Innovations of the Ninth Circuit

Judge James R. Browning[*]

My assignment is to summarize the various innovations instituted by the Court of Appeals for the Ninth Circuit. I believe these innovations are highly relevant to the question before us: will the Ninth Circuit be a model for change?

As we all know, the innovations arose out of necessity. In the late 60s and early 70s, the Ninth Circuit's caseload exploded.[1] In 1961, the year I joined the court of appeals, 443 appeals were filed.[2] Thirteen years later the number reached 2,697, nearly a seven-fold increase.[3] This year the total may surpass 10,000.

In 1973, Congress established the Hruska Commission to search for a solution to the caseload expansion.[4] The Commission recommended, among other things, that the Fifth and Ninth Circuits be divided.[5] The Commission reasoned that courts of appeal of their size, fifteen and thirteen judges, respectively, were too large to function effectively.[6] It is a myth that large appellate courts cannot function effectively, but a myth that still plagues us today. Indeed it is the major premise of the Commission's recommendation that the Ninth Circuit Court of Appeals be restructured.

The Commission concedes there is no evidence that the Ninth Circuit Court of Appeals is not operating effectively now, except in minor respects we are in the process of correcting. There is no evidence the

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[*] Circuit Judge James R. Browning was appointed a judge of the United States Court of Appeals for the Ninth Circuit by President Kennedy in 1961. From July 1976 to June 1988, he served as Chief Judge of the Ninth Circuit.

[1] *See* Administrative Office of the U.S. Courts, *Table Reports of the Proceedings of the Judicial Conference of the United States* 181, tbl. 25 (1975).

[2] *Id.* at 183, tbl. 26.

[3] *Id.*

[4] Thomas W. Church, Jr., *Administration of an Appellate Leviathan: Court Management in the Ninth Circuit Court of Appeals*, *in* RESTRUCTURING JUSTICE 229 (Arthur D. Hellman, ed., 1990).

[5] *Id.*

[6] *Id.*

Ninth Circuit will become "too big" to continue to operate effectively. The truth is no one knows the maximum number of judges that can function effectively as a court of appeals.

The Ninth Circuit grew from three judges to seven in the 1930s,[7] seven to nine in 1954, nine to thirteen in 1968, thirteen to twenty-three in 1978, and twenty-three to twenty-eight in 1984.[8] Before each increase, critics assured the world that our court had exceeded its maximum practicable size before the new judges arrived. They were always wrong.

Before the court increased to seven, critics commented that "a seven-member court, with varied ideological and jurisprudential viewpoints, could not provide justice across the circuit's vast geographical jurisdiction." Professor Charles Allen Wright wrote that when he clerked for Learned Hand on the Second Circuit in 1949 and 1950: "it seemed perfectly clear that the maximum number of judges a court of appeals could have without impairing its efficiency was six," the number of judges then on the Second Circuit. As Professor Wright said later: "in 1950 when we made these comments we were illustrating in striking fashion de Toqueville's admonition against confusing the familiar with the necessary."

The predictions of the Judicial Conference of the United States proved no sounder. In 1964, the Judicial Conference opined that the maximum number of judges on a court of appeals should be nine, the number of Justices on the Supreme Court. Eight years later the conference drew the line at fifteen. In 1977, Chief Justice Burger suggested, as the Conference had, that the magic number was nine, the size of his District of Columbia Court of Appeals. "By any measurement of logic, reason, or standards of judicial administration," the Chief Justice said, "the Ninth Circuit cannot function effectively as one unit with 13 circuit judges." Today every circuit, other than the First, has a court of appeals of eleven or more.

One of the principle bases relied upon by the Commission in deciding that our court of appeals is too large was a survey of federal circuit judges across the country in which a majority expressed the opinion that the optimal size of a court of appeals was between eleven and seventeen.[9] I suggest it is far more significant that 2/3 of the judges and

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[7] One judgeship was created in 1929, one was created in 1935, and two more were created in 1937. This brought the total from three to seven.

[8] Arthur D. Hellman, *The Crisis in the Circuits and the Innovations of the Browning Years*, *in* RESTRUCTURING JUSTICE 7 (Arthur D. Hellman, ed., 1990).

[9] Commission on Structural Alternatives for the Federal Courts of Appeals, Final Report 29 [hereinafter Final Report]. Citations to Final Report can be found at http://app.comm.uscourts.gov (last visted Oct. 25, 2000). Hard copies of all cited Final

lawyers of the Ninth Circuit reported they were satisfied that the court is functioning well with twenty-eight judges, and ought to be left alone.

Congress rejected the Hruska Commission's suggestion that the Fifth and Ninth Circuits be divided and instead authorized circuits with fifteen or more judgeships to experiment with methods of making a large court of appeals operate effectively.[10] The Fifth Circuit rejected the invitation and in due course was divided into two new circuits: the old Fifth and a new Eleventh Circuit. The Ninth Circuit embraced the invitation and, in the words of one commentator, "inaugurated a decade of innovation and experimentation that was probably without parallel in the history of the federal judicial system."[11] Over the next five years, the time to decide appeals was reduced by half. The Ninth Circuit's backlog was eliminated and all the courts in the circuit succeeded in deciding their caseloads quickly.

The Ninth Circuit implemented several innovations to avoid conflicting decisions by panels of the court of appeals. Eleven judges, rather than the court's full complement of twenty-eight, now sit on the en banc court.[12] This allows the court to effectively review decisions that may create conflicts within the circuit, while relieving individual judges of the burden of participating in every en banc decision. The entire court remains involved, however. All judges participate in the decision to take a case en banc, and the full court can vote to reverse a decision of an eleven-member panel, although this has never happened.[13]

We also sought to avoid intra-circuit conflicts *before* they arose. The process begins before the judges see a case. Staff attorneys "inventory" appeals by identifying the issues raised.[14] This information is fed into the computer so cases raising the same issue can be calendared before the same panel, if the panel's schedule permits. If that is not possible, each panel is informed of the pendency of the other cases raising similar issues.[15] When two panels are presented with the same issue, the panel whose case is submitted first has priority. Other panels are required to defer submission until the first panel makes its ruling.

The next line of defense against conflicts comes before a panel files an opinion designated to be published. Each day, the staff attorneys

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Report documents are on file with the UC Davis Law Review.

[10] *Id.* at 33.

[11] Hellman, *supra* note 8, at 7.

[12] Final Report, *supra* note 9, at 32.

[13] *Id.*

[14] *Id.* at 31.

[15] *Id.*

disseminate a "pre-publication report" to all judges and law clerks, with a brief description of each holding. This allows all members of the court to review Ninth Circuit decisions a few days before they are released, to help ensure that proposed opinions do not conflict with existing court decisions. These pre-publication reports include a list of pending cases, which might be affected by the decision, alerting future panels to new precedent so that they may avoid creating unnecessary intra-circuit conflict.

Another noteworthy series of innovations were designed to make the administration of justice more efficient. Perhaps the most significant was the creation of screening panels to decide simple cases.[16] As I've said, all appeals are inventoried by central staff attorneys after the briefs have been filed. In addition to identifying issues raised on each appeal, the staff attorneys assign a weight or degree of difficulty to each case. The simplest cases, those that are controlled by clear and well-established precedent and can be disposed of with little effort, are assigned to screening panels. Each month a screening panel composed of three judges meets to decide these appeals.[17] Staff attorneys orally present the case to the panel, and the judges decide it. A screening panel will hear approximately 140 to 150 appeals during the week it meets. If any one of the three judges feels an appeal raises an issue that should be decided by an argument panel, he or she may exercise a unilateral prerogative to kick the case from the screening panel to an argument panel, where the judges will have the benefit of oral argument and extensive research by their personal law clerks.

The following are a few of the many other innovations adopted over the years:

1. An executive committee of the court of appeals was created to facilitate administrative decisions and to conserve judge-time, an innovation subsequently emulated by the Judicial Conference of the United States.

2. The first completely computerized docketing system in the federal appellate courts was installed.

3. A Circuit Court Mediation Program was created offering services of highly qualified and experienced mediators to

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[16] *Id.*

[17] *Id.*

facilitate early settlement of selected civil appeals. The program targets the most complicated, difficult to resolve cases. Last year, the circuit mediators considered 886 cases and settled 737 of them.

4. An Appellate Commissioner position was created to manage the payment of Criminal Justice Act vouchers and perform other selected quasi-judicial tasks, relieving judges of heavy and time-consuming duties.

5. High-quality video conferencing equipment was installed in the court's principle locations, Pasadena, San Francisco, Seattle and Portland, to reduce the travel time and expense of attending court meetings and participating in oral screening panels.

6. A website was established to provide access to important court materials and information to the Bar, the media and the public. Opinions are available at the website by noon on the date of release. Current and future calendars; telephone contacts; general orders; local rules; model jury instructions and other frequently requested documents are also provided.

7. In perhaps the most significant innovation of them all, a long-range planning committee was created under the chairmanship of Chief Judge Procter Hug to formalize and institutionalize the Court's continuing system for planning and initiating additional innovations as they may be needed. Nine specific goals were established: 1) ensuring the quality of the court's decisions and its decision-making process; 2) ensuring consistency of the court's decisions; 3) resolving cases promptly; 4) providing convenient and effective access to the court; 5) treating all litigants and counsel fairly and with respect; 6) providing appellate services at reasonable cost to litigants and taxpayers; 7) providing a positive work environment for all court personnel; 8) maintaining positive relations with other courts; and 9) improving the public's understanding of and confidence in the judicial system. Each year the Chief Judge, in consultation with the Executive Committee, prepares an action plan specifying tasks the court will undertake during the year and identifying the person or

persons responsible. Successes and failures in implementing the action plan are evaluated at the end of each year. All of the Court's operations are carefully evaluated and, hopefully, improve each year on a continuing basis.

8. A Bankruptcy Appellate Panel (BAP) was established to hear bankruptcy appeals for the entire circuit, an innovation Congress recommended in all circuits.[18]

9. Circuit-wide permanent conferences of chief district judges, chief bankruptcy judges, magistrates, clerks, and chief probation officers were established to act as a clearinghouse for communication throughout the circuit and to generate proposals for improvements in judicial administration.

10. A Ninth Circuit proposal to decentralize the administration of the federal judicial system, particularly in procurement and budgeting, resulted in the adoption of a highly successful pilot program nationwide.

11. A study was completed, and changes in complaint procedures implemented to promote race, gender and religious fairness in the court.

12. The Ninth Circuit Judicial Conference was reorganized as an effective forum for continuing dialogue between bench and bar on improving the administration of justice in the courts of the circuit.

13. Talents of lawyers of the Ninth Circuit were utilized by making them members of the committees of the Judicial Council, the Ninth Circuit Conference, and the Senior Advisory Board. A representative group of lawyers from each of the thirteen districts in the Ninth Circuit meets annually with the trial judges of the district and the chief judge of the circuit to develop and implement improvements in the operation of the courts in their districts.

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[18] Gordon Bermant & Judy B. Sloan, *Bankruptcy Appellate Panels: The Ninth Circuit's Experience*, 21 ARIZ. ST. L.J. 181, 182-86 (1989).

14. A Ninth Circuit historical society was founded to encourage the circuit to recapture its past and preserve a record for its future. Similar societies have been formed in several circuits.

15. Councils of state and federal judges were organized in each of the nine states of the circuit.

16. The Western Justice Foundation was created to encourage collaboration of various groups dedicated to improving the administration of justice.

The court of appeals has suffered from extended and numerous judicial vacancies. In each of the last three years, the court has lost between seven and eight judge-years of judicial work because of these vacancies. Despite the fact, the court continues to operate efficiently. As of this week, we have only four vacancies, the smallest number since 1996. I have no doubt that when these vacancies are filled, and we continue in our long tradition of innovation and self-evaluation, the country's largest circuit will also be the most efficient.

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