

May 28, 1998

Commission on Structural Alternatives
for the Federal Court of Appeals
Washington, D.C. 20544
By fax (202) 208-5102 and Express Mail

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Dear Commission members,

I appreciate this opportunity to submit written testimony concerning the work of the Commission. I am the Sydney M. Irmis Professor of Law and Political Science at the University of Southern California Law School. I have taught constitutional law, federal courts, and civil procedure in law schools for the past 18 years. Additionally, I am the author of two treatises, Federal Jurisdiction (Little, Brown & Co., 2d. ed. 1988) and Constitutional Law: Principles and Policies (Aspen 1997), and many articles concerning federal courts and constitutional law. I have had the pleasure of speaking to federal judges in every Circuit and have argued cases in the Eighth Circuit, the Ninth Circuit, and the District of Columbia Circuit.

I am writing to express views about one of the most important issues facing the Commission: what is the optimal size for a federal circuit? Closely related to this is the question of whether the Ninth Circuit should be split.

At the outset, I should disclose that before

thoroughly researching the issue, I thought that smaller Circuits were preferable and that it would be desirable to split the Ninth Circuit as the Fifth Circuit was divided almost 18 years ago. However, after carefully considering the issue, I changed my view and concluded that there is no optimal size for federal circuits. There is no indication that larger circuits will be slower in processing and deciding cases or that they will produce more intra-circuit conflicts. Moreover, larger circuits offer advantages, such as in having judges from a broader geographic area reflecting a likely greater diversity of perspectives and in efficiencies derived from a larger scale.

Indeed, any attempt to specify an optimal size for circuits is likely to ignore other important considerations. For example, I believe that there is a substantial benefit to making sure that several states are included in any Circuit. There is a significant benefit, albeit one that cannot be quantified, of panels of judges that include more than one state. Regional circuit courts offer this benefit. Yet, specifying an optimal size for circuits would ignore this and risk large states like California, New York, or Texas being alone as a circuit or with one state at most. Even worse, a determination of an optimal size could even lead to splitting a single state into different circuits, a result that would seem to lead to chaos when those circuits would conflict in interpreting the state's laws or determining their constitutionality.

Additionally, any determination of what is the optimal size for a circuit likely is very much dependent on current practices and technology. In a world without electronic data bases and electronic communications among chambers, a smaller circuit with judges in close proximity had many benefits. But computer technology now makes these benefits to a smaller size out-dated. There is every reason to believe that future technologies will likewise undermine any current attempt to define what is the ideal size for a circuit.

If no optimal circuit size can be defined, the key question becomes under what circumstances a circuit should be divided. The simple answer is that a circuit should be split only when a problem is proven. There are obvious costs to splitting any circuit. For instance, two administrative structures will need to be developed where previously there had been only one. Therefore, the Long Range Plan of the Federal Courts (1995) declared: "Circuit restructuring should occur only if compelling empirical evidence demonstrates adjudicative or administrative dysfunction in a court so that it cannot continue to deliver quality justice and coherent, consistent circuit law in the face of increasing workload." (at 44). Judges on a court and lawyers appearing before it are in a particularly good position to evaluate whether a problem exists.

My review of the data and opinions concerning the Ninth Circuit reveals no problems that would justify its being split. In terms of efficiency, by any measure the Ninth Circuit

functions as well, or better, than many smaller circuits. One study found that the Ninth Circuit was better than the national average in terms of the median time from oral argument submission to disposition. See Senate Judiciary Committee, Ninth Circuit Court of Appeals Reorganization Act of 1995, S. Rep. No. 197, 104th Cong., 1st Sess. at 20 n.8. Likewise, the Ninth Circuit was found to produce written decisions in a higher percentage of cases than the national average. Id. at 20 n.12. It must be noted that the Ninth Circuit has been significantly understaffed and that this likely is responsible for slowing the processing of cases.

Nor is there any indication that the size of the Ninth Circuit causes a greater degree of intra-circuit conflicts. Professor Arthur Hellman carefully studied the extent of intra-circuit conflicts in the Ninth Circuit. Professor Hellman concluded that there was not a significant problem and that "the perception of conflict in the Ninth Circuit has been skewed by the admitted disarray in a few high-visibility areas of the law characterized by a large volume of cases and fact-specific legal rules." Arthur D. Hellman, Dividing the Ninth Circuit: An Idea Whose Time Has Not Yet Come, 57 Montana L. Rev. 261, 276 (1996). Indeed, my conclusion is identical to Professor Hellman's: "The proponents of [splitting the Ninth Circuit] have not pointed to any problems in the administration of justice that would be cured or mitigated by this particular realignment." Id. at 261.

Moreover, it is striking that those most familiar with the

Ninth Circuit -- its judges and the attorneys who appear before it -- are virtually unanimous in opposing its division. They, too, do not see problems in administration that would be cured by a smaller size. The Judicial Council of the Ninth Circuit, its governing body, and the Ninth Circuit Judicial Conference, composed of judges and lawyer representatives, repeatedly have opposed splitting the circuit. Official bar organizations in Arizona, California, Hawaii, Idaho, and Montana also have opposed dividing the circuit. This is powerful evidence of the absence of a problem sufficient to warrant a split.

I realize, of course, that this Commission is looking at much more than just the size of the Ninth Circuit. Yet, the evidence concerning the Ninth Circuit is strong refutation of any optimal size for a circuit. I urge this Commission to take the position that a circuit should be split only if there is evidence of a serious problem in the administration of justice, as demonstrated both by statistics and the opinion of those involved in the circuit. Moreover, there should be a determination that splitting the circuit is the preferable way of dealing with these problems.

I thank the Commission for inviting comments and for considering my views.

Sincerely,

Erwin Chemerinsky

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