

Statement on confirmation of three nominees for Ninth Circuit Court of Appeals

Senator Hiram L. Fong Papers

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Statement on Confirmation of
Three Nominees For
Ninth Circuit Court of Appeals
By U. S. Senator Hiram L. Fong
For Delivery in the Senate
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Mr. President. I rise to speak on the confirmation of three persons nominated by the President to serve on the Ninth Circuit Court of Appeals: John F. Kilkenny of Oregon; Ozell M. Trask of Arizona; and Eugene A. Wright of Washington.

The Senate Judiciary Committee, on which I serve, has examined their background, experience, and qualifications and has concluded all three merit confirmation by the Senate.

On the question of recommending approval of the three nominees en bloc, the Committee vote was a six-six tie until after absent members were polled, at which time the vote was nine to seven to send the nominations to the Senate for confirmation.

While I voted against sending the nominations to the Senate at this time, my vote should not be construed as a vote against the nominees. This was the only way available to me to protest the failure to name someone from the State of Hawaii to fill one of the three vacancies.

Neither should the statement I am about to make be construed as criticism of any one of the three nominees. While I do not know them personally, they come highly recommended.

Nevertheless, I would be remiss in my duty to my State of Hawaii if I did not use this occasion to enter my protest at the by-passing of Hawaii in filling the three existing vacancies on the Ninth Circuit Court of Appeals.

There are nine States plus the Territory of Guam within the Ninth Circuit. Of the nine States, California is represented on the bench by 5 judges and Arizona, Idaho, Montana, Nevada, and Washington by one judge each. Of the nine States, only Alaska, Hawaii, and Oregon are not represented on the Ninth Circuit Court. The Territory of Guam is also not represented.

The pending nominations would give Oregon one judge; Arizona and Washington would each receive a second judge.

Hawaii would still not be represented. Neither would Alaska nor the Territory of Guam.

To understand Hawaii's equitable claim to a seat on the Ninth Circuit Court, it is necessary to review a bit of history. Hawaii had been a Territory of the United States for sixty years before attaining statehood. As a Territory, there were many Federal laws and many Federal programs that did not apply to Hawaii. Once Hawaii became a State, there was a lot of "catching up" to be done so that Hawaii could approach parity with her sister States.

In the case of the Ninth Circuit Court, Hawaii had never been represented on that bench, although we were covered by that Circuit. In order to give Hawaii an opportunity for representation and to help cope with the mushrooming caseload of the Ninth Circuit, two years ago, on August 2, 1967, I introduced a bill (S. 2201) to increase the Ninth Circuit Court judgeships by four members, to a total of thirteen.

My proposal, cosponsored by 17 other Senators, was later incorporated as part of S. 2349, which increased the number of judgeships in various circuits and which became Public Law 90-347 on June 18, 1968.

One of the four new judgeships for the Ninth Circuit was filled by President Johnson, leaving three vacancies to be filled by the new Administration taking office January 20, 1969.

On January 29, just nine days after the new Administration came into office, the Senate Judiciary Committee held hearings on a number of nominations, including that of Mr. Richard G. Kleindienst to be Deputy Attorney General of the United States. As a Member of the Judiciary Committee, I attended the hearings and questioned witnesses. I referred to Mr. Kleindienst's forthcoming duty of recommending candidates for Federal judgeships. I asked Mr. Kleindienst

the following question with reference to the three vacancies on the Ninth Circuit Court:

"Do you feel, as a recommending authority, that geographic diversity should be one of the factors in your recommendation for nominees to the Ninth Circuit Court?"

Mr. Kleindienst replied as follows:

"Senator, I think it should be one of the factors. There are several others that you have to take into consideration, it seems. That is the number of cases that on a percentage basis or a proportionate basis go to the court; also, the population."

Then he went on to say,

"But certainly, to the extent possible, giving every State within the circuit, regardless of the circuit, a voice in that court should be one of the considerations, yes, sir."

Then I said,

"I am very grateful for your answer, because I feel that Hawaii should have some representation on the

Ninth Circuit, there being 13 judges and nine States represented. "

To which Mr. Kleindienst replied, "It should."

The fact that Hawaii has never been represented on the Ninth Circuit Court and the testimony of Mr. Kleindienst that Hawaii should be represented on this Court are compelling reasons why I believe that Hawaii is entitled to one of the three vacancies.

In addition, Mr. Kleindienst agreed that geographic diversity is one of the factors to be considered. Hawaii is America's only mid-Pacific State, with a history far different from any of the other States in the Ninth Circuit. On the basis of geography, I believe Hawaii is entitled to a Ninth Circuit judgeship.

Mr. Kleindienst noted two other factors to be considered, population and the number of cases a State generates for consideration by the Ninth Circuit Court.

In regard to population, according to U. S. Census estimates as of January 1 this year, Hawaii has a population greater than three other States which already have judges on the Ninth Circuit Court. Hawaii's population of 775, 000 is greater than Idaho's population of 702, 000. It is greater than Montana's population of 700, 000. It is greater than Nevada's population of 465, 000. These three States have one judge each now sitting on the Ninth Circuit Court.

In addition to the three States in the Ninth Circuit which already have judges on the Court, there are four other States smaller than Hawaii which are represented on their respective Circuit Courts: North Dakota with 633,000 population; Delaware with 538,000; Vermont with 417,000; and Wyoming with 314,000.

Nationwide, of the nine States with smaller populations than Hawaii, seven already are represented on their respective Circuit Courts.

Of the ten smallest States, only Hawaii with its 775,000 people; South Dakota with its 670,000 people; and Alaska with its 281,000 people will not have representation in their respective Circuit Court of Appeals.

In terms of cases generated for the Ninth Circuit Court, in fiscal year 1968, the latest year for which I was able to obtain figures, Hawaii generated 17 cases, 1.43 per cent of the total number. This was the identical number -- 17 -- generated by Idaho which already has a judge on the Ninth Circuit Court. Montana, which also has a Ninth Circuit judge, generated only two more cases than Hawaii, representing 1.60 per cent of the entire Ninth Circuit caseload. Nevada generated 4.14 per cent of the caseload.

To sum up, in terms of population, Hawaii ranks above three States which already have representation on the Ninth Circuit

Court. In terms of caseload, Hawaii is on a par with one State which already has a Ninth Circuit judge and is only two cases behind a second State already represented on the Court.

Based on the facts I have already mentioned, based on the testimony of Mr. Kleindienst, based upon my activity in initiating the measure increasing the Ninth Circuit judgeships by four, as senior Senator from Hawaii I believe I was amply justified in pressing Hawaii's entitlement to a seat on the Ninth Circuit Court. Therefore, I suggested the name of an eminently qualified Federal District Court judge in Hawaii for a seat on the Ninth Circuit appellate bench.

Hawaii has a strong entitlement to representation on the Ninth Circuit Court so as to bring about geographical balance, so as to conform with the principle of minimal representation to give each State a voice in its circuit court, and so as to recognize population, caseload, and the unique cultural and historical traditions of Hawaii.

On the ground of equity, fairness, justice, consistency with America's democratic principles, and comity among sovereign States, I have labored in behalf of a Ninth Circuit Court judgeship for Hawaii. As none of the pending nominees is from Hawaii, I shall continue to press Hawaii's just claim whenever the next vacancy in the Ninth Circuit occurs.

In the meantime, I have no desire to delay Senate action on these nominations. Nor shall I call for a roll call vote.

I extend every good wish to Judge Kilkenny, Mr. Trask, and Judge Wright as they embark on their new duties, and I congratulate them on the high honor the President bestowed on them by naming them to these judicial posts. I am confident the Senate will similarly honor them by confirming their nominations today.

I simply want the record to show that Hawaii has an excellent claim to a seat on the Ninth Circuit Court. I hope and trust one of Hawaii's qualified jurists, of which we have many, will be named to the next vacancy that occurs in the Ninth Circuit Court of Appeals.