

Supersized Appellate Courts Undermine the Rule of Law

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Examining Ideas for Restructuring the 9th Circuit

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## Supersized Appellate Courts Undermine the Rule of Law

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Chairman Goodlatte, members of the Judiciary Committee. I am delighted to be here with you today to discuss what I believe a critical issue in the administration of justice in the western third of the United States. As many of you know well, proposals to split the Ninth Circuit Court of Appeals have been offered on numerous occasions over the past half century. As early as 1954, the Ninth Circuit judicial council had endorsed a circuit-splitting proposal, although it withdrew its approval of the plan later that year.<sup>1</sup> Then again, in 1973, the Commission on Revision of the Federal Court Appellate System—the Hruska Commission—recommended splits for both the Fifth and Ninth Circuits.<sup>2</sup> Nearly a decade later, the Fifth Circuit was finally split, but the Ninth Circuit was left under the weight of rapid population growth and the resultant increased caseload. Throughout the past four decades, judgeships have been added and en banc proceedings modified to help the Ninth Circuit cope with its massive caseload without splitting the circuit. Now with 29 active judgeships (three of which are currently vacant) and another 19 judges serving in senior status, there are simply too many cases and too many judges in the Ninth Circuit to effectively administer justice in an efficient and cohesive manner. The ponderous structure that is the Ninth Circuit can continue in its present

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<sup>1</sup> Commission on the Structural Alternatives for the Federal Courts of Appeals, Final Report, Pub. L. No. 105-119 at 43, December 18 1998.

<sup>2</sup> *Id.*

fashion indefinitely, but the rule of law within the circuit will certainly not last much longer, for reasons I will explain in a moment. Thus, it is imperative that the circuit be split, in order to create a structure under which the judiciary can perform its vital functions.

The Ninth Circuit is by far the largest in the nation, both in terms of geography, population and the corresponding workload. The circuit covers an area with more than 65 million people, nearly twice the population as the next most-populous circuit,<sup>3</sup> and accounts for more than a third of all pending appeals in the country.<sup>4</sup> Although the Ninth Circuit has more than double the average number of active judgeships in the circuit courts,<sup>5</sup> those 29 judges are inundated with cases and unable to efficiently handle the constant caseload, resulting in a time from appeal to decision of nearly eighteen months—more than 50% higher than the average in the other circuits.<sup>6</sup> Unfortunately, simply adding more judges to the Ninth Circuit is not a plausible remedy.<sup>7</sup> Indeed, there are already too many judges in the Ninth Circuit – a situation that has exacerbated caseload problems and contributed to the inefficiency of the Circuit.

But more fundamentally than either caseload or judicial efficiency is the loss of collegiality on the court, and by that I do not mean merely the exchange of pleasantries by the judges. Collegiality, in the most general terms, denotes a feeling of shared authority among

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<sup>3</sup> Based on 2016 U.S. Census estimates, available at <https://www2.census.gov/programs-surveys/popest/tables/2010-2016/state/totals/nst-est2016-01.xlsx>.

<sup>4</sup> Based on U.S. Courts Statistical Tables for the period ending March 31 2015, available at [http://www.uscourts.gov/sites/default/files/b00mar15\\_0.pdf](http://www.uscourts.gov/sites/default/files/b00mar15_0.pdf).

<sup>5</sup> Statistics from the Ninth Circuit AIMS Database.

<sup>6</sup> See Quinn Emanuel, March 2013 Appellate Update—The Appellate Timetable, available at <http://www.quinnemanuel.com/the-firm/news-events/article-march-2013-appellate-update-the-appellate-timetable/>.

<sup>7</sup> See generally Gerald Bard Tjoflat, *MORE JUDGES, LESS JUSTICE: The Case Against Expansion of the Federal Judiciary*, 79 A.B.A.J. 70, July 1993. Cf. Stephen Reinhardt, *TOO FEW JUDGES, TOO MANY CASES: A Plea to Save the Federal Courts*, 79 A.B.A.J. 52, January 1993.

members of a group.<sup>8</sup> For our purposes, it is the idea that judges embody the knowledge that they have a “common interest . . . in getting the law right,” as Judge Harry Edwards noted in a 2003 law review article.<sup>9</sup> Collegiality within an appellate panel permits an open, honest, and frank discussion of otherwise divisive issues without fracturing the unity of the group. Moreover, familiarity between judges allows each to learn of the other’s “ways of thinking and reasoning, temperaments, and personalities,”<sup>10</sup> which in turn fosters a cohesive group in which ideas can be exchanged freely, an exercise which necessarily precedes a sound decision.<sup>11</sup> As First Circuit Judge Frank Coffin noted nearly two decades ago while serving as Chairman of the Committee on the Judicial Branch of the United States Judicial Conference:

The increased size of courts and heavy workloads militate against the old-fashioned collegiality that existed when judges sat often with each other, had leisurely discussions together, wrote thoughtful memos back and forth, and, over a year's time, had many opportunities off the bench to dine and socialize with their colleagues. Friendship bred respect which led to consensus or, at least, civility. Now, with both trial and appellate courts composed of even larger numbers of judges, collegiality is at risk of being an endangered condition.

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<sup>8</sup> The American Heritage Dictionary 291 (2d college ed. 1982).

<sup>9</sup> Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1645 (2003).

<sup>10</sup> *Id.* at 1647.

<sup>11</sup> *Id.* at 1650 (“The mental states of judges who are engaged in collegial deliberations are entirely different from those of judges on a court that is not operating collegially . . . . When a judge disagrees with the proposed rationale of a draft opinion, the give-and-take between the commenting judge and the writing judge often is quite extraordinary – smart, thoughtful, illuminating, probing, and incisive. Because of collegiality, judges can admit and recognize their own and other judges' fallibility and intellectual vulnerabilities . . . . The result is a better work product.”)

The consequences of a loss of collegiality should not be underestimated. An important by-product of collegiality within an appellate panel is the strengthening of the rule of law.<sup>12</sup> Instead of serving to fracture and divide the group, diverse viewpoints are able to engage in healthy scholarly debate, which results in “better and more nuanced opinions - opinions which, while remaining true to the rule of law, over time allow for a fuller and richer evolution of the law.”<sup>13</sup> Collegiality thus serves to check the tendencies of some judges to “fly solo,” ruling according to their personal views rather than the clear commands of the law. Additionally, the concept of judicial collegiality conveys a reverence for “circuit precedent and the principle of stare decisis,”<sup>14</sup> as well as a healthy reluctance to decide certain issues “in the absence of collegial deliberation.”<sup>15</sup> Thus, collegiality is absolutely vital to the proper execution of the judicial function—that is, if we are to adhere to the founders understanding of the proper role of the judiciary as the branch which exercises judgment and not will.

The late Judge Edward Becker of the Third Circuit recognized the importance of collegiality among an appellate court’s judges. Commenting on whether the structure of the federal appellate judiciary is suited to its ever-growing workload, Judge Becker wrote:

“[W]e must not let the size of the courts of appeal themselves grow too large. In principle, each court of appeals should consist of a number of judges sufficient to maintain the traditional access to and excellence of federal appellate justice; to

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<sup>12</sup> Harry T. Edwards, *Race and the Judiciary*, 20 *Yale L. & Pol’y Rev.* 325, 329.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 1680.

<sup>15</sup> *Id.* at 1681 (citing *Glass v. Blackburn*, 767 F.2d 123, 124 (5th Cir. 1985) (per curiam) (noting that “the remaining issues require additional evaluation and collegial consideration before a ruling can be made”); *see also* *Wells ex rel. Kehne v. Arave*, 18 F.3d 658, 661 (9th Cir. 1994) (Reinhardt, J., dissenting) (“The Ninth Circuit en banc court less than four hours later denied a stay without any oral argument and without even assembling or otherwise discussing the case in a collegial manner. Surely this is no way for judges to perform the single most important duty assigned to them by the Constitution and federal law.” (emphasis omitted))

preserve judicial collegiality; and to maintain the consistency, coherency, and quality of circuit precedent. An appellate court, in this special sense, is not merely an administrative entity. An appellate court is a cohesive group of individuals who are familiar with one another's ways of thinking, reacting, persuading, and being persuaded."<sup>16</sup>

In a circuit the size of the Ninth Circuit, judges are denied the opportunity to develop fully the collegiality required for proper execution of their duties. The concept is simple: the more judges, the more combinations of judges; the less likely that the same judges will work together frequently enough to become familiar with each other. As a result, the judges never develop the kind of collegiality that is critical to keep maverick tendencies and personal agendas in check by the rule of law.

Other problems arise in circuits as large as the Ninth due to a lack of predictability in regard to the law of the circuit. As explained by Chief Judge Gerald Bard Tjoflat, who served on the old Fifth Circuit before it was split:

“[W]hen you get as large as the old Fifth Circuit was, with twenty-six judges, the law becomes extremely unstable. One of several thousand different panel combinations will decide the case, will interpret the law. Even if the court has a rule . . . that one panel cannot overrule another, a court of twenty-six will produce irreconcilable statements of the law.”<sup>17</sup>

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<sup>16</sup> William H. Rehnquist *et al*, *Symposium: The Future of the Federal Courts*, 46 Am. U. L. Rev. 263, 284 (April 1996).

<sup>17</sup> Thomas E. Baker, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS 66-67 (1994) (quoting from an interview with Gerald Bard Tjoflat).

As Chief Judge Tjoflat recognized, adding judgeships yields a more manageable caseload per judge, but the rule of law suffers immensely. Any other result can hardly be expected: In a circuit with 29 active judgeships, for example, there are 3,654 possible three-judge panel combinations. Add in the Ninth Circuit's 19 Senior Judges and there are a whopping 17,296 possible 3-judge combinations!<sup>18</sup> In such a situation, a decision could go either direction depending upon which three judge combination was selected to hear the case, and the truncated *en banc* mechanism utilized by the Ninth Circuit does little to alleviate the problem. The White Commission itself recognized the problem, noting that "there is consensus among appellate judges throughout the country (including about one-third of the appellate judges in the Ninth Circuit) that a court of appeals, being a court whose members must work collegially over time to develop a consistent and coherent body of law, functions more effectively with fewer judges than are currently authorized for the Ninth Circuit Court of Appeals."<sup>19</sup> The White Commission concluded that "the maximum number of judges for an effective appellate court functioning as a single decisional unit is somewhere between eleven and seventeen."<sup>20</sup>

Judge Becker was also cognizant of the manner in which an overgrown judiciary weakens the rule of law within a circuit. Judge Becker demonstrated his point by comparing the Ninth Circuit to his own circuit. In 1995, the Judge Becker's Third Circuit published 353 opinions, which equated to approximately 8500 pages of typed material. Judge Becker explained that when this amount of reading is added to the "manifold other duties of reading, writing, thinking, conferring, and administering" inherent in a federal appellate judgeship, "it takes me

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<sup>18</sup> Gerald Bard Tjoflat, *MORE JUDGES, LESS JUSTICE: The Case Against Expansion of the Federal Judiciary*, 79 A.B.A.J. 70, July 1993.

<sup>19</sup> Commission on Structural Alternatives for the Federal Courts of Appeals Final Report, December 18, 1998, Pub. L. No. 105-119.

<sup>20</sup> *Id.*

seven days a week to do my job.”<sup>21</sup> During the same period, however, the Ninth Circuit published 927 opinions.<sup>22</sup> According to Judge Becker, “there is no conceivable way that any judge of that court can read, or even meaningfully scan and digest, anywhere near that number of opinions so as to be abreast of circuit law. In other words, the Ninth circuit is already far too large.”<sup>23</sup> In any circuit in which the judges are physically incapable of keeping up with the decisions of their colleagues, the law of the circuit becomes fragmented and contradictory, resulting in the loss of predictability. Thus, the vicious cycle is completed, as the lack of predictability within the circuit and the “instability in circuit law creates unnecessary litigation,” which must be dealt with by an already overburdened judiciary.<sup>24</sup>

Both collegiality and the rule of law suffered as the old Fifth Circuit expanded, and both were reinvigorated after the circuit was split. As has been described by Judges Becker and Tjoflat, both are currently at risk in the Ninth Circuit.

These claims are not mere speculation. As Seventh Circuit Chief Judge (and University of Chicago Law Professor) Richard Posner has demonstrated, the quality of judicial output declines as the number of judge on an appellate court expands. Controlling for ideological disagreements by looking at summary reversals and unanimous non-summary reversals by the Supreme Court, Judge Posner statistically demonstrated that the Ninth Circuit had the highest rate of reversal of any regional court of appeals in the country during the period studied, 1985 to

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<sup>21</sup> Rehnquist *et al.*, *Symposium*, 46 Am. U. L. Rev., at 285.

<sup>22</sup> See ADMINISTRATIVE OFFICE OF THE UNITED STATES, STATISTICS DIVISION, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: REPORT OF THE DIRECTOR, LEONIDAS RALPH MECHAM 50 tbl. S-3 (presenting statistics to the effect that, in the twelve months prior to Sept. 30 1995, the Ninth Circuit published a total of 927 opinions).

<sup>23</sup> Rehnquist, *supra* note 16, at 285.

<sup>24</sup> *Id.* at 286.

1997.<sup>25</sup> The summary reversal rate for the Ninth Circuit during that time was 0.030820; the next largest circuit – the Fifth – had a summary reversal rate of 0.005092.<sup>26</sup> Thus, although the Fifth Circuit had nearly the same caseload as the Ninth Circuit (548 cases per judge in the Fifth, 570 per judge in the Ninth), the Ninth Circuit experienced a rate of summary reversal *more than six times higher* than the next busiest circuit. And the problem has not abated in the two decades since Judge Posner’s study. As Ninth Circuit Judge Diarmuid O’Scannlain noted in a 2013 article, “approximately one in ten Ninth Circuit cases reviewed by the Supreme Court results in a summary reversal,” and another half are reversed unanimously in non-summary dispositions by an otherwise ideologically-divided court.<sup>27</sup>

Moreover, the combined reversal rate of the Fifth and Eleventh Circuits is much lower than it was before the two circuits were split from the old Fifth. As Judge Posner demonstrated, the combined rate of summary reversal of the split courts, since the split, has been (through 1997) .000146; the Fifth Circuit's rate for the 5 years before the split was .000597, more than four times larger and statistically significant at the 95 percent confidence level.<sup>28</sup> In other words, size matters, and the overly-large size of the Ninth Circuit is producing a demonstrably higher summary reversal rate than exists in her sister circuits.

The Commission for Revision of the Federal Court Appellate System—more commonly known as the Hruska Commission—was created by the Judicial Council in 1971 in order to study how best to decrease caseload and increase judicial efficiency in the federal circuit courts

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<sup>25</sup> See Richard A. Posner, *Is the Ninth Circuit Too Large? A Statistical Study of Judicial Quality*, 29 J. Legal Stud. 711 (2000) (comparing summary reversal rate for the Ninth Circuit to other circuits).

<sup>26</sup> *Id.*, at 714 (the figures are statistically significant at a 95% confidence level).

<sup>27</sup> Diarmuid O’Scannlain, *A Decade of Reversal: The Ninth Circuit’s Record in the Supreme Court Through October Term 2010*, 87 Notre Dame L. Rev. 2165, 2167 (2013).

<sup>28</sup> *Id.*, at 717.

of appeal. To achieve this end, the Hruska commission recommended in 1973 that the Fifth and Ninth Circuits be split. Although Congress initially declined to implement either reform, the Fifth Circuit was eventually split in 1981, forming the new Fifth Circuit and the Eleventh Circuit.<sup>29</sup> The Ninth Circuit merely adopted procedural changes, including a limited *en banc* policy.<sup>30</sup> The Eleventh and new Fifth Circuits have since enjoyed renewed collegiality between its judges, allowing for a higher quality of judicial output, but the Ninth Circuit's reversal rate has remained the highest in the country, despite its innovative procedural changes.

More recently, the Commission on Structural Alternatives for the Federal Courts of Appeal, chaired by former Supreme Court Justice Bryan White (the "White Commission") recommended yet another procedural innovation for the Ninth Circuit rather than the tried and true model of splitting the circuit into manageable size. The White Commission recommended retaining the Ninth as a single circuit with three, semi-autonomous administrative divisions.<sup>31</sup> Yet while this would improve collegiality within the divisions, the inter-division conflicts would still create a problem for the Circuit, and there would still need to be a limited *en banc* procedure, with all the same "roll of the dice" problems for judicial consistency that exist presently.

The simple fact is that for over a hundred years, the area of the Ninth Circuit has remained static, but the population and docket of the Ninth Circuit has swelled to proportions that render the administration of justice an extremely difficult task. The circuit's phenomenal growth has undermined the crucial concept of collegiality upon which the efficient functioning

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<sup>29</sup> FIFTH CIRCUIT COURT OF APPEALS REORGANIZATION ACT OF 1980, October 14, 1980, Public Law 96-452, 94 Stat. 1994.

<sup>30</sup> *Id.*

<sup>31</sup> COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FED. COURTS OF APPEALS, FINAL REPORT (Dec. 18, 1998), available at <http://www.library.unt.edu/gpo/csafca/final/appstruc.pdf>.

of an appellate *court* (rather than a loose collection of independent jurists) relies. The remarkable judges of the Ninth Circuit—and there are many—are hamstrung by the sheer volume of output from colleagues that they rarely see, making it all but impossible for them to even read, much less deliberate about, all the decisions of the court.

In order to remedy this situation, the Ninth Circuit must be split. Such a split will decrease caseload and administrative burdens and promote collegiality within the newly-created circuits,<sup>32</sup> thereby permitting the judiciary to function at the level of efficiency justice requires. Moreover, splitting the Ninth Circuit will strengthen the rule of law by promoting decision-making grounded in collective understanding of the law's commands rather than idiosyncratic interpretations or personal agendas, resulting in a more cohesive, consistent body of law that helps insure its faithful and equal application.

These are more than lofty ideals or laudable goals; this is a vision of what the federal judiciary could, and indeed should, be. Splitting the Ninth Circuit is merely the first step toward restoring the reverence deserved by one of our nation's second-highest courts.

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<sup>32</sup> Jennifer E. Spreng, *The Icebox Cometh: A Former Clerk's View of the Proposed Ninth Circuit Split*, 73 WASH. L. REV. 875, 955 (1998).