Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE ANTHONY M. KENNEDY

August 17, 1998

The Honorable Byron R. White
Chairman, Commission on
Structural Alternatives for the
Federal Courts of Appeals
Washington, D. C.

Dear Byron:

In response to your invitation, I am pleased to comment on the question of the geographic boundaries of the United States Court of Appeals for the Ninth Circuit. Based on my observations and perspective as a former judge of that court and as a member of this Court, I submit the reasons for dividing the Ninth Judicial Circuit outweigh the reasons for retaining it as now constituted.

Background

In 1975, the Court of Appeals for the Ninth Circuit, anticipating an increase in its thirteen authorized judgeships, began informal discussions to decide whether to recommend division of the Circuit. There was a difference of opinion; but a majority of the judges, myself among them, concluded the Circuit should maintain its geographic boundaries at least until it could operate for a time with a full complement of judges. We wanted to experiment, to determine the advantages and disadvantages of a large Court of Appeals. So the court did not recommend changes in its geographic jurisdiction. A 1978 statute, Pub.L. 95-486 (92 Stat. 1633), authorized ten new judges for the court. In response, and as permitted by the new statute, the court implemented a limited en banc panel composed of fewer than all the court's judges. Some of us wanted nine judges on the panel, others thirteen. The resulting compromise was eleven.

In part, I think, because some of us did recognize that the large circuit was an experiment, we devoted tremendous time and energy to make it a success. We hoped the opportunity to decide a large number of cases might yield principles of decision which would bring more clarity and cohesion to the law than if the Circuit were smaller. We thought the bar would benefit if nine states were to have a single resolution of any common issue. More ambitious suggestions, such as assigning judges to discrete subject areas for a period of time, were thought problematic and were not pursued.

As the Federal Courts Study Committee observed, the Courts of Appeals have been faced for more than a decade with a "crisis of volume." *Report of the Federal Courts Study Committee* 109 (April 2, 1990). Like all of its sister circuits, the Ninth Circuit confronted the problem by innovations and changes, not the least important of which was the successful use of Bankruptcy Appellate Panels. The Committee was also correct to note, however, that increases in productivity "seem to be approaching their limit." *Ibid.*

Few members of the public, indeed all too few members of the Bar, appreciate the scholarship and dedication of the individual judges on our courts of appeals. I retain the greatest admiration and respect for all of my former colleagues. Since I have left the Court of Appeals, their workload has again increased in dramatic proportions. It is remarkable that they have been able to manage the case load, though it seems to me unfair to ask them to continue to process such a high number of cases per judge. This heavy case load makes it all the more urgent to ensure that the size of the circuit is not an additional and systemic problem.

Reasons for Concern About Present Size

I have not had the opportunity to study all the submissions made to your Commission, but my present view is that the large Circuit has yielded no discernable advantages over smaller ones. From my discussions with the judges of the court and my review of some of the material submitted in support of retaining the Circuit with its present boundaries, what is striking is the relative absence of persuasive, specific justifications for retaining its vast size. A court which seeks to retain its authority to bind nearly one fifth of the people of the United States by decisions of its three-judge panels, many of which include visiting Circuit or District Judges, must meet a heavy burden of persuasion. In my view this burden has not been met. The size of the Ninth Circuit has a number of disadvantages, a few of which I shall mention.

First, a laudable desire to respect the views and prerogatives of other judges on the court tends, I think, to encourage judges to avoid general principles so that other members of the court can write on the same subject. The result is a certain lack of clarity and cohesion in the case law of the Circuit.

Second, there is an unacceptable risk of intra-circuit conflicts, or, at the least, unnecessary ambiguities. A large number of dispositions tends to make it difficult for judges to keep abreast of the jurisprudence of the court. Soon after the 10 judges were added in 1978, not to mention the five additional judges in 1984, see Pub.L. 98-353 (98 Stat. 346), I found I could not read all of the published dispositions of my own court. This in turn causes inadvertent intra-circuit conflicts. Further, even when judges in good faith attempt to follow stare decisis, a certain potential for

error exists. The risk and uncertainty increase exponentially with the number of cases decided and the number of judges deciding those cases. Thus, if Circuit A is three times the size of Circuit B, one would expect the probability of an intra-circuit conflict in the former to be far more than three times as great as in the latter. The number of en banc decisions should be correspondingly higher, yet the Ninth Circuit, which is the largest circuit by far, does not use its en banc process more often than other circuits. In some years the Ninth Circuit has had fewer en banc hearings than other circuits even in terms of absolute numbers. True, en banc hearings are such a small percentage of the total number of dispositions system-wide that no clear comparative pattern of utilization emerges, even on a ten-year study. It is quite apparent, however, that the Ninth Circuit does not come close to the number of en banc hearings necessary to resolve intra-circuit conflicts, much less to address questions "of exceptional importance." Fed. R. App. Proc. 35(a). Uncertainty and lack of cohesion in the law are antithetical to the ends of our judicial system.

A decision in an en banc case, as a general rule, requires more time, more deliberation, and more writing than go into the ordinary three-judge panel opinion. The result, however, is beneficial. Products of en banc consideration, majority opinions and separate writings, reflect extra efforts invested in the process and represent appellate judging in one of its most instructive forms. En banc opinions assist other courts, including the Supreme Court, in resolving difficult legal issues. And where circuit precedent has been "overtaken by the tide" of authority from other Courts of Appeals, *Critical Mass Energy Project* v. *Nuclear Regulatory Comm'n*, 975 F. 2d 871, 876 (CADC 1992) (en banc), rehearing en banc allows a circuit the opportunity to assess the soundness of its earlier views and, if need be, to put its house in order before the Supreme Court must do so. If the Ninth Circuit were divided, then the necessity for more en banc hearings, and the harm from the failure to use the device often enough, would be reduced.

Third, even if the Court of Appeals does have a consistent internal law in a number of subject areas, its size prevents the multiple panel opinions that sometimes produce inter-circuit conflicts. In other words, if the Ninth Circuit were to be divided into two or more circuits, then we would be more likely to have the benefit of more than one panel opinion on a given issue and would have the advantage of the views of more judges. While intra-circuit conflicts or ambiguities and the instability they create are harmful to the system, inter-circuit conflicts, where there is reasoned and deliberate disagreement, are instructive to the system as a whole and in particular to the Supreme Court.

Fourth, although I deplore the tendency to increase the number of Article III judges and to expand the jurisdiction of the federal courts, past experience would seem to show that, even if federal jurisdiction is not increased, a certain number of additional judges will be needed in the future. The Commission's report will be

influential in considering the size of the Circuit not just at present but for perhaps two decades. The Commission, therefore, may wish to consider what recommendation it would make if the Ninth Circuit were to have 40 or more judges. The likelihood of the addition of some judges is a further reason to divide the Circuit now, so that the problems I note are not exacerbated.

Fifth, the recruitment of judges is a relevant consideration. A talented lawyer or jurist who contemplates the prospect of service on a court which should be designed to offer the benefits and rewards of a collegial relationship might well hesitate before agreeing to serve on a court where some 3000 different combinations of judges will make up the panels, and where he or she will be the junior judge on a court of 28 active judges, in addition to valued senior members.

This brings me to a sixth observation about the Ninth Circuit even in its present size. Our constitutional tradition has been one of broad community participation in the judicial selection process. When a court is seen as an integral part of a community, then persons and groups from the community as a whole, and not just the bar, can insist that the political branches consider nominees who are distinguished by their fairness, detachment, and impartiality. The sense of shared identity and responsibility dissipates, however, when a circuit is so large that the makeup of a panel is a luck-of-the-draw proposition, with a strong likelihood of drawing judges having no previous attachment to the affected community. In these circumstances there is less incentive for groups other than political ones to become involved in the judicial appointment process. If the selection and nomination process is accessible and meaningful only to those with partisan interests, there will be a tendency to give less consideration to those qualities of judicial temperament and demeanor that are essential to a fine judiciary. I am concerned, then, that in the future the large size of the Circuit will have an adverse effect on the judicial selection process. Justice must detached but should not be remote; judges must be impartial but ought not to be faceless. When an appellate court becomes as large as the Ninth Circuit, there is a greater risk that unfortunate influences will predominate in the appointment process. Special interests work best when simple lines of responsibility are blurred.

This is related to my seventh concern, which is that the present size of the Ninth Circuit is not sensitive to the vital necessity of preserving the values of federalism. As noted by the Judicial Conference's most recent study of the federal courts, those values are reflected in our long tradition of appointing judges to serve a specific region. *See* Judicial Conference of the United States, *Long Range Plan for the Federal Courts* 43 (December 1995). For this reason, and because of the undesirability of any of the contemplated structural alternatives for the federal appellate system, *see Report of the Federal Courts Study Committee* 116-124 (April 2, 1990), our present system should be preserved and strengthened. The legal communities and other constituencies in the separate states ought to have a real

interest in the judges of their respective circuits, and the judges, conversely, ought to have historic and professional ties to the regions they serve. The experiment accepted in 1978 represents a notable departure from the design which has served us so well. What began as an experiment should not become the status quo when it has not yielded real success. In my view the judicial system would be better served if the states of the present Ninth Circuit were to comprise more circuits than one.

Possible Ways to Divide the Circuit

It is one thing to identify a problem, another to solve it. How to split the Ninth Circuit is a difficult, sensitive question. In an attempt to offer some assistance, I make these brief observations.

The States of Alaska, Washington, Oregon, Idaho and Montana have a community of interest and a geography that justify assigning them to their own circuit. There is no reason to hold these Northwest states hostage to the difficulty of determining a proper circuit for California, Arizona, Hawaii, and Nevada. If the solution for the latter states is not at hand, that could be studied and debated while the Northwest states concentrate their energies on at once forming a cohesive and effective circuit.

The problem with the remaining states, of course, is the vast population of the State of California. California's population today is the rough equivalent of the entire population of the United States at the time of the Civil War. The problem, however, suggests its own solution. Serious consideration should be given to assigning California to two different circuits. The Districts of Northern and Eastern California could be in one circuit, with, say, Hawaii and Nevada. The Districts of Central and Southern California could form another, with Arizona, Guam, and Saipan. These are just illustrative possibilities, for I have not studied projected case loads or population figures.

The described alignment would give Senators from California a special interest in two circuits, not just one. The attendant advantages of manageable size and sensible administration, however, seem to me to overcome that objection, if indeed it be one. If California were not divided, moreover, the number of judges required for California alone would constitute a circuit so large that the deficiencies already present in the Ninth Circuit might persist.

If California were assigned to two circuits, it would, of course, be imperative to ensure prompt resolution of any conflict between these circuits with respect to issues affecting California. I have seen no proposal for an inter-circuit en banc procedure that makes sense or is fair to the bar and litigants of the State. To take just one example, a bill in the House of Representatives in the 103d Congress provided that, in the event of a conflict between the two circuits, the "California"

judges from each Circuit would constitute an inter-circuit en banc. *See* H. R. 3055, 103d Cong. §3 (1993). This is contrary to our tradition and to sound judicial principles. After being appointed some judges find it necessary or convenient either to move to California or to move away from it, depending on their individual situations. Does mere residence while serving on the court determine who is a "California" judge? In addition, an inter-circuit en banc should bind both circuits, but it would be inappropriate and destructive of collegiality to require "non-California" judges to be bound by their "California" colleagues on important questions of law. Yet this would be the necessary result, for even if the cases prompting an inter-circuit en banc arose from California, the en banc decision would bind both circuits in cases arising from all other states.

At one time, I thought the absence of a fair and workable proposal for an inter-circuit en banc mechanism was an all but insurmountable objection to allowing two circuits to operate within a single state. I have begun to think this is not an obstacle. The judicial system could function well without an inter-circuit en banc, leaving to the Supreme Court the responsibility to resolve any inconsistent decisions affecting the single state. After all, the government of the United States functions well despite the possibility of having to litigate a question in multiple circuits and the concomitant possibility of conflicting decisions in those courts. Furthermore, duplicative litigation and potential conflict between two circuits in the same state would hardly be unfamiliar to California, which like every state already faces the possibility of litigating the same question in both state and federal court. Where such litigation results in a conflict between a state's highest court and a federal court in that state on a question of federal law, our Court resolves the conflict. *See, e.g.*, *South Dakota* v. *Yankton Sioux Tribe*, __ U. S. __, 118 S. Ct. 789 (1998) (conflict between the Supreme Court of South Dakota and the Eighth Circuit). No one has suggested that such conflicts are the result of some serious dysfunction of judicial structures. If duplicative litigation, in practice, should result in an excessive burden on the State of California, the statutes and rules governing transfer and consolidation of cases could no doubt be adapted to mitigate the problem. Thus, although not insensitive to the potential burden to California of having to defend its laws in two different circuits, I believe the advantages attendant to California in having concise, orderly, predictable case law in two circuits would outweigh the temporary problems of a few conflicting decisions, decisions which can have prompt resolution in this Court. The advantages to all of the other states of the present Ninth Circuit have been enumerated.

Conclusion

My present view is that if the Ninth Circuit were divided, the new alignment could better serve the orderly and efficient administration of justice. My further conclusion is that the State of California could be assigned to two different circuits and the Supreme Court could act with the necessary speed and determination to

resolve any conflicts that create difficulty or uncertainty in administering and enforcing the laws and policies of that State.

I extend to you and your Commission my greetings and special thanks for undertaking this study, which will be of vital importance to the federal courts and to our judges, who remain devoted to preserving the integrity of the justice system.

Sincerely,