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## AN UPDATE ON THE NINTH CIRCUIT DEBATE

Carl Tobias\*

### I. INTRODUCTION

Several years ago, I evaluated in *The Journal*<sup>1</sup> the final report and recommendations of the Commission on Structural Alternatives for the Federal Courts of Appeals.<sup>2</sup> I assessed in that article both the report itself and the centerpiece of the commissioners' suggestions—a divisional arrangement for the Ninth Circuit that could also be adopted by the remaining intermediate appellate courts as they increase in size.<sup>3</sup> At that time, legislation intended to implement the Commission's recommendations had only recently been introduced,<sup>4</sup> and I suggested that Congress reject the bill.<sup>5</sup>

Neither house has yet subscribed to the report's divisional approach, although numerous developments have occurred since I last analyzed it here. Perhaps most important was the legislation sponsored in March 2000 by a group of senators that would have split the Ninth Circuit<sup>6</sup> and the similar measures that members of both houses offered during the spring of 2001.<sup>7</sup> Because these events may have a significant effect on the future

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1. Carl Tobias, *Appellate Study Panel Issues Final Report*, 1 J. App. Prac. & Process 409 (1999).

2. Commission on Structural Alternatives for the Federal Courts of Appeals, *Final Report* (1998).

3. *Id.* at 40-50; *see generally* Tobias, *supra* n. 1, at 411-13.

4. Sen. 253, 106th Cong. (1999).

5. *See generally* Tobias, *supra* n. 1, at 414.

6. Sen. 2184, 106th Cong. (2000).

7. Sen. 346, 107th Cong. (2001); H.R. 1203, 107th Cong. (2001).

of the federal appellate courts, I examine here their history and potential significance. I consider at the outset the relevant developments since my last analysis in this journal. Focusing on the Ninth Circuit, I then offer a number of predictions about the future of the federal courts of appeals and make several recommendations for their improvement.

## II. RECENT DEVELOPMENTS

The Commission on Structural Alternatives for the Federal Courts of Appeals had its genesis in the most recent effort to divide the Ninth Circuit: the May 1995 campaign led by senators from several states in the Pacific Northwest.<sup>8</sup> They faced strong opposition. The Ninth Circuit's chief judge, Procter Hug, Jr., several other members of his court, and numerous members of Congress, including Senator Dianne Feinstein and nearly all of California's Congressional delegation, argued against possible bifurcation and proposed instead that Congress authorize a thoroughgoing assessment of the federal appellate system.<sup>9</sup> This opposition prevailed, and the five-member Commission was created in November 1997 to evaluate the appeals courts and to suggest improvements, if any were warranted, and its members were instructed to emphasize the Ninth Circuit.<sup>10</sup> Issued in December 1998, the report of the Commission on Structural Alternatives for the Federal Courts of Appeals recommended that Congress prescribe a divisional arrangement for the Ninth Circuit and authorize the other courts of appeals to implement divisional plans as they grow.<sup>11</sup>

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8. Sen. 956, 104th Cong. (1996); *see also* 141 Cong. Rec. S7504 (daily ed. May 25, 1995) (statement of Sen. Gorton); *see generally* Ninth Circuit Court of Appeals Reorganization Act of 1995, S. Rep. No. 104-197 (1995); Thomas E. Baker, *Rationing Justice on Appeal: The Problems of the U.S. Courts of Appeals* ch. 5 (West Pub. Co. 1994); Carl Tobias, *The Impoverished Idea of Circuit-Splitting*, 44 Emory L. J. 1357, 1376-95 (1995).

9. *See e.g.* Sen. Rep. 104-197, *supra* n. 8, at 19-20. For examination of earlier studies of the appellate system, *see* Thomas E. Baker, *A Generation Spent Studying the United States Courts of Appeals: A Chronology*, 34 U.C. Davis L. Rev. 395 (2000).

10. *See* Pub. L. No. 105-119, § 305, 111 Stat. 2491, 2492 (1997).

11. *See Commission Report, supra* n. 2, at 40-50; *see generally* Arthur D. Hellman, *The Unkindest Cut: The White Commission Proposal to Restructure the Ninth Circuit*, 73 S. Cal. L. Rev. 377, 381-93 (2000); Procter Hug, Jr., *The Commission on Structural Alternatives for the Federal Courts of Appeals' Final Report: An Analysis of the*

In January 1999, several senators sponsored a bill that tracked the report's recommendations,<sup>12</sup> but Judge Hug analyzed the proposed divisional approach, concluded that it was unworkable, and criticized it publicly.<sup>13</sup> He also established a Ninth Circuit Evaluation Committee consisting principally of active judges<sup>14</sup> and asked it to scrutinize the Ninth Circuit's work in light of concerns expressed by the members of the Commission on Structural Alternatives for the Federal Courts of Appeals and other observers of the federal courts.<sup>15</sup> Judge Hug also directed the committee to suggest ways in which the operations of the Ninth Circuit might be made more efficient and its procedures made easier for the public to understand and to use.<sup>16</sup>

During July 1999, the applicable subcommittees of the Judiciary Committees in both houses held hearings on the Commission's recommendations and the then-pending bill.<sup>17</sup> Chief Judge Hug and Ninth Circuit Judge Charles Wiggins opposed each when testifying,<sup>18</sup> but Ninth Circuit Judge Pamela Ann Rymer, who had served on the Commission, testified on behalf of the plan and the bill. Judges Andrew Kleinfeld and Diarmuid O'Scannlain, both also of the Ninth Circuit, urged Congress to consider change for the Ninth Circuit, although neither explicitly supported the Commission's report.<sup>19</sup> In the

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*Commission's Recommendations for the Ninth Circuit*, 32 U.C. Davis L. Rev. 887, 897-99, 901-06, 909-17 (1999); John B. Oakley, *Comparative Analysis of Alternative Plans for the Divisional Organization of the Ninth Circuit*, 34 U.C. Davis L. Rev. 483 (2000); see generally *Special Issue on the Commission on Structural Alternatives for the Federal Courts of Appeals*, 15 J. L. & Pol. 379-580 (1999).

12. Sen. 253, 106th Cong. (1999); see 145 Cong. Rec. S742 (daily ed. Jan. 20, 1999); see generally *Commission Report*, *supra* n. 2, at 89-91 (providing the proposed legislation on which Sen. 253 was based).

13. See Hug, *supra* n. 11.

14. See Ninth Circuit Evaluation Committee, *Interim Report* (Mar. 2000).

15. *Id.* at 2.

16. *Id.*

17. *Hearing on the Final Report by the Commission on Structural Alternatives for the Federal Courts of Appeals Before the Senate Judiciary Subcommittee On Administrative Oversight and the Courts* (1999); *Oversight Hearings on the Final Report of the Commission on Structural Alternatives for the Federal Courts of Appeals Before the House Judiciary Subcommittee On Courts and Intellectual Property* (1999).

18. Senate Hearing, *supra* n. 17, at 41, 113.

19. *Id.* at 59 (acknowledging that Judge Rymer had served as a member of the Commission); *id.* at 79 (testimony of Judge Kleinfeld); *id.* at 87 (testimony of Judge

week between the Senate and House hearings, Senator Feinstein proffered a measure modifying the Ninth Circuit's en banc process and requiring that at least one judge whose chambers are located in the geographic region from which a particular appeal arose would sit on the three-judge panel hearing the case.<sup>20</sup>

In March 2000, the Ninth Circuit Evaluation Committee published an Interim Report that included a number of valuable recommendations, many of which the court has now adopted in an effort to streamline its procedures and to make justice more accessible. Those improvements include revamping the en banc procedure, providing for regional assignments, and undertaking measures intended to encourage collegiality among the judges, increase efficiency, and maintain the consistency of circuit law.<sup>21</sup> The Ninth Circuit specifically adopted new procedures for the limited en banc court that has recently been holding quarterly sessions and granting more suggestions for rehearing en banc;<sup>22</sup> began experimenting with regional assignments involving the northern administrative unit;<sup>23</sup> instituted measures intended to expedite disposition, such as increased batching of appeals that involve closely related issues; instituted measures that maintain and foster uniformity, including an electronic mailbox; instituted more careful scrutiny of petitions for rehearing en banc (which

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O'Scannlain); *id.* at 188 (statement of Judge Sneed); *see generally* Hellman, *supra* n. 11, at 387; Pamela Ann Rymer, *How Big is Too Big?* 15 J.L. & Pol. 383 (1999); Pamela Ann Rymer, *Implications of the White Commission*, 34 U.C. Davis L. Rev. 351 (2000).

20. Sen. 1403, 106th Cong. (1999); *see generally* 145 Cong. Rec. S8884 (daily ed. July 20, 1999) (statement of Sen. Feinstein); Senate Hearing, *supra* n. 17, at 6 (statement of Sen. Feinstein); *see generally* David R. Thompson, *The Ninth Circuit Court of Appeals Evaluation Committee*, 34 U.C. Davis L. Rev. 365, 374-75 (1999); Carl Tobias, *The Next Step for the Ninth Circuit*, 733 S. Cal. L. Rev. 1407, 1416 (2000); Penny Arevalo, *Ninth Circuit Remains Intact, for Now*, 10 Corp. Leg. Times 80 (June 2000).

21. *See Evaluation Committee Interim Report*, *supra* n. 14; *see generally* Procter Hug, Jr. & Carl Tobias, *A Preferable Approach for the Ninth Circuit*, 88 Cal. L. Rev. 1657, 1667-71 (2000); Thompson, *supra* n. 20; Tobias, *supra* n. 20.

22. *See Evaluation Committee Interim Report*, *supra* n. 14, at 2-6. *See generally* Hug & Tobias, *supra* n. 21, at 1669. The Ninth Circuit is the only court that employs a "statutorily authorized 'limited en banc' court." *Commission Report*, *supra* n. 2, at 32. *See generally* Pub. L. No. 95-486, 92 Stat. 1633 (1978).

23. *See Evaluation Committee Interim Report*, *supra* n. 14, at 12-13; *supra* n. 16 and accompanying text; Hug & Tobias, *supra* n. 21, at 1670; Thompson, *supra* n. 20, at 374-75.

should help identify possible conflicts); and focused on outreach.<sup>24</sup>

Before these changes could be implemented, senators reintroduced a proposal to split the Ninth Circuit.<sup>25</sup> The new bill's sponsors argued for a split, criticizing the divisional arrangement and complaining that the circuit is so large and its judges so overworked that collegiality suffers and their decisions are too often reversed by the Supreme Court, that cases languish too long on appeal before resolution, and that circuit law is internally inconsistent.<sup>26</sup> However, Congress adjourned in December 2000 without enacting any of these three pieces of proposed legislation, which would have either authorized a divisional approach, instituted changes in the en banc process and imposed regional assignments, or bifurcated the court.

When Congress convened in January 2001, the situation remained unsettled. The November 2000 elections resulted in an evenly divided Senate and left the Republican Party—from which many of the Ninth Circuit's critics have historically come—with only a slight majority in the House. Moreover, the members of the Senate and the House who have traditionally been the most vociferous advocates of bifurcation appeared to consider the question less compelling, perhaps because the Supreme Court has reviewed a comparatively smaller number of Ninth Circuit appeals in recent terms,<sup>27</sup> and the court itself has implemented some changes for which its critics had been calling. Senator Frank Murkowski of Alaska did, however, introduce a circuit-splitting proposal on February 15, 2001,<sup>28</sup> expressing again a number of the previously articulated justifications for a split, including inconsistent decisions,

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24. *Evaluation Committee Interim Report*, *supra* n. 14, at 6-12. See generally Hug & Tobias, *supra* n. 21, at 1667-69, 1671; Thompson, *supra* n. 20, at 369-74.

25. Sen. 2184, 106th Cong. (2000); see 146 Cong. Rec. S1233 (daily ed. Mar. 7, 2000) (statement of Sen. Murkowski); *id.* at S1234 (statement of Sen. Hatch); *supra* n. 11 and accompanying text; Scott Bales, *The Ninth Circuit: Should It Stay or Should It Go?* 34 U.C. Davis L. Rev. 379, 386-88 (2000).

26. See 146 Cong. Rec. at S1233 (statement of Sen. Murkowski); *id.* at S1234 (statement of Sen. Hatch); 147 Cong. Rec. S1476 (daily ed. Feb. 15, 2001) (statement of Sen. Murkowski).

27. Ninth Circuit Court of Appeals Law Library Table on United States Supreme Court Reversal Rates (2000); Hug & Tobias, *supra* n. 21, at 1669-70.

28. Sen. 346, 107th Cong. (2001).

inappropriate delays, and a too-substantial reversal rate.<sup>29</sup> Five weeks later, an identical measure was offered in the House for ostensibly analogous reasons.<sup>30</sup> Neither has so far garnered significant support, perhaps in part because both houses have been occupied since mid-September with fighting terrorism abroad and securing the national defense at home.

### III. THE FUTURE

#### A. Predictions

A complex constellation of factors makes it difficult to predict what will happen next. Illustrative of that uncertainty, and particularly important, is the current party composition of the Senate and the House, a consideration rendered substantially more complicated by Vermont Senator James Jeffords's decision to leave the Republican party in mid-2001 and become an independent.<sup>31</sup> Whether President Bush would sign a circuit-splitting bill if its historically Republican supporters could move such a bill through Congress also remains unclear, although President Clinton threatened to veto any circuit-splitting bill. It appears probable, however, that a significant number of senators and representatives might be reluctant to impose so drastic a legislative redesign on a federal court most of whose judges seem to oppose it.<sup>32</sup> Moreover, Judge Hug's recent decision to transfer the office of chief judge to Judge Mary M. Schroeder<sup>33</sup> could change the court's opposition to any proposed change, although her succession to the chief judgeship will not change

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29. 147 Cong. Rec. at S1476 (statement of Sen. Murkowski); *supra* n. 25 and accompanying text.

30. H.R. 1203, 107th Cong. (2001); 147 Cong. Rec. H1114 (daily ed. Mar. 22, 2001).

31. See e.g. Jeanne Cummings, *How One Man's Urge to Bolt GOP Rattles Much of Washington*, Wall St. J. A1 (May 24, 2001); Alison Mitchell, *G.O.P. Senator Plans Shift, Giving Democrats Control in Setback for White House*, N.Y. Times A1 (May 24, 2001).

32. See Procter Hug, Jr., *Comments to the Commission on the Draft Report* (1998); but see Eugene A. Wright et al., *Comments to the Commission on the Draft Report* (1998); Senate Hearing, *supra* n. 17, at 79 (testimony of Judge Kleinfeld); *id.* at 87 (testimony of Judge O'Scannlain); *id.* at 188 (statement of Judge Sneed).

33. See e.g. Mary Schenk, *Urbana Judge Named Chief of 9th Circuit*, Champaign News-Gazette A3 (Jan. 14, 2001).

the views held by the majority of Ninth Circuit judges, who have historically opposed both bifurcation and the establishment of formal divisions.

Despite the uncertainty engendered by these factors and by Congress's preoccupation with national defense, I can offer several predictions. In the 107th Congress, few members of either chamber have shown much interest in revitalizing the divisional arrangement that served as the foundation of the recommendations made by the Commission on Structural Alternatives for the Federal Courts of Appeals. Indeed, no senator or representative has introduced a measure that incorporates the commissioners' suggestions as they were expressed in failed Senate Bill 253. The Ninth Circuit judges' strong opposition—and that of their colleagues on the other courts of appeals—to the divisional approach may in part explain this hesitation, and it suggests that the concept may not be revived in the near term.<sup>34</sup>

However, some senators and representatives, especially those from the Pacific Northwest, will probably continue to pursue bifurcation, even though they will probably not succeed. No Judiciary subcommittee in either house scheduled hearings on any of the circuit-splitting measures during this session.

The development of wider interest in, and more enthusiastic support for, bifurcation seem likely to remain a function of several considerations: (a) the extent to which the Ninth Circuit's rulings are controversial; (b) how many of its cases the Supreme Court chooses to review; and (c) the number of Ninth Circuit opinions the Supreme Court does in fact reverse. Another consideration will be the perceived success attained by the court in applying measures that improve its operations. For instance, the Evaluation Committee proposed, and the court has implemented, a plethora of approaches that appear to be preserving and promoting uniform circuit law, facilitating expeditious, inexpensive, and equitable disposition of cases, and responding to the public's needs.<sup>35</sup> The Ninth Circuit has thus continued its tradition of experimenting with new approaches, and the best strategy may be to give the court's

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34. See Harry T. Edwards et al., *Comments to the Commission on the Draft Report* (1998); Hug, *supra* n. 11.

35. See *supra* nn. 22-25 and accompanying text.

self-initiated reforms sufficient time in which to prove effective. If they work, there may be no need to restructure the Ninth Circuit.

The court may soon consider the Evaluation Committee's final report and will probably implement or experiment with any of its additional suggestions that appear likely to be effective. If the Ninth Circuit continues its attempts to improve the delivery of justice in the West, particularly by capitalizing on the Evaluation Committee's recommendations and on the type of innovative experimentation for which it has long been known, the case for either splitting the circuit or dividing it internally will weaken. But several groups of interested observers—members of Congress, particularly those from the states in the Ninth Circuit, judges who serve on the other federal courts of appeals, academics, and other professional court-watchers—will continue to monitor the court's future efforts to resolve its docket, which is the country's largest, as efficiently as possible. The size of the court's caseload alone makes the Ninth Circuit's endeavors of special interest to its professional observers, because mounting caseloads and essentially static resources mean that the other federal courts of appeals will increasingly come to resemble the Ninth Circuit.

### *B. Suggestions*

The Ninth Circuit, and to a lesser extent, the other courts of appeals, must continue to employ and to experiment with measures that will foster the prompt, economical, and fair disposition of the cases that fill their burgeoning dockets. Federal appellate judges should develop consensus on the best ways in which to address case growth in light of their dwindling resources and should attempt to persuade Congress that the approaches chosen will work. They should also exchange information on procedures and mechanisms that seem to show promise, while Congress should support the courts' efforts by working with them to find solutions that will enhance appellate courts' ability to resolve cases quickly, equitably, and in a way that satisfies consumers.

For now, lawmakers should eschew the divisional concept developed by the Commission on Structural Alternatives for the

Federal Courts of Appeals. Dividing the Ninth Circuit on a geographic basis seems likely to prove inefficacious and to disrupt the court's daily operations. The Congress should also reject any circuit-splitting proposals that appear in the near future, for a split will not improve the circumstances of the Ninth Circuit or those of any other federal court of appeals.

#### IV. CONCLUSION

Congressional attention has been focused on the work of the Ninth Circuit for good reason. It is here that court-reform proposals may have their best practical test, because the Ninth Circuit has been willing to experiment with measures that treat the country's busiest appellate docket. Its self-initiated reforms may address many of the problems about which the court's critics have complained. Moreover, the sort of incremental reform that I endorse should be permitted to work before the more drastic remedy of a circuit split is imposed.

