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SYMPOSIUM

FOREWORD: THE PROPOSAL TO SPLIT THE NINTH CIRCUIT COURT OF APPEALS

Carl Tobias*

The *Montana Law Review* is extremely pleased and privileged to have the opportunity to publish the following four papers which make valuable contributions to understanding of the United States Court of Appeals for the Ninth Circuit, of the courts of the Ninth Circuit and of the federal courts in general. These papers are particularly important because their four distinguished authors have been intimately involved in the recent and the ongoing debate over the possibility of dividing the Ninth Circuit.

Senator Conrad Burns (R-Mt.), who has served in the Senate since 1989, had substantial responsibility for the most recent effort to split the Ninth Circuit which began a year ago. Senator Burns was an original cosponsor of Senate Bills 853 and 956, and he testified at the September 13, 1995 hearing before the Senate Judiciary Committee on the proposed split. Senator Burns helped to assemble the compromise version of S. 956 that the Committee approved on December 7, 1995, led the floor fight seeking Senate passage of that compromise on March 18, 1996, and agreed to the study commission proposal which the Senate passed on March 21, 1996.

Professor Arthur Hellman has analyzed the Ninth Circuit more extensively than any other legal academician, principally through his numerous evaluations of the federal appellate courts.

* Professor of Law, University of Montana. I wish to thank Peggy Sanner for valuable suggestions, Cecelia Palmer and Charlotte Wilmerton for processing this piece, and Ann and Tom Boone and the Harris Trust for generous, continuing support. Errors that remain are mine.

Professor Hellman served as the Deputy Executive Director of the Commission on Revision of the Federal Appellate Court System (Hruska Commission), which studied the appeals courts and made suggestions for improving them more than two decades ago. He also served as Director of the Ninth Circuit Staff Attorney Office for two years.

Chief Judge Procter Hug, Jr., has served as a Judge of the Ninth Circuit Court of Appeals for nearly two decades. Chief Judge Hug assumed the important administrative position as head of the United States Courts for the Ninth Circuit when former Chief Judge J. Clifford Wallace resigned from that post in Spring of 1996 after more than a half-decade of dedicated leadership.

Judge Diarmuid O'Scannlain has been a Circuit Judge of the Ninth Circuit for a decade. Before assuming the bench, Judge O'Scannlain rendered distinguished public service in federal and state government and engaged in private practice for two decades in Portland. During the September 1995 hearing on S. 956, Judge O'Scannlain became the first judge of the appellate court to state publicly that he favored division of the Ninth Circuit.

The present is a critical time for the federal courts, for the Ninth Circuit, and for the Montana Federal District Court which is one of fifteen districts within the circuit's purview. In addition to Chief Judge Hug's assumption of his new post as head of the United States Court for the Ninth Circuit, the Ninth Circuit and the Montana District have recently marked several milestones.

During 1995, the efforts of Senator Max Baucus (D-Mt.) to convince President Bill Clinton that he should assign a Ninth Circuit vacancy to Montana culminated in the Chief Executive's decision to do so. President Clinton appointed Sidney Thomas, a highly-respected Billings attorney, to that position. In January 1996, the United States Senate confirmed Thomas.

During 1995, Chief District Judge Paul Hatfield announced his intention to assume senior status after a decade and a half of dedicated service. During February, 1996, Chief Judge Hatfield assumed senior status, and Judge Jack Shanstrom became Chief Judge of the Montana District. Senator Baucus recommended that President Clinton name Donald Molloy, a highly-respected Billings attorney, to fill the opening. In May 1996, the Senate Judiciary Committee approved Molloy, and two months later the Senate confirmed Molloy.

The present is an especially critical time for the Ninth Circuit. That appellate court is the largest geographically, has the

biggest caseload, includes the greatest number of judges (28), and is the most expensive to operate. The Ninth Circuit is also considered to be a leader in numerous areas. Perhaps most important has been the court's willingness to experiment with a number of procedures for expediting appellate dispositions. The circuit's report on gender bias in the courts may well have been the most ambitious assessment of gender discrimination in the federal courts that has ever been undertaken. The circuit has also exercised leadership in numerous other areas, such as issues involving race and ethnicity, tribal courts, and review of local district procedures for consistency with the Federal Rules of Civil Procedure and Acts of Congress.

Introduction of S. 956 a year ago marked the fourth serious effort in a dozen years to divide the Ninth Circuit. Advocates of circuit-splitting argue that the court's size delays resolution of appeals and fosters inconsistency and that California judges, cases and attitudes dominate states in the Pacific Northwest. Opponents contend that size is a virtue which affords healthy diversity, that minimal inconsistency exists and that California does not dominate the court.

Senator Burns provides an insider's perspective on the recent effort to divide the Ninth Circuit and why he believes that circuit-splitting is desirable. The Senator affords the reasons for introduction of S. 956 and documents the Senate's treatment of the measure. Senator Burns then evaluates the relative merits of dividing the court by analyzing the arguments in favor of and against a split and finds that conditions in the circuit have steadily worsened since the early 1970s when the Hruska Commission recommended division. He concludes with several thoughts on the proposed commission.

Professor Hellman examines five reasons why he believes that splitting the Ninth Circuit is an idea whose time has not yet come. First, he urges that the proponents of circuit-splitting must bear the burden of showing that the division suggested will improve justice in the West. Second, Professor Hellman suggests that little weight be accorded to the 1973 Hruska Commission report. The scholar then argues that empirical studies do not substantiate claims that the Ninth Circuit has been unable to maintain consistency in its decisionmaking. He next rejects contentions that circuit law should reflect a Northwestern viewpoint. Finally, Professor Hellman admonishes that division of the court today could prevent Congress from instituting more thorough reform in the future.

Chief Judge Hug defends the view that the Ninth Circuit should not be bifurcated. He argues that the court is currently functioning well and serves as a model for the operation of large circuits. The Chief Judge finds that judges and attorneys who work in the Ninth Circuit oppose division. He also suggests that splitting the court is an inappropriate solution to increasing caseloads. Chief Judge Hug concludes by stating that the Ninth Circuit would welcome a comprehensive and impartial study.

Judge O'Scannlain reflects on the national study commission which the Senate approved in March. He suggests that the entity will find combination of appeals courts into "jumbo circuits" inappropriate. Judge O'Scannlain then assumes that the commission will agree that the Ninth Circuit must eventually be split and affords several suggestions for how commission members might approach that task. The judge explores four possible solutions and provides informative data, while he finds that splitting California is the preferable course of action.

These authors have ably stated numerous defensible positions on the advisability of splitting the Ninth Circuit which should contribute significantly to ongoing debate over possible division and the future of the federal courts. Members of Congress, federal judges and students of the federal courts should consult these papers in addressing certain short-term and long-term issues involving the Ninth Circuit and the appellate system.

The *Montana Law Review* hopes that the papers published below will enhance comprehension of the Ninth Circuit and of the federal court system. The recent debate over possible division of the Ninth Circuit has increased public awareness of the federal courts and heightened congressional interest in them. The debate has led to a Senate proposal to study the appellate courts. The time may well be right for that study because growing dockets apparently constitute a serious problem in numerous circuits. If that study proceeds, however, Congress should insure that the commission has adequate time and resources and a sufficiently broad mandate to complete an excellent report.