Testimony of

The Honorable Mary Schroeder

Chief U.S. Circuit Judge
U.S. Court of Appeals for the Ninth Circuit
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STATEMENT OF CHIEF JUDGE MARY M. SCHROEDER
TO THE SENATE JUDICIARY COMMITTEE ON S. 1845
Wednesday, September 20, 2006

Good afternoon Mr. Chairman. My name is Mary M. Schroeder and I am Chief Judge of the Ninth Circuit, a position I have occupied since December 2000. I very much appreciate the opportunity to be with you this afternoon, and especially appreciate the fact that the committee has before it a specific proposal for division of the circuit, not just an abstract proposition that the circuit be divided. This Bill, S. 1845, illustrates the problems inherent in any proposal to divide the circuit, but it also serves to illustrate the particularly dramatic inequities that flow from a proposal that splits California and Hawaii off from the majority of the states in the circuit.

I am pleased to have with me to testify here today, in opposition to S.1845, my colleague Sidney Thomas of Montana, who is in line to become Chief and has a special expertise in dealing with case volume. We are joined in the hearing room by several of our colleagues who may be familiar to you, a number of whom were confirmed by your Committee within the last few years. They are Alex Kozinski of Los Angeles, California, Consuelo Callahan of Sacramento, California, Richard Clifton, of Honolulu, Hawaii, Johnnie Rawlinson, of Reno, Nevada, and Carlos Bea of San Francisco. As recent additions to our court, they have a vital interest in the continuity and stability of the circuit that they were nominated and confirmed to serve.
As the Chief, it is my obligation to do my best to insure the economical, efficient, and fair administration of justice throughout the circuit. The concern for the administration of justice forms the basis for my opposition to division of the Ninth Circuit. This view has been shared by all of my predecessors as Chief within living memory, beginning with my predecessor from Arizona, Richard Chambers, appointed by President Eisenhower and extending through chiefs appointed by Presidents Kennedy, Nixon, and Carter, and the two future chiefs, Judges Kozinski and Thomas, appointed by Presidents Reagan and Clinton respectively. The overwhelming majority of our Court of Appeals judges oppose a division of the circuit. This has never been a partisan political issue for us.
The Ninth Circuit Court of Appeals is sometimes confused with the larger administrative entity of the Ninth Circuit. The Ninth Circuit itself comprises all of the district courts, and bankruptcy courts within its geographic jurisdiction, as well as the Court of Appeals. This bill would split them all. Yet the district judges and bankruptcy judges don't want division either.

You will have before you two letters declaring opposition to division. One is signed by more than 50 district judges. The other is signed by more than 50 bankruptcy judges. They believe that a division of the circuit will lead to confusion, unnecessary costs, and delay. Court administration

experts agree. The subject has been studied and studied, most recently by the White Commission. None of the studies have found any serious administrative problem unique to our circuit, much less a problem that would be solved by circuit division.
What about the Bar? The lawyers don't want a split either. The Federal Bar Association, the American Bar Association, state bar associations, including those of Arizona, Montana, Nevada, Washington, and Alaska, plus numerous county and local Federal Bar Chapters throughout California and the rest of the Circuit are on record as opposing division.
The closest followers of case law teach in our law schools. You also have a statement signed by more than 350 law professors opposing a division.

From the most practical standpoint, division would make the practice of law more expensive. There may be a lack of understanding of the real costs for lawyers and their clients inherent in Circuit division. The fact is that while the ire of a few in Congress is focused on a handful of the decisions from our Court of Appeals, all of the proposals are to dismantle the entire Circuit. The Circuit law for California would be different from that of its neighbors. Yet, as we all know, there is a lot of interstate commerce conducted within the states of our Circuit. Lawyers should not be forced to track new and different Circuit law in bankruptcy or commercial litigation for example, that spans Arizona and California.
The Ninth Circuit has become the home of intellectual property and technology, with Microsoft, Intel and the Silicon Valley. Circuit division makes the practice of law and litigation more complicated and more expensive, with no commensurate gain in administrative efficiency. As the United States looks toward the Pacific for increasing foreign trade, and major law firms are opening offices in Asia daily, the nation can benefit from the Ninth Circuit as an unfragmented source of federal law. Of course, the East Coast has been fragmented from the 18th Century, but why, in the 21st Century, should we set out to create a similar system in the west?
From the standpoint of the courts, technology and communication have made the business of court administration easier, not more difficult. In fact, Senior Circuit Judge J. Clifford Wallace of San Diego, who served with distinction as our Chief Judge a few years back, has outspokenly opposed division and has repeatedly suggested that the small Circuits ought to think about merging. As 34 of our active and senior circuit judges said resoundingly in a recent article in Engage: "yes, we are big and our territory is wide, but we have shown that we can function effectively and efficiently despite - indeed because of - our size . . . we have made size our friend rather than our enemy."

The Ninth Circuit has been the leading innovator in the federal system. We have utilized data bases of issues presented in pending cases ever since the computer was in its infancy. We began the Bankruptcy Appellate Panel, an institution now recognized by statute and utilized in many circuits. We were among the first federal courts to experiment with televised appellate arguments, and the first to have high profile cases telecast live and nationwide.

Why are our judges and those who have studied the circuit, and those who practice in our courts opposed to division? There are many reasons. One reason is our fine staff, that serves our courts well. Our Clerk's Office of the Court of Appeals is headed by Cathy Catterson, nationally admired for her superb administrative and people skills. Cathy has received the highest award of the Administrative Office, the Director's Award, for her work. Her office of skilled staff attorneys handles emergency matters from the trial courts promptly and efficiently. Her staff helps our

judges decide a motion in a very serious matter, as for example, a motion for stay of a district court order enjoining the construction of a dam, within 72 hours, and then put the case on the appropriate track for resolution. We also have staff experts in death penalty litigation who have compiled an on-line handbook for use by staff in district courts clerks' offices throughout the circuit. This helps all our courts handle difficult and often complex death penalty cases.
In addition, our staff works up hundreds of cases, principally uncounseled cases, for presentation to panels of three judges of our Court of Appeals each month. Headquartered in our geographic hub city of San Francisco, our staff helps us serve the courts and the litigants of the entire circuit both fairly and promptly.
This bill, S. 1845, would separate the majority of states in the circuit from that circuit staff and circuit headquarters. Seven states, from Alaska to Arizona, would constitute a new circuit that has no headquarters, no administrative resources to process the cases and no legal staff to assist in presenting them to judges. All of these would have to be created. That would not promote the administration of justice in those states.
I have been speaking about administrative resources, but what about judicial resources? Here the geographic and demographic realities, and the inequities of division come into even sharper focus.

Seventy percent of the circuit's cases presently emanate from the State of California. This bill would add seven judgeships, all of which would have to be allocated to California. Even if those judgeships were added, and, more to the point, actually filled, the imbalance of caseload between the Ninth and the new Twelfth would be palpable. Circuit judges in the Ninth, the California circuit, would have more than 500 cases per judgeship, while judges in the remaining circuit would have only about 300. Division would leave the California circuit with an experienced staff, (assuming our existing staff were willing to put up with the disruption of schism,) but it would leave the remaining Ninth Circuit without the available assistance we now enjoy from the dozens of district and circuit judges outside California and Hawaii and familiar with the same circuit law. As Chief Judge of the Circuit responsible for its administration, this possibility presents an administrative nightmare.
In sum, this Bill, S. 1845, would leave California alone with Hawaii in a circuit containing more than 70% of the cases of the existing circuit, 18% of the cases in the entire country, far too few judges, much of the Pacific Ocean and only four Senators. Such a circuit would lose the capacity to make interchangeable use of the district or circuit judges from the other seven states in the new Twelfth Circuit, since they would be operating under a different circuit law. The new Ninth Circuit, that would include California and Hawaii, would be overwhelmed and would need at least 13 additional judges to bring its case load even with the load of the judges in the new Twelfth Circuit.

Of the remaining seven states in the new Twelfth, or"string-bean" circuit, as the late Chief Judge Chambers of Tucson described it when a similar division situation was first discussed 40 years ago, it would have a very busy Arizona border and a long border with Canada, giving it large scale security issues to cope with. It would take years for a new circuit to assemble a staff with the experience of the existing Ninth Circuit staff, and there seems to be some disagreement as to where the staff would live since that circuit would have no geographic hub city.
Thus a new Ninth Circuit would need many more judges, and the Twelfth would need a headquarters, a staff, and a hefty travel budget, as judges and staff would have to fly from the

two population centers of a new circuit, one located close to the Canadian border and the other near the Mexican border.

All of this is very costly. Our latest estimates of cost were drawn up several years ago. We now have a new Director of the Administrative Office and a new Chief Justice who have not had an opportunity to examine the real impact of circuit division, not only on the states of the West, but on the entire federal court system. This has been a period of severe budget constraint on all of the courts, and I would urge you not to consider this or any other reconfiguration of the circuit seriously without comprehensive up to date cost estimates. At a minimum, however, start up costs for a new circuit, including a new headquarters and equipment, would exceed $100 million. Annual salary costs for a Circuit Executive, Clerk of Court, technicians, staff attorneys, and other support staff would run into the millions per year. All of these costs would essentially duplicate resources now provided in the Ninth Circuit.

It is said that the Ninth Circuit Court of Appeals has grown too big. Yet we have not had a new judgeship since 1984. We are authorized 28 judgeships, but we have never actually had the full 28 positions filled for more than five minutes. At one point in the 90's, we were down ten active judgeships out of 28, and it has taken us nearly ten years to come close to achieving out full complement. We currently still have two vacancies.

At the present time the court is experiencing growth in the number of case filings, particularly administrative and civil cases emanating from issues relating to the border. The Arizona border now has the heaviest illegal immigrant traffic. California processes a huge volume of asylum cases. The Governors of the border states, including the Governors of Arizona and California, recently met and announced the urgent need for comprehensive immigration legislation. Many of you and members of your staff have heard me say that whatever legislative policy Congress eventually adopts, our judges and staff can be helpful in ironing out the administrative details so that the law can be administered efficiently and well in our courts. Each of our branches has an important role. We need to work together.

There are, of course, proponents of Circuit division and have been for decades. They have predominantly come from the Pacific Northwest out of a desire to create a Pacific Northwest Circuit that would, it is said, better represent regional interests unhappy with decisions of the Ninth Circuit Court of Appeals that have been perceived as adversely affecting economic interests such as fishing and timber. That is not a good reason to divide circuits.

One of my heroes is the late Judge John Minor Wisdom, appointed by President Eisenhower, who was an outspoken opponent of division of the Fifth Circuit, and who recognized that circuits should not be divided in order to promote regional interests. He believed that Circuits should be large, so that the Circuit Court of Appeals could reflect diverse interests. He decried efforts to divide Circuits in order to create smaller courts that reflected only local interests. In an article after division of the Fifth Circuit, entitled "Requiem for a Great Court," 26 Loyola Law Review 788 (1980), Judge Wisdom said: "The federal courts rose to bring local policy in line with the Constitution and national policy. The federalizing role of circuit courts should not be diluted by the creation of a circuit court so narrowly based that it will be difficult for such a court to overcome the influence of local prides and prejudices." I agree. So did my late colleague Chuck Wiggins, a former Congressman who often expressed his view that Congress legislates one law for the entire country, and we should not attempt to restructure courts to reflect regional views.

There are some myths driving proponents of dividing the Circuit. But they also serve to highlight important reasons why the Circuit should remain intact.
There is, for example, the notion that the Circuits should all look alike: that the map of federal Circuits west of the Mississippi should look like the map of Circuits on the East Coast. But the western states don't look like the eastern states. The Circuits in the East were formed from the original 13 colonies, while the West has its roots in the Louisiana Purchase. This pro-split argument is most frequently phrased as "it's too big." But the truth is that any Circuit with Alaska is going to be larger than any other Circuit geographically, and any Circuit containing California is going to be larger than any other Circuit in case load and population. I live in Maricopa County, Arizona. That County is bigger than the State of Connecticut. As Judge Shirley Hufstedler once said, "you can't legislate geography." And in this great country you can't legislate demographics either.

An argument related to size relates to our en banc process. For many years we operated quite happily with an en banc court of eleven, and recently began an experiment with fifteen judges on an en banc court. Congress by statute has authorized any court with more than 15 judges to use a limited en banc court, and we like it. We could adopt a rule that all of our active judges sit on each en banc court, but we haven't done so because we think the limited en banc is a better use of resources. We encourage other Circuits to try it. If there were to be a Circuit division, so many additional judgeships would have to be created for California, that the California Circuit would use the limited en banc process. Nothing would be gained by splitting the Circuit except cost and confusion.
There are other myths that proponents of circuit division propagate. There is the myth that smaller courts are more collegial than larger courts. This is not borne out by the experiences of our judges or by the expert opinions of those who have studied small group dynamics. Those of us who have sat on both a small court of nine appellate judges and on the Ninth Circuit can attest to the greater collegiality of a larger court that comes with greater freedom of association.

There is a related myth that, as one of my colleagues frequently likes to put it, division of circuits is in the "natural order of things." They point to the division of the Fifth Circuit nearly 30 years ago. This view reflects a misunderstanding, and assumes that the Fifth Circuit was divided for reasons of judicial administration. Indeed, some members of the current Fifth and Eleventh Circuits themselves tend to see that division has an inevitable product of some kind of court reform. That was the face put on it when the division eventually became effective in 1980. But division came only after two decades of a titanic struggle over civil rights decisions, decisions that angered powerful Southern Senators who refused to add needed judgeships for the circuit until it was geographically cut in half. Eventually new active judges replaced the judges responsible for the desegregation of the old South, and the circuit court itself requested a division. But even the judges on the Fifth did not think division was a long term solution to caseload problems.

The real story of the Fifth is told in a remarkable book by Deborah J. Barrow and Thomas G. Walker, published by Yale University Press, and entitled "A Court Divided: The Fifth Circuit Court of Appeals and the Politics of Judicial Reform." As the very first pages state: "The gloss of simple administrative change [and] judicial unanimity . . . masks the reality of a long and often bitter eighteen-year controversy." Division was a direct result of the civil rights decisions of the

60s, and was opposed by the judges of that court who had participated in those decisions and who, by the time this division played out, were all semi-retired. The force that brought about the division was the power of a stubborn member of Congress who made good on his threat to prevent the court from getting any judges until it was divided. The point was to separate Judge Wisdom and Judge Brown in Texas from Judges Tuttle in Georgia and Frank Johnson in Alabama. Division was administratively quite feasible because there were three states on each side of the divide, with a large state, Texas, on one side and another, Florida, on the other. Throughout the struggle for the preservation of the Fifth Circuit, the Ninth Circuit remained firm that it did not wish to be divided, and eventually a compromise was worked out that the Fifth Circuit could choose to divide and the Ninth Circuit could choose not to. At the hearings on S.11 in 1977 to

create, inter alia, 45 additional district court judgeships in the country and ten additional judgeships for the Ninth Circuit, the chief judge of the Ninth Circuit, Jim Browning, testified on questions about an en banc process with a court of 23 judges, rather than 13. He said "we could deal with 23 judges sitting en banc, but we cannot deal with 13 judges trying to do the work that it requires 23 to do." He put it as well as anyone. Then Judiciary Committee Member McClellan reluctantly agreed that Browning should prevail, for unlike the Fifth, there was no easy way to divide the Ninth into roughly similarly sized groupings of states. As Barrow and Walker note, McClellan realized both the need for more judgeships and the "almost insurmountable problems associated with trying to divide a geographically huge circuit in which one state, California, generated most of the case filings." That observation is even more true today than it was 30 years ago.

Will there be a time when the circuit should be divided? Will the circuit become too big? Clearly its geography won't change. Through advances in technology unthinkable when the Fifth Circuit struggled with 97 cases per judge, the Ninth Circuit has absorbed increases in district court judgeships, administered record appellate filings and skyrocketing criminal border prosecutions - all without an increase in circuit judgeships since 1984.

Is there an absolute limit to the number of judges an appellate court should have? Who knows until we come close to experiencing it, and we haven't come close yet. In the 60s it was said no court should be larger than nine, and now every circuit court in the country, save the First Circuit, is larger than nine. There are in fact more state court judges in the State of Arizona than there are federal judges in the entire Ninth Circuit. The Ninth Circuit has twenty-eight authorized judgeships. If we ever actually receive and fill the seven additional judgeships we have requested, we will gain more experience, but I, for one, am not holding my breath for that day ever to come.

Let me close by trying to build some shared perspective on our work. As government officers in two of the branches of our federal government, we as judges and you as Senators, deal with difficult issues. You, however choose the questions to address by legislation. We do not choose the cases we must decide in the district and circuit courts.

In the years I have served as a circuit judge, I have participated from the bench in many cases emanating from the great issues that you have addressed through legislation over nearly 30 years. To list just a few: Amendments to update Civil rights and employment discrimination laws, Sweeping changes in bankruptcy law (twice), Immigration Reform, Habeas corpus and death penalty legislation, Sentencing Guidelines.

At the present time we are experiencing a deluge of immigration cases as a result of decisions in the Executive Branch to reduce administrative review of immigration judge decisions and to increase enforcement at the border. These demands affect all the Circuit Courts, but the most dramatically affected is the Ninth Circuit because close to 50% of all the administrative immigration cases emanate from California.

We do need additional help in dealing with these cases, particularly additional judges. We are exploring many ways of avoiding delay in the calendaring of non-priority civil cases. My colleague, Judge Thomas will address how technology is helping us. Division of the Circuit would not be a solution, it would instead create a serious handicap.
Thank you.