

United States District Court

District of Arizona

United States Courthouse

Phoenix, Arizona 85025

Chambers of
Robert C. Broomfield
Chief Judge

November 4, 1998

MEMO TO: Justice White and Members of the Commission,
and its Executive Director

FROM: Robert C. Broomfield *RCB*

RE: Comments on Commission Report

In my letter to the Commission and my testimony in Seattle, I indicated that I opposed the split of the Ninth Circuit because of a strongly-held view that we should have fewer, rather than more, circuits in order to insure that the Supreme Court of the United States can in fact resolve disputes among the circuits. I also had other reasons set forth in my letter. This memorandum reflects my views and not necessarily those of the other judges of this court.

Although in its report the Commission proposes a split of sorts within the Court of Appeals for the Ninth Circuit, I believe that the Commission has crafted a uniquely acceptable means by which the regional Courts of Appeals can perform the federal judicial business of this nation, particularly as it relates to the Ninth Circuit. Your proposal provides a mechanism to avoid fractionalization and inconsistencies of the law in the respective Courts of Appeals and, most importantly, preserves the role of the Supreme Court in being able to resolve the major conflicts among the circuits as well as hear the otherwise important and

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significant issues presented to it.

However, I believe there are a few changes - I do not believe them to be major--which should be made.

First, I believe that the Circuit Division should be expanded significantly and the Presiding Judges of the regional divisions should not be automatic members in this en banc process. Because I am one, I think I am entitled to note that being a chief judge (or presiding judge) is simply an accident of age and seniority and is no indicator of greater adjudicative insight than any other member of any court. Presiding judges should be treated just like any other judge for selection on the Circuit Division for en banc purposes. Further, and most importantly, I believe that the Circuit Division should be expanded significantly to at least 13 or perhaps 15 members, randomly drawn. Conflicts among the divisions should be resolved by a very substantial membership of the court rather than the seven or nine as proposed.¹ A thirteen-member Circuit Division would permit four judges drawn at random from each of the three divisions along with the chief judge of the circuit. A fifteen-member Circuit Division would permit five members from each division with the senior judge presiding. All other members of the court should be eligible for random selection before a judge is reselected for another Circuit Division Panel. Finally, the Courts of Appeal should be encouraged to take more, rather than less, matters en banc even to the extent of relegating error correction to memorandum opinion of two judges without argument. It is the important precedential opinions of the court to which the public is entitled and which should have the broadest judicial input.

¹ The text of recommendation 1(b) on page 42 of the report suggests a seven-member Circuit Division while Appendix C Section 46(d) on page 86 of the report suggests up to nine members.

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Second, I believe that the sunset provision should be eliminated. The emotion and time which has gone into the efforts to split, or to avoid a split of circuits, should not need to be repeated in seven years which is what I believe would occur with a sunset provision. Congress should either find your plan, as you may choose to modify it, either acceptable or unacceptable. Your plan provides for the long term, potentially for all circuits. We do not need another debate (and the anguish which goes with it) in seven years or a year or two preceding it.

Third, I believe that the alignment of the Districts into the three Court of Appeals Divisions for appeals purposes should be altered. I believe that the District of Arizona should be included in the Middle Division for workload reasons. Clearly, the growth in this country has been in the West and, particularly, in the Southwest. The States of Arizona and Nevada are among, if not the fastest growing states in the Union. California, particularly Southern California continues to grow. If the Districts of Arizona, Southern California and Central California are grouped together in the Southern Division of the Court of Appeals, it is inevitable that that Division will be the first Division which will want (13 judges) or need (17 judges) to split into a fourth Division. But there would be no way to split them. However, if the District of Arizona was placed in the Middle Division then the fourth Division would likely comprise the Districts of Nevada and Arizona.

Fourth, although it may not need to be a statutory mandate, I believe that the Court of Appeals should sit in Phoenix on some regular basis. Whether Phoenix ends up in the Middle or Southern Division of the Ninth Circuit, it is currently the sixth largest city in the United States and, depending on how one counts, the second or third largest city in the Ninth Circuit. The future will reflect continuing substantial growth in the Southwest.

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Finally, while I have no philosophical problems with the District Court Appellate Panels (DCAP), I have some concern whether this is simply a transfer of appellate jurisdiction from one set of judges to another--without any additional resources. Respectfully, district judges within the Ninth Circuit are every bit as busy as the Court of Appeals judges, and I see no expectation that the Congress would be willing to create additional district judgeships when they would not create court of appeals judgeships. Perhaps they would. But even if DCAPs are proposed in your final report, I suggest that their use should be on a rotational basis among all district judges within the circuit (with the option to refuse) so as to avoid the perception that some district judges (those who serve on the DCAP) are better, more intelligent, or of a higher order than other district judges. There is already some evidence of that phenomenon within the BAP in the Ninth Circuit. To make all district judges eligible for DCAP service would avoid that problem.

In closing, your proposal leaves the Ninth Circuit as a Circuit which I believe is healthy and wise. It only affects the Court of Appeals yet leaves that Court, through the Circuit Division process, a single court. In that sense, I believe that the proposal represents a remarkably workable and appropriate compromise.

RCB:lp