Introduction to the Symposium

Chief Judge Procter Hug, Jr.[*]

This is an important seminar that UC Davis Law School is sponsoring to examine the present and future structure of our federal court system. This is a particularly valuable seminar because UC Davis has brought together some of the people who have devoted the most careful thought to the future of the federal courts. I am particularly pleased with the subtitle "Will the Ninth Circuit be a Model for Change?" Indeed, we believe *we have been, we are,* and *should continue to be* a model for the future, of how a large circuit court can operate efficiently and effectively.

It is important to note that the Ninth Circuit does not advocate that other circuits should necessarily follow this model anymore than we believe those in other circuits are equipped to determine what works best in the Ninth Circuit. Each area of the country has a different composition of states and populations and a different legal culture. What works well in one circuit may not be the best method of operation in another circuit. Just as our nation is composed of fifty independent states that operate quite differently and serve as laboratories for new ideas, so circuits should not be required to fit in one mode of operation. Circuits should be left to experiment, revise procedures, and determine what is best for efficient, effective, and fair administration of justice in their areas.

It is also important to keep in perspective that the vast majority of all litigation is conducted in the state courts. Of the ninety-one million filings in the country, only about two million are filed in the federal courts.[1] So we have to keep in mind that the federal judicial structure is

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[*] This piece is an annotated and slightly modified version of former Chief Justice Hug's opening remarks delivered, on March 24, 2000, at the Symposium on Managing the Federal Courts at the UC Davis School of Law. *See* 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 2-7) (March 24, 2000.) Hereinafter the transcripts of the symposium videotapes will be referred to as *Symposium Transcript*. All transcripts are on file with the author.

[1] Chief Judge Procter Hug, Jr., Address at the 76th Annual Meeting of the American Law Institute (May 17, 1999), *in* REMARKS AND ADDRESSES AT THE 76TH ANNUAL AMERICAN

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currently designed to handle only about 2 percent of the litigation in the country. Thus, when Congress federalizes various new areas of criminal law or adds new causes of action that may be brought in federal courts, it is vital that Congress be aware of the effect it has on the structure of the federal court system and provide the judges and the financial support to handle the additional caseload. It is obvious the magnified effect that adding one hundred thousand cases to the federal court system will have, as opposed to spreading the cases throughout the state court system.

There is no big structural problem with adding trial judges because they operate as independent courts, and the number of district judges and bankruptcy judges has generally kept pace with the caseload. The structural problem arises with the courts of appeals because appellate circuit judges have to operate as one court. During the past fifteen years, the appellate caseload has increased about 68%.[2] More appeals mean more circuit judges on a court, more circuit courts, or continued expansion of the circuit judges' caseload.

At the upper end of the spectrum, the Supreme Court has taken a sensible approach by limiting the number of cases the Court takes to those it believes it can handle effectively. The number of decisions in cases the Supreme Court takes has actually diminished from 124 in 1984 to about seventy-five to eighty-five in the last several years. This is a decrease of about 40%.[3] Courts of appeals, however, have a different problem because they are required to accept all appeals, with no certiorari discretion, as is available to the Supreme Court. It is the structure of the appellate court that is dictating how our circuits are organized. In order to deal with the increasing appellate caseload, there are essentially three alternatives:

1. Add judges to the circuit courts of appeal.

LAW INSTITUTE MEETING 4, 5 (1999).

[2] *See* JUDICIAL BUSINESS OF THE UNITED STATES COURTS, 1999 ANNUAL REPORT OF THE DIRECTOR 84 tbl. B (1999) (indicating that there were 54,693 appeals filed in 1999); Commission on Structural Alternatives for the Federal Courts of Appeals, Final Report 14 tbl. 2-3 (Dec. 18, 1998) (indicating that there were 32,616 appeals filed in 1984) [hereinafter Final Report]. Citations to Final Report can be found at http://app.
comm.uscourts.gov (last visited Oct. 25, 2000). Hard copies of all cited Final Report documents are on file with the UC Davis Law Review.

[3] *See* Final Report, *supra* note 2, at 12 tbl. 2-1 (showing 124 Supreme Court opinions in 1984 as opposed to 76 in 1997); *see also* Michael H. Koby, *The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique*, 36 HARV. J. ON LEGIS. 371, 384 tbl. I (1999) (describing Supreme Court's recent docket decline).

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2. Create more circuits, with a smaller number of circuit court judges.

3. Continue to accept a larger and larger caseload, without increasing the number of circuit judges.

The most unsatisfactory solution, in my opinion, is the latter one, adopted by one circuit, which is just to continue to accept an increasing caseload without increasing the number of judges, simply in order to remain a small circuit court. This can only be done with greater delegation or a less thorough review by the judges. It is true that in recent years we have had a larger number of frivolous or easily resolved cases, particularly some of the prisoner civil rights cases and some pro se cases. The Ninth Circuit, and most other circuits, have developed ways of separating these for special treatment so that a great deal of time is not spent on frivolous or easily resolved cases. However, once this has been done, and the cases of substance remain, the only way to handle an overload of these substantive cases is to adopt short cuts, such as judgment orders, restrictions of oral arguments, more delegation to law clerks and staff, or a more limited review by the judges - none of which is satisfactory.

I view this as the greatest threat to the continued excellence of the federal judiciary. This is a matter that I believe should concern all of us, because as a circuit court continues to accept large per-judge caseloads there is an inevitable reduction in the time a judge has to devote to each case in order to render a fair decision and a quality opinion. Evidence of this danger is demonstrated by recent congressional hearings that have questioned the necessity for filling judicial vacancies or adding judgeships because a circuit court should become more "efficient" and handle larger per-judge caseloads.

The alternate approach of adding more circuits simply by dividing existing circuits also has serious disadvantages. First, increasing the number of circuits places an additional burden on the Supreme Court to resolve conflicts. Second, dividing circuits creates real practical problems. In many instances, it would require dividing a state, such as California, Texas, Florida, or New York, into two or more divisions.

The Ninth Circuit has opted for the approach of adding the judges that it believes are required to handle the caseload with the deliberation that is required for each case. This has resulted in a larger circuit court of appeals, currently, with twenty-eight authorized judgeships. We have found that this has worked very successfully for nearly twenty years and has been well accepted throughout the circuit.

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Some judges and lawyers from other parts of the country say "an appellate court that large can't work well." The answer is that other circuits have not tried it; we have, and it does work well. We have a very collegial court. The judges get along very well together, even though they may frequently disagree on particular cases. The interaction on the court makes us very familiar with the judicial philosophy and predilections of each of our other judges. At our annual retreat, the warmth and friendship expressed among all of the judges on our circuit court are really inspiring and would be the envy of many smaller courts.

Throughout the years, various senators have made several efforts to split the Ninth Circuit. I must say that the principal motivation has been their dissatisfaction with some of the decisions of our court dealing with the environment, endangered species, Native Americans, civil rights, and death penalty cases. However, these attempts are generally couched in terms of effective judicial administration.

Some commentators assert that the circuit is simply too big, the geographical expanse is too extensive, and the population is too large. However, that is merely a conclusion without analysis. Simply stating that the circuit is "too big" does not address the issue of whether the circuit functions well and whether the current structure of the circuit is the best way to serve the nine western states and island territories. An overwhelming majority of the judges and lawyers in the Ninth Circuit agree that it functions well and that the current structure is the best way to serve this western part of the United States.

I might pause for an interesting historical note. One little recognized fact is that, for a substantial portion of its history, the Ninth Circuit's geographical jurisdiction was larger than it is today. In addition to covering the western states, the court heard appeals from Shanghai, Canton, Tientsin, and Hankau. In what one scholar has called "probably the strangest federal tribunal ever constituted by Congress," the United States Court for China was created in 1906 and remained operative through 1948.[4] The court essentially served as a United States District Court, with appeals going to the Ninth Circuit. Its jurisdiction included civil and criminal matters involving American citizens residing in China and activities of United States corporations operating in China. You probably think that the United States Court for China has been long forgotten. However, a recent law review article, written by Professor

[4] David J. Bederman, *Extraterritorial Domicile and the Constitution*, 28 VA. J. INT'L L. 451, 452, 462-63 (1988).

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Henry Perritt, recommends the creation of a new United States Court for Cyberspace, modeled after the United States Court for China.[5] I would like to make it very clear that the Ninth Circuit is perfectly willing to give up any future claim to include China or to include the entire Universe through a Court for Cyberspace. I would think this would be a reasonable compromise that Congress could willingly accept.

The most recent effort to split the Ninth Circuit, in 1997, resulted in the creation of the White Commission. In the first panel, the distinguished participants will be discussing and evaluating the Commission's Report. In the second panel, we will be hearing opinions and discussions from distinguished judges and scholars from a more general perspective. The final panel will discuss in some detail the successful approach of the Ninth Circuit as a large circuit, how it developed, how it now functions, and how, with its self-evaluation, it is seeking to continue to further improve its operation.

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[5] Henry H. Perritt, Jr., *Jurisdiction in Cyberspace*, 41 VILL. L. REV. 1, 100 (1996).

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