

Senator Kyl
Examining Proposals to Split the Ninth Circuit
September 20, 2006
Follow-Up Questions for Professor Eastman

- 1) In your testimony you asserted that a judicial body should function as a cohesive unit.

I noted in my testimony that a court should be a collegial body for it to function properly. Cohesiveness would be one aspect of that, but because the concept of collegiality is broader than mere cohesiveness, I'll think it important to respond to this question by reference to collegiality.

- a. What are the characteristics of a cohesive judicial body?

As I described in my testimony, it is critical to the functioning of a court *of law* (rather than a mere collection of judges exercising something akin to legislative will) that it be a collegial body, not in the sense that the judges simply exchange pleasantries in the hallway, but that all the judges on the court share the common enterprise of getting the law right, faithfully applying it to the cases before them. In a law review article cited in my prepared testimony, Judge Harry Edwards gave a wonderful description of how to recognize the dynamic of a collegial court: "The mental states of judges who are engaged in collegial deliberations are entirely different from those of judges on a court that is not operating collegially When a judge disagrees with the proposed rationale of a draft opinion, the give-and-take between the commenting judge and the writing judge often is quite extraordinary – smart, thoughtful, illuminating, probing, and incisive. Because of collegiality, judges can admit and recognize their own and other judges' fallibility and intellectual vulnerabilities The result is a better work product." I think also helpful is Judge Frank Coffin's discussion of the subject, in which he described "the old-fashioned collegiality that existed when judges sat often with each other, had leisurely discussions together, wrote thoughtful memos back and forth, and, over a year's time, had many opportunities off the bench to dine and socialize with their colleagues. Friendship bred respect which led to consensus or, at least, civility." From these very insightful descriptions we can draw some key characteristics: 1) Frequent discussions both on and off the bench about the law; 2) thoughtful and civil memos back and forth about opinions before they are released, producing a give and take between the judges that makes for a better opinion and a more consistent application of the law; and 3) a small enough group that the judges actually have the opportunity to develop close enough relationships that the first two characteristics are genuinely possible.

- b. What impact does such cohesion have on the law?

The benefits of collegiality are, quite simply, better opinions and more consistent legal holdings, stronger devotion to the rule of law instead of idiosyncratic personal views, and a more nuanced and more thoughtful application of the law to new circumstances that come before the court. Conversely, the negative impact of a lack of collegiality on a

court are, quite frequently, intra-circuit conflicts in the law, opinions that are less thorough in their discussion of existing law or less nuanced in their application of existing law to new circumstances, and perhaps most troubling, the weakening of informal social sanctions that serve to check the tendencies of anyone in positions of power to push their own agendas.

c. How is size detrimental to these attributes?

The larger the court, the less frequently judges are able to sit together, dine together, or just take walks together to reflect on the law and the particular cases before them. The marks of a truly collegial court do not appear overnight, but by frequent exposure to, and appreciation of, the work and thought processes of one's colleagues. It is hard for that process to work if judges only rarely sit together, or even see each other, as is necessarily the case on a large court. On a 13-judge court (the current average size of the federal courts of appeals), there are 286 possible combinations of 3-judge courts. On a court with 28 judges, there are 3,276 possible combinations of 3-judge courts. In other words, a court of slightly more than double the size has more than 11 times greater the number of possible 3-judge panels, with a consequent loss of the collegiality that flows from familiarity. If one factors in all the senior judges on the 9th Circuit, resulting in a total of 49 different judges on the Court, there are 18,424 possible combinations of 3-judge courts. It is hard to imagine a number much less conducive to fostering collegiality than that.

Size is also detrimental in another respect as well. In most courts, the *en banc* process serves as a corrective device for the statistical groupings that are out of sync with the rest of the court, yet in the Ninth Circuit, it is virtually impossible for the Court to sit *en banc*. The truncated *en banc* procedure most often utilized by the court is not a true *en banc* court, but rather a limited subset of the court, where statistical groupings out of sync with the views of the court as a whole are still possible.

d. Please provide specific examples of how the law of Ninth Circuit has been impacted negatively by its size, particularly in relation to other circuits?

The Ninth Circuit's reversal rate is among the worst in the country, but its rate of reversal by summary or unanimous non-summary decisions is six times worse than the next closest circuit. I attribute this reversal rate to the Court's size, to the weakening of collegiality that flows from its size, and to the weakening of the collegiality check on judges in the crafting of opinions with a lesser degree of regard for clearly established binding precedent than is appropriate for an intermediate court of appeals. As for specific case examples, I'll add to the list provided by Judge Roll several cases from the year I clerked at the Supreme Court. In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Supreme Court unanimously reversed Judge Reinhardt's holding for the truncated *en banc* court finding a constitutionally-protected fundamental right to assisted suicide. In *Mazurek v. Armstrong*, 520 U.S. 968 (1997), the Supreme Court reversed in a *per curiam* decision the Ninth Circuit's decision vacating a lower court decision that permitted a Montana statute requiring that only licensed physicians perform abortions to go into

effect. The Supreme Court found the Ninth Circuit's decision to be "clearly erroneous" under Supreme Court precedent. In *Lambert v. Wicklund*, 520 U.S. 292 (1997), again in a *per curiam* opinion, the Supreme Court reversed Judge Reinhardt's decision for the Ninth Circuit invalidating Montana's Parental Notice of Abortion Act "because the Ninth Circuit's holding is in direct conflict with" Supreme Court precedents. In *Bennett v. Spear*, 520 U.S. 154 (1997), in an opinion by Justice Scalia, the Supreme Court unanimously reversed the Ninth Circuit's holding dismissing a suit by ranchers and irrigation districts under the Endangered Species Act. The Supreme Court held that property owners have as much right to sue for violations of the Endangered Species Act as others, noting: "It is difficult to understand how the Ninth Circuit could have failed to see this from our case law." In *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997), in an opinion by Justice Ginsburg, the Supreme Court unanimously reversed the Ninth Circuit's holding (again, in an opinion by Judge Reinhardt) that it had jurisdiction to consider (and then held unconstitutional) Arizona's English as the Official Language initiative, holding that the "Ninth Circuit had no warrant to proceed as it did." In *Bibles v. Oregon Natural Desert Ass'n*, 519 U.S. 355 (1997), the Supreme Court summarily reversed the Ninth Circuit's decision ordering the Bureau of Land Management to disclose the list of names and addresses of those private individuals who subscribed to the BLM's newsletter. The Court's *per curiam* opinion derided Judge Schroeder's opinion for the Ninth Circuit, describing the couple of conclusory statements on which the opinion rested as "the sum total of the Court of Appeals' analysis" and "inconsistent" with a recent Supreme Court decision. Most of these cases are not merely reversals where the Supreme Court disagreed with the Ninth Circuit on a close question of law, but unanimous or summary reversals, where the Ninth Circuit's decision was notably inconsistent with clearly-established precedent. It is unlikely that a court of more modest size would not have utilized the informal checks that flow from effective collegiality, or the more formal checks that flow from a properly functioning *en banc* review, to correct these flagrant errors before they went to the Supreme Court.

- 2) Please include any other facts or comments that you consider to be important to this discussion, particularly from your perspective as a law professor.

As a law professor and also as the director of a constitutional litigation center, I am frequently asked my opinion about the merits of a particular case pending on appeal to the Ninth Circuit. My typical response is to ask whether the panel has been announced in the case, because without that information, I cannot give even an educated guess about the likely outcome. While panel composition is an important variable in every court, the problem seems to be particularly acute in the Ninth Circuit, a phenomenon which I attribute to the Court's size and resulting decrease in the ability of each judge to be familiar with all the work of his or her colleagues. This loss of collegiality, in the way I have defined the term, produces a bit of a "crap shoot" mentality among litigants in the Ninth Circuit, and it is no way to engender respect for the rule of law.