CHIEF JUDGE PROCTER HUG, JR. AND THE SPLIT THAT DIDN'T HAPPEN

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I. INTRODUCTION

Almost half a century ago, Justice Felix Frankfurter delivered a fascinating lecture on "Chief Justices I Have Known."[1] In the course of his remarks, he addressed "[o]ne of the things that . . . even lawyers do not always understand" about judges. He was referring to the question: "Does a man become any different when he puts on a gown?" Frankfurter gave his reply: "If he's any good, he does."[2]

Frankfurter was no mystic, and he surely did not mean that "put[ting] on a gown" magically transforms the wearer into a different person. What he meant, rather, is that when a person who is "any good" takes on a new position – and in particular a position as freighted with power, responsibility, and history as that of an Article III judge – the position brings out qualities that were not previously seen.

Justice Frankfurter's comment comes to mind when I think of the extraordinary circumstances under which Judge Procter Hug, Jr. became Chief Judge of the Ninth Circuit. The date was March 1, 1996. Nine months earlier, eight Senators from five western states had introduced Senate Bill 956. The purpose of the bill, as stated in its title, was "to divide the ninth judicial circuit of the United States into two circuits." If the bill had been enacted, it would have been only the third time in the 104-year history of the federal courts of appeals that a circuit was split. And it would have been the first time that Congress had divided a circuit without waiting for a consensus to develop among the bench and bar in the affected region.[3]

Notwithstanding the absence of consensus, the legislation moved through the Senate with unusual speed. A hearing was held in September 1995, and in December the Judiciary Committee debated the bill at a markup session. Senator Dianne Feinstein expressed opposition to the measure, emphasizing that judges and lawyers in the Ninth Circuit had spoken out against it. She offered an amendment to S. 956 that, in lieu of splitting the circuit, would have established a commission to study all of the federal courts of appeals. By a single vote, the committee failed to adopt the amendment. Instead, the committee

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[1] Felix Frankfurter, *Chief Justices I Have Known*, 39 VA. L. REV. 881 (1953).

[2] *Id.* at 901.

[3] *See* Arthur D. Hellman, *Dividing the Ninth Circuit: An Idea Whose Time Has Not Yet Come*, 57 MONT. L. REV. 261, 268-70 (1996).

voted to report out a substitute proposal to divide the Ninth Circuit – a proposal that was similar to the original bill, but with a different alignment of the states. When Congress recessed at the end of the year, the bill was awaiting action on the Senate floor.

Throughout 1995, the chief judge of the Ninth Circuit was Judge J. Clifford Wallace of San Diego. Judge Wallace was an experienced and respected figure in the realms of judicial administration and federal court reform. A confidant of Chief Justice Warren E. Burger, he had served for six years as a member of the powerful executive committee of the Judicial Conference of the United States. He had written numerous articles in top-ranked law journals on issues ranging from judicial discipline to constitutional interpretation. When he testified at the September 1995 hearing of the Senate Judiciary Committee, he spoke with the authority of a national leader on issues of court policy.

In March 1996, Circuit Judge Procter Hug, Jr. would not have been described in similar terms. Judge Hug was, of course, a prominent and highly respected figure in the legal community of Nevada. He was held in the highest regard by his fellow judges on the Ninth Circuit Court of Appeals. He had served as Chairman of the Board of Regents of the University of Nevada and as a director of the American Judicature Society. But he was relatively unknown in the corridors of power where the fate of the Ninth Circuit would be decided. For that reason, there were, no doubt, those who felt a sense of concern. They might have asked: how will the Ninth Circuit fare with an untested leader at its helm?

Five years later, when Judge Hug stepped down as chief judge, the answer was clear: the Ninth Circuit fared very well. Although the circuit's continued existence as a single juridical entity was challenged again and again, each time the circuit emerged intact. To mention a few of the key events: the full Senate quickly repudiated the Judiciary Committee's preference for an immediate division of the Ninth Circuit. Instead, it voted to establish a Commission on Structural Alternatives for the Federal Courts of Appeals along the lines suggested by Senator Feinstein. The study commission proposal came very close to enactment, but time ran out and the 104th Congress adjourned without acting on any measures relating to the Ninth Circuit.

Maneuvering resumed in the 105th Congress. In July 1997, the Senate resurrected the circuit division proposal by endorsing a rider to the Judiciary appropriations bill. That was undoubtedly the moment of greatest peril for the Ninth Circuit, for the appropriations committees were unfamiliar territory to the judges and lawyers who were seeking to head off the legislation. Ultimately, in a hard-fought compromise, Congress adopted a much-weakened version of the study commission proposal. The study commission held hearings, made recommendations that pleased no one, and faded from the scene. A new bill to divide the Ninth Circuit was introduced in the 107th Congress, but no action has been taken to move the bill forward, and even its sponsors appear to have lost interest. Although the Ninth Circuit Court of Appeals continues to generate controversy, the issue of circuit division is off the table for the foreseeable future.

Judge Hug would be the first to say that the successes of the Ninth Circuit during this period were not the work of any one individual. Indeed they were

not. But when an institution is under attack, the difference between success and failure often lies in leadership. As a scholar who followed the battle very closely, I have no doubt that Judge Hug's leadership contributed significantly to the outcome.

This is not the place for a full account of the events of this turbulent period. The history has been recounted elsewhere, and I shall not repeat it here.[4] Rather, I shall discuss some of the qualities that characterized Judge Hug's leadership and how they contributed to the success of the circuit's campaign.[5]

II.

I have referred to "the battle" over circuit splitting legislation. Given the intensity of feeling that the issue aroused on both sides, the metaphor comes readily to mind, and I shall not forego its use here. But military phraseology is particularly out of place in writing about the role played by Judge Hug. I doubt that Judge Hug viewed the conflict in military terms, and I am certain that he did not see himself as a general in the field, leading troops. On the contrary, perhaps the most apt comparison would be to the senior partner in a diverse law firm that values civility and participation as well as success.

This characterization may come as something of a surprise to those who do not know Judge Hug. The independence of the federal judiciary carries with it a certain isolation, not only from political processes but also from much of the give-and-take that is the norm in American life. That in turn often breeds an aloofness that is the antithesis of partnership. Not so with Judge Hug.

One thing that stands out in Judge Hug's exercise of leadership is that he pursued his objectives through a process characterized by collaboration, not top-down control. He did not command; more than anything else, he listened. Those who participated never felt that they were working "for" the chief judge; they were working with him. I saw this clearly at the opening meeting of the Court of Appeals Evaluation Committee, and I am sure that the same picture would emerge from meetings of the more ad hoc groups that convened to consider strategy during the period when circuit division proposals were gaining support in Congress. The result was to energize the lawyers and judges who took part in efforts to support the circuit's position, making their work all the more effective.

III.

Coupled with this attitude of collaboration was a receptiveness to new ideas that was particularly striking in light of the circumstances. When an insti-

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[4] For a detailed account, see Carl Tobias, *A Federal Appellate System for the Twenty-First Century*, 74 WASH. L. REV. 275, 282-94 (1999). For a brief summary, see Arthur D. Hellman, *The Unkindest Cut: The White Commission Proposal to Restructure the Ninth Circuit*, 73 S. CAL. L. REV. 377, 378-80 (2000).

[5] This is an appropriate place to acknowledge that not all judges and lawyers in the Ninth Circuit opposed the proposal to divide the circuit. However, that was the position of the overwhelming majority, and I think it is fair to refer to it as the position of "the circuit."

tution is under attack, there is a natural tendency for its defenders to resist suggestions for change, for fear that any acknowledgment of flaws will only encourage critics. Although Judge Hug never wavered from his position that the Ninth Circuit was an essentially sound institution, this did not stop him from seeking ways of improving the circuit's operations.

This can be seen most concretely in Judge Hug's decision to establish a Ninth Circuit Court of Appeals Evaluation Committee. The Evaluation Committee was created in 1999 after the Commission on Structural Alternatives submitted its report recommending that the Ninth Circuit be retained intact but that its court of appeals be divided into three largely autonomous "adjudicative units." I'm sure there were those who saw the establishment of the Evaluation Committee as little more than a public relations ploy designed to stave off legislation to implement the Commission proposal.[6] However, as a member of the committee, I can testify that this was not so.

Judge Hug made clear from the start that he expected the committee to conduct a serious and searching inquiry into all aspects of the court of appeals' operations. He named as chair Circuit Judge David R. Thompson of San Diego, a highly respected jurist who had taken no part in the circuit split fight. Judge Thompson, in turn, led the committee in a thorough and wide-ranging examination of court practices. Recommendations from the committee led to action by the court. Perhaps more important, the committee's studies sometimes showed that the court's practices were sound and did not warrant change.[7]

Admittedly, I am not an unbiased observer here. But it is easy to lose sight of how remarkable it is that a committee of this kind was established at all. As I have written elsewhere,

> [A]mong judges there is a strong commitment to confidentiality. This commitment is strongest in the context of deciding cases and writing opinions, but it spills over into administrative and legislative matters as well . . . habits of secrecy and exclusion of outsiders do not suddenly fade away because the issues do not immediately involve the disposition of cases under submission.[8]

In defiance of these "habits," Judge Hug created an evaluation committee and included three "outsiders" as members.[9] He encouraged the committee to dig deeply into court procedures, and he instructed the court's staff to provide all necessary information and support. The court's staff, led by the dedicated and able Clerk of Court, Cathy Catterson, cooperated in every way it could.[10]

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[6] A bill to implement the White Commission recommendations was introduced in the Senate less than a month after the Commission submitted its report. S. 253, 106th Cong. (1999). Hearings on the bill were held in June 1999.

[7] *See* David R. Thompson, *The Ninth Circuit Court of Appeals Evaluation Committee*, 34 U.C. DAVIS L. REV. 365 (2000).

[8] Arthur D. Hellman, *Deciding Who Decides: Understanding the Realities of Judicial Reform*, 15 LAW & SOC. INQUIRY 343, 348 (1990).

[9] The three outsiders were District Judge David Ezra of Hawaii, federal prosecutor Miriam Krinsky (Chair of the Ninth Circuit Advisory Committee on Rules and Procedures), and myself.

[10] For a brief description of the operational responsibilities of the Ninth Circuit Court of Appeals staff, see Cathy A. Catterson, *The Role of the Staff in the Operation of the Ninth Circuit Court of Appeals*, 34 U.C. DAVIS L. REV. 389 (2000).

I doubt very much that any of this would or could have happened in any other federal court. That it happened in the Ninth Circuit is, to some degree, a reflection of a unique tradition that can be traced back at least to the regime of Chief Judge James R. Browning,[11] but it is also, in very large part, a tribute to the personality and approach of Chief Judge Procter Hug, Jr. Judge Hug believed that a committee of this kind could help the court find answers to difficult questions, and he had sufficient confidence in his institution that he was willing to expose its inner workings to scrutiny that included "outsiders."

IV.

Earlier, I likened Judge Hug's role to that of a senior partner. One of the things a senior partner contributes is legal acumen, and among the tools that Judge Hug brought to bear in the battles over circuit division were the analytical skills familiar to those who have read his judicial opinions.

A judge's use of analytical techniques might not seem worth remarking – except that this was essentially a political fight, and one might have thought that only political considerations mattered. There was no avoiding politics, of course, but Judge Hug believed that it was important to lay out, in the most convincing way possible, the reasons for the circuit's opposition to any kind of split – whether of the circuit itself or only of its court of appeals.

Two of Judge Hug's contributions are of particular interest. In a law review article published in 1999, Judge Hug offered a meticulous dissection of the "adjudicative division" proposal of the Commission on Structural Alternatives.[12] What made the piece particularly effective was its use of examples and illustrations to show that the Commission proposal would not accomplish the goals sought by its proponents.[13]

In a later piece, Judge Hug took on one of the most prominent figures in the realm of legal discourse, Judge (and sometime professor) Richard A. Posner. Judge Posner, who has been described as "without doubt the dominant legal intellect of this age,"[14] published an article purporting to show that "increasing the number of judges of an appellate court reduces the quality of the court's decisions."[15] The article bristled with numbers and tables, with percentages given to the sixth decimal place. But Judge Hug was not put off either by the author's reputation or by the array of statistics. He carefully examined the raw material underlying Judge Posner's arguments and convincingly demonstrated the "flimsy premises" and the "slim and irrelevant statisti-

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[11] *See* James R. Browning, *Innovations of the Ninth Circuit*, 34 U.C. DAVIS L. REV. 357 (2000); ARTHUR D. HELLMAN, RESTRUCTURING JUSTICE: THE INNOVATIONS OF THE NINTH CIRCUIT AND THE FUTURE OF THE FEDERAL COURTS xvi (1989).

[12] Procter Hug, Jr., *The Commission on Structural Alternatives for the Federal Courts of Appeals' Final Report: An Analysis of the Commission's Recommendations for the Ninth Circuit*, 32 U.C. DAVIS L. REV. 887 (1999).

[13] I too have criticized the Commission proposal, on somewhat different grounds. *See* Hellman, *supra* note 4; Arthur D. Hellman, *Getting It Right: Panel Error and the En Banc Process in the Ninth Circuit Court of Appeals*, 34 U.C. DAVIS L. REV. 424 (2000).

[14] David J. Garrow, *A Tale of Two Posners*, 5 GREEN BAG 2d 341, 341 (2002).

[15] Richard A. Posner, *Is the Ninth Circuit Too Large? A Statistical Study of Judicial Quality*, 29 J. LEGAL STUDIES 711 (2000).

cal data" that were the basis for Judge Posner's conclusions.[16] By the time Judge Hug finished his analysis, Judge Posner's arguments lay in shreds.

V.

Finally, no account of the qualities that Judge Hug brought to the circuit division battle would be complete without mention of his sense of humor. Judges are human, and when they debate important issues on which feelings run high, tempers may flare. When this occurred, Judge Hug was often able to defuse tension by injecting a note of wry humor into the proceedings. Similarly, as the controversy over circuit restructuring wound its seemingly endless course, Judge Hug never lost his ability to see the lighter side of the debate.

A sense of humor was particularly valuable for the long-term health of the circuit and its institutions. Judges who took different positions on issues of restructuring would have to work together in years to come, not only in the decision of cases but also in administrative matters relating to the court and the circuit. Judge Hug's example, I'm sure, encouraged other judges to retain a sense of proportion about events that, no doubt, loomed larger at the time than they would from a broader perspective.

VI.

If there is a single moment that captures the qualities that characterized Judge Hug's brand of leadership during the five years he served as chief judge, it is perhaps his appearance at the annual meeting of the American Law Institute in San Francisco in May 1999. The ALI has its roots in the eastern legal establishment. Of its first 64 annual meetings, only 4 were held outside Washington, D.C. – and those took place in Philadelphia, Pennsylvania. Indeed, to many members it probably seemed unthinkable that the Institute would gather anywhere except in the ballroom of the Mayflower Hotel on Connecticut Avenue in Washington. The 1999 meeting was only the second in the Institute's history to be held on the west coast.

In most years, the opening speaker at the ALI meeting is the Chief Justice of the United States. In 1999, it was Chief Judge Hug. The meeting took place just a few months after the Commission on Structural Alternatives submitted its final report. As was appropriate for an organization dedicated to improving the operation of the law, Judge Hug took the opportunity to offer a brief but cogent critique of the Commission's recommendation that the Ninth Circuit Court of Appeals be divided into three "adjudicative divisions" that would operate virtually as autonomous courts. He began by explaining the origins of the "structural problem" in the federal courts of appeals: increasing caseloads, mandatory jurisdiction, and the lure of procedural shortcuts designed to avoid adding more judges. He then turned to the White Commission's report. He acknowledged that the Commission had offered "some valuable ideas for experimentation," but he made clear that the divisional structure proposal did not fall within that category. Rather, he outlined the proposal, step by step, and showed that, even

[16] Procter Hug, Jr., *Potential Effects of the White Commission's Recommendations on the Operation of the Ninth Circuit*, 34 U.C. DAVIS L. REV. 325, 339 (2000).

on its own terms, it fell "way short in comparison to the current operation of the Ninth Circuit Court of Appeals."[17] It was a devastating critique – but always within the spirit of the ALI and its commitment to a process that is "thorough, scholarly, and fair."[18]

Judge Hug's sense of humor was also very much in evidence. Judge Hug told the ALI members of the "little-recognized fact that for a substantial portion of its history the Ninth Circuit's geographical jurisdiction was larger than it is today," for "the court heard appeals from Shanghai, Canton, Tientsin, and Hankau."[19] This came about because Congress had created the United States Court for China and had provided for appeals to the Ninth Circuit from its decisions. Judge Hug noted that a recent law review article recommended "the creation of a new United States Court for cyberspace, modeled after the court in China." He continued:

> I would like to make it very clear. The Ninth Circuit is perfectly willing to give up any future claim to include China or to include the entire universe through a court for cyberspace. Now I think that would be a reasonable compromise that Congress could willingly accept.[20]

The audience, of course, was delighted. And when Judge Hug finished his remarks, the president of the American Law Institute, the late Charles Alan Wright, returned to the podium to tell the members that, "speaking as a professor of law . . . I agree with everything [Judge Hug] has said about why the recommendation of the Commission is ill-advised." No more authoritative endorsement could have been imagined; Professor Wright was without doubt the nation's foremost authority on the federal courts. Judge Hug's triumph was complete.

VII.

Earlier, I adverted to the habits of confidentiality that characterize judicial institutions. One additional consequence of this phenomenon is that tributes to judges tend to take on a formulaic quality.[21] Those who know the judge best – the judge's colleagues – shy away from detailed accounts of particular cases that would reveal the unique contribution made by the judge.[22] Similarly, those who have worked with judges on administrative matters feel constrained from

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[17] AMERICAN LAW INSTITUTE, PROCEEDINGS OF THE 76TH ANNUAL MEETING 9 (1999) (remarks of Chief Judge Hug).

[18] Michael Traynor, *The President's Letter*, A.L.I. REPORTER, Fall 2000.

[19] Remarks of Chief Judge Hug, *supra* note 17.

[20] *Id.*

[21] See the splendid (and too little known) unsigned student note, *Crossing the Bar*, 78 YALE L.J. 484 (1969).

[22] It is interesting to note that the extensive body of internal documents from the United States Supreme Court has only served to underscore the Justices' commitment to legal discourse at the highest level. For instance, Professor Dennis Hutchinson, the biographer of the late Justice Byron R. White, has commented that:

> [Justice] White's internal memos, prepared for the eyes of his colleagues only, may be his best – the judge as pure legal analyst. They are clear, sharp, and forceful, and they display strengths of both synthesis and analysis in areas of technical complexity. Perhaps most important, they understand doctrine from the standpoint of both judge and justice, from below and above . . . .

DENNIS HUTCHINSON, THE MAN WHO ONCE WAS WHIZZER WHITE 373-74 (1998).

disclosing private conversations or documents intended for a limited audience. I will not break with that tradition. Rather, I will draw on my experience as an observer of the circuit division battle and a participant in the Evaluation Committee to offer a concluding observation about Judge Hug's leadership of the Ninth Circuit.

The last half-decade of the twentieth century was a tumultuous and difficult time for the Ninth Circuit. The court of appeals came under attack by politicians, by editorial writers, even by other federal judges. A vigorous, proactive response was required. But in the setting of a court, even more than elsewhere, it was no less important that the debate be carried on in an atmosphere of civility and respect for opposing views. Judge Hug never lost sight of those values, and as a result his advocacy was all the more effective. The Ninth Circuit was very fortunate to have Judge Hug as its chief judge during this time of trial.