APPELLATE STUDY PANEL ISSUES FINAL REPORT

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Appellate judges and practitioners should be aware that the Commission on Structural Alternatives for the Federal Courts of Appeals issued its final report for the President and Congress on December 18, 1998.[1] Congress authorized the Commission in November 1997,[2] and Chief Justice William Rehnquist appointed the commissioners in December of that year.[3] The Commission had ten months to study the federal appellate system, "with particular reference to the Ninth Circuit," and two months to write a report suggesting such "changes in circuit boundaries or structure as may be appropriate for the expeditious and effective disposition of the caseload of the Federal Courts of Appeals, consistent with fundamental concepts of fairness and due process."[4]

The Commission was the product of protracted, ongoing controversy over splitting the Ninth Circuit, which is the biggest appeals court in terms of its docket, judges, and geographic size, encompassing eight western states, Hawaii, Guam and the Northern Mariana Islands.[5] In August 1997, advocates of circuit division, who contended that the circuit has "grown to a point that it cannot function effectively,"[6] persuaded the Senate to

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1. *See* COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, FINAL REPORT (Dec. 1998). The full text of the report is available for a limited time on the Commission's web page at <http://app.comm.uscourts.gov/>.

2. *See* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 105-119, § 305, 111 Stat. 2491 (1998).

3. *See* FINAL REPORT, *supra* note 1, at 1.

4. Appropriations Act § 305(a)(1)(B), 111 Stat. at 2491, Pub. L. No. 105-119 (1997).

5. *See* S. Rep. No. 104-197, 104th Cong. (1995); Carl Tobias, *Suggestions for Studying the Federal Appellate System*, 49 FLA. L. REV. 189, 192-214 (1997).

6. FINAL REPORT, *supra* note 1, at ix.

adopt an appropriations rider that would have split the circuit,[7] but the House of Representatives did not approve the proposal. Congress consequently chose to create the Commission.

Issuance of the Commission's final report is very important. The circuits are essentially courts of last resort because the Supreme Court reviews a minuscule number of appeals.[8] The Commission concluded that these courts are experiencing docket growth that has "transformed them into different judicial entities from what they were at mid-century," while appeals and workload demands on judges will probably expand in the future.[9] Congress asked the Commission to analyze the difficulties created by mounting cases and suggest effective remedies for any problems detected.[10] Congressional approval of the Commission, the group's composition, and its careful study mean that the report will be influential and may even chart the appellate system's destiny for the twenty-first century.

Throughout 1998, the Commission sought public input on many issues that implicated its statutory mandate.[11] During the spring, the Commission held six one-day public hearings in Atlanta, Chicago, Dallas, New York, San Francisco and Seattle.[12] With the authorization of Congress, the Commission also enlisted the assistance of the Federal Judicial Center and the Administrative Office of the United States Courts, the two major research arms of the federal courts.[13] For instance, the Commission helped the Center develop and circulate surveys to federal circuit and district judges and to more than 5,600 appellate practitioners, seeking their views on the appeals courts.[14] The Commission reviewed all of the relevant information that it received and published a tentative draft report on October 7, 1998.[15] The Commission then solicited public

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7. *See* S.1022, 105th Cong. § 305(b)(2)(1997).

8. *See* FINAL REPORT, *supra* note 1, at ix.

9. *Id.*

10. *See* Appropriations Act § 305(a)(1)(B), 111 Stat. at 2491.

11. *See* FINAL REPORT, *supra* note 1, at 2-4.

12. *See id.* at 2-3.

13. *See id.* at 2; *see also* Appropriations Act § 305 (a)(4)(D), 111 Stat. at 2492.

14. *See* FINAL REPORT, *supra* note 1, at 4.

15. *See* COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, TENTATIVE DRAFT REPORT (Oct. 1998) (visited June 10, 1999)

comment on that draft during a thirty-day period, considered this public input, and issued a final report on December 18.[16]

In its final report, the Commission recognized the increasing caseload pressure on the circuits, but found "no persuasive evidence [that any] circuit is not working effectively or that creating new circuits will improve the administration of justice in any circuit or overall."[17] The Commission considered Ninth Circuit administration "innovative in many respects" and concluded that there was "no good reason to split the circuit solely out of concern for its size or administration" or "to solve problems [of] consistency, predictability, and coherence of circuit law."[18] The panel further recognized that dividing the court would eliminate the administrative benefits offered by the current circuit configuration and deprive the Pacific seaboard and the West of a means to maintain consistent federal law in this region.[19] The Commission, therefore, rejected circuit-splitting, unless there were no other way of treating perceived difficulties in the court of appeals, and proffered instead the concept of adjudicative divisions as an effective alternative for the Ninth Circuit and for all of the appellate courts as they increase in size.[20] The Commission specifically suggested that the Ninth Circuit remain intact but that it be reorganized into three regionally based adjudicative divisions. The Commission proposed that "each division with a majority of its judges resident in its region" have exclusive jurisdiction over appeals arising from district courts in those regions.[21] The Commission correspondingly recommended that a Circuit Division resolve conflicts that develop between regional divisions.[22] The Commission asserted that its "plan would increase the

<http://app.comm.uscourts.gov/report/draft.htm>.

16. *See* FINAL REPORT, *supra* note 1, at 4.

17. *Id.* at 29.

18. *Id.* at ix.

19. *See id.* at ix-x.

20. *See id.* at x.

21. *Id.* at x, 40-45. The Commission recommended creating a Northern Division, which would include the Districts of Alaska, Idaho, Montana, Oregon, and Eastern and Western Washington; a Middle Division, which would include the Districts of Northern and Eastern California, Guam, Hawaii, Nevada, and the Northern Mariana Islands; and a Southern Division, which would include the Districts of Arizona and Central and Southern California. *Id.* at 41.

22. *See id.* at x, 45-46.

consistency and coherence of the law, maximize the likelihood of genuine collegiality, establish an effective procedure for maintaining uniform decisional law within the circuit, and relate the appellate forum more closely to the region it serves."[23]

The Commission admonished Congress that if it rejected the recommendation for adjudicative divisions and decided instead to split the Ninth Circuit, the "challenge of finding a workable solution is daunting."[24] The Commission evaluated more than a dozen possibilities and "found each without merit."[25] Nonetheless, the Commission described the "only plans that are even arguable" but characterized all three as "flawed and [chose to] endorse none."[26]

The Commission also honored its statutory mandate by submitting several recommendations for change in the federal appellate system generally. Recognizing that circuits vary in terms of their size, dockets, judicial resources and growth rates, the Commission urged that Congress "equip those courts to cope with future, unforeseen conditions by according them a flexibility they do not now have."[27] Although the Commission emphasized that the Ninth Circuit divisional organization could serve as a model for other circuits as they grow,[28] the Commission suggested a statute that would afford individual courts considerable flexibility in devising a divisional plan, stating that the Ninth Circuit proposal was only one model.[29]

The Commission specifically recommended that Congress authorize each court of appeals to decide, with panels of two rather than three judges, cases that do not involve questions of public importance, pose special difficulty, or have precedential value.[30] The Commission also suggested that Congress authorize circuits to create district court appellate panels consisting of two district judges and one circuit judge to review designated categories of appeals, with discretionary review available in the

23. *Id.* at x.

24. *Id.*

25. *Id.* at x, 52-57.

26. *Id.* at x. For a detailed explanation of which plans the Commission found were arguable and why the Commission eventually rejected them, see *id.* at 55-56.

27. *Id.* at xi.

28. *See id.* at x-xi, 60-62.

29. *See id.* at x-xi, 60-62, 97-98.

30. *See id.* at xi, 62-64.

court of appeals.[31] The Commission contended that these measures collectively "should equip the courts of appeals with an ability, structurally and procedurally, to accommodate continued caseload growth into the indefinite future, while maintaining the quality of the appellate process and delivering consistent decisions—assuming, of course, that the system has the necessary number of judges and other resources."[32]

The Commission's suggestions, as outlined in the Tentative Draft Report, particularly those related to the Ninth Circuit divisional arrangement, received considerable criticism during the 30-day comment period. Members of Congress and attorneys from California voiced concern that the state's four federal districts would be split between the Middle and Southern Divisions, thereby raising the specter of different legal interpretations within California.[33] Senators and lawyers from the Pacific Northwest claimed that the reasons the Commission proffered for the divisional proposal also supported circuit-splitting.[34] Seven active and senior appellate judges of the Ninth Circuit correspondingly took the unprecedented step of calling for the court's bifurcation.[35] However, virtually all of the remaining appellate judges sharply criticized the practicality of the divisional idea, asserting, for instance, that the Circuit Division would impose another layer of appeal and thereby increase expense and delay.[36] Despite these criticisms, the Commission made only minor changes in the final report.[37]

31. *See id.* at xi, 64-66.

32. *Id.* at xi.

33. *See, e.g.*, Comments of Tulare County Counsel (Nov. 6, 1998) <http://app.comm.uscourts.gov/report/comments/Tulare.pdf>; Comments of Daniel M. Kolkey (Nov. 6, 1998) <http://app.comm.uscourts.gov/report/comments/Kolkey.htm>.

34. *See, e.g.*, Comments of Alan G. Lance (Nov. 9, 1998) <http://app.comm.uscourts.gov/report/comments/Lance.htm>; Comments of Bruce M. Botelho (Nov. 3, 1998) <http://app.comm.uscourts.gov/report/comments/Botelho.pdf>.

35. *See* Comments of Eugene A. Wright et al. (Nov. 6, 1998) <http://app.comm.uscourts.gov/report/comments/OScannlain.htm>.

36. *See* Comments of Chief Judge Procter Hug, Jr. (Oct. 29, 1998)<http://app.comm.uscourts.gov/report/comments/HUG-Letter.htm>.

37. For example, the final report proposes that the size of the Circuit Division be thirteen, rather than seven, judges and that divisions be discretionary, rather than mandatory, for appeals courts other than the Ninth Circuit when they have more than a specific number of judges. *Compare* FINAL REPORT, *supra* note 1, at 94, 97, *with* TENTATIVE DRAFT REPORT, *supra* note 15, at 83, 85.

The debate over the future of the federal appellate courts and the Ninth Circuit now returns to Congress. In January 1999, senators introduced proposed legislation that embodies the recommended statute included in the Commission's report for Congress and the President.[38] However, Congress should not pass this suggested legislation. The Commission failed to collect, analyze, and synthesize empirical data, which would convincingly show that appellate courts are experiencing problems that are sufficiently troubling to warrant treatment with approaches that are as potentially ineffective as the divisional arrangement. Therefore, Congress should seriously consider authorizing additional study or recalibrating the proposed commission statute to authorize Ninth Circuit experimentation.

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38. *See* S. 186, 106th Cong. (1999); S. 253, 106th Cong. (1999); *see also* FINAL REPORT, *supra* note 1, at 93.