Commission on Structural Alternatives for the Federal Courts of Appeals

prepared testimony presented by:
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Introduction

Thank you for the opportunity to add my views to the thoughtful debate regarding the structure and alignment of the federal appellate system, and, in particular, the Court of Appeals for the Ninth Circuit. I have practiced before a great number of state and federal trial and appellate courts. In terms of the quality of justice delivered and the quality of the judicial process, the Ninth Circuit, in my experience, is a standout. Perhaps because of its very size, the Ninth Circuit is at the forefront of innovations in court management, ensuring prompt, reasoned decisionmaking, and creating a court that, to borrow a phrase of the times, is "user friendly." In the face of ever increasing caseloads, and ever expanding federal jurisdiction, Congress should applaud and encourage these innovations, some of which have been induced by the very size of the circuit and many of which might be useful to other circuits, irrespective of size. Like the states that comprise individual circuits, the boundaries of each circuit are best explained by historical facts that may have less relevance today. However, subsequent history and tradition and the opportunity to share the collective experience of different circuit sizes and management are powerful reasons against redrawing

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circuit boundaries. For reasons detailed hereafter, I strongly oppose any realignment of the federal appellate system that would entail splitting the Ninth Circuit.

Burden of Persuasion

As others have recognized, those who favor splitting the Ninth Circuit should bear the burden of persuading Congress, as well as the bench, the bar, and the public, why change is necessary.[2] That burden has not been met.

I have followed the debate in legal newspapers and periodicals, in the law reviews, and in the popular press, and as gathered in the Commission's website, and it strikes me that the arguments pressed by those who favor splitting the circuit fall generally under three thematic headings. The first I will call "regionalism" — the notion that the current Ninth Circuit is unresponsive to the needs of certain geographic regions within its boundaries, and/or is dominated by California judges. Next is what I call "nostalgia" — a sentimental, almost quaint notion that circuit courts should be small enough that all the judges can regularly sit around a table discussing not only the courts opinions but the matters of the day. The final theme is "quality of justice" — the argument that the size of the Ninth Circuit leads to inefficiencies and inconsistent judgments. I address these themes in turn.

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[2] See, e.g., Committee on Long Range Planning of the Judicial Conference of the United States, Proposed Long Range Plan for the Federal Courts (1995) ("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 an increasing caseload.").

Regionalism

The two U.S. Senators who have most visibly pressed for splitting the Ninth Circuit both hail from states in the Pacific Northwest. Conrad Burns, senator from Montana, along with Slade Gorton, senator from Washington, introduced a bill in 1995 that would have created a new Twelfth Circuit, composed of Alaska, Idaho, Montana, Oregon, and Washington. In response to concerns that this particular structure would do nothing to solve the perceived caseload and other challenges facing the remainder of the circuit, they later introduced an alternative proposal that would have cordoned off California, Hawaii, Guam, and the Northern Mariana Islands as the new Twelfth Circuit, and left the remainder of the Ninth Circuit intact.[3]

Although Senator Burns, in an article published in 1996 in the Montana Law Review,[4] is silent on the effects splitting the circuit might have on regional interests, his silence on this point appears newfound. The Washington Post, for instance, reports that Senator Burns had previously, in a floor speech, justified his push to split the circuit by arguing that "we are seeing an increase in legal actions against economic activities in states like Montana, such as timbering, mining and water development. This threatens local economic stability." Similarly, Senator Gorton has stated that the Ninth Circuit is "dominated by California judges and California judicial philosophy. . . . [T]he interests of the Northwest

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[3] Both senators had played roles in prior legislative efforts to split the circuit, but it was their 1995 efforts that eventually led, by way of a compromise, to the establishment of this Commission on Structural Alternatives for the Federal Courts of Appeals.

[4] Sen. Conrad Burns, Dividing the Ninth Circuit Court of Appeals: A Proposition Long Overdue, 57 Mont. L. Rev. 245 (1996).

cannot be fully appreciated or addressed from a California perspective." Putting aside threshold questions of, for example, who counts as a California judge or what can properly be described as a California judicial philosophy, I am terribly concerned by the fact that United States Senators have raised these concerns in the context of a debate over the organization of the federal judiciary.

The authority we collectively confer on federal judges rests largely upon the premise that judges are to be guided by the Constitution and federal law, not by the varying winds of regional interests. Indeed, the Constitution in its wisdom provides that Court of Appeal judges be appointed for life, in significant part to protect against the pressures of local state or regional interests. The federal courts are superimposed upon the fifty states and numerous territories despite vastly differing economies, histories, and cultures of the states and territories. Despite these local differences, however, we expect that the Constitution, as well as the Securities and Exchange Act, the Endangered Species Act, ERISA, RICO, and even the Federal Rules of Civil Procedure all mean the same, and will be enforced with equal vigor, whether the judge interpreting these authorities sits in Guam, Texas, or Maine.

Any argument premised on the assumption that judges will not limit the bases of their decisionmaking to the law and record before them, but instead will decide cases with an eye to local interests, should not be countenanced. Such talk pollutes the discourse in an insidious way. Over time, if we allow ourselves to talk about the federal judiciary as reflective of local concerns, we will find it more and more difficult to ensure that it does not.

Nostalgia

A second theme that appears throughout the writings of persons in favor of splitting the Ninth Circuit is the rather vague notion that the circuit "is just too big."[5] The Honorable Edward R. Becker, Chief Judge of the Court of Appeals for the Third Circuit, for example, whom I admire greatly, has previously submitted testimony to this Commission that exemplifies this view. Judge Becker, whose own circuit currently has thirteen active judges, writes:

> "[W]hen a circuit gets so large that an individual judge cannot truly know the law of his or her circuit . . . the circuit is too large and must be split. . . . I cannot imagine a judge in a circuit as large as the Ninth, with its staggering volume of opinions, being able to do what we in the Third Circuit do. . . . If this assumption is correct, the Ninth Circuit, according to my rough rule of thumb, needs to be split.[6]

Similarly, Senator Burns has written:

> The more judges that sit on a court, the less frequent a particular judge is likely to encounter any other judge on a three-judge panel. Breakdown in collegiality usually leads to a diminished quality of decision-making. . . . in a court like

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[5] The Ninth Circuit currently has twenty-eight authorized judgeships — the largest of any of the federal courts of appeals. Only nineteen of these judgeships are currently filled, however, at least in part due to holds Senator Burns has placed on nominees to the circuit posts. By his own concession, Senator Burns placed these holds in order to draw attention to the problems he sees with the current structure of the Ninth Circuit. See Burns, supra note 4, at 248

[6] Letter from Edward R. Becker to the Honorables Byron R. White, Gilbert S. Merrit, Pamela Ann Rymer, and William D. Browning, and N. Lee Cooper, Esq. of January 26, 1998.

the Ninth Circuit, with 28 authorized judges and 3,276 possible combinations of panels, the fact is particularly evident.[7]

These and other similar arguments resonate with a sort of quaint sentimentalism that, unfortunately, fails to face up to the inevitable consequences of increasing caseloads and ever expanding federal jurisdiction. Further, so far as I can discern, there is little, if any, quality of justice evidence to support either Judge Becker's conclusion that the Ninth Circuit can't do "what we in the Third Circuit do,"[8] or Senator Burns' assertion that there is a breakdown in collegiality or that such a breakdown "usually leads to a diminished quality of decision-making."

Admittedly, as an advocate, I would be comforted to know that the members of a tribunal deciding an appeal for one of my clients could sit around a table for as many days as necessary to discuss circuit law and the merits of my appeal with their colleagues. Similarly, if I were a judge, I would certainly enjoy the idealized setting of a court that allowed frequent and thoughtful personal interactions with colleagues. These romanticized images — regardless whether there ever was a time in which the reality of judging mirrored this ideal — ignore modern realities, and have no place in deciding the fate of the current Ninth Circuit, which is a modern court facing current challenges of an expanding federal jurisdiction and increased

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[7] Burns, supra note 4, at 251 n.28.

[8] I do recognize, that as the caseload increases, it becomes harder for an individual judge to read and digest each published opinion (assuming a concomitant growth in the number of published opinions). Some judges of the Ninth Circuit, through sheer moxie, continue to study each new opinion. I understand that even those who don't, however, generally establish procedures within their chambers to assure that every opinion is in fact read, and that opinions with dissents, and opinions raising unusual points of law, are brought to the judge's attention.

federal caseload. The federal judges with whom I am acquainted, no matter the court on which they sit, are among the busiest persons I know, and I doubt any of them would adopt the "judges of the round table" as a realistic model in restructuring the circuits. While opportunity for casual and non-judicial interchange may indeed be less than in some circuits,[9] focused and disciplined discussion among decision-making panels has not, to my knowledge, suffered, and may actually have improved through some of the Ninth Circuit innovations.

The Honorable J. Clifford Wallace, former Chief Judge of the Ninth Circuit, has written that life as a judge on a small court might very well be more enjoyable than life on a large court: However, "my preference to live in a small town or to work in a smaller court is not relevant. Federal courts do not exist to serve the preference of federal judges . . . . The real question, then, is not what size of court judges prefer, but which size will work best for the future."[10] Judge Wallace is correct. Absent compelling evidence linking the size of a circuit court to actual harm suffered by litigants or an observable deterioration in the quality of justice or the judicial process, nostalgia for an earlier time in which courts and caseloads were smaller does not justify splitting the Ninth Circuit.[11]

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[9] Ironically, modern transportation and communication have probably increased these opportunities for the far-flung judges of the Ninth Circuit when compared to the opportunities available to their predecessors.

[10] Testimony of the Honorable J. Clifford Wallace, April 3, 1998, before the Hearings of the Commission on Structural Alternatives for the Federal Courts of Appeals.

[11] Indeed, if the "nostalgia" argument were sufficient justification for splitting a large circuit, why stop at the Ninth? Assuming continued increases in authorized judgeships in the courts of appeals, this argument could lead to frequent revisions of the appellate structure, and an ever increasing number of circuit courts.

Quality of Justice

The only evidence, in my view, that could justify splitting the Ninth Circuit would be proof that the size and/or makeup of the circuit has somehow reduced the quality of justice delivered, however defined.[12] However, those proposing a split have failed to provide evidence that the quality of justice the Ninth Circuit delivers falters in any significant manner.

I leave to others more able than I the task of sifting through statistics relating to length of time from filing to disposition of an appeal, and the relative frequency of "intra circuit" splits. Suffice it say on these two points that I am impressed by those statistics indicating that Ninth Circuit judges are the third fastest in ruling on appeals once the case has been submitted for decision, and I am persuaded by the work of, for example, Professor Arthur D. Hellman of the University of Pittsburgh School of Law, who finds "little support for the thesis that predictability of appellate outcomes suffers in the large circuits."[13]

My colleagues and I represent clients in matters pending not only before the Ninth Circuit but also other circuits in the federal system and, based on that experience, wish

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[12] Even assuming this initial point, proponents would additionally need to show that splitting the circuit would in fact address the "quality of justice" problems. This they have surely failed to do. I have not yet read or heard any persuasive explanation as to why creating two administrative units from one — without adding judges and without reducing caseloads — would reduce the time necessary to dispose of an appeal. Nor have proponents suggested why, from a consistency of precedent standpoint, the existence of two separate courts for the Western states — which would not be bound by one another's precedent — is preferable to one.

[13] Arthur D. Hellman, Dividing the Ninth Circuit: An Idea Whose Time Has Not Yet Come, 57 Mont. L. Rev. 261, 277 (1996). Professor Hellman has studied dissents in published Ninth Circuit opinions in an effort to determine the circumstances that make appellate outcomes "unpredictable." He concludes that unpredictability generally results from a "fact-specific rule of law that by its nature requires case-by-case evaluation," id. (quoting Arthur D. Hellman, Breaking the Banc: The Common Law Process in the Large Appellate Court, 23 Ariz. St. L.J. 915, 984 (1991), rather than a conclusion of law that actually conflicts with prior precedent.

to share personal experiences bearing on the quality of justice.

As an advocate, I believe that oral argument is an important part of achieving well-reasoned dispositions. The Ninth Circuit regularly, efficiently and effectively uses oral arguments. The attitude that I discern from judges of the Ninth Circuit is that oral argument is usually helpful and is a right that should be offered to litigants and their advocates. My experience suggests that the Ninth Circuit use of oral argument is equal to any other circuit and greater than some.

I also understand from conversations with judges and their former law clerks[14] that after judges leave the bench, the Ninth Circuit panels meet behind closed doors to discuss tentative dispositions, as well as writing assignments for opinions and dissents. This post-argument face-to-face meeting would seem to be an important opportunity for sharing views and is likely to lead to more fair and rational results. Moreover, the practice inculcates shared values of respect, civility, and collegiality, and introduces the more junior judges to the methods of reasoning and decisionmaking employed by the more senior judges. While my knowledge of the practices in other circuits is limited, it is my understanding that this practice is not universal.

From the practitioner' standpoint, the Ninth Circuit has a ready and working *en banc* process, which operates to prevent and correct intra circuit conflicts and to rehear matters of obvious importance, including most death penalty appeals. Some proponents of splitting the circuit have leveled the criticism that the Ninth Circuit's limited *en banc* procedure permits as few as six judges (who would compose a majority of the eleven member

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[14] Nineteen of the associates at my law firm clerked for Ninth Circuit judges.

limited *en banc* panel) to determine the law of the circuit against the will of the other twenty-two judges.[15] Again, this criticism falls under the heading "nostalgia" — if it is different than the traditional method of conducting *en banc* review, it must be somehow worse. As an advocate participant, that is not my experience.

To the contrary I believe that the *en banc* process in the Ninth Circuit is as vigorous and thoughtful as in many other circuits. The Ninth Circuit's *en banc* process entails far more than just the hearing itself. First, judges frequently circulate substantial and detailed memos to one another and/or to the full court discussing opinions they feel are erroneous, or for some other reason require further review or revision. Any active judge is then free to request *en banc* review. At that point the judges write and respond to additional memos about the opinion, and the merits of taking the case *en banc*. I am told that this process can be vigorous, contentious, deliberative, and collegial all at the same time. Moreover, exchange between judges on the question whether to take a case *en banc* — which includes both active and senior judges — is often quite frank, because the exchanges, as well as the judges' votes on whether to grant *en banc* review, are never made public.

Because the Ninth Circuit does not reveal whether a vote was taken, or which judges voted for or against review, the litigants (and therefore the public) are notified of the vote only if the Court in fact votes to grant review. Then, and only then, are the members of the *en banc* panel selected.[16] This ensures the participation of all judges in the opportunity for

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[15] See, e.g., Burns, supra note 4, at 252.

[16] Death penalty *en banc* panels are an exception to this rule. Because of the time exigencies presented by death penalty appeals, these *en banc* panels are pre-selected to ensure their availability if a death penalty case goes *en banc*.

robust debate regarding cases that are candidates for *en banc* review, even those judges who are not eventually selected for the panel. Thus, any criticism of the breadth of Ninth Circuit *en banc* review that focuses only on the hearings themselves, ignores the judicial effort and attention that occurs behind closed doors. An understanding of the realities of these private procedures reassures me that the Ninth Circuit is able to implement a meaningful *en banc* review whenever necessary.

Finally, the Ninth Circuit does a superior job of issuing reasoned, written opinions in nearly all appeals that are terminated on the merits. Indeed, the Ninth Circuit issued written decisions in 97% of its cases in 1995, while the national average was 89%.[17] All these signs point to a large, but well functioning circuit court that continues — despite the additional pressures of court vacancies and an increasing caseload — to deliver high quality justice to the residents of the West. If there is indeed some kind of crisis abrew, the proponents of the proposed split have done a poor job exposing it.

Benefits of Retaining a Large Circuit

Finally, I fear that splitting the Ninth Circuit now would truncate an important chapter of innovation in court management. Like it or not, the other circuits will sooner or later look a lot like the Ninth Circuit does now, at least in terms of numbers of cases and numbers of judges. The Ninth Circuit can, and has, served as a testing ground for numerous techniques in court management. Applying the maxim that innovation follows need, we

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[17] See Procter Hug, Jr., The Ninth Circuit Should Not Be Split, 57 Mont. L. Rev. 291, 298 (1996).

should allow the current Ninth Circuit -- including not just the judges who sit and decide the merits of appeals, but also a large, knowledgeable clerk's office — to continue to operate without re-definition and to encourage it to share its experiences and innovations with other circuits.

The Ninth Circuit clerk's office, with its staff of research attorneys, is among the smartest and most advanced in the country. In order to handle the Ninth Circuit's burgeoning caseload, the clerk's office has developed a number of procedures aimed at preventing the very same parade of horribles the proponents of splitting the circuit fear (mistakenly) are already upon us. This phenomenon is not particularly remarkable: when an institution increases in size, it often develops management tools that increase efficiency and effectiveness. A few examples of these administrative innovations should suffice.

The Ninth Circuit employs a staff of research attorneys who evaluate appeals as soon as they have been docketed. They read the briefs and assign the appeal a "weight" from one to ten, based on the apparent complexity of the issues and the record. This process assists the clerk's office in distributing roughly equal quantities of work to the various three judge panels sitting for hearings in any given month.

The research attorneys also code the issues presented by a particular appeal, and track the cases raising the issues through a computerized tracking system. This allows the court to do two things, both of which minimize the risk of inconsistent results and/or opinions. First, the clerk's office groups appeals raising the same or similar issues and sends those grouped appeals to the same three judge panel. In this way, a single panel gains expertise in the particular issue and sees it in a variety of factual contexts, which can lead to better

reasoned discussion of the implications of deciding the issue one way or another. Second, when the clerk's office is unable to group cases with similar issues together, the office notifies panels that a different panel is also deciding a case that raises the same issue. This allows panels to communicate with one another so as to avoid the possibility that separate panels might simultaneously, or nearly simultaneously, decide the same issue differently.

The Ninth Circuit is also a leader among courts in adopting and integrating advanced communication techniques.[18] The judges' chambers, for example, have long been connected to one another through e-mail and other document sharing capabilities. The court even utilizes video conferencing. I, for one, recently participated in a video conference with circuit executives. I was told video conferencing is used regularly among judges and among judges and the clerk's office. Finally, communication with the bar is also innovative and effective. Judges throughout the Circuit regularly make themselves available for attorney exchanges and education. As an example of innovative communication, the court produced a video for practitioners that is designed to guide them through the twists and turns of appellate procedure. This video, widely distributed at low cost, reaches an audience far beyond the typical educational program.

Conclusion

I am convinced that those who say the circuit should be split have not met their burden. Indeed, I perceive compelling reasons to leave the Ninth Circuit — which by all

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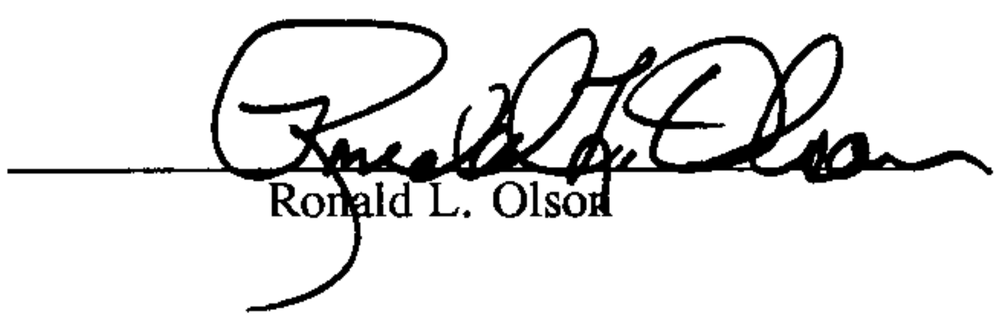
[18] These communication techniques take some wind out of the sails of those who presume that geographic breadth of the circuit prevents meaningful and frequent exchange between judges.

criteria is well functioning — alone. Congress, when it established the geographic boundaries of the Ninth Circuit might not have anticipated that its growth would outstrip the growth of the other circuits. This growth, however, need not be lamented just because it has rendered the Ninth Circuit larger and "different." Indeed, I believe that it is the very size of the circuit — in terms of both geography and caseload — that propels many of its innovations. We should encourage these experiments, and learn from them. Allowing the circuit the freedom to address its own problems and challenges, moreover, is consonant with our notion of federalism. Just as we accept and expect that states (which vary in size far more dramatically than do the circuit courts) be allowed to grow and experiment within the United States, so too should we be alert to shared experimentation among the federal courts of appeals. It could be that innovations yet to come could be prematurely precluded if we insist on cookie-cutter circuits, especially in the absence of clear evidence of any judicial crisis. The Ninth Circuit appears to be the precursor to circuit courts of the future. I, for one, am eager to learn what that future holds.

Submitted this 1st day of June, 1998.



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