The Advantages of Larger Federal Courts of Appeals

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INTRODUCTION

This Article creates an imaginary conversation between former Chief Judge Wallace and the symposium participants on the desirability of larger courts of appeals. The symposium panels considered the recommendations of the Commission on Structural Alternatives for the Federal Courts of Appeals ("The Commission"), opinions on the future of the federal courts of appeals, and innovations in the Ninth Circuit. Much of the discussion addressed the desirability and feasibility of splitting the Ninth Circuit. This Article will add the viewpoint of former Chief Judge J. Clifford Wallace based on his writings and testimony before the White Commission.

Although he was unable to attend the symposium, Chief Judge Wallace has a valuable perspective on these issues. Chief Judge Wallace was appointed to the Ninth Circuit in 1972 and served as Chief Judge from 1991 to 1996. He has studied the future of the federal judiciary and structure of the federal courts for two decades and written numerous articles on the subject.[1]

While I do not presume to speak for Chief Judge Wallace, he has repeatedly argued that circuits should be combined into fewer, larger units. In his view, large circuits can enhance stability, predictability, and efficiency in the law.[2] More importantly, Chief Judge Wallace has argued that if large circuits are rejected, the circuits will be continually split into smaller units as they grow to handle increased dockets.[3] As a result, federal law will become fragmented and balkanized.[4] Judge Wallace's argument provides a thoughtful counterpoint to the chorus of voices calling for splitting circuits into smaller units.[5] In addition to summarizing the arguments advanced by Judge Wallace, this Article will present some of the concurring views and counter arguments raised at the symposium.

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[1] *See Hearings of the Commission on Structural Alternatives for the Federal Courts of Appeals* (April 3, 1998) (testimony of J. Clifford Wallace, Senior Judge, United States Court of Appeals for the Ninth Circuit), *available at* http://app.comm.uscourts.gov/hearings/chicago/wallace/htm [hereinafter Wallace, *White Commission Testimony*].

[2] *See* Judge Clifford Wallace, *The Case for Large Federal Courts of Appeals*, 77 JUDICATURE 288, 288 (1994).

[3] *See id.*

[4] *See id.*

[5] *See id.*

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I. LARGER CIRCUITS WILL IMPROVE STABILITY AND PREDICTABILITY

Rejecting the view that a large court is inherently unpredictable because of the great number of possible panel permutations, Chief Judge Wallace has argued that a large court is more stable and predictable. Specifically, a large court will produce sufficient case law to enable practitioners to find truly useful precedent.[6] As any practitioner knows, the surest way to predict the outcome of litigation is to find a case on point. When there is no precedent, the lawyer can only speculate on the outcome. Since a large circuit decides more cases, it produces more useful precedents and provides greater guidance to the lawyers and the lower courts. This practical reality explains the decision of some smaller jurisdictions – including Guam – to elect to follow the law of California which provides a generous body of case law for guidance.[7]

Moreover, empirical evidence fails to support the assertion that large courts like the Ninth Circuit are less predictable than smaller courts. As Professor Arthur Hellman's studies concluded, the feared inconsistency in the decisions of the Ninth Circuit simply did not materialize.[8] Professor Hellman conducted two studies of Ninth Circuit decisions, which found that intracircuit conflicts were not a significant problem and that the Ninth Circuit was successful in avoiding such conflicts.[9] As Professor Meador observed, the empirical study "goes far toward rebutting the assumption that such a large appellate court, sitting in randomly assigned three-judge panels, will inevitably generate an uneven body of case law."[10]

Indeed, based on his empirical research, Professor Hellman ultimately agreed with Judge Wallace in echoing the practitioners' view that unpredictability was not the result of too many decisions creating conflicts but the lack of precedent to provide guidance.[11] For this reason,

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[6] *See id.*

[7] *See id.*

[8] *See id.* at 289 (citing Arthur D. Hellman, *Maintaining Consistency in the Law of the Large Circuit, in* RESTRUCTURING JUSTICE 83-86 (Arthur D. Hellman, ed., 1990)).

[9] *See* Arthur D. Hellman, *Dividing the Ninth Circuit: An Idea Whose Time Has Not Yet Come,* 57 MONT. L. REV. 261, 276 (1996) [hereinafter *Dividing*] (citing Arthur D. Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court,* 56 U. CHI. L. REV. 541 (1989) [hereinafter *Jumboism*], and Arthur D. Hellman, *Breaking the Banc: The Common-Law Process in the Large Appellate Court,* 23 ARIZ. ST. L. J. 915 (1991) [hereinafter *Breaking*]).

[10] Wallace, *supra* note 2, at 289 (quoting Daniel J. Meador, *Struggling Against the Tower of Babel, in* RESTRUCTURING JUSTICE, *supra* note 8, at 195-199.

[11] *See* Hellman, *supra* note 9, *Dividing,* at 277 (1996) (quoting Hellman, *supra* note 9, *Breaking,* at 984).

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Professor Hellman concluded that the problem of unpredictability is more likely to arise in small circuits than in large ones because fewer cases are decided.[12] According to Professor Robel, this view is reflected in the empirical evidence collected by the White Commission.[13] As she explained, practitioners responded that a major reason that they cannot predict appellate outcomes is the lack of precedent.[14]

Chief Judge Becker of the Third Circuit would undoubtedly disagree. In his view, an appellate court is not "a large group of strangers" but "a cohesive group of individuals who are familiar with one another's way of thinking, of acting, of persuading, and being persuaded."[15] To him, this close relationship is essential to maintaining consistency and predictability:

> 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 ensuring its predictability and adjudicating cases in like manner. In my view, the salient principle underlying this language that I have just read, is that when a circuit is so large that an individual judge cannot truly know the circuit law . . . then the circuit is too large and must be split.[16]

While Chief Judge Becker acknowledged that Professor Hellman's empirical study reflected consistency in the Ninth Circuit, he indicated that he had received private reports to the contrary.[17]

Other participants echoed Judge Becker's view that a large circuit cannot maintain the collegiality which is necessary to maintain the highest quality of decision-making. As Judge Rymer explained, two-thirds of the circuit judges nationwide and one-third of the judges on the Ninth Circuit believe that the maximum number of judges on a circuit should be between eleven and seventeen.[18] Beyond that, there are too many to regularly sit together, read decisions, and keep abreast of what

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[12] *See id.*

[13] *See* Lauren K. Robel, UC Davis School of Law Symposium, *Managing the Federal Courts: Will the Ninth Circuit be a Model for Change?* (Transcript of Videotape No. 2 at 14) (March 24, 2000). Hereinafter the transcripts of the symposium videotapes will be referred to as *Symposium Transcript.* All transcripts are on file with author.

[14] *See id.*

[15] Hon. Edward R. Becker, 3 *Symposium Transcript* 11.

[16] *Id.* at 11-12.

[17] *Id.* at 12.

[18] Hon. Pamela Ann Rymer, 1 *Symposium Transcript* 10.

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the court is doing.[19]

But Professor Hellman questioned the value of the judges reading everything the court publishes. While he found the desire to keep abreast of every development admirable, he did not find it essential.[20] He provided as an example a recent Ninth Circuit decision on the provisions on the 1996 Telecommunications Act.[21] He saw no great value in all the judges of the court reading this decision unless they have a case bearing on the issues in the case.[22]

In its final report, the White Commission weighed these arguments.[23] The Commission acknowledged the difficulty – or perhaps impossibility – of precisely evaluating consistency and predictability.[24] But in its view, "the appellate process puts a premium on collegial deliberation, both in panels and en banc."[25] And in the Commission's judgment, smaller decisional units foster this collegiality:

> [T]he consistent, predictable, coherent development of the law over time is best fostered in a decisional unit that is small enough for the kind of close, continual, collaborative decision making that 'seeks the objective of as much excellence in a group's decision as its combined talents, experience, and energy permit.'[26]

The Commission considered the number of judges who could work together as a collegial court. It concluded:

> In our opinion, apparently shared by more than two-thirds of all federal appellate judges, the maximum number of judges for an effective appellate court functioning as a single decisional unit is somewhere between eleven and seventeen.[27]

In order to achieve these smaller decisional units, the Commission proposed that the Ninth Circuit be reorganized into three regionally-

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[19] *Id.*

[20] Arthur D. Hellman, 4 *Symposium Transcript* 2.

[21] *See id.*

[22] *Id.*

[23] *See* Commission on Structural Alternatives for the Federal Courts of Appeals, Final Report 39-40 (1998) [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.

[24] *See id.* at 40.

[25] *Id.*

[26] *Id.* (quoting FRANK COFFIN, ON APPEAL 215 (1994)).

[27] *Id.* at 29.

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based adjudicatory divisions.[28] Each division would be semi-autonomous.[29] Under this proposal,"[d]ecisions made in one division would not bind any other division, but they should be accorded substantial weight as the judges of the circuit endeavor to keep circuit law consistent."[30]

In short, Chief Judge Wallace views a large appellate court with its high volume of precedent as providing increased predictability in outcomes. Others argue that the large number of judges on the court makes it impossible for them to master circuit law and achieve the level of collegiality necessary to ensure predictable decision-making. The White Commission ultimately adopted the view that smaller decisional units, rather than a high volume of binding precedent, ensure more predictable decisions.

II. LARGER CIRCUITS WILL PROVIDE EFFICIENCIES

According to Judge Wallace, growth produces both inefficiencies and efficiencies.[31] He cites two innovations adopted by the court to illustrate the opportunities to improve judicial administration in large courts: (1) the automatic issue-coding system; and (2) limited en banc review.[32]

The Ninth Circuit developed its issue-coding system to ensure a consistent body of federal law is applied across the circuit. The system informs the court as to what panels are working on what issues and permits the panel to which the issue is first assigned to decide the matter.[33] Essentially, this system enables the court to identify and avoid potential conflicts before they arise.

In addition to the efficiencies realized through the issue-coding system, Judge Wallace has emphasized the efficiencies resulting from adoption of limited en banc review. In the Omnibus Judgeship Act of 1978, Congress adopted procedures for limited en banc review.[34] The law provides that federal appellate courts of fifteen or more judgeships may conduct en banc hearings with less than the full court.[35] In the Ninth Circuit, eleven judges hear en banc proceedings. The full court

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[28] *See id.* at 40.

[29] *See id.* at 43.

[30] *Id.*

[31] *See* Judge J. Clifford Wallace, *supra* note 2, at 289.

[32] *Id.*

[33] Hon. James R. Browning, 5 *Symposium Transcript* 9.

[34] *See* Wallace, *supra* note 2, at 289.

[35] Omnibus Judgeship Act of 1978, Pub. L. No. 95-486, 56 Stat. 1633.

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may overrule the limited en banc court, but it has not been inclined to do so.[36] Judge Wallace concluded, "the court is willing to rely on eleven of its judges for the purposes of finality."[37]

The efficiency of limited en banc hearings has been endorsed by the 1990 Report of the Federal Courts Study Committee. The Committee concluded:

> The limited en banc appears to allow more efficient use of court of appeals resources and should be available to the other courts of appeals, even those that do not regularly have fifteen active judges. The growth in the number of circuit judges is likely to continue, increasing the potential for en banc courts of unwieldy size.[38]

Chief Judge Hug underscored the continued success of the limited en banc procedure.[39] As he reported, since the adoption of the procedure in 1980, 170 cases have received en banc review. Of those cases, one-third of them were decided unanimously and two-thirds of them were decided by votes of eight to three or greater.[40] Most recently, the Ninth Circuit Evaluation Committee chaired by Judge Thompson concluded that the 11-member en banc bench achieves approximately ninety-four percent representativeness.[41]

Again, Professor Hellman's research supports the limited en banc procedure. As he has explained, since the adoption of limited en banc procedures in 1980, the Ninth Circuit has declined to institute full en banc hearings even though that procedure is available if judges are dissatisfied with limited en banc review.[42] From this Professor Hellman concluded that the judges of the Ninth Circuit accept the limited en banc decisions.[43] Moreover, empirical evidence supports the conclusion that an eleven-member bench accurately reflects the views of the full court.[44] As he concluded, an en banc hearing by the full court is "familiar but not necessary."[45]

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[36] *See id.*

[37] *Id.*

[38] *Id.*

[39] Hon. Procter Hug, Jr., 5 *Symposium Transcript* 5.

[40] *See id.*

[41] Hon. David R. Thompson, 5 *Symposium Transcript* 2.

[42] *See* Hellman, *Dividing*, *supra* note 5, at 281-82.

[43] *See id.*

[44] Arthur D. Hellman, 4 *Symposium Transcript* 4-5.

[45] *Id.*

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Others have criticized limited en banc procedures. Judge Rymer captured the essence of the debate in terms of one's conception of the court. In her view, an Article III judge has the constitutional responsibility to participate in every aspect of the decision-making process and the appellate court should not be administered as a representative body.[46] An Article III judge cannot be represented in the decision-making process by someone else.[47]

One response to this argument is that, of course, the Constitution did not create either district courts or circuit courts but only the United States Supreme Court.[48] Article III of the Federal Constitution provides: "The judicial Power of the Unites States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[49] As creations of Congress, the circuit courts and their en banc procedures may well be viewed differently than the Supreme Court and may be governed by procedures which would not be appropriate for the Supreme Court. But the point is a serious one which deserves serious debate.

The White Commission considered the efficacy of the Ninth Circuit's limited en banc review.[50] While it acknowledged that the procedure worked well in its early years, the Commission reported growing dissatisfaction with both the infrequency of the hearings and also the size and composition of the en banc court.[51] In the Commission's view, the divisional arrangement it proposed would ensure more efficient en banc review.[52]

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[46] Hon. Pamela Ann Rymer, 3 *Symposium Transcript* 3.

[47] *See id.*

[48] U.S CONST. art. III, § 1.

[49] *Id.*

[50] *See* Final Report, *supra* note 23, at 48.

[51] *See id.* With respect to the infrequency of en banc review, the Ninth Circuit has recently increased the number of hearings. *See* Jason Hoppin, *Lowering the Bar on en Banc*, S.F. DAILY RECORDER, Mar. 20, 2000, at 1. Specifically, in 1994 and 1995, the court voted to hear eight en banc cases. In 1996, the number was 14; in 1997, the number was 19; in 1998, the number was 17; in 1999, the number was 19. *Id.* Senior Judge David Thompson has stated, "There's been a change in the culture of the court of appeals with regard to the taking of hearings." *Id.* In addition, Senator Dianne Feinstein has introduced a bill which would lower the standard of review from a majority to 40 percent. *Id.* With respect to the composition of the panels, Senator Feinstein's bill would raise the number of judges empaneled to a majority of the active judges. *Id.* On the other hand, some circuit judges criticize frequent en banc review. *See* NLRB v. Sav-On Drugs, Inc., 728 F.2d 1254 (1984); Hon. Jon O. Newman, *Forward: In Banc Practice in the Second Circuit: The Virtues of Restraint*, 50 BROOK. L. REV. 365 (1984).

[52] See the comments of Hon. Procter Hug., Jr. in this symposium edition criticizing the Commission's proposal for divisional en banc review.

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Beyond the merits of specific innovations is Judge Wallace's larger point that the Ninth Circuit can serve as a laboratory for innovative approaches to the administration of justice in the federal courts of appeal. As many of the symposium participants have observed, the federal courts must develop ways to handle the growing caseloads while maintaining the quality of the process. Indeed, the 1990 report of the Federal Courts Study Committee concluded that the courts are facing a "crisis of volume."[53] As Professor Hellman noted, the Ninth Circuit experience and innovations should prove useful to Congress in deciding in the long term how to cope with the need for the systemic reform necessary to deal with this crisis.[54]

But Chief Judge Becker presented a dissenting view. In his experience, smaller administrative units are preferable.[55] As an example, he used the death penalty crisis in the Third Circuit that he handled when he became chief judge.[56] The governor of Pennsylvania opposed the death penalty and did not sign a death warrant for eight years creating a serious backlog of cases.[57] Chief Judge Becker formed a task force of the top people in every level of state government and worked with them to facilitate the processing of the cases.[58] He doubted that the same result could have been achieved if nine or eleven states were involved.[59]

Thus, on the question of administrative efficiency, Judge Wallace stresses significant innovations by the Ninth Circuit which can be a model for other circuits as the federal dockets expand. But others consider smaller circuits to have administrative advantages and greater flexibility.

III. SMALLER CIRCUITS WILL BALKANIZE FEDERAL LAW

Chief Judge Wallace's preference for large circuits is explained in part by his view of the alternative. Given the continuing growth of federal dockets, if large circuits are rejected, division of the existing circuits is

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[53] Hellman, *Dividing*, *supra* note 9, at 285-286.

[54] *Id*; *see also* Hon. Procter Hug, Jr., *Potential Effects of the White Commission's Recommendations on the Operation of the Ninth Circuit*, 34 U.C. DAVIS L. REV. 323 (2000), Hon. Procter Hug, Jr., *The Ninth Circuit Should Not Be Split*, 57 MONT. L. REV. 291 (1996) [hereinafter *Split*].

[55] Hon. Edward R. Becker, 4 *Symposium Transcript* 1-2.

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

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inevitable and with it the balkanization of federal law.[60] Because none of the smaller circuits would develop a large body of case law, lawyers would be forced to search other circuits for guidance, knowing that those decisions are not binding precedent.[61] In this way, predictability of outcomes would be undermined. Moreover, since the smaller circuits would not be required to follow out-of-circuit decisions, intercircuit conflicts would increase.[62]

In other words, fragmenting the appellate court structure into smaller circuits rather than large ones poses the real risk of unpredictable and inconsistent decision-making. In Judge Wallace's view, increasing the number of circuits will eventually undermine and ultimately destroy the federal judicial system:

> Obviously, a time necessarily will come when there is no real national federal law. The purpose of federal courts will be frustrated and a national rule will be largely illusory.[63]

In contrast to the fragmentation of the courts and resulting balkanization of federal law, large circuits ensure the uniformity and consistency of the law in large geographic regions.[64] For example, the Ninth Circuit has the same law across a seaboard which facilitates border trade and commerce.[65] Chief Judge Hug has emphasized the desirability of uniformity over a wide geographic area and added that the diversity represented in a large court of appeal weakens a tendency toward regional parochialism.[66]

The White Commission addressed the regionalizing and federalizing functions of appellate courts in its final report. In several ways, the Commission echoed the views of Chief Judge Wallace in explaining the desirability of maintaining the court of appeals for the Ninth Circuit as currently aligned.[67] First, this alignment "respects the character of the West as a distinct region." Second, this alignment ensures that a single court will interpret and apply federal law throughout this region, particularly the commercial and maritime laws which govern relations

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[60] Wallace, *supra* note 2, at 289.

[61] *Id.*

[62] *Id.*

[63] Wallace, *White Commission Testimony, supra* note 1, at 5.

[64] *Id.* at 4.

[65] *Id.* at 5.

[66] Hon. Procter Hug. Jr., *Split, supra* note 53 at 300.

[67] Final Report, *supra* note 23, at 49-50.

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with the Pacific Rim, which is a strength of the circuit.[68] Finally, this alignment "contemplates a single set of local circuit rules, continued supervision of the entire circuit by the chief judge and judicial council, a single circuit judicial conference, and a conflict-correction mechanism within the same judicial circuit."[69]

On the other hand, Professor Oakley observed that the circuit court system is built on the notion that the circuits will reach inconsistent results. As he explained, "We use our circuits in their own way as a laboratory of federalism in order to frame issues for the Supreme Court."[70] In other words, our appellate system ensures some percolation in the lower courts which facilitates sound decisions by the Supreme Court. And Scott Bales expressed skepticism about the balkanization argument pointing out that the Supreme Court already reviews decisions of 50 states and all the circuits.[71]

In sum, Judge Wallace concludes that repeatedly dividing the circuits into smaller units will ultimately fragment federal law, undermining national uniformity and consistency. But others point out that some percolation of issues is a desirable aspect of our federal system and that the fears of balkanization may be overstated.

CONCLUSION

To Judge Wallace the choice between large and small circuits is clear. He has rejected what he describes as sentimental and anecdotal arguments for small circuits and would instead combine circuits into five or six large circuits to improve stability, predictability, uniformity, and efficiency.[72] To be sure, this vision has been met with substantial counter arguments and obstacles – principled, practical, and political. Yet, his view provides a thoughtful counterpoint to the clamor for smaller circuits.

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[68] *Id.* at 50.

[69] *Id.*

[70] John B. Oakley, 3 *Symposium Transcript* 3.

[71] Scott Bales, 3 *Symposium Transcript* 4.

[72] Wallace, *White Commission Testimony, supra* note 1, at 6.

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