursue creates efficiency advantages over an Intercircuit Court of Appeals. While a true Intercircuit Court would expend enormous time and energy divining meaning from potentially meaningless statutes,[39] the Conference can simply propose an answer. Removing circuit splits from the pool of certiorari petitions would free the Supreme Court to address larger constitutional questions, rather than resolve such issues as whether the term "States" includes foreign nations. Drafting errors (such as ambiguous capitalization) can be referred to Congress with a proposed solution around which to structure debate. Because the Judicial Conference's authority is nonbinding, Congress must intervene to give effect to the Conference's opinion. Congress has a chance to speak again after the judicial process has revealed a statute's ambiguities, and the judiciary has merely proposed—not imposed—a solution.

Without a substantive recommendation from the Conference, Congress might well ignore the judiciary's concerns, leaving any ambiguities to be resolved by the courts.[40] Indeed, there is often no incentive for Congress to resolve ambiguous language. Compromise and ambiguity—not clarity, internal harmony, and linguistic precision—drive the passage of legislation.[41] In short, consistent national law is probably more likely when the Conference suggests solutions to Congress, instead of relying on Congress to draft its own.

But blending administration with adjudication creates substantial dangers. Judge Robert A. Katzmann, himself a proponent of a robust relationship between the federal courts and Congress, has argued that judicial-legislative communication must first and foremost "honor the sanctity of the judicial

38. *See* KATZMANN, *supra* note 17, at 101 ("When the Judicial Conference makes a recommendation about proposed legislation, it has special weight."); *cf.* 62 CONG. REC. 203 (1921) (statement of Rep. Lea) (opposing the Conference of Senior Circuit Judges because it would "give official color to the judiciary's recommendations to Congress").

39. *See, e.g.*, Sharp v. Weinberger, 798 F.2d 1521, 1522 (D.C. Cir. 1986).

40. *See* KATZMANN, *supra* note 17, at 74 ("[J]udicial suggestions that 'congressional attention' be paid to some other aspect of the statutory scheme may not be seen by [congressional] committee staff.").

41. Obfuscation can facilitate compromise. *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 276-77 (1994); *cf.* LEWIS CARROLL, *Through the Looking Glass*, *in* ALICE IN WONDERLAND 101, 163-66 (Donald J. Gray ed., W.W. Norton & Co. 1971) (1871) ("When *I* use a word . . . it means just what I choose it to mean—neither more nor less.").

process, with its ideals of independence, impartiality, and absence of partisanship."[42] Any activity that reasonably "could appear to run counter to those norms" should be subjected to "the strictest prudential scrutiny."[43] Notwithstanding its statutory authorization to make recommendations to Congress, Conference activity should still be bounded by these concerns.

The Conference's advisory resolution of circuit splits departs from these values. Speaking on circuit splits before potentially sitting in judgment over them undermines the appearance of independence and impartiality: because the Chief Justice presides over both the Conference and the Supreme Court, his overlapping roles make him vulnerable to a conflict of interest.[44] If Congress does not resolve a given split, there is a strong possibility that it will appear on the Supreme Court's docket,[45] and the Chief Justice's interests in managing the Supreme Court's docket may cause him to route splits toward resolution by the Conference.[46] To solve this problem, the Chief Justice should not participate in making these types of legislative recommendations.[47]

Moreover, advocating for a particular side of a circuit split is partisan. In straying beyond the bounds of the judicial process and attempting to codify a

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42. KATZMANN, *supra* note 17, at 90. From 1986 to 1999, Judge Katzmann served as President of the Governance Institute.

43. *Id.*

44. Indeed, the Chief Justice "presided" over the Judicial Conference's endorsement of the legislation to resolve the circuit split over 28 U.S.C. § 1332(c). JUDICIAL CONFERENCE REPORT, *supra* note 22, at 35, 56.

45. *See* FED. JUDICIAL CTR., *supra* note 12, at 55 ("A petition alleging an intercircuit conflict is a prime candidate for the Court's attention. Petitioners are therefore likely to assert a conflict whenever any argument can be made for its existence, regardless of whether the conflict is important or whether it had any practical effect on the underlying action."); *see also* SUP. CT. R. 10 (including among the "Considerations Governing Review on Certiorari" whether "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter," and stating that "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion").

46. Conference activity also may influence the Chief Justice's views when an issue comes before the Court. The Conference's initial opposition to new remedies for female victims of violence anticipated Chief Justice Rehnquist's opinion holding the Violence Against Women Act's civil rights remedy unconstitutional in *United States v. Morrison*, 529 U.S. 598 (2000). After its initial opposition, the Conference decided not to take a position on the remedies. *See* Resnik, *supra* note 5, at 295-96.

47. When the Conference was initially created, it was unclear whether the Chief Justice would have voting rights. The original statute merely stated that the Chief Justice "shall . . . summon" the Conference and "shall be the presiding officer." Act of Sept. 14, 1922, ch. 306, § 2, 42 Stat. 837, 838 (current version at 28 U.S.C. § 331 (2000)); *see also* FISH, *supra* note 3, at 42. Chief Justice Taft was the first to vote, and the practice has since become accepted. The current statute neither endorses nor unsettles the current practice.

preferred outcome, the Conference risks creating an impression of judges as politically self-interested actors. More importantly, when the Conference takes sides in circuit splits without formal briefing by interested parties, it forgoes the benefits and safeguards of the adversarial system and treads on the "sanctity of the judicial process."

Many believe that it is "more important that a rule of law be settled, than that it be settled right."[48] But the consistency that the Conference seeks should be effected by Congress, not proposed by the courts. As then-Judge Ruth Bader Ginsburg pointed out, "There is, of course, an ideal intercircuit conflict resolver . . . . Congress itself. On the correct interpretation of Federal statutes no assemblage is better equipped to say which circuit got it right."[49]

CONCLUSION

Ambiguous statutes plague the federal system and generate intercircuit conflicts that require resolution. The difficulties faced by courts in interpreting such statutes invite a greater role for the Judicial Conference in advising Congress on circuit splits. This Comment has argued that the Conference should be mindful of the need for self-restraint when it operates in the political arena; it should provide substantive recommendations to Congress only in a manner that is nonpartisan and does not jeopardize the impartiality or independence of judicial decision-making.

Safekeeping these values requires confining the Conference to a notification role regarding splits in authority; it should simply bring ambiguous language to Congress's attention. Such activity would differ from the Governance Institute's project, in which courts independently facilitated communication between Congress and the judiciary by transmitting individual opinions. The Conference is uniquely situated to coordinate the systematic, institutional compilation of problematic statutory language for Congress, but its status as the representative of the third branch creates tension between Conference advice and court adjudication. The Conference should *only* offer support for consistency;[50] it should not affirmatively recommend which view among its constituent courts should be codified.

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48. Di Santo v. Pennsylvania, 273 U.S. 34, 42 (1927) (Brandeis, J., dissenting).

49. *A Bill To Establish an Intercircuit Panel, and for Other Purposes: Hearings on S. 704 Before the Subcomm. on Courts of the S. Comm. on the Judiciary*, 99th Cong. 113 (1985) (statement of Judge Ruth Bader Ginsburg).

50. *Cf.* REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 18 (Sept. 2006) (noting that "a disparity exists among the circuits with regard to the extent to

The Conference's well-intentioned forays beyond the judicial process to secure some measure of legislative clarity have suffered mission creep. Because Congress has ignored intercircuit splits that reveal drafting errors, the Conference has begun to pick up Congress's legislative burden outside of the adjudicative context. The judiciary should restrict itself to what it does best—resolving actual cases and controversies as an impartial arbiter, after a focused adversarial hearing on the dispute. Replacing adjudication with advisory political entanglements sacrifices more than it gains.

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which an inmate in Bureau of Prisons custody may serve a term of incarceration in a residential reentry center," but limiting itself to "support [of] legislation to resolve the statutory ambiguities . . . that have given rise to the intercircuit disparity," without recommending a specific result).