Contemplating the Future of the Federal Courts of Appeals

Chief Judge Edward R. Becker[*]

The principal question before us is circuit structure, with particular reference to circuit size. My point of departure is the Long-Range Plan ("LRP") for the Federal Judiciary promulgated in December 1995 by the Judicial Conference of the United States. The commentary to LRP recommendation seventeen states:

> In principle, each court of appeals should consist of a number of judges sufficient to: maintain traditional access to, and excellence of, federal appellate justice; preserve judicial collegiality and the consistency, coherence, and quality of circuit precedent; and facilitate effective court administration and governance. An appellate "court," in this special sense, is not merely an administrative entity. Nor should it consist of a large group of strangers-like a jury venire— who are essentially unknown to one another. Rather, a "court" is a cohesive group of individuals who are familiar with one another's way of thinking, reacting, persuading, and being persuaded. The court becomes an institution, an incorporeal body of precedent and tradition, of shared experiences and collegial feelings, whose members possess a common devotion to mastering circuit law, maintaining its coherence and consistency (thus assuring its predictability), and adjudicating cases in like manner.[1]

In my view, the logical corollary of this language is that, when a circuit is so large that an individual judge cannot truly know the law of the

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[*] Chief Judge Becker is the United States Circuit Judge for the Third Circuit, where he has served since 1982, and as chief judge since February 1998. Prior to his appointment to the Third Circuit, Chief Judge Becker served as United States District Court Judge for the Eastern District of Pennsylvania from 1970 until 1982 and worked in private practice from 1957 to 1970 in Philadelphia.

[1] JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS 44 (December 1995).

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circuit and by that I do not mean having a law clerk or staff attorney look it up when the need arises, the circuit is too large and must be split.

In the Third Circuit, we circulate all published opinions to the full court at least eight days before filing. This practice enables the judges to read them before they are filed and, by e-mail correspondence, to point out problems to insure the consistency and coherence of circuit law. Moreover, and most importantly, the circulation of opinions allows a judge to master circuit law. To be sure, a judge can always read the slip opinions after they are filed. In practice, however, this will often not happen, given the demands on judicial time and the lack of pressure to do so after the opinion is published.

My point is that I cannot imagine judges in a circuit as large as the Ninth, with its staggering volume of opinions, being able to do what the judges in the Third Circuit do to master circuit law. It is not possible unless the judges receive bionic injections or have super-human brain power. If that assumption is correct, the Ninth Circuit, or any circuit that cannot meet this rough rule of thumb, needs to split.

There are, of course, other compelling reasons to split the Ninth Circuit. In a circuit as large as the Ninth there are the pitfalls associated with limited en banc review that were discussed this morning. I note my agreement with Judge Rymer's point of view on that issue.[2] There is also the matter of collegiality. I am informed that some judges of the Ninth Circuit have not sat with each other for three or four years. In contrast, in the other circuits, the judges sit with each other frequently. That way one gets to know one's colleagues, to develop a level of trust, and to understand the way in which one's colleagues think and deal with problems. The result is an enhanced appellate process.

I cannot overemphasize the importance of the notion of the law of the circuit.[3] It is not a measure of judicial efficiency. Rather it is a qualitative matter, founded upon the notion that only when the judges are able to master circuit law can they sufficiently and with necessary celerity engage each other substantively. When the circuit gets too large, quality suffers. Having in mind that we demand excellence of courts of appeals, and that those courts are essentially the courts of last resort, this is a matter of great importance to our federal polity. And although I

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[2] *See* Hon. Pamela Rymer, UC Davis School of Law Symposium, *Managing the Federal Courts: Will the Ninth Circuit be a Model for Change?* (Transcript of Videotape No. 1 at 9-10) (March 24, 2000.) Hereinafter the transcripts of the symposium videotapes will be referred to as *Symposium Transcript.* All transcripts are on file with UC Davis Law Review.

[3] *See generally* Honorable Gerald Bard Tjoflat, *The Federal Judiciary: A Scarce Resource,* 27 CONN. L. REV. 871, 872-73 (1995).

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understand that Professor Hellman's study reflects that there is consistency and coherence in Ninth Circuit jurisprudence, I must tell you that the private reports I get from judges who are on or have sat with the Ninth Circuit are quite different.[4]

For all of these reasons, the Ninth Circuit should be split. Further, because the subtitle of this program is whether the Ninth Circuit should be a model, I think it appropriate for me to put in my two cents on how it ought to be split. Given the size and distribution of its caseload, there appears to be no feasible way to divide the Ninth Circuit except to divide California. The landscape in this area has been changed by the recent adoption by the California Supreme Court of a certification procedure allowing federal courts in California to certify questions of state law to that court.[5] Certification alleviates concerns that a California split would result in inconsistent determinations of state law. I also believe that if there is an issue not resolved by the certification procedure, an en banc panel of the two circuits should be convened to predict California law. That would hardly be the end of the world. The problem is no different with respect to federal law, where two circuit courts make contrary holdings. For example, the Second Circuit in New York may announce one resolution of a contested federal issue, and we in Philadelphia may reach a contrary conclusion - both affecting parties to a case in Newark, right across the river from New York City.

I view the White Commission's proposal for divisions as temporizing, and as poor policy. If a circuit is too large, we should divide it. Then you get a real circuit. I rest my case on the problems with divisions on what Professor Oakley and Ms. Krinsky said this morning.[6] Talk about opening a can of worms! They spoke of Balkanization. I would call it Byzantine. It seems to me that that is what you get with divisions.

Is there a problem if we divide and thereby create more circuits? I do not see one. The Supreme Court has more than adequate capacity to resolve circuit splits. The Supreme Court's docket is down from around 170 cases to 100 cases.[7] If there were ten more circuits, the Supreme Court, with its current docket, could resolve circuit splits without the

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[4] *See* Arthur D. Hellman, *Maintaining Consistency in the Law of the Large Circuit, in* RESTRUCTURING JUSTICE 83-86 (Arthur D. Hellman, ed., 1990).

[5] *See* Cal. Ct. R., Div. I, R. 29.5.

[6] *See* John Oakley, 1 *Symposium Transcript* 12-13; Miriam Krinsky, 2 *Symposium Transcript* 9-10.

[7] *See* The Justices' Caseload, available at Supreme Court Official Web Site (November 16, 2000), http://www.supremecourtus.gov/about/justicecaseload.pdf (on file with author).

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necessity of an intermediate tribunal. As we have seen, the suggestions for a National Court of Appeals have disappeared; they are not even on the radar screen anymore in view of the sharply decreasing docket of the Supreme Court.

The data accompanying the LRP support the predictions of Judge Merritt about the huge increase that we may expect in the federal caseload and hence in the size of the federal judiciary.[8] If the data proves correct, redrawing circuit lines and splitting circuits will be necessary. I note, however, that we can also mollify the problem by combining some circuits.

How serious a problem is it to redraw circuits? The last time the circuits were redrawn was over a century ago. And so I ask what for me is a rhetorical question: If we redraw circuit lines every 110 years, will the republic stand? You bet it will. That's my proposal - every 110 years! The next time we do it is in 2110! The republic will survive until then and thereafter. Would circuit realignment cause problems, including dislocations, and entail costs? Certainly. But it seems to me that the ultimate goal - maintaining the excellence of the federal appellate judiciary and the coherence and consistency of circuit law, and the concomitant necessity of creating a group of judges who can truly master circuit law, counsels moving in this direction.

Now, what about the White Commission's proposal authorizing courts of appeals to organize themselves into divisions? I have already given my view on divisions - it is a bad idea. But if we are going to have divisions, I also disagree with the White Commission's proposal authorizing courts of appeals with more than fifteen judges to organize themselves into divisions. I view this as a deleterious measure, which would politicize courts of appeals and divert them from their primary duty of case resolution. The problem is that the availability of the division option will be a brooding omnipresence that will come up each year, or each time a new judge is added, that can poison the atmosphere of a collegial court.

This is acutely so in circuits that are ideologically divided. The Fourth Circuit is a prime example. This proposal would inject highly charged divisive issues into the circuit chemistry, such as the number of judges who can serve in a division, the configuration of the division lines and boundaries, the frequency with which division lines might shift, and even whether division lines will be moored to state lines at all. At best, resolving these questions will operate as a drain on, and diversion of,

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[8] Hon. Gilbert S. Merritt, 3 *Symposium Transcript* 8-9.

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judicial energies. Given these consequences, I view it as no answer to say that the courts of appeals can decline to divide. Has the dispute about the Ninth Circuit diverted and drained the energies of its judges and staff? Of course it has. And, so I repeat, if and when the time comes to split a circuit, let's split the circuit. Congress can do so on the recommendation of the Judicial Conference.

What about the notion of regional circuits? When Dean Perschbacher and Professor Oakley introduced this program this morning, they talked about culture - the culture of a circuit, the culture of a bar.[9] And they talked of history. History and culture are important to our judicial system. The idea of regional circuits, which was endorsed by the LRP, is viable because it comports with the nation's history and with our culture. It also accommodates concerns of efficiency and cost in terms of travel. We ought to encourage oral argument, yet when circuits get too far flung it is difficult for the lawyers who will argue these cases to get from one place to another.

If we believe in regional circuits, I do not see how Alaska and Arizona can in any reasonable sense be deemed part of the same region. Arizona, Idaho, and Montana seem to me to be much more indigenous to a mountain state circuit, much closer to the Tenth Circuit than they are to the Ninth. Most of the other circuits are regional in character, but the regionality of some are questionable. What do Michigan and Tennessee, (both in the Sixth Circuit) have in common in terms of the notion of regions? Concomitantly, why do South Dakota and Arkansas belong in the same (Eighth) circuit?

Now, I understand and accept the value of long-range institutional arrangements and the importance of enabling lawyers to rely on precedent, and so a strong case has to be made before disrupting circuit alignment. Thus, what I am now about to propose is not something that I advance with confidence that many will take it seriously. But, in terms of the doomsday prediction of Judge Merritt and the LRP about what is going to happen to the caseload in 30 years, when the Ninth Circuit will need 100 judges to handle the work, it may make sense. If we were to redraw circuit lines, I would do it as follows:

> First Circuit: New England Circuit: Maine, Massachusetts, Rhode Island, New Hampshire, Vermont, and Connecticut (and Puerto Rico)

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[9] Rex Perschbacher, 1 *Symposium Transcript* 1; John Oakley, 1 *Symposium Transcript* 11-15.

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Second Circuit: Metropolitan Circuit: New York and New Jersey

Third Circuit: Mid-Atlantic Circuit: Pennsylvania, Delaware, Maryland, and the District of Columbia (and the U.S. Virgin Islands)

Fourth Circuit: Mid-South Circuit: Virginia, West Virginia, North Carolina, South Carolina, and Tennessee

Fifth Circuit: South Central Circuit: No change (Texas, Louisiana, Mississippi).

Sixth Circuit: Middle Border Circuit: Ohio, Michigan, Kentucky, and Indiana

Seventh Circuit: Great Lakes Circuit: Illinois, Wisconsin, and Minnesota

Eighth Circuit: Plains Circuit: Arkansas, Iowa, Missouri, Nebraska, North Dakota, South Dakota, Kansas, and Oklahoma

Ninth Circuit (divide into two circuits):

(A) Cal-Pacific Circuit: Southern District of California, Central District of California, Guam, Hawaii, Nevada, and Northern Mariana Islands

(B)Northwest Circuit: Alaska, Northern District of California, Eastern District of California, Idaho, Montana, Oregon, and Washington

Tenth Circuit: Mountain States ("Four Corners") Circuit: Colorado, New Mexico, Utah, Wyoming, and Arizona

Eleventh Circuit: Southeast Circuit: No Change (Georgia, Florida, Alabama)

Finally, I will comment on the matter of the efficiency of the circuit as an administrative unit. While I respect the admirable management of the Ninth Circuit under the leadership of Chief Judge Hug and Circuit Executive Greg Walters, I am not persuaded by their contention that size does not matter in administration. I believe that a circuit can be better administered in smaller units. My recent experience in the Third Circuit with innovations in the management of death penalty litigation, spurring

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pro bono activity at the bar, and dealing with circuit libraries, have shown me that a chief circuit judge (who must after all attend to judicial duties as well) and a circuit executive can be more effective when they deal with smaller and more cohesive units.

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