Testimony of

Circuit Judge Alex Kozinski

U.S. Court of Appeals for the Ninth Circuit

October 26, 2005

STATEMENT OF CIRCUIT JUDGE ALEX KOZINSKI
TO THE SENATE JUDICIARY SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS
October 26, 2005
Re: Revisiting Proposals to Split the Ninth Circuit

I appreciate the opportunity to appear before you today. My name is Alex Kozinski. I was appointed to the Ninth Circuit in 1985 by President Ronald Reagan, and I maintain my chambers in Pasadena, California. I am here today to speak in opposition to pending proposals to split the Ninth Circuit.

The title for today's hearing, as posted on the Judiciary Committee's web page, is Revisiting Proposals to Split the Ninth Circuit: An Inevitable Solution to a Growing Problem. I believe the more appropriate question for the Subcommittee is how best to administer justice in the region covered by the Ninth Circuit. Dividing a circuit should only take place when: (1) there is demonstrated proof that a circuit is not operating effectively; and (2) there is a consensus among the bench and bar and public that it serves that division is the appropriate remedy. Neither of those conditions exists today. Dividing a circuit should not take place to make the lives of some judges or lawyers easier or cozier, or to reduce travel burdens, or to remove immigration cases from its docket.

With regard to the first point, there is a consensus among the bench and bar about the operation of the Ninth Circuit, and that consensus is that the Circuit works well and should remain intact. Of the Court's 24 active judges, only three, all here today, favor division of the Circuit.

It might be useful for the Subcommittee to learn the views of some of the Court's more recent appointees about the administration of justice in the Ninth Circuit Court of Appeals. I will therefore quote from a letter written by Circuit Judge Carlos Bea of San Francisco, who was appointed to this Court by President Bush in September 2003. Judge Bea writes on behalf of his colleagues Judge Johnnie Rawlinson of Las Vegas, appointed by President Clinton in July 2000; Judge Richard Clifton of Honolulu, appointed by President Bush in July 2002; and Judge Consuelo Callahan of Sacramento, appointed by President Bush in March 2003. Among them, they have accumulated about ten years of Ninth Circuit experience.

The letter reads in part:

. . . Some of us took the Bench with some trepidation that the size of the Circuit and the volume of cases would result in inefficiencies; that the number of judges would result in lack of collegiality. Others had no such skepticism.

Regardless our views before joining the Ninth Circuit, all of us have been impressed with the efficiency with which the court dispatches its business and our procedures for maintaining a uniform federal jurisprudence in our Circuit.

Additionally, whether we were appointed by Democratic or Republican presidents, our experience is that the number of judges, the varied panels and the several locations in which we sit enhances rather than diminishes the enthusiasm and collegiality we have encountered.
It is all too easy to look at the Ninth Circuit's size and case load from the outside and summarily conclude changes are needed. But take it from some recent arrivals who are on the inside its administrative efficiency is second to none.
. . . .
I will next month be celebrating my 20th anniversary on the Ninth Circuit. I, too, started out skeptical that a circuit this size could be run efficiently and fairly. And I, too, came to the view so clearly stated by Judges Bea, Rawlinson, Clifton and Callahan in this letter.
In addition, a number of bar associations have weighed-in recently on the issue. Most notably, the State Bar of Washington, which had for many years favored division, now opposes a split. At its April 2005 meeting, its Board of Bar Governors voted to unanimously oppose division. The State Bar of Arizona, on August 19, 2005, voted to reaffirm its longstanding opposition to splitting the Ninth Circuit. The Hawaii State Bar Association in April 2005 advised of its continuing opposition. On September 16, 2005, the Montana State Bar Association passed a resolution opposing the passage of any bill directed at splitting the Ninth Circuit. The Federal Practice and Procedure Committee of the Oregon State Bar voted to oppose a split in early 2005, though its governing body has not acted on its recommendation, as far as I know. Scores of other local and specialized bar associations continue to express their opposition.
Joe Russoniello, who served as United States Attorney for the ND CA during the Reagan Administration, at roughly the same time Senator Sessions served as US Attorney for Alabama, has expressed and continues to express his long-standing opposition to circuit division, and I ask that a copy of his statement be made part of the record along with the Bar Resolutions noted above.
Any institution or organization can improve its operation and effectiveness. And the Ninth Circuit is always striving to improve how it operates. We have been under the spotlight of Congress, the media, the legal community and the public for many years. And those who have taken the time to study and understand the issues--rather than reacting to a sound bite, or an unpopular decision--have concluded that the court is functioning well.
Right now, our current challenge is dealing with the incredible growth of administrative agency appeals from the Board of Immigration Appeals. Along with the Second Circuit, which has experienced a 1400% increase in its immigration workload in the last five years, the Ninth Circuit has had about a 500% increase in these cases. My colleague, Judge Thomas, will be addressing this further in his testimony.
As technology has changed the world, it has changed the courts, and will continue do so in the coming years. The Ninth Circuit was the first circuit to institute an automated docketing system; we are now on the verge of an electronic web-based filing system. The use of instantaneous electronic mail has allowed circuit judges over wide geographic distances to communicate as if they were in the same courthouse. Videoconferencing for motion panels and administrative meetings has become commonplace. The Court's web page contains the court's decisions as soon as they are filed, along with other useful information, including digital recordings of oral arguments.
The Court uses an automated issue identification system to keep track of the common issues pending in these cases. The Court must be able to recognize potential or perceived conflicts early and address them directly and immediately. To that end, the Court established a system of

inventorying cases to make sure that issues are identified in each case, placed in a database and monitored to make sure that panels are alerted as to all other pending cases in which the same issue is being raised. This system of identifying issues and grouping cases, which is unique among the circuits, allows for efficient resolution of scores of cases at a time once the central issue is decided by a panel. Here are a few examples in the immigration field: After a final decision issued in Magana-Pizano v. INS, 200 F.3d 603 (9th Cir. 1999), which the Court had designated as the lead case raising immigration law issues regarding the retroactivity of a section of the Antiterrorism and Effective Death Penalty Act, one three-judge panel was able to resolve approximately ninety cases involving the same issues in a single sitting. In Falcon-Carriche v. Ashcroft, 350 F.3d 845 (9th Cir. 2003), the Court upheld the legality of streamlining regulations being used at the BIA. In Romero-Torres v. Ashcroft, 327 F.3d 887 (9th Cir. 2003), the Court held that it lacked jurisdiction to review hardship determinations. These two latter decisions resulted in the disposition of literally hundreds of pending immigration appeals, many prior to the completion of briefing.

Also, through the use of this automated inventory and issue identification system, our Court issues pre-publication reports circulated to members of the Court to advise them two days in advance of the filing of every published opinion, and to identify cases pending before the Court that might be affected by the lead opinion.

Nevertheless, some judges complain about the difficulty in keeping up with reading the number of published opinions from our Circuit. That problem, if there is one, is not confined to our Circuit. Other circuits with fewer judges also have a high number of published opinions. For example, both the Seventh and Eighth Circuits issued roughly the same number of published opinions as the Ninth Circuit--about 600 published opinions last year. The sheer number of judges and law clerks examining our opinions makes it unlikely that any opinion will evade scrutiny for consistency and legal soundness. More important, with the advances of computer-aided legal research as well as the court's internal issue tracking system, one can get up-to-the-minute information on the state of the law in a given subject matter with the stroke of a few keys.

I would urge the Senate to spend its limited time and resources in addressing those areas of the government that merit serious attention, e.g., immigration reform, disaster preparedness issues, problems within the intelligence communities and the like.

Thank you for allowing me the opportunity to testify.