Federalism and Separation of Powers

A Court United: A Statement of a Number of Ninth Circuit Judges*

Editor's Note: This article is the second installment of a series entitled "Ninth Circuit Split: Point/Counterpoint." This article is the counterpoint to Judge Diarmuid F. O'Scannlain's previous article in this series that was featured in the October 2005 issue of Engage. Judge O'Scannlain will author a final rebuttal to this article which will be published in the next issue of Engage, scheduled to be released in early Fall of 2006.

Last issue, in this space, our colleague, Judge Diarmuid O'Scannlain, wrote a lengthy article, heavily footnoted and adorned with numerous graphs, arguing that the Ninth Circuit should be split. To those of us who went to college in the early 70s, Judge O'Scannlain's article is reminiscent of a then widely read book titled, appropriately enough, *The Limits to Growth*. The book's authors, writing on behalf of an organization calling itself The Club of Rome, purported to demonstrate that, by the year 2000, the world would run out of land, food and clean drinking water to satisfy the needs of an out-of-control global population. Like Judge O'Scannlain's article, *The Limits to Growth* tried to make its point by the use of graphs, charts and opinions of so-called experts—all leading to the "inevitable" conclusions favored by the book's authors.

The year 2000 has come and gone and we find ourselves in a world much different from that predicted by The Club of Rome and its experts. The book's tone of urgency and inevitability—like that of Judge O'Scannlain's article—was based on false assumptions and selective use of statistics; it painted a distorted picture that ignored the ability of people and institutions to adapt to inevitable changes in a complex world.

Any discussion of splitting the Ninth Circuit must take into account two very important and immutable facts: First, any circuit that includes California will always be the largest circuit in the country, and the one with the greatest caseload. California is our most populous state, boasts the world's fifth largest economy and has the busiest Mexican border crossing point in the country. Appeals from California now number something like eleven thousand a year, accounting for seventy percent of our caseload. Unless California is split between two circuits, the circuit containing it will always dwarf all the others and require a very large number of appellate judges.

All split proposals now on the table, for example, would leave California in the Ninth Circuit, which would be comprised of between twenty-one and twenty-six judges, not many fewer than the twenty-eight now authorized. Even then, the circuit will be under-staffed, so that in a few short years we'll be back up to twenty-eight judges or more. At the same time, the eleven Ninth Circuit judges, like Judge O'Scannlain, who would wind up in the new circuit will see their work cut to a bit more than half. In other words, a substantial number of new judges will have to be added to our circuit so that judges in the new circuit(s) will have the luxury of a reduced caseload.

The second immutable fact that any split proposal must take into account is that the territory of the western states is huge and will always require substantial travel time by both lawyers and judges—whether or not the circuit is split. Any circuit that includes Alaska will, of necessity, have the largest territory. The current split proposal, as approved by the House and endorsed by some Senators, would create a sparsely-populated Twelfth Circuit spanning more than four thousand miles, from the Mexican border in Arizona to the Bering Strait in Alaska. No split will eliminate the need for judges and lawyers to travel across the Pacific for hearings on cases from Hawaii, Guam and Saipan. Rather than traveling to Los Angeles and San Francisco—large hubs, with frequent flights and relatively cheap airfares, where most of our cases are now heard—judges and lawyers from the southern part of the new circuit would have to travel to Seattle, Missoula or Portland for some hearings, while those in the north would sometimes have to travel to Phoenix or Las Vegas. What is now an easy one-hop trip would turn into a travel nightmare for many judges and lawyers. Thus, many of the problems Judge O'Scannlain points out—to the extent they are problems at all—will not be eliminated, and may in fact be exacerbated, by splitting the Ninth Circuit.

The remaining issues do not remotely justify a split. Judge O'Scannlain, for example, points to the number of opinions—about seven hundred—published by the Ninth Circuit each year, and complains about the "daunting task" of keeping track of such a colossal body of caselaw. However, the Eighth Circuit issued even more opinions, and the Seventh Circuit issued only about one hundred fewer, during the same twelve-month period, yet we hear no complaints from the lawyers and judges in those circuits.

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In reality, this is no more than a debater's point. Lawyers practice in discrete areas of the law and are generally unconcerned with caselaw in other areas; criminal lawyers care not a whit about our antitrust cases, and trademark lawyers seldom read our immigration opinions. The number of opinions any lawyer need worry about is thus far fewer than the seven hundred we issue every year. When it comes to caselaw in their area of expertise, lawyers generally complain that there are too few opinions. Judges, of course, rely on lawyers to bring relevant caselaw to their attention, and have law clerks to help them. We are surprised to learn that Judge O'Scannlain considers this to be a problem, as he always displays a firm command of our circuit's caselaw during case sittings and our internal *en banc* debates.

Then there is the shopworn argument that we are too big to maintain consistency in our caselaw. This supposed problem has been much mooted, and we have spent considerable time and resources trying to track it down. We have invited lawyers to bring inconsistencies to our attention, even if they have no case raising the issue pending before us, and have provided electronic and conventional access points for them to do so. For several years, we maintained a panel of judges and staff charged with identifying caselaw-inconsistencies. We are, each of us, mindful of the need to maintain consistency, and take very seriously any suggestion in a brief or petition for rehearing that our cases on a particular point are in conflict. After many years of devoting time and attention to the issue, we have concluded that conflicts in our caselaw do occur, but they are very rare. And when they are brought to our attention, even on relatively trivial points, we immediately take steps to correct them. The charge that our caselaw is riddled with hidden inconsistencies is simply not true—as demonstrated by the fact that Judge O'Scannlain, who meticulously documents many other propositions in his article, offers not a single example.

Judge O'Scannlain also expresses concern about the fact that we are one of the slowest among the circuits in disposing of our cases. But size bears no relation to the speed with which a court decides cases, as is borne out by the fact that the First Circuit, though the smallest, with only six judges, is not nearly the fastest circuit. The mix of cases and the number of judicial vacancies are what make a difference; they bear directly on how many cases the court can decide in a given period.

At this time and for some years past, the Ninth Circuit has had four vacancies, accounting for some fourteen percent of its authorized positions; within the recent past we had as many as ten vacancies, more than a third of our positions. The delay in filling vacancies has, not surprisingly, caused delay in getting cases to the judges, pushing our average case disposition time approximately four months above the national average. However, what Judge O'Scannlain fails to mention is that, once the cases are submitted to the judges, we are the second-fastest among the circuits in disposing of them. If size were the dispositive factor, one would expect our court to be dead last. In fact, quite the opposite is the case; once our judges receive the cases, we are unusually fast in deciding them. When our court is fully staffed, the delay in deciding cases will be eliminated; size has nothing to do with it.

Then there is the bugaboo about collegiality, and the supposed absence of it on a large court. Collegiality is an elusive concept and few judges or lay people agree about what it means. One common meaning concerns the ability of judges to get along with each other on friendly terms—enjoying an atmosphere of bonhomie and mutual respect. In that sense, we consider ourselves as collegial as any other court, far more than many. Though we often disagree, we seldom engage in the kind of ad hominem attacks that some other courts are known for. And, whatever our differences, we have not resorted to publicly impugning each other's integrity, or filing charges of misconduct, as has happened in other circuits and state supreme courts, all of them much smaller than ours. Though we have very different views on a variety of matters, including whether our court should be divided, our disagreements are highly professional, never mean-spirited or personal. Indeed, among the reasons we oppose the split is the sad prospect of losing our excellent working relationship with some of our colleagues, like Judge O'Scannlain.

Judge O'Scannlain also seems to say that we lack collegiality in the sense that we can't gain insight into each other's thinking processes, and this prevents us from reaching consensus in difficult cases. The quaint notion that judges on a small court engage in a Vulcan mind meld where they come to assimilate each other's points of view is easily disproved. One need only consider the Rehnquist Court, where the same nine justices worked together for eleven years straight. Were Judge O'Scannlain's theory correct, one would expect that, by the end of that period, disagreements among the justices would have been rare and unanimous opinions the rule. As we know, the opposite is true; differences that existed at the beginning of that period remained—and often grew more pronounced—by the end.

The simple reality of modern appellate judging is that we do not spend endless hours in face-to-face debate trying to hammer out a mutually acceptable solution. Rather, conferences tend to be short; few minds get changed there. The real debate on hard cases takes the form of inter-office memos, and in majority and separate opinions, where judges articulate their views precisely and at length. We all read these memos and opinions, and gain a fairly accurate insight into each other's thinking; sometimes we reach consensus, sometimes we don't. But there is absolutely no evidence that judges who spend more quality time together end up agreeing more often. Indeed, experience teaches that on smaller courts, where judges are forced to deal with each other constantly, acrimony and disagreement may be more common.

Nor is our use of visiting judges remarkably high, as Judge O'Scannlain suggests. During the past year, only 3.4 percent of our cases included the use of such judges, below the national average of 5.1 percent and well below the 11

percent in the Second Circuit and 22.5 percent in the Sixth Circuit. Again there is no relationship between a circuit's size and its use of visiting judges.

Our colleague also disparages our limited *en banc* process, which calls for a panel of fifteen judges (formerly eleven) to decide cases taken *en banc* by vote of the full court. He overlooks the fact that splitting the circuit will not resolve this problem, for the same reason it will not resolve many of the other issues he raises. Under any of the pending split proposals, the remaining Ninth Circuit would have at least twenty-one authorized positions, far too large for a viable all-hands *en banc* panel; this is just two short of the number of judges we had when we first adopted the limited *en banc* process in 1980. Whether or not the circuit is split, the great majority of the circuit's cases will continue to be decided by a court where a limited *en banc* is the only workable procedure. Moreover, as other circuits are now approaching twenty judges, it is only a matter of time before they too will have to adopt this procedure.

There is nothing sinister or illegitimate about a limited *en banc* court. Traditionally, *en banc* meant hearing by the full court, but this practice arose in an era when circuits were small and a full-court *en banc* was not a problem. Nothing about *en banc* consideration requires the participation of the full court. Having circuit law made by a limited *en banc* court, which consists entirely of the court's active judges, is certainly no less legitimate than the widespread practice of making circuit law by three-judge panels consisting of a single active judge, a senior judge and a judge visiting from another court.

Cases are taken *en banc* largely for two reasons: First, there is a conflict in the law of the circuit which cannot be resolved by a three-judge panel because such panels have no authority to overrule circuit precedent. And, second, because the case is one of exceptional importance, it merits consideration by more than three judges. Neither of these functions requires the participation of every single judge of the court of appeals. A limited *en banc* court, consisting of a representative portion of the full complement of judges, ensures that all competing views will be considered and reflected in majority, concurring and dissenting opinions. And, because the judges are drawn randomly for *en banc* panels, the results will be the same as would be reached by the full court in the overwhelming number of cases. Since eighty-five percent of our *en banc* cases have been decided by seven-to-four or greater majorities, it is the rare case that would have been decided differently by a full-court *en banc*.

Finally, Judge O'Scannlain relies on history, but history cuts largely against him. To begin with, the redrawing of circuit lines—at least as to modern circuits—has occurred very rarely, and never over the opposition of the affected judges. Judge O'Scannlain's reference to the frequent redrawing of circuit borders prior to the Civil War era is entirely beside the point. While circuits existed from the early days of the Republic, they meant something very different from what they do today because there were no circuit judges and no permanent courts of appeals. Rather, until late in the 19th century, Supreme Court justices rode circuit, and heard appeals on panels consisting of themselves and local district judges. Thus, a change in circuit boundaries affected only what geographic area a particular justice would be required to patrol.

The circuits as we know them were first created in 1891 when Congress established the courts of appeals. Since that time, Congress has been chary about re-drawing circuit lines, and has done so only twice—when it split off the Tenth Circuit from the Eighth in 1929, and then, again, in 1981, when it divided the Fifth Circuit to create the Eleventh Circuit. In both instances, the split enjoyed the support of the affected courts, because the circuits could be divided into units of roughly equal size in terms of territory and caseload. For reasons already explained, this is impossible to do in the Ninth Circuit.

By contrast, the overwhelming number of Ninth Circuit judges have repeatedly and consistently opposed a split; only three active judges support it. Split opponents include judges appointed by Republican and Democratic presidents; judges appointed as early as 1961 and as late as 2003; judges from California, Arizona, Nevada, Oregon, Washington, Hawaii and Montana; active and senior judges; men and women. Neither ideology nor personal convenience animates this opposition; indeed, personal convenience for many of us points the other way. Our opposition, rather, stems from a firm conviction, based on our collective experience, that splitting the Ninth Circuit is a very bad idea for the public we serve.

Aside from the weakness of the arguments supporting the split, we see some very potent arguments militating against it. Because of our size, we have been both required and enabled to work smarter and become more productive. To ensure consistency in our caselaw, we have implemented a case monitoring and issue-spotting system that alerts panels to other pending cases raising the same legal issues. We have a pre-publication report that digests upcoming cases and alerts our judges before opinions are actually published; on numerous occasions, this has resulted in halting publication of opinions because of a previously-unidentified conflict. We were the first circuit to institute a Bankruptcy Appellate Panel, which now hears five hundred appeals a year, easing caseload pressure for our district judges. We have an active appellate mediation program that resolves one thousand cases a year. We are the only circuit with an appellate commissioner, who resolves over eleven hundred fee applications and four thousand motions a year; the appellate commissioner has helped resolve these matters more quickly and consistently than before, gaining the unanimous acclaim of our bar. Long before anyone had heard of the Internet, we pioneered the use of e-mail for the conduct of court business. We have also made active use of tele-conferencing for motions, screening and administrative work. These procedures have saved our judges many days of travel every year. The White Commission, which studied the operations of the circuit courts, noted in its 1998 report that the Ninth Circuit was well run and remarked on the

court's many innovative procedures. It concluded that "[s]plitting the Ninth Circuit itself would be impractical and is unnecessary. As an administrative entity, the circuit should be preserved without statutory change."

Only forty years ago, every circuit had fewer than ten judges; today, only one circuit, the First, does. Every other circuit now has more judges than the Ninth Circuit had in 1965. It will be no more than a generation or two until other circuits are as large as we are today. The idea of splitting circuits in order to keep the number of appellate judges small is a pipe dream. How, for example, could one profitably split the Fifth Circuit—which now has seventeen judges—without splitting Texas? Or the Second Circuit without splitting New York? And what will the repeated splitting do to the burden on the Supreme Court in resolving inter-circuit conflicts? Soon, probably very soon, other circuits will find themselves in the situation in which the Ninth Circuit finds itself today, and they will have no choice but to adapt, as we have. Our innovations will provide valuable experience about how to deal with the inevitable problem of size.

In addition, by aggregating its resources, a large circuit can provide to districts with smaller caseloads significant assistance that would not otherwise be available, such as courthouse design and maintenance, human resource consulting and technology support. Through close communication among the district courts, the Ninth Circuit has been able to supply visiting district judges when a region experiences unexpected vacancies or a surge in case filings. These reasons, among many others, are why numerous bar associations including those of Arizona, Washington, Montana and Hawaii oppose a split of the Ninth Circuit.

We also believe that splitting the Ninth Circuit will have another important, though subtle, deleterious effect. While district courts have traditionally been considered local in character, circuits have been national or at least regional. It has been a strength of the federal appellate courts that their judges hail from several states, thus bringing to bear a wider perspective than their district court colleagues. Having several states in the same circuit also ensures that a multitude of senators are involved in vetting judicial appointments to the courts of appeals. Thus, no circuit today—save the D.C. Circuit, which is sui generis—comprises fewer than three states. Splitting the Ninth Circuit will break with this important tradition; under the legislation that is currently under consideration, the new Ninth Circuit would consist of only two states—California and Hawaii. Because of California's hugely disproportionate size, the overwhelming number of the new Ninth Circuit's judges will be appointed from California. This will change the regional and national character of our court and turn it, in effect, into a California Federal Court of Appeals. Once the three-state precedent is cast aside, it will not be too long before we have a Texas Federal Court of Appeals, a New York Federal Court of Appeals and perhaps a Florida or Illinois court as well. We believe this course is neither wise nor prudent, as we have found that a diversity of experiences and viewpoints, brought to us by judges from a multitude of states and geographic regions, has had a positive and invigorating influence on our decision-making process. The principle of the regional federal circuits is important and should not be lightly discarded.

We do not dispute that the increase in the federal caseload, and the appellate caseload in particular, presents a serious challenge to the orderly administration of justice. We do disagree, however, with those who would answer this challenge by breaking up what we consider to be an effective, well-organized and efficiently-run organization. Splitting the Ninth Circuit would be a costly enterprise, estimated by the Administrative Office of the United States Courts at some $96 million, plus additional costs of $16 million a year for operating two circuits rather than one. At a time of budget austerity, it seems wasteful and counterproductive to spend that kind of money for a net loss in efficiency.

There are, indeed, measures Congress might consider to deal with our caseload problem. In addition to adequately staffing our court by filling vacancies, Congress might look to the reasons for the increase in appellate caseloads. For example, we and the Second Circuit have suffered a huge number of filings (some six thousand cases in our court) in immigration cases. This has come as a direct result of what is known as "streamlining" on the part of the Board of Immigration Appeals, which has recently released thousands of cases from its docket after giving them only cursory review. These cases have found their way into the federal courts of appeals, and our court and the Second Circuit are the ones most directly affected by this practice. While this problem may be only temporary, Congress may well want to consider providing a more effective administrative appeal process.

Finally, we oppose the proposed split of the Ninth Circuit to the extent it is motivated by partisan political considerations or unhappiness with some of our decisions. In this regard, we are confident that we speak not just for ourselves, but also for those judges who favor a split. Whatever our other disagreements, we are united in our view that whether to split the Ninth Circuit should be governed by the kind of administrative and efficiency issues we have discussed in these pages, and not by a desire to punish our court for its decisions.

In sum, we believe the case for splitting the circuit has not been made. Yes, we are big and our territory is wide, but we have shown that we can function effectively and efficiently despite—indeed because of—our size. Large organizations, whether they be corporations or courts, profit from economies of scale. We have made size our friend rather than our enemy; other courts of appeals will have no choice but to follow suit, because in one generation, two at the most, they will be where we are today. Which is why the overwhelming number of judges of the Ninth Circuit, and the lawyers who practice before us—the people who know the most about the court's operation—strongly oppose the split. The time has come to put this bad idea behind us and get on with the business of administering justice.