Commission on Structural Alternatives for the Federal Courts of Appeals

Statement of U.S. Senator Frank Murkowski, Alaska

"An unmanageable administrative monstrosity," is how former Chief Justice Warren E. Burger described the state of the current Ninth Circuit U.S. District Court. His characterization is understated.

The Ninth Circuit is by far the largest of the thirteen circuits, encompassing nine states and stretching from the Arctic Circle to the border of Mexico and across the International Dateline. In fact, the circuit, which spans some 1.4 million square miles, is larger than the First, Second, Third, Fourth, Fifth, Sixth, Seventh and Eleventh Circuits combined.

The only factor more disturbing than the geographic magnitude of the Ninth Circuit, is the magnitude of the Ninth Circuit's ever-expanding docket. It serves a population of more than 49 million people, almost 60 percent more than are served by the next largest circuit. By 2010, the Census Bureau estimates that the Ninth Circuit's population will be more than 63 million -- a 43 percent increase in just 13 years.

As former Chief Judge Wallace of the Ninth Circuit stated, "it takes about four months longer to complete an appeal in our court as compared to the national median time." The 49 million residents of the Ninth Circuit are the persons that suffer. Many wait years before cases are heard and decided, prompting many to forego the entire appellate process. In brief, the Ninth Circuit has become a circuit where justice is not swift and not always served.

Additionally, the massive size of the Circuit often results in a decrease in

the ability of judges to keep abreast of legal developments within this jurisdiction. The large number of judges scattered over a large area inevitably results in difficulty in reaching consistent circuit decisions. U.S. Supreme Court Justice Anthony M. Kennedy stated during a recent Congressional hearing that the Ninth Circuit is "too large to have the discipline and control that's necessary for an effective court."

This judicial inconsistency has led to continual increases in the reversal rate of Ninth Circuit decisions by the U.S. Supreme Court. During the 1997-1998 Supreme Court session, the court reversed 19 of the 20 cases that it heard from the Ninth Circuit -- that's an astounding 95% reversal rate.

Why does the reversal rate continue to increase? Because the circuit is simply too big; intracircuit conflicts are the result. Ninth Circuit Judge, Diramuid O' Scannlain described the problem as follows:

> "An appellate court must function as a unified body, and it must speak with a unified voice. It must maintain and shape a coherent body of law. A circuit judge must feel as though he or she speaks for the whole court and not merely as an individual. As more and more judges are added, it becomes harder for the court to remain accountable to lawyers,other judges, and the public at large. As the number of opinions increase, we judges risk losing the ability to keep track of precedents and the ability to know what our circuit's law is. In short, bigger is not better."

Another Ninth Circuit Judge, Andrew J. Kleinfeld agrees: "With so many judges on the Ninth Circuit and so many cases, there is no way a judge can read all other judges' opinions...it's an impossibility."

Some may argue that Congress, in complying with its constitutional duty of oversight of the federal appellate system, is acting in haste. That contention is unfounded. The concept of dividing the Ninth Circuit is not new. Numerous proposals to divide the Circuit were debated in Congress since before World War II. In 1973 Congressional Commission to study realignment of the Circuit System, chaired by Senator Hruska, strongly called for the division of the Ninth Circuit. Congressional hearings have been held in 1974, 1975, 1983, 1989, 1990 and 1995. Dividing the Ninth Circuit has been studied, debated and analyzed to death. It's time for action.

Others who oppose legislation to bifurcate the Ninth Circuit, contend that all the Circuit needs is the appropriation of more federal dollars for more federal judges. However, history reveals this contention to be false. In fact, Congressional increases in the number of judges have yielded few improvements. Studies on omnibus judgeships legislation concluded that adding "judges only delayed what appeared to be a nearly inexorable climb in appeals taken to the court" and only served to further tax the judicial confirmation process.

As early as 1954, Supreme Court Justice Felix Frankfurter warned that the courts' growing business could not "be met by a steady increase in the number of federal judges" because this increase was "bound to depreciate the quality of the federal judiciary and thereby adversely affect the whole system." Soon after Congress divided the former Fifth Circuit, former Senator and Alabama Supreme Court Chief Justice, Howell Heflin, a Democrat from Alabama, remarked that "Congress recognized that a point is reached where the addition of judges decreases the effectiveness of the court, complicates the

administration of uniform law, and potentially diminishes the quality of justice within a Circuit."

Former Oregon Senator Bob Packwood believed that a circuit split would enable judges to achieve a greater mastery of applicable, *but unique*, state law and state issues. He believed such a mastery was necessary because "burgeoning conflicts in the area of natural resources and the continuing expansion of international trade efforts will all expand the demand for judicial excellence...By reforming our courts now, they will be better able to dispense justice in a fair and expeditious manner."

I concur. The uniqueness of the Northwest, and in particular, Alaska, cannot be overstated. An effective appellate process demands mastery of state law and state issues relative to the geographic land mass, population and native cultures that are unique to the relevant region. This need for greater regional representation is demonstrated by the fact that the East Coast is comprised of five federal circuits. A division of the Ninth Circuit will enable judges, lawyers and parties to master a more manageable and predictable universe of relevant caselaw.

Further, a division of the Ninth Circuit would honor Congress' original intent in establishing appellate court boundaries that respect and reflect a regional identity. In spite of efforts to modernize the administration of the Ninth Circuit, its size works against the original purpose of its creation: the uniform, coherent and efficient development and application of federal law in the region.

No one Court can effectively exercise its power in an area that extends

from the Arctic Circle to the tropics. Legislation dividing the Ninth Circuit will create a regional commonality which will lead to greater uniformity and consistency in the development of federal law, and will ultimately strengthen the constitutional guarantee of justice to all.