



United States Court of Appeals

for the Ninth Circuit
P. O. Box 31478
Billings, Montana 59107-1478

Chambers of
SIDNEY R. THOMAS
United States Circuit Judge

TEL: (406) 657-5950
FAX: (406) 657-5949

May 1, 2004

Hon. Jeff Sessions
Hon. Diane Feinstein
Subcommittee on Administrative Oversight and the Courts
United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Sessions and Senator Feinstein:

Thank you for the opportunity to submit additional information for the record pertaining to various proposals to divide the Ninth Circuit Court of Appeals into two or more circuits. I am an active Ninth Circuit Judge, with chambers in Billings, Montana. The views expressed in this letter are my own.

Division of the Ninth Circuit at this time would create increased delay and decreased access to justice. It would create unnecessary and expensive duplication of core functions, while substantially reducing vital services. The most effective means of administering justice in the federal courts in the states comprising the Ninth Circuit is a centralized administration, with significant community outreach and services through the use of technology.

To explain my reasoning fully, I would like first to address the real world administrative impact of any split, then address some of the underlying concerns expressed by those promoting a structural division of the circuit.

Budgetary and Administrative Impact

At the present time, as the Subcommittee members are undoubtedly aware, the federal courts are facing a budgetary crisis. Ralph Mecham, Executive Director of the Administrative Office of the United States Courts wrote a memorandum to all federal judges on April 22, 2004, observing that: "The entire

judicial branch of government faces the most serious funding challenge that I have seen during my 19 years as Director of the Administrative Office.” At the present time, all federal courts – including the courts of the Ninth Circuit – are preparing contingency plans involving significant personnel layoffs and other cost-saving measures.

As the Subcommittee is also undoubtedly aware, the Judiciary budget is prepared and allocated based on formulas that are, in great measure, caseload driven. Thus, circuit division will not necessarily mean greater funding for the federal courts in the current Ninth Circuit; it will essentially take existing funding and divide it. However, each new circuit will be required to duplicate and fund essential core functions. There will be multiple Clerks of Court and Circuit Executives, along with other top administrative staff positions. In sum, circuit division will reorganize the current staff resources into a more administratively top-heavy organization, less able to deliver needed services. The only remedy would be to take money from other circuits. This remedy might be required on the basis of the revised formulas for new circuits, but it would have an unfair and disastrous effect on other circuits that are currently experiencing severe budget crises of their own.

I will discuss later the administrative savings of maintaining the present structure for the Court of Appeals, and the cost in inefficiency and delay that would occur by dividing the circuit. Aside from those issues that are unique to the Court of Appeals, there are other, significant cost savings that would be lost if the Ninth Circuit would be divided. For example, one of the most expensive aspects of the judiciary budget is the payment for defense of capital cases. We have been cognizant of this problem and have created a committee to review budgets for the prosecution of such cases. Chief Judge Stephen M. McNamee of the District of Arizona and Judge Barry T. Moskowitz of the Southern District of California have done remarkable work in analyzing capital case budgets. Their work has saved hundreds of thousands, if not millions, of dollars. These efforts would be significantly lost or reduced under a new division. There simply would not be enough of a critical mass of judges to serve these functions in a small circuit.

Likewise, the smaller circuits would have significantly fewer resources in space and facility planning, a division in the Ninth Circuit Executive’s office which has also saved taxpayers significant sums of money and assisted in the

construction of courthouses that are more efficient and less costly. An excellent example of effective planning is the new district courthouse in Seattle, which utilizes courtroom space in an innovative and efficient manner. The planners of the Circuit Executive's office have been invaluable to smaller states like Montana and Idaho, to assist in courthouse planning given those states' very unique needs.

In short, there are enormous costs – both direct and indirect – that would be created by circuit division. Administrative duplication and waste would be substantial. Circuit division would result in a significant decrease in the services that the Circuit now provides.

Most importantly, the effect of these costs and inefficiencies would be compounded by our current budget situation.

Caseload Growth in the Ninth Circuit

The major premise behind the argument for structural division of the Ninth Circuit is that population growth throughout the region will cause increased appellate caseloads, and that division is the only means of accommodating the uniform increase in appellate filings. This argument is based on a faulty premise. In fact, there is no correlation between population growth and federal appellate filings. Rather, increases in appellate work have been primarily based on discrete, specific circumstances that tend to be transitory.

For example, Alaska's population grew 8.5% between 1991 and 2002. However, the number of appeals filed in the Ninth Circuit from Alaska actually *decreased* during the same period by 88.7%. Similarly, Oregon's population increased 17% between 1991 and 2002; its federal appellate caseload *decreased* during the same period by 13%. Indeed, if one examines the states comprising the Northern division of the Ninth Circuit (Alaska, Washington, Oregon, Idaho, and Montana), the appellate caseload has been virtually flat for over a decade. From 1993 to 2002, while the aggregate population grew 17%, the total appellate caseload from the region *decreased* by 3.2%.

The lack of relationship between population growth and federal appellate caseload is also demonstrated by reference to the various current proposals. S. 562 would divide the Ninth Circuit into two new Circuits, a new Twelfth Circuit

comprised of Alaska, Washington, Oregon, Idaho, Montana, Hawaii, and Arizona, with California and Nevada comprising the Ninth Circuit. The area comprising the Twelfth Circuit under that scenario has experienced a population growth of 20.5% between 1991 and 2002. However, its federal appellate caseload has only increased 12.8% during that period. In contrast, during the same period, the states assigned to the Ninth Circuit under the bill experienced a population growth of 15%, but a caseload growth of 45.7%.

If we examine S. 2278, we see similar results. The area comprising the new Thirteenth Circuit under that proposal (Washington, Oregon, Alaska) experienced a 16.7% increase in population between 1991 and 2002; its federal appellate caseload *decreased* 7.8% over that period. In contrast, the states comprising the Ninth Circuit under S. 2278 (California & Hawaii) experienced a 13.2% population increase over the same period, but a 47.4% increase in federal appellate caseload.

Overall, the caseload growth has been relatively flat over the last decade in the areas that would comprise the two new circuits; the increase has been in California filings, at a pace that has outstripped population growth. In sum, creating new circuits as proposed cannot be justified based on purported growth of cases within the areas covered by the new circuits.

The simple fact is that federal appellate caseload is not related to population growth. Rather, it is more influenced by other factors that tend to be transitory. For example, the federal courts in the states bordering Mexico have experienced enormous caseload growth in recent years. However, last year appeals from the Southern District of California – one of the judicial districts most affected by the problem – decreased from the previous year. The current appellate caseload challenge in the Ninth Circuit is not based on geography or population, but rather the actions of a single administrative agency.

The fact that judicial caseload emergencies tend to be transitory and driven by unique problems is also demonstrated by examining caseload in the various judicial districts. In my home state of Montana, for example, we recently experienced a judicial emergency because only one of Montana's three judgeships had been filled. To avoid dismissal of criminal cases for lack of a speedy trial, district judges were flown in from throughout the Ninth Circuit to try cases.

Eventually, two more judges were confirmed and the crisis abated. This is a familiar story in our Circuit, and the judges of our Circuit have demonstrated a remarkable willingness to assist their colleagues during these critical times. That is a luxury of a larger Circuit – to be able to have the flexibility to reallocate judicial resources during times of need.

In short, if one examines the data carefully, one can quickly discern that there is no independent justification for creating new federal circuit courts in the Western United States based on population projections or the intuitive notion that caseloads are uniformly increasing throughout the region. Rather, the data indicates that caseload spikes have been driven by unique circumstances that tend to be short-lived. To address these problems, the best solution is a larger Circuit that has the flexibility to reallocate resources internally, rather than to erect structural barriers to the allocation of judicial resources.

Delay

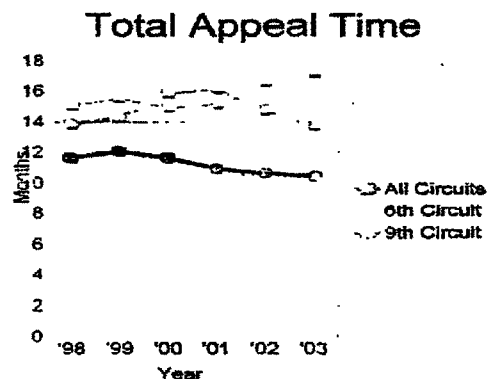
The second major faulty premise upon which the proponents of a circuit division rest their case is delay in case processing. Proponents of a split assume, without explaining, that any division of the Ninth Circuit will improve case processing time. The opposite is true. Circuit division will increase, not decrease delay.

First, let me address the question of delay within the Ninth Circuit. By use of case management techniques over the past several years, we have substantially reduced delay. In 2001, we faced a backlog of cases that developed from 1994-1998, during a period when the Court was operating with only eighteen of its twenty-eight judgeships filled. To address this, we adopted an aggressive case management plan. The plan was successful. At the end of 2001, the Administrative Office reported a median time from Notice of Appeal to disposition in the Ninth Circuit of 16.1 months. At the end of 2003, the median time was 13.7 months, a 14% decrease in two years. Our internal statistics showed an approximate 50% decrease in the time between the filing of the last brief and oral argument hearing during the same period. This statistic is important to us because it provides a good measure of how fast attorneys are able to get their case heard.

Our most current internal data indicates that, as a rough approximation, the time between filing briefing and oral argument in cases designated as important enough for oral argument is six months. (Other factors beyond our control influence the total time for all cases, such as the time it takes to obtain state court records in state prisoner habeas cases, which may be resolved at screening, rather than oral argument.) Because of the large influx of immigration cases, we do not expect the general median time for case processing to decline until the bulge of immigration cases has been resolved. However, long term trends in the filing of other cases have shown a decrease. For example, there has been a decrease in the filing of prisoner civil rights cases and a decrease in the number of state prisoner habeas petitions. Unless other events intervene, I would expect us to be able to resume our decrease in case processing time once the bulge of immigration cases have been resolved. The Ninth Circuit remains one of the fastest circuits in the nation in resolving cases after presentation to a panel of judges.

Moreover, the influx of immigration cases will probably not affect the case processing time for the states in the Northwest. There are very few administrative immigration cases filed there; thus, we should be able to maintain, and perhaps improve, our favorable oral argument disposition time in that region.

If delay were the primary justification for a circuit split, then there would be a much better case for dividing the Sixth Circuit than dividing the Ninth, as illustrated by this graph, which shows a continuing increase in delay in the Sixth Circuit, and a decrease in delay in the Ninth Circuit in the last five years.



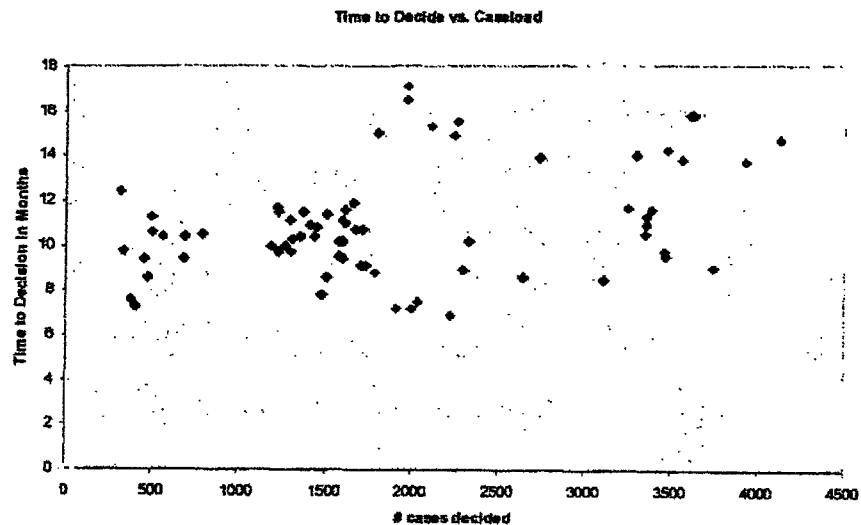
The simple fact is that case processing delay is not related to caseload, or size of circuit. The Commission on Structural Alternatives for the Federal Courts of Appeal, more popularly known as the "White Commission," studied the subject of delay thoroughly in 1998 and concluded that circuit size was not a critical factor in appellate delay. Specifically, the White Commission wrote:

We have reviewed all of the available objective data routinely used in court administration to measure the

performance and efficiency of the federal appellate courts, but we cannot say that the statistical criteria tip decisively in one direction or the other. While there are differences among the courts of appeals, differences in judicial vacancy rates, caseload mix, and operating procedures make it impossible to attribute them to any single factor such as size.

Commission on Structural Alternatives for the Federal Courts of Appeal, Final Report, p. 39 (1998).

In addition to a lack of relationship between circuit size and delay, there is no statistical relationship between total caseload and disposition time, as shown by this scattergraph, which illustrates the lack of relationship between decision time and caseload across all circuits.



Perhaps the real question is what the goal is in terms of case processing time, what structure best achieves it, and at what cost. For example, the difference between median case processing time for all circuits and the Ninth last year was 3.3 months. We were not the slowest circuit. If, by using management techniques, the Ninth Circuit could reduce total case processing time by 2.4 months in just two years, is there a compelling reason to cause serious disruption in the federal courts with the hope of reducing total case processing time by a few more months? Or is it better to continue to improve effectiveness and efficiency within the current structure?

If one examines the administrative structure of the Ninth Circuit and its efficiencies, I believe the only conclusion that can be drawn is that a circuit split will increase delay, rather than decrease it. A division of the circuit will cause the loss of a large number of administrative tools to reduce appellate caseload, and will place more cases and administrative tasks on judges.

The caseload mix of the federal judiciary, particularly in the Ninth Circuit, has changed over the years. Approximately 40% of total appeals in the Ninth Circuit are filed by *pro se* litigants. Last year, for example, there were 4,942 *pro se* appeals filed in the Ninth Circuit out of 12,694 total cases. These appeals are processed by a special Pro Se Unit in the Ninth Circuit staff attorneys' office. The vast majority of these appeals are then resolved by presentation to screening panels made up of Article III judges. Very few of these cases are referred to judges' chambers for consideration by oral argument panels.

Further, well over half of the cases filed are the subject of procedural terminations. A procedural termination of a case may be occasioned by a number of factors, including: (1) dismissal for lack of jurisdiction, (2) resolution of the case through the efforts of the Circuit Mediator's office, (3) denial of a Certificate of Appealability, (4) dismissal for failure to prosecute. All of these terminations are accomplished through work of the central staff, not the work of individual judges and their law clerks. For example, over 1,000 appeals in the Ninth Circuit were resolved last year through action by the Circuit Mediator's office. The staff attorneys worked up and made presentations as to 1,829 Certificates of Appealability. Of those, 9% were granted; 91% were denied. In other words, well over 1,600 potential appeals were terminated at that stage, without the involvement of the chambers of individual judges. The Ninth Circuit case screening program is designed to quickly ascertain jurisdictional problems and to cull out cases in which the facts are uncomplicated and the result is dictated by Circuit precedent. The result of this is that approximately 1,800 appeals, or approximately one-third of total merits determinations cases were resolved outside of oral argument calendars.

To put this into total perspective, in an average year, approximately 50% of the filed cases are procedurally terminated through staff efforts before they reach a merits panel; of the remaining merits terminations, one-third were resolved by judicial screening panels deciding the cases based on staff presentations. Taking

this all together, the Circuit staff provided the primary assistance in the resolution of approximately 80% of appeals; the remaining 20% were resolved by judges and their chambers staff on oral argument calendars.

A division of the circuit will mean far fewer staff resources available to handle the non-oral argument calendar appeals, which account for 80% of the volume of circuit work. Splitting the circuit will not create budget increases; rather it will likely take existing resources and divide them. Moreover, core functions will be replicated, and additional management positions required. Thus, there will be far less staff available for case processing.

The current case mix in the Ninth Circuit is best addressed by retaining a strong, coordinated, central staff that can perform essential case triage and resolve the vast majority of appeals. Circuit division would reduce or eliminate many of these critical personnel resources available. The inevitable result will be inefficiency, waste of judicial time, loss of services, and increased delay.

However, there are additional reasons why circuit division will cause delay. In addition to the central staff, other institutional components of the Ninth Circuit have significantly reduced the number of appeals needed to be decided by appellate judges.

The Ninth Circuit Bankruptcy Appellate Panel, for example, resolved 675 appeals last year. The Ninth Circuit Appellate Commissioner has removed an enormous administrative load from the circuit judges by processing approximately 1,500 Criminal Justice Act vouchers last year, ruling on approximately 2,800 routine administrative motions last year, and conducting hearings and managing attorney discipline cases. These innovations would not be available to smaller circuits.

Further, in a circuit with a small number of circuit judges, any problems encountered by an individual judge would have far more ramifications than in a larger circuit. If a judge on a six or eight person court became temporarily or permanently disabled, it would have a much greater impact than a judge experiencing problems on a larger court. Likewise, if problems developed in the confirmation of a judge who was to serve on a smaller circuit, then it would have a significant impact on the functioning of that circuit.

Judges in small circuits would also have to assume a greater administrative load than in the current Ninth. In the present Ninth, judges rotate service on a series of important committees and administrative roles. These administrative tasks would be unnecessarily duplicated by Circuit division. Judges would do less judging, and more administering, if the Ninth Circuit were divided.

Circuit division does not eliminate caseload; it merely reallocates it. The cases still need to be decided. There is no evidence that demonstrates that the present caseload could be more effectively or efficiently managed by dividing the Ninth Circuit. In terms of efficient case processing, the best model at the present time is a strong, central administrative staff to examine cases for procedural and jurisdictional defects before the cases are referred to oral argument panels. If the ability to handle 80% of the Ninth Circuit's cases is impaired, and if circuit judges are forced to spend much more time with administrative matters, then the inevitable result will be increased delay to the litigants.

The best solution to resolving case processing delay is within the existing institution. Circuit division will not eliminate delay; it will create unnecessary delay.

En Banc Procedure

The Ninth Circuit's limited en banc procedure has been cited as a rationale for circuit division. However, a close examination will dispel the notion that circuit division is justified in order to guarantee a full court en banc hearing.

First, this involves an extraordinarily small number of cases. In 2003, there were 13,494 appeals filed in the Ninth Circuit. Twelve cases were heard en banc. In 2002, there were 12,157 appeals filed in the Ninth Circuit; 14 cases were reheard en banc. The suggestion has been made that the limited en banc procedure results in fewer cases reheard en banc. However, the Ninth Circuit hears more cases en banc than other circuits. For example, in 2003, every other circuit court of appeals except the Sixth Circuit heard fewer than 7 cases en banc.

The following chart illustrates the point:

<u>Circuit</u>	<u>En Banc Cases</u>
DC	1
First	3
Second	0
Third	4
Fourth	3
Fifth	6
Sixth	14
Seventh	3
Eighth	7
Ninth	15
Tenth	4
Eleventh	6

Over the 27,291 cases terminated in the federal circuit courts of appeal in 2003, only 66 involved en banc decisions. It is a very small number of cases, both nationally and within the Ninth Circuit.

Second, very few of the limited number of cases reheard en banc involved close votes. Since 1996, almost 70% of the en banc cases were decided by margins of 8-3 or more. Forty-two percent of the cases were decided unanimously. No cases were decided by a one or two vote margin during 2003. The following chart provides the data:

NUMBER OF JUDGES VOTING IN MAJORITY IN LIMITED EN BANC OPINIONS 1996 - 2004

	Unanimous	10-1	9-2	8-3	7-4	6-5	Not yet decided
2004 ¹	1	0	0	0	0	0	3
2003	6	1	0	1	0	0	4
2002 ²	8	0	0	1	4	3	0
2001 ³	4	0	0	3	5	5	0
2000	10	2	1	6	2	1	0
1999	10	3	4	1	1	1	0
1998	4	1	1	1	5	2	0
1997	2	2	0	4	3	5	0
1996	9	0	0	2	1	2	0

¹ Current through April 5, 2004.

² One case vacated without en banc opinion.

³ Two cases from 2001 were taken off the en banc calendar.

Third, the worry that only six votes on the en banc court will bind the circuit neglects two significant facts: (1) well over 99% of the cases decided by the Ninth Circuit – and all the circuit courts for that matter – are decided by three judge panels, in which the votes of two judges bind the entire Circuit and (2) the Ninth Circuit allows for a full court en banc rehearing. As yet, there has not been an occasion in which a majority of the eligible judges has voted to rehear a case before the entire court.

Fourth, although eleven judges are ultimately drawn to serve on a Ninth Circuit en banc court, the determination whether to take a case en banc remains with the full court. By statute (28 U.S.C. § 46(c)), a vote in favor of en banc rehearing by a majority of non-recused active judges is required to take a case en banc. Moreover, any active or senior judge may call for en banc rehearing, and all may participate in the exchange of views – often extensive – that precedes the vote.

Fifth, the Court has taken concerns about the representative nature of the limited en banc panel seriously and studied the question. Prompted by issues raised during the White Commission hearings, the Ninth Circuit formed an Evaluation Committee to examine some of the issues raised more closely, including the limited en banc procedure. To answer the questions relating to en banc procedures, the Evaluation Committee consulted with a number of outside academic experts. One of the experts consulted was Professor D.H. Kaye of the College of Law, Arizona State University, a noted expert in the field of law and statistics, who conducted a statistical analysis of the size of the limited en banc court in relation to a full court of 28 judges. Professor Kaye calculated the probability that the outcome of the limited en banc court vote would be the same as that of a full court of 28. He posited a binary issue (judges would vote either to affirm or to reverse), and he considered the possible divisions among 28 judges. He found that expanding the en banc court would result in only a trivial gain in the degree by which an en banc court decision would represent the views of all judges of the court. The largest gain would occur when there were 28 active judges who divided 17 to 11 in their views as to whether the panel opinion was correct. Yet even in that situation, if the limited en banc court were expanded to 13, the gain in accuracy of “representativeness” would be only 3.5 cases per hundred, and only 7 cases per hundred if the limited en banc court were expanded to 15.

The Evaluation Committee also met with a number of other scholars to discuss this issue, including Professor Linda Cohen, Department of Economics, University of California, Irvine; Professor John Ferejohn, Hoover Institute, Stanford University; Professor Louis Kornhauser, New York University School of Law; Professor Matt McCubbins, Department of Political Science, University of California, San Diego; and Professor Roger Noll, Department of Economics, Stanford University, CA. These scholars consulted by the Committee confirmed the import of the calculations done by Professor Kaye in concluding that the current random draw is effective in providing a representative en banc court of 11 judges.

To supplement the analysis by Professor Kaye and the other consultants, the Evaluation Committee requested Professor Arthur Hellman of the University of Pittsburgh School of Law to conduct an empirical study of actual en banc outcomes. His conclusion was that the evidence strongly indicates that in a substantial majority of en banc cases the limited en banc court has reached the same result that a majority of active judges would have reached. He also concluded that in the cases in doubt, expanding the limited en banc court would have added to the judges' burdens without enhancing the "representativeness" of the outcome. He observed:

It is true that enlarging the size of the en banc court would make it more "representative" in an abstract sense. But the more important question is whether it would produce decisions, with majority, concurring and dissenting opinions, that better represent the views of the court's active judges. Probability analysis and empirical data both indicate that the gains would at best be marginal.

Sixth, none of the bills would totally eliminate the limited en banc court. Under any scenario, the circuit containing California would eventually have too many judges for a permanent full court en banc panel. For example, S. 2278 would place 21 judges in the reconstituted Ninth Circuit. So, to the extent that the procedure is view as problematic, none of the pending legislation addresses it fully.

Seventh, when all factors are considered, the limited en banc court is a valuable tool. Rehearing a case en banc uses up significant circuit resources. It is

a time and energy consuming process. My opinion is that the limited en banc system employed by the Ninth Circuit should be analyzed as to its legitimacy, representativeness, and deliberative quality. The limited en banc panel has rarely, if ever, reversed the decision of a prior en banc panel. Indeed, it is rarely requested to do so. There is no compelling evidence that the decisions of the limited en banc panel are not accepted as the binding decisions of the Court. Our internal studies, and all external studies, have concluded that the composition of the panel is sufficiently representative. Having too many judges can interfere with the deliberative process; limiting the panel number to eleven strikes an appropriate balance between the number required for legitimacy and representativeness and the number required for effective deliberations. It also strikes, in my opinion, the proper balance of resources needed to resolve en banc-worthy issues.

Finally, and perhaps most importantly, the question of size of the en banc panel is a matter within the administrative control of the Ninth Circuit. No legislation is required to either increase the size of the panel, or to mandate a full court en banc panel. That can be accomplished by vote of the judges of the circuit.

For all of these reasons, I do not believe that the nature of the limited en banc system employed by the Ninth Circuit justifies a circuit division.

Collegiality

Collegiality is often cited as a reason to create smaller circuits. In many cases, judges on smaller circuits have enjoyed a strong rapport. This doesn't mean, however, that judges on a larger circuit cannot achieve a similar rapport. Indeed, as most judges on our Court have testified repeatedly, we enjoy a very collegial atmosphere on our Court, despite differences of opinion. In some ways, a larger court is better able to absorb strong personality differences. When personal differences arise on a smaller court, a court may become rapidly dysfunctional. There are many examples of this. My point is not to argue that a larger circuit is more, or less, collegial than a smaller circuit; only to point out that a close working environment does not always produce collegiality.

Some proponents of a split have argued that the judges on our Court do not sit in panels as often as these observers believe they should. However, a careful look at other circuits should show that this is an exaggerated problem. For

example, the Eleventh Circuit, which was touted as an example to the Committee employs a large number of visiting judges. Indeed, 66% of the published opinions of the Eleventh Circuit involved a visiting judge on the panel. In contrast, only 33% of the published opinions of the Ninth Circuit involved a visiting judge. This is not to criticize the practice of the Eleventh Circuit, by any means. However, the point is that paring the size of a Circuit does not necessarily mean that judges will be sitting with each other more often. Indeed, as caseload increases, more visiting judges will be required, and the so-called collegiality created by frequency of sitting will be diminished.

On our Court, we have daily substantive interchanges of opinions and ideas through e-mail, some of them quite spirited. We sit often together on en banc panels. We have frequent contact. One excellent measure of collegiality is the degree to which judges resolve differences. Well over 90% of the cases are decided by unanimous vote. Further, there has been an increasing trend on our Court for off-panel judges who have concerns about panel opinions being able to work out differences with the panel without proceeding to a vote on whether to rehear the case en banc. During 2003, there were thirteen en banc calls or potential en banc calls that did not result in a ballot because the panel agreed to amend its opinion. This amounted to almost a quarter of the en banc calls. Given the frequency of communication and the internal indicia of collegiality, additional panel sittings would not materially improve our understanding of each other, at least in my opinion.

Nor would a circuit division necessarily produce a closer working environment. The geography of the Ninth Circuit, regardless of how it might be divided, precludes daily person-to-person contact. A single judge located in Hawaii, Alaska, or Montana is not going to have daily in person contact with other circuit judges, regardless of circuit configuration. In any circuit, for example, my chambers would not be located within driving distance of any other chambers. The daily in person interaction between judges will not change with a circuit split. The primary contact of the judges in any circuit division would remain as it is now, primarily by e-mail and telephone. Personal contact would be limited to court meetings and oral arguments. The illusion of increasing personal contact is not a reason to divide the Circuit.

Connection with Community

Coming from a less populated state, I feel strongly that a court must have a strong connection with the community it serves. Part of the premise for change is that smaller circuits would promote that. However, attorneys in states like Montana are unlikely to feel a significantly more intimate connection with a Circuit whose headquarters is in Seattle or Las Vegas or Phoenix, as opposed to a Circuit whose headquarters is in San Francisco. Likewise, no circuit division would place all circuit judges in an intimate environment; they would still maintain chambers hundreds or thousands of miles apart.

The best method of establishing and maintaining a sense of community is through the use of technology and through continued contact between the Circuit and community it serves. To that end, we have made enormous strides over the past several years. Ninth Circuit opinions are immediately posted on the Circuit's website, which contains an enormous amount of useful information. Digitized audio files of Ninth Circuit arguments are available on the website the day after argument. The Clerk's office has made briefs, orders, and audiofiles of cases in which the public has expressed an interest immediately available via the internet. Video argument will soon be available to litigants who cannot afford to travel in person for oral argument. Many of these advances were hastened as a result of conferences between the bench and bar of the states in the Ninth Circuit. Technology allows the Circuit to stay in close contact with the community it serves. However, technology is not always cheap. Because the Ninth Circuit has pooled resources, it can continue to improve the service it provides to litigants and the public. However, the resources for doing so would be seriously diminished in a small circuit.

Conclusion

For all of these reasons, I oppose a structural division of the Ninth Circuit. The best means of addressing the present challenges is within the existing structure. Division will be costly, inefficient, ineffective, and result in the significant impairment of the administration of justice in the Western United States. I thank the Subcommittee for its consideration of my views and those of my colleagues.

Sincerely,



Sidney R. Thomas
United States Circuit Judge