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A Ninth Circuit Split Study Commission: Now What?

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A NINTH CIRCUIT SPLIT STUDY COMMISSION: NOW WHAT?

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I.

On March 20, 1996, the Senate passed, by unanimous consent, S. 956, a bill to establish a "Commission on Structural Alternatives for the Federal Courts of Appeals."[1] The purpose of the legislation is to study the present division, structure and alignment of the federal courts of appeals, with "particular reference" to the Ninth Circuit, and to report to the President and Congress recommendations for appropriate changes in circuit boundaries. As presently drafted, the legislation calls for submission of its report no later than February 28, 1997.

II.

As one member of the Court of Appeals most affected, I view this legislation as a far superior alternative to the bill which passed the Senate Judiciary Committee on December 21, 1995, and would have immediately divided the Ninth Circuit.[2] The bill also provides an historic opportunity to develop a comprehensive blueprint for the structure of the federal courts of appeals generally, and the Ninth Circuit in particular, for the 21st Century. No comprehensive review of the structure of the federal courts has been undertaken since the study chaired by the late Senator Roman L. Hruska of Nebraska in the 1970s (the "Hruska Commission"),[3] and in my view such a review is most timely.

The timeliness of the review becomes quickly apparent when

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1. S. 956, 104th Cong., 2nd Sess. (1996). As of this writing, the measure is pending in the House of Representatives, referred to the Committee on the Judiciary where it has been, in turn, referred to the Subcommittee on Courts and Intellectual Property. I am not aware of any scheduled House hearings on the legislation; however, I strongly suspect that by the time of publication of this essay, the commission may well already be in business.

2. On September 13, 1995, I offered testimony before the Senate Judiciary Committee in opposition to the original version of S. 956. *See Ninth Circuit Court of Appeals Reorganization Act of 1995: Hearings on S. 956 Before the Senate Comm. on the Judiciary*, 104th Cong., 1st Sess. 2 (1995) (statement of the Hon. Diarmuid F. O'Scannlain, Judge, U.S. Court of Appeals for the Ninth Circuit). In addition, portions of this essay were originally published in Diarmuid F. O'Scannlain, *A Ninth Circuit Split is Inevitable, But Not Imminent*, 56 OHIO ST. L.J. 947 (1995).

3. 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, 234-42 (1973).

one takes a hard look at the unique circumstances facing the Ninth Circuit. The Ninth is by far the largest of the twelve regional circuits in the country, alone handling about 20% of the entire federal judicial caseload. It comprises sixteen separate courts, including the United States Court of Appeals for the Ninth Circuit (on which Chief Judge Hug and I sit) and fifteen district courts. These courts sit in nine states and two territories ranging from the Rocky Mountains to the Sea of Japan and from the Mexican border to the Arctic Circle. Our court of appeals presently has seats for twenty-eight judges; the next largest regional court of appeals is the Fifth Circuit in New Orleans, with seventeen judges.[4] The district courts in our circuit range in size from the Districts of Guam and the Northern Mariana Islands in Saipan with one judge each, to the Central District of California with twenty-seven judges in the Los Angeles metropolitan area. In all, there are ninety-nine active district judgeships in the circuit, and with the twenty-eight judgeships on my court, the circuit comprises a total of a hundred and twenty-seven active judgeships.[5]

The modern history of the Ninth Circuit is also unique among the federal courts of appeals. The initial version of S. 956 did not represent the first proposal which Congress has considered to address the issue of the Ninth Circuit's growth and size. In 1978, following submission of the Hruska Commission's report, Congress enacted Public Law 95-486.[6] Section 6 of that Act permitted circuit courts of appeals of more than fifteen active judges, essentially the Fifth and Ninth Circuits, to divide themselves into various administrative divisions and to sit en banc with less than the full number of judges on the court of appeals. The judges of the Fifth Circuit responded by unanimously proposing that their circuit be split in two, and Congress created the Eleventh Circuit comprising Georgia, Alabama, and Florida, and reduced the former Fifth Circuit to Louisiana, Mississippi, and Texas. The Ninth Circuit, however, elected to remain intact, and has instituted a number of innovations designed to handle the administrative challenges posed by what is perhaps the largest appellate court of its kind in the world.

In my view, many of those administrative innovations have

4. *See* 28 U.S.C. § 44(a) (1994).

5. *See infra* p. 320 tbl. A.

6. Act of Oct. 20, 1978, Pub. L. No. 95-486, 92 Stat. 1629 (codified as amended at 28 U.S.C. § 41 (1994)).

been successful. I entirely agree with Chief Judge Hug that the Ninth Circuit is handling its caseload reasonably well, and there is not currently a crisis. Nevertheless, I and a number of my colleagues are quietly but increasingly worried about the future, and many of us harbor doubts about how long we can continue to perform effectively as the caseload continues to grow. Based on the statistical norms, our court recently unanimously requested ten additional judges which, if Congress were to approve such a request, would bring the total number of active judges to thirty-eight, not including our fourteen senior colleagues. Further, in 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 increase at a rate significantly ahead of most other regions of the country.

In light of these trends, I believe that the single most fundamental choice facing the proposed commission as it prepares its report for Congress and the President is whether to encourage further growth of the Ninth Circuit, thus impliedly promoting an amalgamation of the circuits into a lesser number of circuits with larger courts of appeals, or to continue to restructure the circuits into more manageable regional entities. I am firmly convinced that the latter is the more preferable option.

In my view, amalgamation simply is not practical. As a court of appeals becomes increasingly larger, it loses the collegiality among judges that is a fundamental ingredient in effective administration of justice in a court responsible for stating what the law is. Collegiality, in the appellate court context, means much more than mere mutual respect among judges. It defines an environment where judges have the opportunity to sit frequently on panels together, thus increasing understanding of each other's reasoning, decreasing the possibility of misunderstandings, and increasing the tendency toward rendering unanimous decisions. It is a precious value which is forged from close, regular and frequent contact in joint decisionmaking, and it is the glue which binds the judges in a shared commitment to maintaining the institutional integrity of circuit law. As the court of appeals continues to grow, it becomes increasingly difficult to maintain the collegiality necessary for the court to do its job.

As I have indicated elsewhere, I should point out that I am in complete agreement with the following statement outlined in the commentary to Recommendation 17 of the "Proposed Long Range Plan for the Federal Courts," submitted in March 1995 to

the Judicial Conference of the United States:

> [U]nrestrained growth has a different effect on the courts of appeals than on the district courts. The effectiveness, credibility and efficiency of a court of appeals is intricately linked to its ability to function as a unified body. A judge's sense that he or she speaks for the whole court and not merely as an individual is critical to an appellate court's ability to shape and maintain a coherent body of law . . . . The resulting stability can make radical shifts in the law of the circuit less likely and thereby moderate to some extent the adverse effects of growth.[7]

For these reasons, I believe that simply adding more judges to an ever-expanding appellate court is not appropriate. As more and more judges are added, I deeply fear that the court loses accountability to lawyers, other judges, and the public at large. Further, as the number of opinions increases, we judges risk losing the ability to keep track of precedents and the ability to know what our circuit's law is. In sum, as I indicated in my testimony before the Senate Judiciary Committee in September, we cannot simply expand forever, and I believe that the Ninth Circuit will ultimately need to be split.

III.

Assuming that the commission agrees that the Ninth Circuit will eventually need to be split, the question commission members must decide is how that split should be accomplished. In my view, it is crucial that any such split be undertaken with a view to ensuring that the new circuits which would result from such a split would be able to meet their primary goal of guaranteeing speedy, just resolution of cases at reasonable cost. In deciding when and how the court should be split, the commission should thus take into account such factors as where the court's cases originate and will be coming from, what types of cases the court will hear in coming years, where the judges will sit, where the headquarters of the remaining circuits should be located, how those headquarters facilities should be developed so as to minimize redundancy and to reduce costs, and what the preferred method of administration should be. Based on these and other factors, I believe that only one of the various solutions proposed

7. COMMITTEE ON LONG RANGE PLANNING OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS 44 (1995).

in recent years adequately addresses the long-term needs of the Ninth Circuit.[8]

A.

As explained more fully in my testimony before the Senate Judiciary Committee, I believe that the split originally proposed by S. 956 was an inadequate solution. Under the original version of the bill, a new Twelfth Circuit (dubbed by some as the "icebox" circuit) consisting of Alaska, Idaho, Montana, Oregon, and Washington would have been created, and the remaining Ninth Circuit would have consisted of Arizona, California, Hawaii, Nevada, Guam, and the Northern Mariana Islands. Such a split would, in my view, do nothing to solve the problems of the remaining Ninth Circuit. Based on 1994 figures, the proposed Twelfth Circuit would take only 23% of the present caseload, while the remaining circuit would keep 77% of the cases and would remain the largest in the country. Accordingly, such a split would fail to address the long-term needs of the circuit, and it would force Congress back to the drawing board once again.

B.

I also believe that the split proposed in the amended version of S. 956 which passed the Senate Judiciary Committee is an inadequate solution. The bill as drafted at the time would have split the circuit into a new Twelfth Circuit (some have labeled it the "string bean" circuit) comprised of Alaska, Arizona, Idaho, Montana, Nevada, Oregon, and Washington, and a new Ninth Circuit consisting of California, Hawaii, Guam, and the Northern Mariana Islands.

To cite merely two examples of the problems such a split would create, the placement of a circuit headquarters in Arizona, the southernmost state in the proposed Twelfth Circuit, would have forced one of my colleagues to make regular, lengthy sojourns from Fairbanks, Alaska to Phoenix, thus wasting valuable judicial time and federal resources. More importantly, passage of the bill would force Congress to build new headquarters facilities in Phoenix. Doing so would not only be expensive in its own right, it would also mean that tens of millions of dollars recently

8. See *infra* pp. 321-22 tbl. B for a summary of how the present Ninth Circuit's caseload would be divided among the circuits which would remain after each possible split.

spent repairing and renovating our San Francisco headquarters will have been wasted. I am confident that a better solution is available.

C.

Another possible alternative is commonly referred to as the "horsecollar" configuration. Under this approach, California would constitute its own circuit, while the other eight states and two territories would surround it like a horsecollar. Certainly, California standing alone would be large enough to justify its own circuit; indeed, it would immediately become the third largest remaining circuit in the country.

I do not believe that this solution is desirable. First and foremost, creating a circuit exclusively for one state might tend to undermine the system of federalism envisioned by the Founding Fathers. In addition, splitting the court in this manner would not be an even split; based on 1993 and 1994 case filings, nearly 60% of the cases in our court arise from California alone.

D.

Another option, in my view the most sound, is that recommended by the Hruska Commission in 1973 and largely incorporated in H.R. 3654, a bill introduced by Representative Michael J. Kopetski of Oregon in the 103d Congress in 1993. Under that proposal, the circuit would be split into a new Twelfth Circuit consisting of the southern and central districts of California and the districts of Arizona and Nevada, and a new Ninth Circuit consisting of the northern and eastern districts of California, the northwest states and the Pacific islands.

The Hruska recommendation has a number of concrete benefits. First, based on 1994 case filings, division of the circuit along these lines would result in a 51%-49% split of the cases today. It would also be the least costly method of division, because no new courthouse construction would be needed. Our Pasadena courthouse would serve as headquarters for the new Twelfth Circuit, while our current headquarters in San Francisco would continue to serve the remaining Ninth Circuit.

Of course, a potential concern with this plan is that it divides one state between two circuits, which has never been done. However, the Hruska Commission carefully analyzed this issue, and concluded that any problems which might arise could be overcome. In addition, the Kopetski bill outlined an innovative

and readily available solution, namely authorization of a special en banc panel which could be convened whenever necessary to resolve any conflict which may arise between the two circuits in California. I believe that this practical device would resolve any difficulties stemming from the inclusion of a portion of California in each of two circuits.

E.

The final alternative is a proposal to split the Ninth Circuit three ways, in accordance with our existing administrative divisions. I believe that this proposal would force Congress to spend significant amounts of money creating a new headquarters for at least one of the new circuits, and that it is thus less preferable to the Hruska Commission's recommendation.

IV.

In sum, assuming that S. 956, as passed by the Senate, is enacted into law without further significant amendment, the commission it creates will have a wonderful opportunity to shape the future of the federal judiciary. It is my sincere hope that whatever proposals the commission ultimately submits will enable us to meet our goals of providing swift, effective judicial decisionmaking at reasonable cost well into the next century.

TABLE A

COURTS WITHIN NINTH JUDICIAL CIRCUIT

15 District Courts

Court Name	City	# of Judges
D. Alaska	Anchorage	3
D. Arizona	Phoenix	8
C.D. California	Los Angeles	27
E.D. California	Sacramento	7
N.D. California	San Francisco	14
S.D. California	San Diego	8
D. Guam	Agana	1
D. Hawaii	Honolulu	4
D. Idaho	Boise	2
D. Montana	Helena	3
D. N. Mariana Islands	Saipan	1
D. Nevada	Las Vegas	4
D. Oregon	Portland	6
E.D. Washington	Spokane	4
W.D. Washington	Seattle	7
TOTAL:		99

One Court of Appeals

Court of Appeals	San Francisco	28
Total 16 Courts:		127

Does not include Bankruptcy Courts, Bankruptcy Judges, and Magistrate Judges.

SOURCES: 28 U.S.C. §§ 44, 133 (1994); Administrative Office of the United States Courts, 1995 Federal Court Management Statistics (1995).

TABLE B

PROJECTED CASE FILINGS IN COURT OF APPEALS UNDER VARIOUS PROPOSALS TO SPLIT THE NINTH CIRCUIT

(Based on filings for year ending June 30, 1994)

A. ORIGINAL VERSION OF SENATE BILL 956 ("ICE-BOX" APPROACH):

In the new 12th Circuit: 1866 (23%)
6 District Courts: Alaska, Idaho, Montana, Oregon, E.D. Washington, W.D. Washington.

Remaining in the 9th Circuit: 6341 (77%)
9 District Courts: Arizona, C.D. California, E.D. California, N.D. California, S.D. California, Guam, Hawaii, Northern Mariana Islands, Nevada.

B. VERSION OF SENATE BILL 956 PASSED BY SENATE JUDICIARY COMMITTEE ("STRING BEAN" APPROACH):

In the new 12th Circuit: 3261 (40%)
8 District Courts: Alaska, Arizona, Idaho, Montana, Nevada, Oregon, E.D. Washington, W.D. Washington.

Remaining in the 9th Circuit: 4946 (60%)
7 District Courts: C.D. California, E.D. California, N.D. California, S.D. California, Guam, Hawaii, Northern Mariana Islands.

C. "HORSECOLLAR" APPROACH:

In the new 12th Circuit: 3584 (44%)
11 District Courts: Alaska, Arizona, Guam, Hawaii, Idaho, Montana, Northern Mariana Islands, Nevada, Oregon, E.D. Washington, W.D. Washington.

Remaining in the 9th Circuit: 4623 (56%)
4 District Courts: E.D. California, C.D. California, N.D. California, S.D. California.

D. HRUSKA COMMISSION RECOMMENDATION:

In the new 12th Circuit: 4177 (51%)
4 District Courts: Arizona, C.D. California, S.D. California, Nevada.

Remaining in the 9th Circuit: 4030 (49%)
11 District Courts: Alaska, E.D. California, N.D. California, Guam, Hawaii, Idaho, Montana, Northern Mariana Islands, Oregon, E.D. Washington, W.D. Washington.

E. THREE-WAY SPLIT APPROACH:

In the new 12th Circuit: 1866 (23%)
6 District Courts: Alaska, Idaho, Montana, Oregon, E.D. Washington, W.D. Washington.

In the new 13th Circuit: 2782 (34%)
2 District Courts: C.D. California, S.D. California.

Remaining in the 9th Circuit: 3559 (43%)
7 District Courts: Guam, Hawaii, Northern Mariana Islands, N.D. California, E.D. California, Nevada, Arizona.

SOURCE: Office of the Clerk, U.S. Court of Appeals for the Ninth Circuit: Judge Diarmuid F. O'Scannlain.