The Heritage Foundation Backgrounder

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NO MORE JUSTICE DELAYED: TIME TO DIVIDE THE NINTH CIRCUIT COURT OF APPEALS

INTRODUCTION

The Ninth Circuit Court of Appeals is the largest in the federal appellate system, handling more cases than any other Court of Appeals. Its enormous span encompasses nine states and one territory, stretching from the Arctic Circle to the Mexican border, and from Hawaii and Guam to Montana and Idaho. Judges spend enormous time traveling around the circuit instead of hearing cases and the public suffers as a result of increased litigation costs. There are more than thirty judges on the Court, leading to often inconsistent and conflicting opinions, and giving rise to a body of law that is neither uniform nor predictable. With a procedure that limits the number of judges resolving these conflicts to eleven, ten of which are chosen by lot, it is no wonder that the Ninth fails to provide the stability and predictability that are virtues of a legal system.

Since the early 1970s, judicial reformers have been trying to split the Ninth, to make it function as a Court of Appeals should, but Congress delayed any action on the matter. Instead, the Ninth has been allowed to try reforms intended to enable it to perform better. While these measures have helped reduce the Court's backlog of cases, they have done nothing to address the more important judicial concerns of the lack of uniformity, predictability, and fairness to the public caused by the Ninth's immense size and unwieldy number of judges. These can only be addressed by dividing the Ninth Circuit into two or more circuits.

THE PROBLEMS OF THE NINTH CIRCUIT

Jurists for years have been troubled by the Ninth's size. In 1973, the Commission on Revision of the Federal Court Appellate System, chaired by Senator Roman L. Hruska, the Nebraska Republican, recommended that the

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Fifth and the Ninth Circuit Courts of Appeals be divided.[1] The Commission's recommendations were triggered by concerns over the growing workload carried by judges in the federal appellate system in general and by the acute difficulties in administering this growing caseload faced by judges in the large circuits in particular. Litigants at that time were suffering extensive delays, often of two years or more in civil cases; travel costs of attorneys and parties to cases pushed up litigation costs, and lengthy travel by judges reduced the time they spent hearing and disposing of cases.

Why More Judges Are Not The Answer

Traditionally, problems such as mounting caseload had been resolved by increasing the number of judgeships in each circuit. Yet adding new judges in large circuits eventually begins to undermine important judicial characteristics, hindering the usefulness of a Court of Appeals.

Most injured by the large circuits is *stare decisis*, the principle central to American jurisprudence. The Latin term literally means to stand by decided matters; in practice it means that the rule of law enunciated by a court under a certain set of circumstances also should be applied to other parties that come before the court with similar circumstances. Essentially this is a basic rule of fairness, ensuring that the law is applied to all parties equally.

Under *stare decisis*, a case sets a precedent for similar cases that follow. The rule of the prior case controls the outcome of the subsequent cases. Judges thus need to keep abreast of the law as it develops in their circuits to render consistent opinions. A key virtue of America's legal system is that the parties involved have a basis of knowing what to expect in court. When there appears to be inconsistency in the disposition of cases within a circuit, the Court of Appeals tries to resolve such conflicts to maintain uniformity.

Authoritative Statement. Cases brought before a Court of Appeals are generally heard by "panels" of circuit judges, usually with three judges to a panel. Within each circuit there are various panels hearing cases at the same time. If panels of a circuit court reach conflicting decisions involving the same questions of law, then the Court of Appeals will rehear the case *en banc*, which means that all of the active judges in the circuit will sit to hear the case and voice their respective opinions. The resulting decision then can properly be said to be the law as authoritatively stated by the entire Court of the circuit.

This venerable system breaks down in a large circuit with a large number of judges. The possibility of panels issuing conflicting decisions increases since a

1 Commission on Revision of the Federal Court Appellate System, *The Geographical Boundaries of the Several Judicial Circuits: Recommendations For Change*, 62 F.R.D. 223, 235 (1973) (hereinafter cited as Hruska Commission).

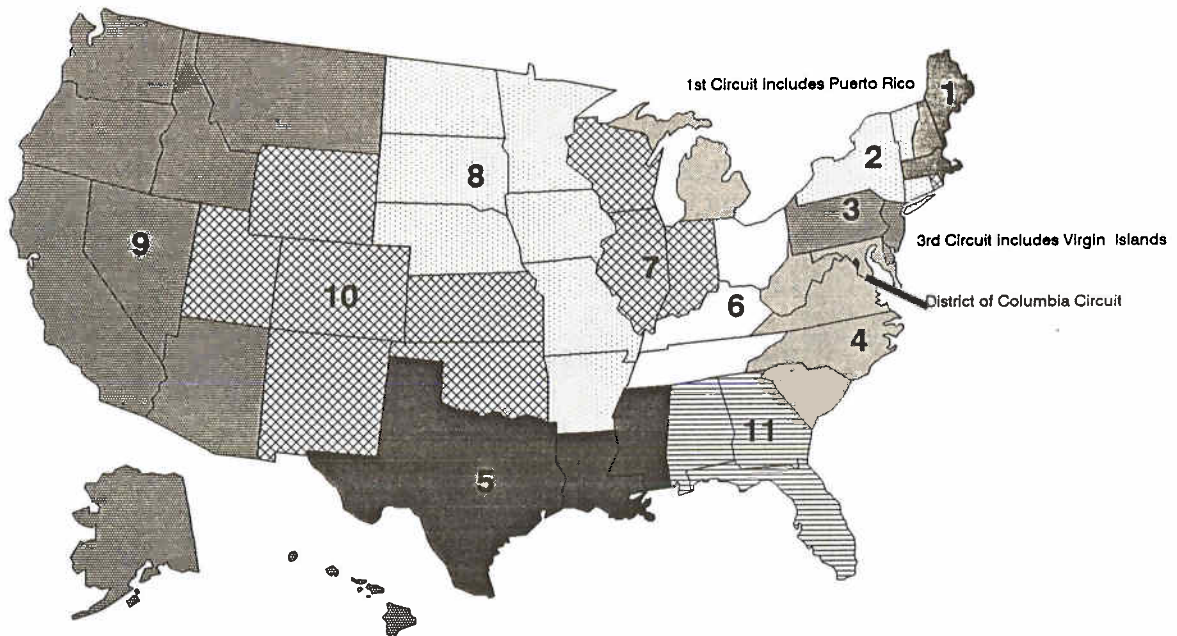
CIRCUIT	STATES	TOTAL POPULATION 1987
FIRST	Maine, New Hampshire, Massachusetts, Rhode Island, Puerto Rico	12,281,000
SECOND	Connecticut, New York, Vermont	21,502,000
THIRD	Deleware, New Jersey, Pennsylvania, Virgin Islands	20,140,000
FOURTH	Maryland, North Carolina, South Carolina, Virginia, West Virginia	21,878,000
FIFTH	Louisiana, Texas, Mississippi	23,811,000
SIXTH	Kentucky, Michigan, Ohio, Tennessee	28,429,000
SEVENTH	Illinois, Indiana, Wisconsin	21,841,000
EIGHTH	Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, South Dakota	17,488,000
NINTH	Alaska, Arizona, California, Guam, Idaho, Hawaii, Montana, Nevada, Northern Mariana Islands, Oregon, Washington	41,840,000
TENTH	Colorado, Kansas, New Mexico, Oklahoma, Utah, Wyoming	12,683,000
ELEVENTH	Alabama, Georgia, Florida	21,831,000

larger Court will tend to have judges with differing philosophies hearing the same questions of law.[2] Various interpretations also tend to be voiced, since individual judges find it very difficult to keep abreast of the many decisions rendered by the many judges in the circuit.[3] Making matters worse, though the frequency of conflicts between panels increases, *en banc* review becomes less feasible. With so many judges, convening the entire Court at one place and time becomes cumbersome, time consuming, and consequently less

2 Thompson, *Increasing Uniformity and Capacity in the Federal Appellate System*, 11 Hastings Constitutional Law Quarterly 457, 460 (1984).

3 *Id.*, 460.

Circuits of the United States Courts of Appeal



9th Circuit Includes Guam & Northern Mariana Islands

Heritage InfoChart

likely. The result: more conflicts between panels and less *en banc* review. This leads to inconsistent application of the law and unfairness to those using the legal system.

Recommendations of the Hruska Commission

The 1973 Hruska Commission recommended that the Ninth Circuit Court of Appeals be split. At that time the Court was composed of thirteen active judges: nine generally was considered the maximum for a Court of Appeals. Stated the Hruska Commission report:

> [the] size of the Court (13 authorized judgeships since 1968) and the extensive reliance it has been required to place on the assistance of district and visiting judges have threatened its institutional unity. Attorneys and judges have been troubled by

> apparently inconsistent decisions by different panels of the large Court; they are concerned that conflicts within the Circuit may remain unresolved.[4]

The Hruska Commission recommended that the Ninth be divided by: 1) creating a Twelfth Circuit to consist of the Southern and Central districts of California and Arizona and Nevada; and 2) a new Ninth Circuit consisting of Alaska, Washington, Oregon, Idaho, Montana, the Eastern and Northern districts of California, Hawaii, and Guam.[5]

Giving Circuits Options. Congress balked, however, apparently to avoid any legislative struggles. Instead, lawmakers effectively avoided a decision on the matter by passing the Omnibus Judgeship Act of 1978.[6] The Act gave circuits with more than fifteen active judges (at that time the Ninth had 13 active and 7 senior judges and the Fifth, encompassing Texas, Louisiana, Mississippi, Alabama, Georgia and Florida, had 15 active judges which the 1978 Act increased to 26) the option of requesting a division or, under section six of the Act, constituting themselves into administrative units and developing limited *en banc* procedures.

The Fifth Circuit could not agree upon a limited *en banc* procedure and instead requested division. This 1981 division resulted in a smaller Fifth Circuit, now including Louisiana, Mississippi, and Texas, and a new Eleventh Circuit encompassing Georgia, Florida, and Alabama. The Ninth Circuit, however, decided to remain intact and introduced procedures designed to improve its administration.[7] The Ninth formed three administrative units, currently based in San Diego, San Francisco, and Seattle. As such, appeals from the areas covered by each unit are usually heard in that unit's headquarters, and the senior active judge in each unit acts as the administrative aide for the chief justice of the circuit. Judges rotate regularly among the three administrative units, spending equal time in each.

Conflict Resolution. The Ninth Circuit also adopted measures designed to reduce the frequency of conflicting decisions by circuit panels. As a result of these measures, for instance, an attempt is made to place similar cases before the same panel, and judges are notified if a case involving an issue similar to the one that they are hearing is already under consideration by another panel.[8] When conflicts arise between panels, the Court convenes in a limited *en banc* capacity to resolve the conflict. This limited *en banc* consists of the Chief Judge of the circuit and ten active circuit judges, chosen by lot. If a judge has not served in three prior limited *en banc* proceedings, that judge automatically is placed on the next limited *en banc* proceeding. But any judge

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4 Hruska Commission at 234-235.

5 *Id.*, 235.

6 Omnibus Judgeship Act of 1978; 28 U.S.C. 41

7 See Thompson, *supra* at 460.

8 Cecil, *Administration of Justice in a Large Appellate Court: The Ninth Circuit Innovations Project*, Federal Judicial Center (1985), pg. 8.

of the circuit has the right to request a full *en banc* hearing to reconsider a decision by the limited *en banc* panel.[9]

WHY THE NINTH CIRCUIT SHOULD BE DIVIDED

Today there are 28 active judges and 8 senior status judges (who may hear occasional cases) on the Ninth Circuit, more than twice the number of judges present at the time the Hruska Commission originally recommended division. While Ninth Circuit innovations have solved some of the Court's administrative problems, some of the gains are deceptive. While the Court's case backlog has been trimmed, for example, this has been due mainly to the increases in the productivity of individual judges, not to the reforms.[10] More important, the deeper concerns of uniformity and predictability of the body of law developed by the circuit have not been addressed by reforms. Fair and effective justice thus still requires a division of the Ninth Circuit.

Improving Uniformity and Predictability

Ninth Circuit Judge Eugene Wright noted during 1984 congressional testimony that a federal Appeals Court cannot be efficient if it has more than nine active judges. Wright stressed that a circuit's judges should be drawn from geographical areas with common legal problems; that there should be close personal relationships and collegiality among the judges; and that there should be consistency in its determinations. Wright explained that "some of the judges of the Ninth Circuit are now no longer able to remain current with the law of the Circuit as it develops."[11] He added that because of "the volume of this printed material, judges are obliged to rely upon law clerks, staff attorneys, librarians, and the eternal hope that their next opinions do not stray too far from the current law of the Circuit."[12] Wright concluded that division of the Court was long overdue.

Successful Split. That splitting the Ninth Circuit would increase the uniformity in the law of the circuit is demonstrated by what happened when the old Fifth Circuit was divided into the new Fifth and Eleventh. Referring to this at the 1984 hearings, Chief Judge Charles Clark of the Fifth Circuit stated that "the division of the Fifth Circuit into the new Fifth and Eleventh Circuits has been very successful. It has done exactly what was intended to be done."[13] Said Clark:

> the principal benefit gained remains that judges, lawyers, and litigants can better cope with a smaller,

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9 *Id.*
10 *Id.*, at 7.
11 Hearings on S.1156 Before the Subcommittee on Courts of Senate Judiciary Committee, 98th Congress, 2nd session (1984), at pg. 17.
12 *Id.*
13 *Id.*, at pg. 88.

more predictable universe of case law. Effective conduct and management of litigation requires mastery of this corpus juris. Circuit judges must know its status on a daily basis to keep the law consistent.[14]

Dealing with the Erosion of Precedent

Not only does the large number of judges on the Ninth Circuit Court hurt the uniformity and predictability of the body of caselaw, but the Court's limited *en banc* procedure undermines the principle of precedent. Traditionally, a court sitting *en banc* gives an authoritative statement of the law precisely because all of the judges in the circuit participate in rendering the decision.

In the Ninth, however, only a minority of the judges of the circuit (11 out of 28 active judges) hear a case involving conflicting judicial interpretations of the law. Moreover, ten of the eleven judges on the limited *en banc* court are chosen by lot. Thus, if two three-judge panels in the circuit reach conflicting decisions regarding the same question of law, the ensuing limited *en banc* court convened to resolve the conflict may contain the three judges from one panel, or the three judges from the conflicting panel, all of these judges, or none of these judges.

Reducing Future Impact. Judges who have not participated in rendering the decision being reviewed naturally feel less allegiance to upholding that interpretation, while in a traditional *en banc* setting, the judges who had promulgated a disputed view of the law would be present to defend it. Thus in the case of the Ninth Circuit each decision reached by a limited *en banc* court has less impact upon subsequent similar cases.

Rarely are two cases heard by an Appellate Court exactly alike in their facts. Usually, there is room for interpretation as to whether a prior decision regarding a similar situation should guide the particular case before the Court, or whether the facts of the case distinguish it from the prior situation.

Impractical Review. In the Ninth Circuit, however, the prior decisions by a limited *en banc* could be treated in markedly different ways depending upon the particular mix of legal and political philosophies represented at the particular limited *en banc* court. And while, theoretically, any judge of the Ninth Circuit has the right to call for a full *en banc* court, convening more than two dozen judges at one time is impractical if not impossible. There thus is great pressure not to call for such review. Indeed, prior to the 1984 congressional hearings, the full Court had not been convened even once to rehear a case.

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14 *Id.*, at pg. 96.

Because of these drawbacks, other circuits have refused to use limited *en banc* courts regularly to resolve conflicts. Judge Clark of the Fifth Circuit stated at the 1984 hearings that it was his Court's view that "the law of the circuit would be more consistent if all of the judges charged with making that law participated in the *en banc* courts."[15] By contrast, a decision by a Ninth Circuit limited *en banc* can hardly be an authoritative statement of the law of the circuit.

Parties in litigation and their attorneys thus find it difficult to be sure of the Ninth's interpretation of the law at a particular time, and therefore do not know how far to proceed in the appeals process. The large number of judges in the circuit creates innumerable combinations of panels that could give restrictive or expansive interpretations to previous limited *en banc* decisions of the circuit. The incentive exists therefore, for litigants to push what might otherwise be a meritless appeal through the system in the hopes of coming before a favorable combination of judges. Dividing the circuit would reduce the incidence of "shopping around" for favorable judges.

Restoring Geographical Balance

Another consideration pointing to a division of the circuit is its immense geographical size. As a land mass, it is the equivalent of all of Western Europe. Such size hurts the relationships between the members of the Court and the federal district judges and the bar of the circuit. As the Ninth Circuit's Judge Wright explained to the Hruska Commission, "Judges whose background and experience lie in places a thousand miles from a given court are unlikely to have a full appreciation of regional aspects of an issue, even if they are aware of them."[16] Another problem predictably, is that the sheer size, population, and importance of California overwhelm the Ninth Circuit. The legal questions and legal climate of California overpower the other states in the circuit. Said Senator Slade Gorton, the Washington Republican at the 1984 hearings:

> We in the state of Washington...are very significant and very important tails on a large dog. We are simply dominated by California judges, by a focus on California, which is not only so large from a geographical point of view, but so heavily concentrated from the point of view of the population and judges, and lawyers appointed to the Ninth Circuit Court of Appeals, from that State.[17]

15 *Id.*, at pg. 90.
16 See Hearings, *supra*, at pg. 18.
17 *Id.*, at pg. 29.

Arguments Against Division

The strongest argument against splitting the Ninth Circuit is that to achieve a reasonably even division of the caseload, the state of California would have to be divided among two circuits. Critics of division argue that California law then would be subject to conflicting interpretations, and the state would have to wait for the U.S. Supreme Court to resolve conflicts among two federal circuit courts. The Hruska Commission, however, concluded that this would not raise particularly novel or unmanageable problems for that situation, for all practical purposes, already existed in every circuit. As the Commission noted:

> Experience in the federal system shows that district courts within the same state may differ in their interpretation of state law. These differences may or may not be resolved by a Court of Appeals; if they are, the resolution may take years. Of central significance on issues of state law both of the proposed Circuits would be obliged to follow the well developed jurisprudence of the California legislature and courts.[18]

Even if it were decided that California should not be split, two separate circuits could be created without dividing any states. For instance, California, Hawaii and Guam could be placed in one circuit, with the remaining states in a second. While this would provide fewer gains than a mere even division, it would still be an improvement over the present situation.

Creating More Conflicts. Other opponents of dividing the circuit argue that realignment or division of circuits is at best a short-term solution. The Supreme Court has stated for many years that its workload has become increasingly unmanageable, reducing the time it can spend deliberating each case and thereby undermining the quality of its written opinions. Because the Supreme Court has jurisdiction over conflicts among the federal circuits, and because creating more circuits will lead to more inter-circuit conflicts, these critics of division argue that dividing circuits is tantamount to increasing the workload of the Supreme Court. Indeed, some scholars even have argued for consolidating circuits and tolerating more intra-circuit conflicts in an effort to relieve the caseload pressure upon the Supreme Court.

While the caseload problem faced by the Supreme Court does limit its ability to provide judicial leadership, this is a separate issue from that of dividing the Ninth Circuit. The citizens of the Ninth Circuit should not have to endure the serious shortcomings of an unduly large circuit simply to shield the Supreme Court from its constitutionally required duties. The need for reforms of the entire federal appellate system should not rule out intermediate reforms of one circuit.

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18 *Id.*, at pgs. 47-48.

CONCLUSION

Division of the Ninth Circuit Court of Appeals is long overdue. While Congress in 1978 delayed taking the required action to allow innovations in administration of a large circuit to be tested, these innovations have not mitigated the harmful effects on the Court resulting from its large number of judges and arbitrary *en banc* procedure.

Americans subject to the Ninth's jurisdiction deserve the same level of service and responsiveness that citizens in other circuits expect and receive. Congress thus should develop legislation that would permit an orderly division of the bloated Ninth Circuit Court of Appeals.

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