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DIVIDING THE NINTH CIRCUIT COURT OF APPEALS: A PROPOSITION LONG OVERDUE

Senator Conrad Burns*

I. INTRODUCTION

On March 20, 1996, the United States Senate passed a bill to create a commission to study the entire federal appellate judicial system with particular reference to the Court of Appeals for the Ninth Circuit. This bill took the form of a substitute amendment to legislation which was reported out of the Senate Committee on the Judiciary on December 21, 1995, that directed the division of the Ninth Circuit Court of Appeals.

I submit this article to provide some insight into the development of this legislation, to discuss the relative merits of the concept of splitting the Ninth Circuit, and to offer a few thoughts on the commission that was ultimately proposed.

II. BACKGROUND

A. Overview

The question of whether—or how—the United States Court of Appeals for the Ninth Circuit should be divided has a lengthy legislative history which spans over half of a century.¹ In 1972, recognizing the problems faced by the courts of appeals and responding to the urgings of Chief Justice Burger and others, Congress created the Commission on the Revision of the Federal Court Appellate System commonly known as the Hruska Commission.² In its 1973 report, the Hruska Commission recommended that the old Fifth Circuit and the Ninth Circuit be divided, noting particularly the Ninth Circuit's "striking" size, its "serious difficulties with backlog and delay," and its "apparently inconsistent decisions by different panels of the large court."³ As a result, the Commission "concluded that the creation of two new

* United States Senator from Montana. I would like to extend a special thanks to Brett Scott, my General Counsel, for his efforts in assisting me prepare this article.

1. Thomas E. Baker, *On Redrawing Circuit Boundaries—Why The Proposal To Divide The United States Court Of Appeals For The Ninth Circuit Is Not Such A Good Idea*, 22 ARIZ. ST. L.J. 917, 923-29 (1990).

2. See Commission on Revision of the Federal Court Appellate System, *The Geographical Boundaries of the Several Judicial Circuits: Recommendations for Change*, 62 F.R.D. 223, 224 (1973) [hereinafter Hruska Commission Report].

3. *Id.* at 228-29, 235.

circuits is essential to afford immediate relief" to citizens living in states in the Ninth Circuit.⁴

Members of the Fifth Circuit Court of Appeals and the Ninth Circuit Court of Appeals disagreed with the Commission's findings and formally opposed the Commission's recommendation to split these two courts. Consequently, Congress did not take action on the Commission's findings and recommendations, and the problems identified by the Commission persisted and, in fact, worsened over the next five years.⁵ In 1978, recognizing the continuing problems plaguing these two courts, Congress authorized courts of appeals with more than fifteen judges to reorganize into administrative units and to streamline the en banc hearing procedure.⁶

In May of 1980, the Fifth Circuit Judicial Council arranged the Fifth Circuit into two administrative units, though it maintained the unities of the en banc court and judicial council. However, the Fifth Circuit Judicial Council immediately realized that this arrangement was unworkable, and unanimously petitioned Congress to divide the court into two autonomous circuits.⁷ As a result, Congress passed legislation to divide the Fifth Circuit.⁸ Similarly, the Ninth Circuit reorganized itself into three administrative units and further adopted a limited en banc procedure.⁹ Such "innovations" have not only failed to resolve the problems facing the Ninth Circuit, but, in fact, they have exacerbated them.¹⁰

4. *Id.* at 228.

5. See discussion *infra* part III.

6. The authorization reads:

Any court of appeals having more than 15 active judges may constitute itself into administrative units complete with such facilities and staff as may be prescribed by the Administrative Office of the United States Courts, and may perform its en banc function by such number of members of its en banc courts as may be prescribed by rule of the court of appeals.

Act of October 20, 1978, Pub. L. No. 95-486, § 6, 92 Stat. 1629, 1633.

7. See Thomas M. Reavley, *The Split of the Fifth Circuit: Update and Finis*, 12 TEX. TECH. L. REV. 1, 5-7 n.52 (1981); see also *Hearing on S. 948 Before the Subcomm. on Courts and Administration Practice of the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 642 (1990) (statement of Gilbert F. Ganucheau).

8. Act of Oct. 14, 1980, Pub. L. No. 96-452, 94 Stat. 1994 (codified at 28 U.S.C. §§ 1, 41 (1994)).

9. THE JUDICIAL COUNCIL AND UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FOURTH BIENNIAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF SECTION 6 OF THE OMNIBUS JUDGESHIP ACT OF 1978 AND OTHER MEASURES TO IMPROVE THE ADMINISTRATION OF JUSTICE IN THE NINTH CIRCUIT 1 (1989); see also JOSEPH CECIL, ADMINISTRATION OF JUSTICE IN A LARGE APPELLATE COURT: THE NINTH CIRCUIT INNOVATIONS PROJECT (Federal Judicial Center 1985).

10. See *infra* notes 23-32 and accompanying text.

*B. Congressional Action to Split the Ninth Circuit**1. Legislation to Split the Ninth Circuit in Previous Congresses*

In 1983, Senator Slade Gorton, of Washington, introduced a proposal to split the Ninth Circuit. That bill, S. 1156, would have divided the Ninth Circuit into a new circuit consisting of Arizona, California, Nevada, Guam, and Hawaii, and a Twelfth Circuit consisting of Alaska, Idaho, Montana, Oregon, and Washington.¹¹ This bill was not reported out of the Senate Committee on the Judiciary.

In 1989, I joined Senator Gorton in introducing S. 948, which would have divided the circuit by creating a new Ninth Circuit comprised of Arizona, California, and Nevada, leaving the remaining States and territories to form a Twelfth Circuit.¹² This legislation likewise failed to gain sufficient support in the Committee on the Judiciary and died without getting the attention of the full United States Senate.

In the 102nd Congress, 1st Sess., Senator Gorton and I once again introduced legislation to split the Ninth Circuit. S. 1686 essentially repropoed the same division outlined in S. 1156. That formulation had also been introduced in the United States House of Representatives in the 101st Cong., 2d Sess., as H.R. 4900. Neither of these bills were reported out of Committee.

An entirely different formulation was introduced in the House of Representatives in the 103rd Cong., 1st Sess., in a bill sponsored by Representative Kopetski, H.R. 3654. That proposal

11. S. 1156, 98th Cong., 1st Sess. (1983).

12. S. 948, 101st Cong., 1st Sess. (1989). The United States Department of Justice, recognizing the negative impact of the Ninth Circuit's problems upon law enforcement, endorsed S. 948 stating:

When the nine circuits were established in their present form in the late nineteenth century, even before circuit courts of appeals were created in 1891, the population of the United States was centered much more heavily in the East. Six circuits were established for 22 states east of the Mississippi, while the Eighth and Ninth Circuits covered the 22 states and territories west of the Mississippi. (The only other states to the west, Texas and Louisiana, were assigned to the sprawling Fifth Circuit covering the six states of the Deep South). Since then, in response to geographic and case-load problems, Congress divided the original Eighth Circuit to create the Tenth Circuit in 1929, and divided the former Fifth circuit, to create the Eleventh Circuit in 1980. In that sense, retaining vast territory and population of the Ninth Circuit in one circuit is an historical anomaly.

Letter from Bruce C. Navarro, Acting Assistant Attorney General, U.S. Department of Justice, to Sen. Howell Heflin, Chairman, Subcomm. on Courts and Admin. Practice of the Senate Comm. on the Judiciary 5 (March 6, 1990).

would have divided the Ninth Circuit in a manner similar to that recommended in 1973 by the Hruska Commission, which had recommended dividing California between circuits.¹³ This bill likewise failed to gain sufficient support and died in Committee.

2. *Legislation to Split the Ninth Circuit in the 104th Congress*

During the 104th Congress, Senator Gorton and I¹⁴ introduced S. 956, a bill to create a new Twelfth Circuit comprised of Alaska, Idaho, Montana, Oregon, and Washington, leaving the remaining States and territories to comprise the new Ninth Circuit.¹⁵ In order to generate interest in this legislation, on May 26, 1995, I placed holds on the pending and future nominees to the Ninth Circuit Court of Appeals during the 104th Congress.¹⁶

On September 13, 1995, the Senate Committee on the Judiciary conducted a hearing on S. 956.¹⁷ Particularly evident at

13. H.R. 3654, 103d Cong., 1st Sess. (1993). H.R. 3654 would have placed Alaska, Idaho, Montana, Oregon, Washington, Hawaii, Guam, the Northern Mariana Islands, the Northern District of California, and the Eastern District of California in the new Ninth Circuit, with the remaining Ninth Circuit districts to be placed in the Twelfth Circuit. That effort reflected a concern with ensuring that a split of the Ninth Circuit created a fairly even split of the caseload and judgeships of the Ninth Circuit between the new circuits.

14. Joining Senator Gorton and me as original co-sponsors of this legislation were Senator Stevens, Senator Murkowski, Senator Packwood, Senator Hatfield, Senator Craig, and Senator Kempthorne. Initially, Senator Baucus joined as an original co-sponsor but removed his name from the original co-sponsorship list. See SENATE JUDICIARY COMM., NINTH CIRCUIT COURT OF APPEALS REORGANIZATION ACT OF 1995, S. REP. NO. 197, 104th Cong., 1st Sess. (1995) [hereinafter SENATE REPORT].

15. This legislation was first introduced on May 25, 1995, as S. 853. See 141 CONG. REC. S7497-02 (daily ed. May 25, 1995) (statement of Sen. Gorton). A minor technical correction was made to the bill, and it was reintroduced as S. 956 on June 22, 1995. See 141 CONG. REC. S8945-01 (daily ed. June 22, 1995) (statement of Sen. Hatch).

16. At the time, the pending nominees were Atsushi Wallace Tashima and William Alan Fletcher. Subsequent to my placing holds on all Ninth Circuit nominees, a Montanan, Sid Thomas, was nominated to the Ninth Circuit. While I wholeheartedly endorsed his nomination and testified on his behalf at his nomination hearing, I feared that if I released any of my holds, I would lose the leverage that the holds had given me over other Members that had generated interest in this legislation. This turned out to be the case.

17. Testifying with me in support of S. 956 at that hearing was Senator Gorton; Chief Judge Gerald Bard Tjoflat of the U.S. Court of Appeals for the Eleventh Circuit; and John McKay, Esq., a practitioner from Seattle, Washington. Opposing this legislation at the hearing was Senator Inouye; Senator Reid; Senator Murray; Chief Judge J. Clifford Wallace of the U.S. Court of Appeals for the Ninth Circuit; Judge Dairmuid F. O'Scannlain of the U.S. Court of Appeals for the Ninth

this hearing was the concern that S. 956 would leave a Ninth Circuit that would still be too large and that could itself raise the question of whether it should be further subdivided in the near future. Judge O'Scannlain particularly noted that S. 956, as introduced, "would do nothing to solve the problems of the remaining ninth circuit."¹⁸ To address this concern, Senator Gorton and I developed an alternate proposal that Senator Hatch offered on my behalf. This substitute amendment to S. 956, which would have established a new Ninth Circuit consisting of California, Hawaii, Guam, and the Northern Mariana Islands and would have left the remaining States as a new Twelfth Circuit, was reported favorably out of Committee on December 7, 1995, by a vote of 11-7.¹⁹

When the bill was reported out of Committee, I began soliciting support for the legislation. However, by mid-March it became apparent that this had become a partisan issue.²⁰ Consequently, on March 20, 1996, Senator Gorton, Senator Kyl and I compromised with Senator Reid, Senator Feinstein, Senator Biden, and Senator Kennedy on legislation to create a commission to study the entire federal appellate system, with particular reference to the Ninth Circuit.²¹ This compromise was agreed to by voice vote and was reported to the House of Representatives, where it is presently pending.

Circuit; Professor Arthur D. Hellman of the University of Pittsburgh School of Law; and Charles E. Jones, Esq., a practitioner from Phoenix, Arizona.

18. SENATE REPORT, *supra* note 14, at 5.

19. *Id.* at 11.

20. By mid-March, I had received assurances of support for the bill reported out of Committee from forty-seven Republican Senators; Senator Baucus was the only Democratic member offering support for the bill. Furthermore, it appeared unlikely at that time that I would be able to get the 60 votes necessary to invoke cloture on this issue; I had released the holds that I had placed on Ninth Circuit nominees at the request of the Republican Majority Leader, Senator Dole (apparently, Senator Baucus had placed holds on a Dole nominee for Kansas District Court and a Hatch nominee for the SEC, asserting that he would release these holds if I would release my holds on Ninth Circuit nominees).

21. The Commission is comprised of eleven members: three to be appointed by the Senate Majority Leader in consultation with the Senate Minority Leader; three to be appointed by the Speaker of the House in consultation with the House Minority Leader; three to be appointed by the Chief Justice of the United States Supreme Court; and two members to be appointed by the President of the United States. The Commission is required to complete its study and make its recommendations by no later than February 28, 1997 to the Senate Committee on the Judiciary. 142 CONG.

REC S2544 (daily ed. Mar. 20, 1996).

III. THE DEBATE: THE RELATIVE MERITS OF SPLITTING THE NINTH CIRCUIT

Over the past five decades, the debate over whether the Ninth Circuit Court of Appeals should be divided has persisted. The arguments which convinced the Hruska Commission to recommend the splitting of the Ninth Circuit still exist today; in fact, conditions have grown steadily worse since 1973.²²

A. *The Arguments in Favor of a Split*

1. *Size, Delays, and Efficiency*

The Ninth Circuit spans nine States and two territories covering fourteen million square miles. It serves a population of more than forty-five million people. The next largest circuit in terms of population, the Sixth Circuit, serves fewer than twenty-nine million people; in fact, every other federal circuit serves fewer than twenty-four million people. By 2010, the Census Bureau estimates that the Ninth Circuit's population will be more than sixty-three million people, which represents a forty-three percent increase in fifteen years. As Judge O'Scannlain of the Ninth Circuit testified before the Senate Committee on the Judiciary, "[I]n light of the demographic trends in our country, it is clear that the population of the states in the ninth circuit, and thus the caseload of the federal judiciary sitting in those states, will continue to grow at a rate significantly ahead of most other regions of the country."²³

Further, the Ninth Circuit already has twenty-eight active judges, making it by far the largest circuit court. The next largest circuit court, the Fifth Circuit, has seventeen active judges, while the smallest circuit court, the First Circuit, only has six. The average number of judges in the federal circuits other than the Ninth Circuit is 12.6.

22. Today, the Ninth Circuit remains the same size geographically as when the Hruska Commission recommended that it be split. In terms of judges and caseload, however, the court has grown substantially. In 1973, the Ninth Circuit was composed of 13 judges and received an annual caseload of approximately 2,300 filings. Since then, the Ninth Circuit has grown to 28 active judges, and the caseload has increased to upwards of 8,000 appellate filings each year. In addition, last year the Ninth Circuit requested, and the Judicial Conference of the United States recommended, that Congress approve 10 new judgeships for the Ninth Circuit Court of Appeals. Thus, an even larger Ninth Circuit appears likely in the not too distant future. SENATE REPORT, *supra* note 14, at 4.

23. *Id.* at 9.

Also, the Ninth Circuit's size has contributed to delay in case processing in the circuit. As Chief Judge Wallace stated in his written testimony to the Senate Committee on the Judiciary, "it takes about four months longer to complete an appeal in our court as compared to the national median time."²⁴ The most recent statistics provided by the Administrative Office of the U.S. Courts reveal that the Ninth Circuit is noticeably slow by other measures. The Ninth Circuit is next to slowest in the time from the filing of a case in the lower court to the final disposition in the court of appeals. It is slowest from the filing of the last brief in a case to a hearing and submission of the case for decision.²⁵

Many have cited the court's enormous size as a factor in the court's inability to process the large number of cases filed in the circuit each year. According to Chief Judge Tjoflat, the Eleventh and Fifth Circuits combined process many more cases every year than the Ninth Circuit, and they have sometimes done so with fewer judges altogether, given judicial vacancies.²⁶ In recent years, the combined Fifth and Eleventh Circuits, containing a total of twenty-nine authorized judgeships, have resolved on the order of fifty percent more cases each year than the Ninth Circuit, which has twenty-eight authorized judgeships.²⁷ Chief Judge Tjoflat attributed these results to collegiality among members of the court.²⁸

2. *Intracircuit Conflicts and En Banc Review*

The large number of judges also creates intracircuit conflicts and increases the likelihood of inconsistent decisions among panels within the circuit. With twenty-eight authorized judges on

24. *Id.*

25. This particular statistic, however, is of negligible import given the circuit's notable delays in overall case processing. *Id.*

26. *Id.* at 9-10.

27. SENATE REPORT, *supra* note 14, at 9-10.

28. Chief Judge Tjoflat observed that large circuits are necessarily prone to a less collegial environment. Gerald Bard Tjoflat, *More Judges, Less Judges*, 79 A.B.A. J. 70, 70-71 (1993). The more judges that sit on a court, the less frequent a particular judge is likely to encounter any other judge on a three-judge panel. Breakdown in collegiality usually leads to a diminished quality of decision-making. Judge O'Scannlain of the Ninth Circuit likewise noted in his testimony before the Senate Committee on the Judiciary that as a court of appeals becomes increasingly large, it loses the collegiality among judges that is such a fundamental ingredient in effective administration of justice. In a court like the Ninth Circuit, with 28 authorized judges and 3,276 possible combinations of panels, this fact is particularly evident. *Id.*

the Ninth Circuit, there are 3,276 possible combinations of panels, not including the significant number of panels including senior judges and judges sitting by designation. The number of three-judge panel decisions and the sheer size of the caseload makes it increasingly difficult for judges in the Ninth Circuit to keep abreast of Ninth Circuit decisions to avoid conflicting decisions. Judges and other individuals seeking to conform their conduct to circuit law also encounter serious obstacles in assessing the law of the Ninth Circuit. Anecdotal evidence indicates that the Ninth Circuit is marked by an increased incidence of intracircuit conflicts.²⁹

Compounding that problem, the Ninth Circuit does not use the traditional en banc procedure for resolving intracircuit conflicts. Instead, the Ninth Circuit uses a limited en banc procedure in which an eleven-judge panel, consisting of the Chief Judge and ten circuit judges chosen by lot, review cases en banc. This method permits as few as six of the sitting judges to dictate the outcome of a case contrary to the judgment of twenty-two others, solely depending upon the luck of the draw.³⁰ Under the Ninth Circuit's rules, the court may decide to review a case using the full en banc court. However, ever since the adoption in 1980 of Circuit Rules permitting the Ninth Circuit to hear cases through limited en banc procedures, the Ninth Circuit has never elected to hear a case sitting as a full en banc court. True en banc review in the Ninth Circuit is effectively nonexistent, and intracircuit inconsistencies are much more likely to go unreviewed. This may explain, in part, why the Ninth Circuit typically has a high reversal rate by the United States Supreme Court.³¹

29. Chief Judge Tjoflat argued at the hearing that it is impossible to conduct a reliable empirical study of intracircuit conflicts because "[t]here are so many ways in which precedent can be disregarded in cases." SENATE REPORT, *supra* note 14, at 10 n.19.

30. The purpose of the en banc court is to establish the law of the circuit by a majority of all the judges, not by a simple majority of a subset of judges randomly chosen, whose decision may not be representative.

31. Senator Feinstein suggested in her additional views submitted to the Senate Committee on the Judiciary, that the assertion that the Ninth Circuit experiences a higher reversal rate than other circuit courts is without support. To the contrary, the Ninth Circuit's reversal rate, while fluctuating from year to year, has been documented to be remarkably high. See, e.g., Marcia Coyle, *A Working Majority: Supreme Court Review*, NAT'L L.J., July 1, 1995, at C-1 (ninth circuit reversal rate in the Supreme Court for the 1994-1995 term was 82 percent); David Lauter, *In Moderate Pursuit of Conservative Goals: Supreme Court Review*, NAT'L L.J., Sept. 2, 1985, at S-2 (noting that "[t]he justices continue to reverse a disproportionately high percentage of the cases coming to them from the 9th U.S. Circuit Court of Appeals.").

B. The Arguments Against a Split

During February of 1996, the Office of the Circuit Executive for the United States Courts for the Ninth Circuit distributed a Position Paper in Opposition to S. 956 Ninth Circuit Court of Appeals Reorganization Act of 1995 and Companion Bill H.R. 2935.³² In this package, ten arguments were offered against splitting the Ninth Circuit, with specific reference to the split proposed in S. 956.³³

1. Circumstances are unchanged from 1990 when the Senate fully considered and rejected earlier legislation that differed in only minor respects from S. 956.

Initially, it should be noted that the substitute amendment to S. 956 is substantially different with respect to the proposed circuit compositions from previous bills to split the Ninth Circuit.³⁴ Notwithstanding that fact, the Ninth Circuit's suggestion that a bill's merit is in any way linked to that bill's success in Congress is unfounded. Thus, the Ninth Circuit's argument here is frivolous.³⁵

2. Creating two circuits from one without increasing judicial resources would not address the fundamental problem of expanding caseloads and delays; dividing the Fifth Circuit in 1980 has resulted in no long-term benefits in expediting case processing.

32. OFFICE OF THE CIRCUIT EXECUTIVE OF THE U.S. COURTS FOR THE NINTH CIRCUIT, POSITION PAPER IN OPPOSITION TO S. 956—NINTH CIRCUIT COURT OF APPEALS REORGANIZATION ACT OF 1995 (June 22, 1995), *reprinted in* 141 CONG. REC. S10436 (daily ed. July 20, 1995). Because the Executive Summary to the Position Paper listed the arguments in opposition to legislation to split the Ninth Circuit in a much more succinct manner and did not combine issues, I have chosen to organize my responses to these arguments in a manner consistent with the Executive Summary.

33. H.R. 2935 and S. 956 were identical in the proposed split of the Ninth Circuit; consequently, the Position Paper made no distinction between the two bills.

34. While it is true that Congress has reviewed several bills splitting the Ninth Circuit in a variety of ways, the split proposed by the Senate Committee on the Judiciary presents Congress with a formulation of first impression. The present legislation strikes a balance among three competing considerations which have led past Congresses to reject legislation: (1) the split should be as close to an even split as possible; (2) the split should not create a circuit consisting of only one state; and (3) the split should not divide the State of California.

35. If such an argument were successful, I can't imagine any legislation of importance ever getting through Congress.

There can be little doubt that the division of the Fifth Circuit was a monumental success. Prior to its division, the twenty-six judges of the Fifth Circuit resolved 4,717 appeals.³⁶ During 1995, the combined Fifth and Eleventh Circuits, comprised of twenty-nine combined authorized judgeships, resolved 12,401 appeals.³⁷ Tripling the output while only adding three new judgeships certainly indicates that splitting the Fifth Circuit yielded long-term benefit. According to Chief Judge Tjoflat, who was on the Fifth Circuit Court when it was divided, the increase in court efficiency is a direct result of collegiality on the court.³⁸ He concluded that the twenty-eight judges on the Ninth Circuit, which resolved 8,307 appeals, would experience a similar increase in court efficiency.³⁹

3. Dividing the Ninth Circuit would increase the potential for inconsistent law relating to admiralty, commercial trade, and utility law along the western seaboard.

I believe that admiralty, commercial trade, and utility laws have remained acceptably consistent along the *eastern* seaboard, which is comprised of six circuit courts. Thus, I believe that the Ninth Circuit has overstated its argument here. However, to the extent that splitting the Ninth Circuit *might* create inconsistency in admiralty, commercial trade, and utility law on the western seaboard, such a concern is minor when compared to the overwhelming benefits in judicial efficiency which will be generated by dividing the circuit.

4. Establishing a circuit consisting of just two states would defeat the traditional federalizing function of multi-state circuits that is a central purpose of the American federal appellate system.

While it is true that the Hruska Commission established the requirement that circuits would be composed of at least three

36. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR 348 tbl. B-1 (1981).

37. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 88, 90 tbl. B-1 (1995).

38. Tjoflat, *supra* note 28, at 70-73.

39. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 90 tbl. B-1 (1995); *see also Ninth Circuit Court of Appeals Reorganization Act of 1995: Hearings on S. 956 Before the Senate Committee on the Judiciary*, 104th Cong., 1st Sess. 2, (1995) (statement of the Hon. Gerald Bard Tjoflat, Chief Judge, U.S. Court of Appeals for the Eleventh Circuit).

states as one of its general criteria for circuit court realignment,⁴⁰ it is unclear whether the Commission intended these criteria to be absolute.⁴¹ Notwithstanding that fact, I believe that the benefits yielded from splitting the circuit outweigh any benefit in maintaining a minimum state requirement in establishing circuit court composition.⁴²

5. The estimated costs to construct a new Twelfth Circuit headquarters range from \$23 to \$59.5 million, plus \$2-3 million in annual costs to duplicate existing administrative functions. An additional headquarters would result in waste of taxpayer dollars spent on the recently completed \$100 million earthquake rehabilitation of the court's historic headquarters in San Francisco.

Estimates from the Congressional Budget Office (CBO) place the additional operating costs in the first year at approximately \$5 million.⁴³ Further, CBO estimates that following the first year, annual operating costs would be increased by \$2-3 million.⁴⁴ I do not believe that there will necessarily be a need for additional headquarters. Presently, the Ninth Circuit has facilities in Seattle, Portland, and Phoenix which could accommodate the headquarters of the newly created Twelfth Circuit.

40. Hruska Commission Report, *supra* note 2, at 231-32.

41. It is telling that, while the Ninth Circuit judges are quick to rely upon the general criteria set forth as part of the Hruska Commission's findings, they are just as quick to dismiss the overall recommendation of the Commission: that the Ninth Circuit should be divided.

42. Presumably, the Hruska Commission recognized that single-state circuits made little sense and feared that in two-state circuits, one state could overwhelm the other, and consequently set the minimum states requirement at three states. While I agree that single-state circuits make little sense, I disagree with the proposition that two-state circuits are a bad idea. Further, to suggest that, because California cases would comprise approximately 90% of the caseload of the newly created Ninth Circuit, splitting the circuit as contemplated by S. 956 is inappropriate, disregards the present circumstances in the Second Circuit and the Fifth Circuit. Presently, New York cases account for approximately 87% of the Second Circuit's docket, while Texas cases account for approximately 70% of the Fifth circuit. SENATE REPORT, *supra* note 14, at 7 nn.14-15.

43. Letter from the Congressional Budget Office, to Sen. Orrin Hatch, Chairman, Senate Judiciary Comm. (Dec. 9, 1995) (concerning S. 956) (on file with author).

44. I believe that these costs are inflated. The suggestion that splitting the circuit will necessitate duplication of administrative personnel in the two circuits is exaggerated. Presently, the Ninth Circuit maintains a large enough administrative staff to service the separate divisions of the court. Funding for staffing requirements for the newly created Twelfth Circuit could be satisfied in large part from reductions in the old Ninth Circuit.

6. *The vast majority of judges and lawyers in the Ninth Circuit have repeatedly voted their preference for retaining the current configuration of the Ninth Circuit.*

As Senator Kyl, a former practicing attorney and member of the Arizona Bar Association, stated before the Senate Committee on the Judiciary, oftentimes the overall position of the bench or bar association does not reflect the position of the majority of practicing attorneys in that state.⁴⁵ The fact that the Attorneys General from California, Arizona, Montana, Idaho, Oregon, Washington, and Alaska unanimously agree that the Ninth Circuit should be split sustains Senator Kyl's observations.⁴⁶

7. *The official bar organizations of Arizona, California, Hawaii, Idaho, Montana, and Nevada, and the Federal Bar Association, have all adopted resolutions opposing any division of the Ninth Circuit.*

As noted above, the formal bar association position does not reflect all, or for that matter the majority, of the views of the legal community in the Ninth Circuit. I do concede that some attorneys, as a general proposition, have a vested interest in maintaining the uncertainty of legal precedent in the Ninth Circuit. For example, uncertainty in the law stimulates litigation, thus, making money for civil attorneys. Likewise, it increases the arguments available to criminal defense attorneys. In fact, the only attorneys who do not benefit from uncertainty in legal pre-

45. It is not surprising that the district court judges, whose decisions are appealed to the Ninth Circuit, and the attorneys, who practice before the Ninth Circuit, have expressed their opposition to splitting the circuit. Opposition to splitting the circuit carries favor with the Chief Judge of the Ninth Circuit. Likewise, the silence of those attorneys and judges who would otherwise have supported splitting the circuit, is understandable. By the same token, the Ninth Circuit judges' reluctance to publicly oppose Chief Judge Wallace on this issue is understandable. Finally, Chief Judge's opposition—and more recently Chief Judge Hug's opposition—to splitting the circuit is not surprising. The Ninth Circuit receives roughly 20% of the entire amount appropriated by Congress for operating the Federal Appellate Courts, which provides the Chief Judge of the Ninth Circuit with a great deal of power (this was recently illustrated by the 1995 Ninth Circuit Judicial Conference which was held in Maui, Hawaii, at a total cost of approximately \$1 million).

46. See letter from Bruce M. Botelho, Attorney General of Alaska, Alan G. Lance, Attorney General of Idaho, Joseph P. Mazurek, Attorney General of Montana, Theodore R. Kulongoski, Attorney General of Oregon, and Christine O. Gregoire, Attorney General of Washington, to Sen. Orrin Hatch, Chairman, Senate Judiciary Comm. (Sept. 12, 1995) (on file with author); see also letter from Daniel E. Lundgren, Attorney General of California, to Sen. Orrin Hatch, Chairman, Senate Judiciary Comm., (Sept. 26, 1995) (on file with author).

cedent are the prosecutors, who have consistently endorsed dividing the circuit.

8. The Ninth Circuit has become a national leader in experimentation in judicial administration, developing solutions that are models for the rest of the country.

While it is true that the Ninth Circuit has employed a number of experimental procedures to make the court more efficient, unfortunately many of these devices have lengthened delays and encouraged litigation in the Ninth Circuit. For example, the limited en banc procedure undermines the ultimate goal of the en banc procedure, which was created to resolve intracircuit conflicts by a majority of judges on the bench. With such a limited en banc procedure, less than one quarter of the court can make such a determination. Furthermore, the limited en banc device is expensive, time-consuming and ineffective with regard to maintaining unity in the law of the circuit. The "justice by lot" selection procedure, in particular, weakens allegiance to the en banc holdings and makes reconciliation of precedents even less likely.

9. Total case processing time in the Ninth Circuit is not significantly longer than the national median; any remaining delay is due to unfilled vacancies and a lack of additional Judges the Ninth Circuit has requested. The Ninth Circuit Judges are the fastest in the Nation in disposing of cases once the panel receives the cases.

The statistics compiled by the Administrative Office of the United States Courts last year suggest the contrary. In his testimony before the Senate Committee on the Judiciary, Chief Judge Wallace of the Ninth Circuit conceded that the Ninth Circuit takes approximately four months longer to complete an appeal as compared to the national median time, which is approximately ten months.

10. The Ninth Circuit would welcome an independent, congressionally-mandated study of federal appellate courts to update Congress before it makes far-reaching structural changes.

In 1973, the Hruska Commission conducted an extensive study of the federal appellate system and came to the conclusion that the Ninth Circuit should be divided. The Ninth Circuit

judges opposed the recommendations of the Hruska Commission and Congress deferred. Since that time, Congress has reviewed a variety of proposals to split the Ninth Circuit, and each time, the Ninth Circuit Judges voiced opposition. Now that the Senate has settled upon establishing a commission to study the federal appellate courts and recommend reform, I look forward to working with the Ninth Circuit in expeditiously implementing the commission's recommendations at the conclusion of its study.⁴⁷

IV. A FEW THOUGHTS ON THE COMMISSION

From the outset of this debate, I have maintained that the issue of whether to divide the Ninth Circuit Court of Appeals and the issue of whether to appoint a commission to study the entire federal appellate system and recommend long-term reform measures, are separate issues and should be treated as such. In my opinion, division of the Ninth Circuit is the only responsible solution to the immediate problems which confront Ninth Circuit judges, practitioners and litigants. A study of the entire federal appellate system, on the contrary, is an appropriate measure with respect to the other federal circuit courts, which, though they do not have the problems identified earlier in this article, might develop administrative problems; it does not, however, address the immediate conditions presented by the Ninth Circuit.

Unfortunately, though, the political reality, which unfolded this past year, is that Congress is presently unwilling to divide the Ninth Circuit over the objection of the Chief Judge of the Ninth Circuit. As a result, we compromised and proposed a commission to formulate a long-range strategy for addressing the anticipated problems which might develop in the federal appellate system, and, in so doing, we postponed addressing the immediate problems presented in the Ninth Circuit.

With respect to the commission, I believe that any radical restructuring of circuit boundaries or the creation of a super-appellate court⁴⁸ will be actively opposed by the federal appel-

47. It is my hope that, should the Commission recommend that the Ninth Circuit be divided, the Ninth Circuit will support this recommendation with the same enthusiasm that they have opposed this legislation historically.

48. In 1988, the 100th Congress created the Federal Courts Study Committee which was charged with the responsibility of studying the federal appellate system and recommending a long term plan for the judiciary. Without endorsing any plan, the Committee proposed the following as options: (1) dissolve the present geographic circuits and draw new circuit boundaries to create new regional courts; (2) create an

late judiciary.⁴⁹ Consequently, should the commission make such a recommendation, it is unlikely that Congress would adopt it. Similarly, Congress is not likely to adopt any recommendation which limits federal jurisdiction for two reasons. First, state courts, whose caseloads would increase as a result of such a proposal, would uniformly oppose such a plan. Second, Congress is unlikely to adopt a plan which has the effect of restricting federal legislation. As a result, I believe that the only proposal which has any chance of passing Congress is a proposal which divides the Ninth Circuit, to resolve the immediate problems presently facing that court, and deferring on the issue of reforming or restructuring other circuits until problems develop.

V. CONCLUSION

Much has been written by legal scholars in opposition of splitting the Ninth Circuit Court of Appeals. While most of the legal treatises agree that some action should be taken—either now or in the near future—to address the continuing problems faced by the Ninth Circuit, few advocate that the Ninth Circuit should be divided. Rather, these legal scholars offer innovative reform measures like redefining circuit court boundaries or restructuring the federal appellate court system. However, all of these articles ignore the political reality facing each of these proposals: Congress is unlikely to adopt any reform proposal which is opposed by the legal community.

additional appellate tier; (3) create national subject matter courts with specialized national jurisdiction; (4) merge all the federal courts of appeals into a single centrally-organized court that has the authority to create and abolish special subject matter panels; and (5) consolidate all the circuit courts and create perhaps five "jumbo" circuits. See FEDERAL COURTS STUDY COMMISSION, 101st Congress., 2d Sess., Report 115, 118-123 (April 2, 1990).

49. This was certainly true when the Hruska Commission studied such proposals and concluded that:

We have not recommended a general realignment of all the circuits. To be sure, the present boundaries are largely the result of historical accident and do not satisfy such criteria as parity of caseloads and geographical compactness. But these boundaries have stood since the nineteenth century, except for the creation of the Tenth Circuit in 1929, and whatever the actual extent of variation in the law from circuit to circuit, relocation would take from the bench and bar at least some of the law now familiar to them. Moreover, the Commission has heard eloquent testimony evidencing the sense of community shared by lawyers and judges within the present circuits. Except for the most compelling reasons, we are reluctant to disturb institutions which have acquired not only the respect but also the loyalty of their constituents.

See Hruska Commission Report, *supra* note 2, at 228.

Meanwhile, as this debate continues, problems in the Ninth Circuit Court of Appeals grow worse. I believe that we should address the immediate problem presented by the Ninth Circuit and then turn to more esoteric discussions of radical judicial reform. By failing to do so, we are doing a great disservice to judges, practitioners, and litigants in the Ninth Circuit.