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## The federal appellate study at midpoint

by Carl Tobias

The Commission on Structural Alternatives for the Federal Courts of Appeals recently passed the midpoint in its work. The first session of the 105th Congress authorized the commission last November, and Chief Justice William Rehnquist appointed the commissioners in December. (See "Congress authorizes appellate study panel," *Judicature*, November-December 1997). Congress granted the commission 10 months to study the federal appellate system, "with particular reference to the Ninth Circuit," and two months to write a report recommending such changes in circuit boundaries or structure as may be appropriate for the prompt and effective resolution of the appellate caseload, consistent with fundamental concepts of fairness and due process.

The commission was the product of a compromise that arose from longstanding and continuing controversy over the advisability of dividing the U.S. Court of Appeals for the Ninth Circuit. The circuit is the largest federal appellate court in terms of caseload, number of judges, and geographic magnitude, including eight western states, Hawaii, Guam, and the Northern Mariana Islands. Proponents of circuit-splitting had achieved their greatest success in the lengthy dispute over the court's division when the Senate in August 1997 approved an appropriations rider that would have split the circuit, although Congress ultimately agreed that authorization of a study would be preferable.

Since early this year, the commissioners have been soliciting public input on numerous questions that are

relevant to the panel's charge. For example, in February the commission issued a news release seeking the public's views "on whether each federal appellate court renders decisions that are reasonably timely, are consistent among the litigants appearing before it, are nationally uniform in their interpretations of federal law, and are reached through processes that afford appeals adequate, deliberative attention of judges."

The commission conducted one-day public hearings in Atlanta and Dallas in March, in Chicago and New York in April, and in Seattle and San Francisco in May. The panel specifically requested that witnesses in the hearings address the following issues:

1. What problems or difficulties do you perceive in the federal appellate system's structure, organization, alignment, processes, and personnel that may interfere with its ability to render decisions that meet the above objectives? What criteria or standards can be used to answer this question?

2. What measures should be adopted by Congress or the courts to ameliorate or overcome perceived problems in the federal appellate system or any of its circuits? What are the advantages or disadvantages of any proposed measures?

3. What is working well in the federal appellate courts?

Most of the witnesses who testified were federal appeals court judges, some were appellate practitioners, and a few were legal academicians or federal or state political officials. The witnesses presented considerable helpful information about the diffi-

culties that increasing appeals and limited resources are creating for the regional circuits, and suggested a significant number of potential solutions for these problems. The commission heard many diverse points of view on both the complications and the possible remedies.

The commissioners also engaged many witnesses in healthy dialogue on issues important to the commission's charge. For example, several commissioners seemed to show considerable interest in the possibility of keeping the Ninth Circuit intact while creating divisions within the court. This idea received its fullest explication from Sanford Svetcoff, an appellate practitioner, in the Seattle hearing. However, former Ninth Circuit Chief Judge James Browning testified in San Francisco that the court had experimented with a similar approach some years ago but found that it was "incompatible with what the judges regarded as the court's central function of creating, maintaining, and applying federal law across the whole circuit."

Witnesses at the six hearings presented surprisingly little information that was entirely new, although the sessions did engender lively exchange and some controversy, particularly in the two hearings on the west coast. Witnesses offered much testimony that essentially repeated ideas they or others had previously expressed elsewhere.

For instance, in Atlanta, Joseph Hatchett, chief judge of the Eleventh Circuit, and Gerald Bard Tjoflat, the previous chief judge of that court, continued their dialogue over whether the circuit requires more active judgeships to resolve promptly, efficaciously, and fairly its substantial, growing docket. Chief Judge Hatchett testified that the "Eleventh Circuit needs more active judges [and] should expand in a limited fashion from 12 to 15 judges," while Judge Tjoflat opposed the addition of any judges. In Dallas, Judge Carolyn Dineen King, who will be the next chief judge of the Fifth Circuit, and Judge Robert Parker of that court, offered similar testimony re-

garding the resources that are necessary to treat the circuit's large, increasing caseload.

In San Francisco, Procter Hug Jr., chief judge of the Ninth Circuit, continued his defense of the court's viability as a substantial circuit. For example, he stated that "we have shown that a large circuit can work well and to the satisfaction of the overwhelming number of judges, lawyers, and litigants and that this is an option that our circuit should be able to choose now, and other circuits should be able to consider in the future." In Seattle, Senator Slade Gorton (R-Washington), an avid proponent of circuit-splitting, persisted in offering reasons why the court should be divided. For instance, he observed that the "most compelling argument for the split comes from the consequence of [the circuit's] size; in particular, the obstacles that the size of the circuit poses to collegiality on the court, and to familiarity

with the diverse issues, the diverse people, and the law."

Although the commission did receive some helpful information from the hearings, it heard little new testimony regarding either the difficulties that the appellate courts are confronting or solutions for the complications. Virtually no testimony of those who work in the regional circuits suggested that the appeals courts are experiencing problems that are sufficiently troubling to warrant remediation, particularly with approaches that are as extreme as circuit-splitting.

Since early 1998, the commission has been working closely with the Federal Judicial Center and the Administrative Office of the U.S. Courts, the two principal research arms of the federal courts that Congress authorized the panel to consult. The commission and the research entities have been collecting, analyzing, and synthesizing relevant empiri-

cal information on the regional circuits. The commission has carefully honored its statutory mandate by studying all of the courts, even as it has emphasized the Ninth Circuit. The commission has circulated questionnaires to appellate and district court judges and to lawyers who have pursued appeals in the regional circuits. The surveys seek information about their experiences in the courts.

After the commissioners have reviewed all of the testimony and empirical and survey data, the commission will compile an interim report this fall. The commissioners intend to solicit public input on that document during a brief comment period before finalizing their report and recommendations for submission to Congress and the president by the December 19 deadline. ♣

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## Books

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these seeming contradictions is to recognize that for Boot the ends justify the means. Boot's goal is to return us to an earlier age: "[W]ould it really be so awful if we could simply click our heels three times and transport ourselves back to 1960?"—back to a time before the Warren court had done its worst, before crime became a problem, before plaintiff-friendly tort liability had taken hold, before Boot was born. Constitutional rights and responsibilities, even-handed procedural rules, the sanctity of jury verdicts, and continuity in the common law appear to be of value to Boot only to the extent that they can be manipulated to serve the end of realizing our triumphant return to the past. Judges who issue rulings at odds with this agenda, Boot concludes, should be treated "with the contempt and scorn they deserve."

After a seven-chapter diatribe devoted to convincing the reader that the judiciary is corroded through and about to collapse under its own

weight, Boot's comparatively tame suggestions for reform present a jarring juxtaposition, if not another sort of self-contradiction. He rejects radical proposals to end life tenure for federal judges, to impeach judges for unpopular decisions, or to empower Congress to overturn Supreme Court interpretations of the Constitution by a simple majority vote, in favor of a more incremental approach. While some of these incremental reforms land with an old, familiar clunk, others—such as merit selection of state judges—hit the mark. One gets the overriding sense, however, that the relative docility (and in the case of merit selection, desirability) of his proposals is attributable less to thoughtful reflection than insufficiency of enthusiasm. As he launches into a discussion of his proposals, Boot expresses "a lot of sympathy" for the position of conservative columnist Thomas Sowell, whom Boot quotes as saying, "I don't offer solutions...I just analyze problems. That's more than enough to keep me occupied for the rest of my life." Hardly the sentiments of a commit-

ted reformer.

In the final analysis, *Out of Order* is a dyspeptic political screed, masquerading as a tract on judicial reform. Public tantrums of the sort on display here may serve the short-term goal of attracting attention to the author (if only in the form of negative reviews), but hopelessly compromise his ability to be taken seriously by anyone outside his small circle of ideological soul mates. That is a shame. Judges can ill afford to ignore widespread, well-reasoned criticism, because there but for the grace of public confidence in the courts goes an independent judiciary. To the extent that Boot has a legitimate point to make, he has squandered the opportunity to make it here by reducing complex problems to slapstick caricatures rather than contributing constructively to the public discourse. ♣

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