

A Ninth Circuit Split Is Inevitable, But Not Imminent

HON. DIARMUID O'SCANNLAIN*

The future of the Ninth Judicial Circuit (headquartered in San Francisco) is one of great significance to the federal judiciary as a whole. The Ninth, of course, is by far the largest of the twelve regional circuits in the country, alone handling about twenty percent of the entire federal judicial caseload. It comprises sixteen separate courts, including the United States Court of Appeals for the Ninth Circuit (upon which Chief Judge Wallace 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 is the largest appellate court in the country, with twenty-eight judges; the remaining eleven regional circuits range in size from the Fifth Circuit (New Orleans) with seventeen judges, to the First Circuit (Boston) with six judges. The district courts 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 circuit judgeships on my court, the Ninth Circuit comprises a total of 127 active judgeships, exclusive of bankruptcy and magistrate judgeships.

In addition, the modern history of the Ninth Circuit is unique among the federal courts of appeals. As Chief Judge Wallace points out, the bill presently before the U.S. Senate Judiciary Committee¹ does not represent the first proposal which Congress has considered to address the issue of the Ninth Circuit's growth and size. In 1978, following a comprehensive study by the Commission on Revision of the Federal Court Appellate System chaired by the late Senator Roman L. Hruska of Nebraska,² Congress enacted Public Law 95-486.³ 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 to the legislation by unanimously proposing that their circuit

* Circuit Judge, United States Court of Appeals for the Ninth Circuit

¹ S. 956, 104th Cong., 1st Sess. (1995).

² 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 (1973) [hereinafter COMMISSION ON REVISION].

³ Pub. L. 95-486 § 6, Oct. 20, 1978, 92 Stat. 1629, 1633 (codified at 28 U.S.C.A. § 41 (1988)).

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.

I

Many of those administrative innovations have been successful. I entirely agree with Chief Judge Wallace that the Ninth Circuit is handling its caseload reasonably well, and there is not currently a crisis. I also concur in his opposition to Senate Bill 956, the proposed legislation currently before Congress. Nevertheless, I and a number of my colleagues are 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.

The increasing pressure on our caseload will soon force Congress and the courts to make a fundamental choice. That choice is, essentially, whether to encourage further growth of the Ninth Circuit, impliedly promoting an amalgamation of the circuits into a lesser number of circuits with larger courts of appeals, or to continue to restructure circuits into more manageable regional entities. Respectfully disagreeing with Chief Judge Wallace, I support the latter option. I am convinced that it is inevitable that the Ninth Circuit be split, and that the time for that split, while not yet imminent, may well be fast approaching.

Amalgamation simply is not practical. As a court of appeals becomes ever larger, it loses the collegiality among judges that is such a fundamental ingredient in effective administration of justice in a court responsible for stating what the law is. As more judges are added, the court may lose accountability to the people it serves. Further, as the number of opinions increases, we risk losing the ability to keep track of what our circuit's law is. As Chief Judge Posner of the Seventh Circuit has noted, we face the danger that we will come to resemble a legislative body, rather than a court.

II

How then should the Ninth Circuit be split to further best the circuit's primary goals of guaranteeing speedy, just resolution of cases at reasonable cost? Four options have been discussed in recent years. In my view, only one of these adequately addresses the long-term needs of the Ninth Circuit.

My reasons for opposing the present bill are substantially the same as Chief Judge Wallace's. My basic concern is that the current bill would do nothing to

solve the problems of the remaining Ninth Circuit. Based on 1994 figures, the proposed Twelfth Circuit would take only twenty-three percent of the present caseload, while the remaining circuit would have seventy-seven percent of the cases, and, with nineteen judges, would still be the largest in the country. The present bill thus virtually guarantees that Congress will soon be back to the drawing board to split the Ninth Circuit once again.

III

There are three other alternatives which I believe may be preferable to the alternative outlined in the current bill.

The first alternative is commonly referred to as the "horsecollar" configuration. Under this approach, California would constitute its own circuit, while the eleven district courts in 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 most importantly, 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 sixty percent of the cases in our court arise from California alone.

The second alternative is the one recommended by the Hruska Commission in 1973⁴ and largely incorporated in H.R. 3654,⁵ 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 southwestern Twelfth Circuit, to consist of the southern and central districts of California and the districts of Arizona and Nevada, and a northwestern Ninth Circuit, consisting of the northern and eastern districts of California, the northwest states and the Pacific Islands.

The Hruska Commission recommendation has a number of concrete benefits. For a study that is now twenty-two years old, it was remarkably prescient. If our court had heeded its advice, there would be two circuits of equal size today. 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 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.

⁴ COMMISSION ON REVISION, *supra* note 2, 62 F.R.D. at 234-42.

⁵ H.R. 3654, 103rd Cong., 1st Sess. (1993).

Of course, a potential concern with this plan is that it divides one state between two circuits, which, as the saying goes, "has never been done." However, the Hruska Commission carefully analyzed this issue, and concluded that any problems which might arise could be overcome.⁶ In addition, the Kopetski bill outlined an innovative and readily available solution to the problem, 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. Simply put, any time a California judge on either Court of Appeals spotted a conflict between the circuits on state or federal law governing California, he or she could call for an en banc panel of the California judges of both courts to resolve it. I believe that this practical solution would resolve any difficulties stemming from the division of California.

The third 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 conclusion, I believe that Congress should consider taking the following steps:

First, I believe that the Congress should make a legislative finding that there is a limit on the size of any given court of appeals, and that continued division of circuits into smaller units is preferable to consolidating the circuits into a smaller number of circuits containing larger courts of appeals.

Second, the Congress should direct the Circuit Judges of the Ninth Circuit to reflect, over the next few years, and then to recommend, as did the judges of the Fifth Circuit Court of Appeals in the 1980s, what the proper division of their circuit should be. That recommendation should be based on an analysis of the factors which will affect the court's ability to meet its goals in the coming years. Any restructuring or realignment of the Ninth Circuit must guarantee accountability to *all* of the people it currently serves.

To those who might argue that enough studies have been done and that now is the time to act, I would point out that no recent systematic evaluation of division of the Ninth Circuit has been performed since the Hruska Commission report in the 1970s. If the Congress nevertheless feels the need to act quickly, then I respectfully suggest that they should give very serious consideration to the Hruska Commission's recommendation.

⁶ COMMISSION ON REVISION, *supra* note 2, 62 F.R.D. at 238-40.