Testimony of

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STATEMENT OF HONORABLE PETE WILSON
IN OPPOSITION TO S. 1845
to
THE COMMITTEE ON JUDICIARY
of
THE UNITED STATES SENATE
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Mr. Chairman and Members of the Committee,

Thank you for this opportunity to appear before you on this important legislation. It is a particular pleasure for me to see a number of old friends with whom I had the pleasure and privilege of serving more years ago than I care to realize. For your part, you may well have tired of seeing me, hearing me, or reading the letters I have written repeatedly opposing proposals to split the Ninth Circuit Court of Appeals. I am here today to do so yet again.

But though the subject is not new and though I cannot offer a new face or a new voice, I do believe that I can offer a powerful practical new argument for rejecting this split--- and any other proposal whereby proponents seek to "free" a new Twelfth Circuit from the jurisprudence presently governing the Ninth Circuit. To the best of my knowledge, the argument I present today has not been proposed or considered before by this distinguished Committee.

Historically the purpose of seeking a circuit court split, and the issues that framed consideration of any proposed split, have been logistical in nature, relating to caseload and the ability of an existing court to adequately perform its duties. These are issues of fundamental importance, deserving of the most careful and objective examination. Chief Judge Mary Schroeder and Judge Sidney Thomas, distinguished jurists of the Ninth Circuit Court of Appeals, will present the strong case in opposition to this proposed split from the standpoint of its logistical implications. Rather than echo these powerful arguments, I will simply go on record as subscribing to them.

With regard to an entirely different consideration--- based upon the desire of split proponents for a new court to achieve a new and different judicial philosophy, and new and different precedents--- allow me first to acknowledge that I personally have not always been happy with decisions of the Ninth Circuit, and that I have on occasion publicly criticized the Court's decisions.

Nonetheless, whatever the temptation to support a split for philosophical rather than logistical reasons, the principal aim of my testimony today is to establish the following point:

Nothing Congress does will enable a new Twelfth Circuit to create precedents anew as if on a blank canvas. To the contrary, any new circuit will be bound to all the Ninth Circuit's precedents, and any change will be so gradual and time-consuming as to not likely be noticed much in our own lifetimes.

How can I deliver this prediction with such certainty? Because history offers us legal authority for what body of precedents will govern the decisions of a newly-created circuit. Indeed, while there is scant authority on this point, it is crystal clear . . . and it makes clear to those wishing for a new court to produce wholesale new precedents that wishing will not make it so.

There have been only two splits permitted by Congress in the entire history of our federal appellate courts. In the first, which in 1929 created the "new" Tenth Circuit out of the "old" Eighth Circuit, two district court decisions simply announced that all the courts of the newly-created Circuit would be bound by the precedents of the old; and did so without any explicit Court of Appeals decision subsequently.

In marked contrast, in the very first case heard by the "new" Eleventh Circuit Court of Appeals in 1981 and the first opinion to be published by the Eleventh Circuit, the court expressly held "that the decisions of the United States Court of Appeals for the Fifth Circuit . . . shall be binding as precedent in the Eleventh Circuit, for this court, the district courts, and the bankruptcy courts in the circuit." (Bonner v. City of Prichard, 661 F.2d 1206, 1207 (1981).)

The Bonner court noted that the act creating the Eleventh Circuit "did not address the issue of what body of law would be adopted" and that "[t]o decide this case, and later Eleventh Circuit cases, we must decide whether this court shall adopt some established body of law as its body of precedent . . . ." "For several reasons," the court concluded, it chose to adopt "the decisions of the . . . Fifth Circuit . . . ." (Bonner, 661 F.2d at 1209.)

What were the reasons for the court's choice?

The first consideration recited was that "[s]tability and predictability are essential factors in the proper operation of the rule of law." The court relied upon the reasoning of the United States Supreme Court expressed in Moragne v. States Marine Lines, Inc., 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970):

The law [must] furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; . . . furthering [the importance of] fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and [by] maintaining [necessary] public faith in the judiciary as a source of impersonal and reasoned judgments.

(Bonner, 661 F.2d at 1209.)

The court in Bonner rejected its own procedural rulemaking power as totally inappropriate for "establishing a body of precedent." It went still further in defining its concern about having to relitigate "every relevant proposition in every case" as risking a requirement for a rehearing en banc under Federal Rule of Appellate Procedure 35 on the ground that each new precedent would involve a "question of exceptional importance." The result, said the court, would be a "burden that this court could not discharge without seriously damaging its effectiveness, and it would mean years of waiting to determine the law of the circuit." Hardly the way to begin for a court dedicated to achieving predictability and stability. Said the new court, quite predictably, "We choose instead to begin on a stable, fixed, and identifiable base while maintaining the capacity for change." (Bonner, 661 F.2d at 1211.)

This is a very practical decision. The burdens of relitigation which it avoids, while preserving the capability to make responsible change, cannot be responsibly ignored either by a court conscientiously
seeking to decide truly important new issues without inordinate delay, or---I respectfully submit--- by responsible legislators seeking to avoid imposing those burdens and unconscionable delays upon the bench, bar, and the public of the proposed Twelfth Circuit. Rather, any evolution in the direction of Twelfth Circuit law ought to occur slowly, by increments, and pursuant to the considered process of en banc consideration.

As the court pointed out,

> The decisions of the former Fifth Circuit, adopted as precedent
> by the Eleventh Circuit, will, of course, be subject to the power
> of the Eleventh Circuit sitting en banc to overrule any such decision.

(Bonner, 661 F.2d at 1210.)

But, again, the requirement for an infinite number of such en banc rehearings of Fifth Circuit precedents was rightly reckoned by the new Eleventh Circuit as imposing intolerable burdens and delays. That was the entirely practical basis for their choice of Fifth Circuit precedent.

Yet an even more compelling motivation for this choice appears to have been the court's profound concern about and determination to avoid the uncertainty sure to flow from any other choice. The court clearly recoiled from the prospect of injury to the rule of law were it to be "cast adrift" upon a metaphoric sea of unpredictable precedents:

> Theoretically this court could decide to proceed with its duties
> without any precedent, deciding each legal principle anew,
> and relying upon decisions of the former Fifth Circuit and other circuit and district courts as only persuasive authority and not binding. This court, the trial courts, the bar and the public are entitled to a better result than to be cast adrift among the
> differing precedents of other jurisdictions, required to
> examine afresh every legal principle that eventually arises
> in the Eleventh Circuit. This approach would be inconsistent with the virtually wholesale adoption in this country of
> English common law.

(Bonner, 661 F.2d at 1211.)

From this anxiety and the court's deep concern that the public perceive and accept the integrity of its choice of precedent, the judges imposed upon themselves the requirement that their choice be taken en banc rather than by "an informal and unrevealed consensus of individual judges . . . which could be upset by changes in the composition of the court."

Underlying the importance which the court attaches to its choice of precedent, the court in Bonner concludes its analysis with a brief but incisive exposition of the doctrine and a clear warning to any who would ignore or flout its commandments:

> We tend to think of stare decisis as only 'it is decided.' The full phrase is stare decisis et non quieta movere - 'to adhere to precedents and not to unsettle things which are established.' The prospect of decades of writing on a clean slate in pursuit of the possibility that in some case or cases we might find a rule we like better (or even conclude that an old Fifth Circuit decision is wrong) is at best unappealing, at worst catastrophic.

(Bonner, 661 F.2d at 1211.)

Mr. Chairman and Members of the Committee, I would like to think the court's admonition is needless. I concede that nowhere in the now too ample record of pending or rejected proposals to split the Ninth Circuit - including S. 1845, the measure presently before this Committee - can ideological change be found as the explicit purpose.
But it is difficult to dismiss the inference as a straw man when so many split proposals over so many years, however they may vary in details, have in common the isolation of California.

Let us assume, moreover, that some day Congress were to entertain a proposal that purported to accomplish explicitly a jurisprudential change that heretofore has been sought only by way of a gerrymandering of judicial circuit boundaries. Were such a brazen measure ever introduced - say, one directing a Twelfth Circuit to follow the law of a circuit other than the Ninth Circuit - such a suspect measure would face the gravest of challenges under the separation of powers doctrine and other constitutional mandates.

Furthermore, any such measure would contravene sound public policy by effecting a radical divorce from "former" Ninth Circuit judges, lawyers, resident businesses and inhabitants, of the case law that had been created by and through them, and that for more than a century had governed them.

As the Bonner court stated in choosing Fifth Circuit precedent,

> Lawyers from Alabama, Georgia and Florida, through litigation of thousands of cases, have made significant contributions to the development of this jurisprudence. Bench and bar are schooled in it. Citizens of these states

and their legal advisers have relied upon it and structured
their legal relationships with one another and conducted their affairs in accordance with it. By adopting the former Fifth Circuit precedent we maintain the stability and predictability previous enjoyed.

(Bonner, 661 F.2d at 1210.)

And so, any such effort by Congress to foist upon a new circuit a law not of its own heritage would, I suspect, quickly meet its demise. No statute could so harness a "new" circuit without imposing on it all the ills and perils generated by a flagrant contravention of stare decisis principles.

In concluding my remarks this afternoon, I can only say that if a new circuit is created in this or some future session of Congress, I hope the judges of that new circuit court--- on the day they hear their first case and publish their first opinion--- act with as much respect for precedent and for the stability and predictability it brings as did the new Eleventh Circuit Court of Appeals. Those who seek and envision immediate and wholesale change of "old" Ninth Circuit precedents are destined to be disappointed---if the new court exercises its unquestioned power to create new precedents and overrule old ones only by en banc rehearings.

If indeed there are some who would by some means seek to force wholesale change that unsettles "established things" and undermines the rule of law, they will find that Bonner is at the table, like Banquo's Ghost, to haunt them. They will be required to learn patience and respect for stare decisis.

In fact it is quite predictable that before such broad change is legitimately achieved by a new circuit court of appeals, several other circuits will have attained the size of the present Ninth Circuit and apply for a split to a Judiciary Committee of the next generation.

Mr. Chairman and Members of the Committee, thank you for your patience and courtesy.