The Ninth Circuit Should Not Be Split

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The immense growth in the size of the federal judiciary over the last twenty years has spurred numerous calls for structural changes. Since 1983, four bills have been introduced in the United States Senate to divide the Ninth Judicial Circuit, the largest of the twelve regional federal courts of appeals. By all indicia, the Ninth Circuit is performing its administrative and adjudicative functions well. I submit that the Ninth Circuit should not be split; rather, it should serve as a model for the large appellate courts toward which all circuits are evolving.

Caseloads in the federal judiciary have increased and will continue to increase. This fact must be at the core of any considered view of the future of the federal courts. At the national level, I have urged that the most rational and logical approach to determining the appropriate size of the federal judiciary is through a three-branch conference to determine the mission of the federal courts.[1] I am pleased that preliminary steps have begun. The first meeting of representatives of all three branches of government in March 1994 laid the groundwork for further principled consideration of those important jurisdictional issues upon which a meaningful estimate can be made as to the necessary size of the federal judiciary to carry out its mission.[2]

That is only the beginning, however, and does not directly address our situation here in the Ninth Circuit. S.956–The Ninth Circuit Court of Appeals Reorganization Act–is the latest in a series of legislative proposals to split the Ninth Circuit. The United States Congress has made only eleven major changes to circuit boundaries in almost 200 years. Upon what basis, if any, is this new drastic measure of circuit-splitting justified? I submit that the burden of persuasion for circuit-splitting rests on the shoulders of those who would change the present circuit alignment. As the recent *Proposed Long Range Plan for the Federal Courts* recognized, circuit restructuring should be relied upon only as a last resort:

> Each court of appeals should comprise a number of judges sufficient to maintain access to and excellence of federal appellate justice. Circuit restructuring should occur only if compelling empirical evidence demonstrates adjudicative or administrative dysfunction in a

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[1] *See* J. Clifford Wallace, *Tackling the Caseload Crisis,* 80 A.B.A. J., June 1994, at 88.

[2] *See* J. Clifford Wallace, *Developing the Mission of the Federal Courts–A Method to Determine the Size of the Federal Judiciary,* 27 CONN. L. REV. 851 (1995).

court so that it cannot continue to deliver quality justice and coherent, consistent circuit law in the face of increasing workload.

What are the objective indicia that demonstrate that a circuit is operating well or poorly? Three in particular come to mind: case processing times, case terminations, and consistency of decisions. The first two rely on statistics, the last on a slightly more subjective analysis of the caseload. By all three measures, the Ninth Circuit Court of Appeals is functioning well.

Case processing time is a measurement that spans the time from filing the notice of appeal to final disposition. It is further broken down into four different intervals: (1) from filing of the notice of appeal to filing the last brief, (2) from filing the last brief to hearing or submission, and (3) from hearing to final disposition, or (4) from submission to final disposition. The judges are directly involved in only the last two intervals.

In 1994, the national median time for all appellate courts from filing the notice of appeal to final disposition was 10.5 months. In the Ninth Circuit, it took 14.3 months; four other circuits also exceeded the national median, with one taking longer than the Ninth Circuit. However, viewed from the standpoint of the amount of time the judges had the cases in their hands, Ninth Circuit judges were the second most efficient in the country at 1.9 months, .5 months *less* than the national median time. Why then the delay? Delay is due to the time lost between the filing of the last brief and sending the case to be heard to a panel of three judges. The Ninth Circuit needs more judges to set more panels to overcome this delay. Circuit splitting will not decrease this delay, it will merely divide it.

Case terminations are another measurement of the efficiency of an appellate court. Several different case termination figures are used for comparison; under each of them, the Ninth Circuit is in the mainstream of courts nationwide. One indicator is whether a court of appeals terminates more cases than are filed in a given year, thus reducing its backlog. Some of the Ninth Circuit's delay was due to the 1989 earthquake and dislocation of our operation. However, the Ninth Circuit has recovered and has terminated more cases than have been filed for the last three years in a row. Only one other court approaches that record. Another related measure is the number of merit terminations per judge. The Ninth Circuit is at the exact national median level of 466 case terminations per judge—thus our circuit judges are working at a level of productivity commensurate with the rest of the judiciary.

Finally, a third indicator of case terminations and backlogs is the Federal Judicial Center's Inventory Control Index. The Index represents the number of months it would take for a court to dispose of all of its pending cases at the court's current termination rate. The Ninth Circuit substantially improved its

termination index rate from almost 15 months in 1989 to 10 months in 1994, thus becoming more current in its work. Over the same time period, eight other circuits showed an increase in their termination index rate, thus falling behind in their work.

A final area of comparison for judging the effectiveness of a court of appeals is its ability to provide the lawyers and parties who appear before it with a relatively clear and stable body of law upon which to rely. In that regard, the Ninth Circuit has been most fortunate to have been the subject of a series of empirical studies conducted for the specific purpose of determining the extent of intracircuit conflict in the Ninth Circuit. Professor Arthur D. Hellman of the University of Pittsburgh School of Law conducted two studies, one in 1983 and another in 1986.[3] Neither of these highly-praised, scholarly studies supported the argument that the Ninth Circuit Court of Appeals is unable to maintain predictability and consistency in its decisions. Further, the Ninth Circuit Court of Appeals has instituted a series of innovative case management devices—including issue coding, case-clustering, staff attorney review, and a limited en banc process—that have effectively reduced conflicts among panels and maintained a high level of consistency in its decisions.

Thus, an examination of several of the key indicia for measuring a circuit's operations clearly demonstrates that the Ninth Circuit is performing well. Even some of those who suggest that the circuit should be split acknowledge that the Ninth Circuit is handling its caseload well and that a crisis does not currently exist. However, they express concern that the court will not be able to perform effectively in the future if it is increased by ten or more judges. I point out that these same arguments were advanced in 1978 when the court had 13 judges and was increased in size, first to 23, and then, in 1984, to 28 judges. The new judges were added gradually; the court very successfully incorporated them and adopted procedures to assure them full participation in adjudication and administration. I respond: give us the opportunity to try to operate with ten more judges. The percentage of increase from 28 to 38 is far smaller than that from 13 to 23 or to 28, and I believe our structure is solidly in place to accommodate the increase rapidly and productively.

Some would say that the federal judiciary is at a critical juncture and that Congress must make a fundamental choice now between continuing to expand, increasing the likelihood of more large appellate courts, or periodically restructuring to try to preserve the values associated with the mid-century ideal of smaller appellate courts. I argue that it is not inevitable that the Ninth Circuit

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[3] *See* Arthur D. Hellman, *Breaking the Banc: The Common-Law Process in the Large Appellate Court*, 23 ARIZ. ST. L.J. 915 (1991) ; Arthur D. Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 U. CHI. L. REV. 541 (1989).

and other large circuits must be split. The evidence demonstrates that large circuits can function as well as, or better than, smaller ones.

In fact, it is the very advantages of size at which we should be looking for future guidance in managing the inevitable growth in our circuit courts. In the Ninth Circuit, we have observed that a single court of appeals serving a large geographic region promotes uniformity and consistency in the law and facilitates trade and commerce by contributing to stability and orderly progress. Following the path of circuit division would lead to the balkanization of federal law and would increase the potential for intercircuit conflicts, especially along the Pacific coast. As I suggested in an earlier article, one long-range proposal to solve the problem of intercircuit conflicts would be to reduce the number of circuits by consolidating the smaller ones.[4]

Other efficiencies come with the growth of a circuit. For example, judicial economies are achieved by the use of a limited en banc court as permitted by Congress pursuant to the Omnibus Judgeship Act of 1978. As I have described elsewhere,[5] the Ninth Circuit designates a court of 11 judges when an en banc hearing is required. The full court may overrule the en banc court, but we have never voted to do so. Why? Because the court is willing to rely on 11 of its judges for purposes of finality. Such a system allows for more efficient use of scarce court of appeals resources, while at the same time assures stability and predictability in the development of the law.

Our large court of appeals is strengthened and enriched, and the inevitable tendency toward regional parochialism weakened, by the variety and diversity of backgrounds of its judges drawn from the large geographic area comprising the circuit. The size of the circuit also allows the circuit to draw upon a large pool of district and bankruptcy judges for temporary assignment to neighboring districts with a temporary but acute need for judicial assistance. These internal circuit deployments are arranged quickly and efficiently. Smaller circuits must call upon help from other circuits, requiring the involvement of a national committee and the approval of the Chief Justice—a slower process.

The Ninth Circuit has been recognized as a national leader in developing innovative solutions to caseload and administrative challenges. The circuit has served as a laboratory for experimentation in a host of areas: budget decentralization, the use of cameras in the courts, block case designations, the use of an appellate commissioner, improved tribal court relations, and the development of alternative forms of capital case representation, to name only a few. An exhaustive scholarly study of the Ninth Circuit and its innovations

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[4] *See* J. Clifford Wallace, *The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?*, 71 CAL. L. REV. 913 (1983).

[5] J. Clifford Wallace, *The Case for Large Federal Courts of Appeals*, 77 JUDICATURE 288 (May-June 1994).

concluded: "[T]he Ninth Circuit experience strongly supports the utility of regional divisions as laboratories for experimentation in matters of governance and administration."[6] That sentiment was echoed by the congressionally-mandated Federal Courts Study Committee which stated: "perhaps the Ninth Circuit represents a workable alternative to the traditional model."[7]

Thus the advantages of size that we enjoy in the Ninth Circuit suggest that the concept of combining circuits ought to be given greater consideration as one of the means of addressing conflicts and caseload problems. Instead of restricting our view to the temporary and unproven solution of dividing circuits, we ought to consider the full range of possible solutions to managing the inevitable growth that confronts the judiciary. So far, each of the circuit-dividing proposals put forth raises as many problems as it tries to resolve. One would create a minuscule circuit while leaving the remaining circuit in a worse position than before. Another would divide California for the sake of making equal-sized circuits while creating a host of cumbersome jurisprudential conflicts and forum shopping opportunities.

The Ninth Circuit should not be tinkered with until we give these issues due study and consideration. The Ninth Circuit, as the nation's largest appellate court, is functioning well. Several well-accepted measurement standards demonstrate that it is handling a huge caseload that will grow inevitably larger. It has devised and refined effective and efficient procedures to decide cases in a timely manner and to assure consistency and uniformity of circuit law. I submit that the large appellate court is unavoidably the way of the future. To that end, the Ninth Judicial Circuit can serve as a beacon and a model for the delivery of justice in the 21st century.

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[6] RESTRUCTURING JUSTICE: THE INNOVATIONS OF THE NINTH CIRCUIT AND THE FUTURE OF THE FEDERAL COURTS 21 (Arthur D. Hellman, ed., 1990).

[7] REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 123 (1990).