

Testimony of

# The Honorable Mike Crapo

April 7, 2004

## SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS

"Improving the Administration of Justice: A Proposal to Split the Ninth Circuit Court"

Statement by Senator Mike Crapo, Idaho

MR. CRAPO: Mr. Chairman, thank you for this opportunity to address the Committee on this important issue. I would like to submit my remarks for the record.

The Ninth Circuit Court of Appeals, as it now stands, is problematic in a number of ways, and because of this, our justice system itself suffers. Those who have suffered true grievances and are working through the appeals process to have the fair review allowed by our laws, are detrimentally affected in a number of ways. The caseload of the Ninth Circuit Court, almost one-fifth of the entire federal appellate caseload, means significant delays for those awaiting action by the court. In fact, in 2002, the Ninth Circuit Court had more cases pending over one year than the rest of the entire federal appellate judiciary combined. These delays cause both financial and emotional hardship for litigants and their attorneys. In some instances, these delays contribute to environmental degradation as well.

The population served by the Ninth Circuit Court encompasses 54 and half million people, across southwestern states, western states, and the non-continental U.S. states and territories. California alone has more people than are served by any other circuit court. Thus, the Ninth Circuit Court three judge panel issues decisions that bind one fifth of all Americans.

Americans depend upon our federal courts to clearly and consistently define "rule of law" under the United States Constitution, and they depend upon the impartiality and fairness of interpretation that comes from a true majority decision. These are two matters of grave concern to me with regard to the current make-up and administrative procedure of the Ninth Circuit Court of Appeals.

Another issue of far greater concern is that of consistency in Constitutional interpretation and precedence. I have very real doubts about the ability of the Ninth Circuit Court to uphold coherence and consistency in its judgments. Even one of the judges admitted that the sheer volume of judgments issued by the Court exacts a "toll on coherence and consistency, predictability and accountability." (Judge Pamela Rymer, 1999). This inconsistency leads to increased likelihood of lawsuits, increased litigation costs, and an impression of arbitrary justice.

Coherency and consistency problems with judgments issued by the Ninth Circuit Court is evident in the percentage of judgments that the Supreme Court has overturned, especially in the last twelve years. From 1992 to 2003, the lowest percentage of overturned appeals was 68 percent. The highest was a telling 95 percent. The average percentage of Ninth Circuit Court decisions overturned by the Supreme Court during this time was 73.5 percent as compared to an average of 61 percent by the all the other circuit courts of appeal combined.

The current size of the Ninth Circuit Court of Appeals adversely impacts collegiality among the judges. When there are 3,000 minimum possible combinations of panels, judges do not have the opportunity to, in the words of Judge Rymer, "get a true understanding of their colleagues' jurisprudence". The size has also necessitated a number of administrative procedures that are unprecedented in the other Courts of Appeals. Of particular concern is the "en banc procedure," in which when a three judge decision is selected for an en banc review by a majority of the Ninth Circuit judges, only eleven judges are appointed to the review panel. Obviously, this means that fewer than one-fourth of the entire court (six judges) can bind the entire circuit with a majority en banc opinion. This cannot guarantee a judgment rendered by the majority.

A majority of Supreme Court justices favor a split of the Ninth Circuit Court, and Judge Diarmuid F. O'Scannlain of the Ninth Circuit testified that when courts grow too large, it is necessary to divide them to make them more manageable. He noted that the Ninth Circuit has virtually the same boundaries as it did in 1855.

The new divisions outlined in Senator Ensign's bill, which splits ninth circuit into three administrative units, will address the glaring concerns brought to light in this hearing. The additional judgeships allotted to the Ninth Circuit Court in this legislation will address the still-excessive caseload which the new Ninth Circuit would bear. Additional judgeships for the new Ninth Circuit in the bill were recommended by the nonpartisan Judicial Conference of the United States.

The addition of a 12th and 13th Circuit Courts of Appeal would allow the federal judiciary to handle the projected population growth and subsequent caseload increase over which they would hold jurisdiction.

The time to make substantive and necessary changes to the Ninth Circuit Court of Appeals and to add two more circuits is long overdue. Residents of the western states, Hawaii, Alaska, and Guam will all benefit from Senator Ensign's proposed legislation, and I fully support his efforts.