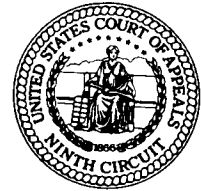


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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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CHAMBERS OF
THOMAS G. NELSON
UNITED STATES CIRCUIT JUDGE

May 27, 1998

Commission on Structural Alternatives
for Federal Courts of Appeals
Thurgood Marshall Federal
Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544

Honorable Commission Members:

For your consideration, enclosed please find a Joint
Statement and a Supplemental Joint Statement by Judge Stephen
S. Trott and myself, together with a computer diskette as
requested.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Thomas G. Nelson".

THOMAS G. NELSON
Circuit Judge

tgn:jg
encs.

Joint Statement of

STEPHEN S. TROTT

and

THOMAS G. NELSON

Circuit Judges

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

To The

COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE
FEDERAL COURTS OF APPEALS

We are both active circuit judges in the Ninth Circuit Court of Appeals, with chambers in Boise, Idaho. This statement represents our views, and we do not speak for the court or any of the other judges of the court. We are authorized to tell you that Senior Circuit Judge Eugene A. Wright of Seattle, Washington, and Circuit Judge Diarmuid F. O'Scannlain of Portland, Oregon, generally agree with what we say in this statement.

We will address only the general question of splitting the Ninth Circuit. We will not discuss the merits or demerits of any particular split, nor will we address the situation in any other circuit or region.

It is important, we believe, to keep this issue in perspective. What Congress does or does not do about splitting the Ninth Circuit does not compel any result in any other circuits. Nor would splitting the Ninth Circuit lead to the shibboleth of "Balkanizing" the courts of appeals. The Ninth Circuit needs its own look; however, what happens here, happens only here.

The Ninth Circuit needs to be split, but not because it or its judges have done or are doing a bad job. The basic reason for splitting the Ninth Circuit is that two smaller courts and administrative units will better serve the public interest.

There are two principal reasons for splitting the Ninth Circuit. The first of these applies only to the court of appeals. The other relates to the Ninth Circuit as an administrative unit of the federal court system.

I.

The principal problem with the Ninth Circuit Court of Appeals as it is presently constituted is that it is simply too large to be efficient. One symptom of size is the fact that it is the second slowest court of appeals in processing its case load, from notice of appeal to final disposition.

The Commission will undoubtedly be the recipient of many statistics. The following summary of speed of disposition and case loads among the courts of appeals is offered as a convenience and not with the thought the Commission will not have previously seen the numbers. The source is Federal Court Management Statistics for 1996, published by the Administrative Office of the United States Courts.

<u>Circuit</u>	<u>Number of Authorized Judges</u>	<u>Actions per Panel</u>	<u>Median Time in Months</u>
First	6	698	8.5
Second	13	971	7.9
Third	14	722	8.0
Fourth	15	1026	7.8
Fifth	17	1237	8.8
Sixth	16	791	13.1
Seventh	11	859	10.5
Eighth	11	876	8.2
Ninth	28	876	14.3
Tenth	12	672	10.1
Eleventh	12	1574	14.7

As can be seen, except for the Eleventh Circuit, all of the other courts of appeals are faster, most much faster, than the Ninth Circuit.

The suggestion has been made that the reason for the delays in processing appeals in the Ninth Circuit is the number of vacancies the court has experienced in the last few years. While this speculation offers an attractive scapegoat for the delays, it does not hold up under scrutiny.

In 1996, the Ninth Circuit had a median time of 14.3 months from notice of appeal to disposition. It also had 53 vacant judgeship months. The Sixth Circuit, by comparison, had a median time of 13.1 months, with 30 vacant judgeship months. Thirty vacant judgeship months for a court of sixteen authorized judges, like the Sixth Circuit, is a vacancy rate of 15.6%. On the Ninth Circuit, 53 vacant judgeship months, with 28 authorized judgeships, is a vacancy rate of 15.8%. So the vacancy rate doesn't explain why the Ninth Circuit is so slow.

If the argument is to be advanced that the Sixth Circuit has a lesser case load per judge than the Ninth Circuit, that would also be incorrect. As the statistics above show, the Sixth Circuit, at 791 actions per panel in 1996, was only somewhat behind the Ninth Circuit at 876. Other circuits with greater numbers of actions per panel were also faster than the Ninth. See, for example, the Second Circuit at 7.9 months and 971 actions per panel, and the Fourth Circuit at 7.8 months and 1026 actions per panel.

The vacancy-as-cause argument also ignores the fact that during 1996 the Ninth Circuit had 15 senior judges. Most of these judges handled at least a 50% case load in the Ninth Circuit. The court also had the help of numerous visiting judges. The impact of this assistance in addressing the existence of vacancies can be seen in the fact that the percentage of terminations on the merits by active judges declined from 85% in 1993 to 74% in 1996. During this same period, pending appeals declined slightly from 7,597 in 1993 to 7,431 in 1996. The court thus adjusted for the vacancies by using senior and visiting judges. The length of time from notice of appeal to disposition simply can't be explained by a lack of active judges.

After this statement was prepared, the 1997 Federal Court Management Statistics arrived. The vacancies on the Ninth Circuit increased sharply to 95.4 months, while that of the Sixth Circuit increased only slightly, to 34.4 months. Thus, the Ninth Circuit had a higher vacancy rate than the Sixth Circuit.

The new figures demonstrate that the vacancy rate still does not account for the time lag in the Ninth Circuit. The median time increased only to 14.4 months in 1997 from 14.3 months in 1996. Pending appeals increased to 7,622 from 7,431 in 1996.

The extreme vacancy rate has imposed a number of strains on the Ninth Circuit, including an undue reliance on visiting judges. But it cannot be blamed for the time delay in

deciding cases. If any further illustration is needed, one has only to look at 1992 when the Ninth Circuit had its full complement of judges. The median time then was 15.2 months compared to 1997's 14.4 months.

While the meaning behind these numbers may be disputed by the opponents of the split, the odds are strong that splitting the Ninth Circuit would produce two faster appellate courts. The beneficiaries of reducing the time taken to decide cases on appeal are the parties to those appeals. Their interests are often ignored in lofty discussions of judicial administration.

Another cost of the size of the Ninth Circuit Court of Appeals is the toll taken by a limited en banc court. On a 28-judge court, a limited en banc panel of 11 represents the views of only 39% of the judges. While it is difficult to assign an objective meaning to this factor, from the inside of the court, the limited en banc process is a frustrating one. If a case of particular interest goes en banc, the chances are good that the judges with the most interest are not on the en banc panel. There is a certain disassociation from en banc opinions which one cannot participate in.

It is not enough to argue, as some have, that appointees of presidents of Party A have a statistical chance of being on any en banc panel which is equal to the proportion of Party A appointees on the court. Regardless of who did the appointing, no other judge on this court truly represents our respective points of view on any case. When a judge has no

voice in making the law of the circuit on a case which is taken en banc, there is a natural feeling of detachment from the process. The current proposal to expand the Ninth Circuit by nine additional judges would not just exacerbate the problem; it would multiply it exponentially.

In smaller circuits, the burden of the formal en banc process can, and is, reduced by circulating the dispositions prior to filing. An off-panel judge who sees a problem with the disposition can discuss it with the panel and work it out. Only if this process fails is resort to an en banc hearing necessary. The savings in time and resources, not only of the judiciary, but the parties, is considerable.

The current size of the Ninth Circuit prevents it from doing better by adopting a pre-circulation practice. In fact, it has abandoned its earlier practice of circulating unpublished decisions among the judges of the court. Until the court is split, it can only respond to the case load and administrative problems created by its size, instead of being able to consider programs that would enable it to do better work, not just more work.

A related problem is the number of cases published every year by the court of appeals. In 1997, the court published nearly 1,000 opinions. Keeping up with those opinions takes a lot of time and energy. It's important for us to keep up, to the extent we believe we have a responsibility for the overall consistency of law in the circuit. On this point, we agree with the comments of Judge Tjoflat presented March 23

in Atlanta. He pointed out how a large number of opinions creates a time problem in both doing assigned casework and monitoring the opinions of the other judges. As he points out: "The judge's only way out of this vicious cycle is to shirk his or her monitoring duties; when this occurs, discordant rules will proliferate within the circuit, and the rule of law in that circuit will begin to crumble."

It is also critical for district court judges and lawyers to keep up with appellate decisions, but for a different reason: they have to be prepared to apply a new rule right away in the trial they have going or are about to start; they don't have the luxury of putting their feet up and thinking about it, or of putting off the reading of slip opinions until a more convenient time. One thousand written opinions to review is an average of about twenty every week, on top of all other assigned tasks.

Another element of the size of the circuit is the geography it covers, from the border with Mexico to the Arctic Circle, from Montana to Guam and the Northern Mariana Islands. All of the splits that have been suggested would result in substantially less travel for most circuit judges. The present configuration of the Ninth Circuit eats up a tremendous amount of the judges' time in travel to calendars, court meetings and en banc hearings. Any reduction in this time commitment can only benefit the judges' ability to stay current with their work.

We do not advocate any particular split of the Ninth Circuit. Any split will produce two smaller courts, with the attendant benefits. While on the subject, however, we believe that it is no answer to the problems associated with the current size of the Ninth Circuit Court of Appeals to say that there should be no split because no split is perfect, or even very good, according to the subjective approach of opponents of the split.

As others have pointed out, California by itself would require a large court of appeals to decide only the appeals originating there. But the size of California cannot justify keeping all of the eight other states in the same circuit. Splitting off only the Northwest would reduce the case load of the remaining Ninth Circuit by 20-25%. This alone would be a benefit to the producers and users of Ninth Circuit opinions.

II.

The second area of concern in the present alignment of the Ninth Circuit comes in the area of court administration. The federal courts in the states in the current Ninth Circuit do more than 16% of the judicial business of the federal courts.¹ The Judicial Conference of the United States is a

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Court of Appeals:	16.6%	(8,692 cases out of 52,312)
District Courts:	14.6%	(38,934 cases out of 267,027)
Bankruptcy Courts:	22.6%	(309,150 cases out of 1,367,394)

Judicial Business of the United States Courts - 1997,
Administrative Office of the United States Courts.

very important institution to the administration of the federal court system. Yet, with 2 of 27 members, the federal courts in the states of the Ninth Circuit have only 7% of the membership of the Conference. With the two additional members created by an additional circuit, the representation would about double, to more than 13%, or nearly equal to the proportion of federal judicial work done in the western states.

A similar problem exists with the Judicial Council of the Ninth Circuit. With four circuit judges and four district judges as voting members, plus the Chief Circuit Judge, it is a very important part of the framework of the federal courts in the circuit. The members of the Council (except for the Chief Circuit Judge) serve three-year terms. The bulk of the 97 active district judges in the circuit can expect that the odds of ever participating in the governance of the circuit are slim, at best. Creation of an additional circuit would effectively double their chances.

The same is true of the 28 judges of the Ninth Circuit Court of Appeals. In an average active service term of 14 years, about half of them will never have a chance to serve.

Cost has been mentioned as a negative factor in the consideration of splitting the circuit. There is no question but that having two circuits instead of one will slightly increase personnel costs, simply by having two court clerks and two circuit executives. But the other personnel

allocations can be split between the circuits with little or no net cost increase.

One unavoidable cost of the split would be housing the new circuit administration, unless the choice is made to split California between two circuits. But housing of a possible Northwest circuit is not a "today" problem. If the Northwest is split off, the logical long-term headquarters would be in Seattle. But while facilities are being acquired there, the United States continues to own the Gus Solomon Federal Building in Portland. It is presently empty and there are no announced plans for occupancy except for the eventual transfer of the bankruptcy court. It should be more than adequate to house the court of appeals and the Circuit Executive's Office for a considerable period of time.

The present district court headquarters in Seattle is inadequate to serve the present, much less future, needs of that court. Once new quarters are found for the district court, the existing district court building would be more than adequate to house the Twelfth Circuit. In fact, it currently houses a courtroom for the use of the court of appeals as well as the chambers of four circuit judges, along with the offices of a deputy clerk and a court of appeals mediator.

The sheer size of the Ninth Circuit imposes some other costs, as well. The space and facilities staff in the Circuit Executive's Office must deal with the needs of district courts and bankruptcy courts in 13 districts in 9

states, plus 2 others in Guam and the Northern Mariana Islands. In doing this work, the staff simply gets stretched too thin by the distances involved to deal effectively with local needs and the vagaries of the different administrations in the various offices of the General Services Administration.

III.

In our opinion, splitting the Ninth Circuit would be of benefit to the litigants before the court and to the judges of the court. The Ninth Circuit has been, and is, a fine court. There is no reason to believe that a smaller Ninth Circuit wouldn't be even better.

Thank you for the time you are devoting to this study effort.

Supplemental Joint Statement

of

STEPHEN S. TROTT

and

THOMAS G. NELSON

United States Circuit Judges
Boise, Idaho

To The

COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE
FEDERAL COURTS OF APPEALS

The statement of Sanford Svetcov came to our attention too late to include a response in the joint statement previously submitted. This statement represents only our views, and we do not speak for any other judges of the court.

Mr. Svetcov is undoubtedly and admittedly one of the ablest appellate practitioners in the Ninth Circuit, if not in the United States. He has proposed a non-split of the Ninth Circuit, into two administrative divisions which would operate somewhat independently, but not entirely.

There are several problems with Mr. Svetcov's approach:

1. The proposal assumes an equal number of judges in each division. However, in 1992, the last time the Court of Appeals was at full strength, there were only eleven active circuit judges resident in the Northern Division as proposed by Mr. Svetcov. Obviously, it would be a matter of the purest chance that an equal number of circuit judges would reside in both the Northern and Southern Divisions.

2. Mr. Svetcov's no-split split does not address the problems associated with a limited en banc court of eleven members. The nonrepresentational aspects of the current process could even be exacerbated by guaranteeing that a majority of the en banc court would be chosen from those voting in favor of en banc review.

3. The demands of travel are not much abated by the proposal. Judges in Southern California would still travel to Seattle and Portland, while judges in the Northwest would still travel to Pasadena, in Southern California.

4. The unwieldiness of the current court meetings would be retained. The individual divisions would apparently not be able to make their own rules of procedure, so there would be no greater opportunity for experimentation than presently exists. If the two divisions could make their own rules, institute their own practices, and hold their own court meetings, then the court would no longer be a court. The split would be effectively in place.

5. The no-split split would not address the basic problems which confront the Ninth Circuit administratively, in that the representational inadequacies on the United States Judicial Conference and the Circuit Council would remain.

The Ninth Circuit Court of Appeals is either a court or it is not. The no-split split would say that it is not. The arguments in favor of this proposal ultimately favor a split of the circuit.

Thank you again for your time.