Questions for the Record

For Honorable Diarmuid O'Scannlain

From Senator Charles Grassley

1. **If a litigant believes that a circuit court has erred, that litigant can appeal the case and have it heard by every judge in that court. The "en banc" process allows for the entire court to review a case. But the Ninth Circuit, due to its size, has decided to randomly select 11 judges to hear these cases, rather than the whole panel of 29 judges. This practice creates millions of possible combinations of judges that could review a case. So the outcome of one panel could be very different than another panel hearing the same case. Do you believe that this is a problem? What does this inconsistency mean for litigants?**

The en banc process is crucial to ensuring uniformity of circuit law where three-judge panel decisions conflict, resolving conflicts with other courts, and addressing questions of exceptional importance.[1]

One of the principal shortcomings of the Ninth Circuit's current configuration is our unwillingness to sit together as an entire court en banc, as every other circuit in the country does. The Ninth Circuit, alone among all circuits, has elected to hold "limited" en banc proceedings,[2] which means that we sit as a panel of 11 judges—the Chief Judge always presiding and 10 others randomly selected. Our unique en banc process offers our best effort to ensure the consistency and coherency of the

[1] *See* Fed. R. App. P. 35.

[2] *See* 28 U.S.C. § 46(c); Pub. L. No. 95-486, § 6 (1978) (authorizing courts of appeals with more than 15 active judges to conduct limited en banc hearings).

law in our circuit, but unfortunately it is less than ideal in confronting the structural problems inherent in a circuit of our size. In every court of appeals but the Ninth Circuit, en banc rehearing is held by the full court—that is, every active judge will participate in the rehearing. Accordingly, in every other circuit, an en banc decision will reflect the full court's views on the case and will thus speak definitively and authoritatively for the entire circuit.

Under our limited en banc process, however, a bare six-judge majority prevailing over a five-judge minority might "speak" for the entirety of the Ninth Circuit—29 active judgeships with no small portion of senior judges. Put another way, our system allows the "law of the circuit" to be made by roughly one-fifth of the court's active judges. This presents the quite real possibility that some of the circuit's most important or divisive issues will be decided by a substantial minority of judges, who do not necessarily represent the true views of our court. Litigants are therefore left wholly without a sense of the views of the circuit on contested issues, and they must instead try their luck at securing a favorable en banc draw.

Our circuit does leave open the possibility of a full-court en banc rehearing, but the option exists in name only. Not once have we ever reheard a case as a full en banc court, notwithstanding that we have two courtrooms, one in San Francisco and one in Pasadena, which have tiered benches with 29 seats. And that is hardly surprising; accommodating 29 voices at a single hearing is a challenging, if not

practically impossible, endeavor. Indeed, Congress's decision in 1980 to split the then-Fifth Circuit was motivated in substantial part by similar concerns over its 26-judge en banc procedures, which were likewise wholly impractical.[3] Hopefully Congress will recognize the very same practical difficulties in the Ninth Circuit today and will take the sensible response to restructure the circuit.

Smaller circuits would allow the entire court to sit together, which would allow for more representative opinions from the entire pool of judges in active service. That would significantly increase the consistent development of circuit case law and promote certainty and stability to guide lawyers in advising their clients in conducting their affairs in conformance with the law.

2. Justice Kennedy, who served on the Ninth Circuit prior to being confirmed to the Supreme Court, advocated in favor of splitting the Ninth Circuit. In 2007, he stated that there were "sound structural reasons" for splitting up the Ninth Circuit, and that the court "is simply too big to have the collegiality that it ought to have." Do you agree or disagree with these statements? Please elaborate.

I agree with Justice Kennedy. As elaborated in my written testimony, I strongly agree that a number of structural reasons support a division of the Ninth Circuit. Such reasons include the significant burdens on our ability to maintain consistency and coherence in our ever-expanding case law, our refusal (or perhaps inability) to

[3] *See* Robert A. Ainsworth, Jr., *Fifth Circuit Court of Appeals Reorganization Act of 1980,* 1981 BYU L. Rev. 523, 526–27 (1981).

hold full-circuit en banc rehearings with the participation of our full court, impediments to providing litigants efficient and expedient resolution of their appeals given the sheer size of our caseload, and the costs and inequities imposed by the massive size (both in terms of population and geography) of our circuit.

I further agree with Justice Kennedy that the Ninth Circuit's extreme size disrupts our ability to foster the sort of close, collegial relationships that ought to exist on an appellate court. Collegiality is extremely important in our appellate system. The genius of the appellate process is founded upon the close collaboration of jurists who combine their independent judgment, informed by their personal experiences, and apply their collective wisdom to decide the issues presented by an appeal. This collaborative endeavor requires an environment in which a reasonably small body of judges has the opportunity to sit and to conference together frequently. Such interaction enhances understanding of one another's reasoning and decreases the possibility of misinformation and misunderstandings. Unlike a legislature, an appellate court is expected to develop one clear, authoritative voice in interpreting the law. But the Ninth Circuit's ungainly size severely hinders us in this regard and creates the danger that our deliberations will resemble those of a legislative, rather than a judicial, body.

The sheer number of judges on our court often means that we work "together" only nominally. All Ninth Circuit judges participate in numerous week-long sittings

on regular appellate oral argument panels. Presuming one sits with no visiting judges—a mighty presumption in the Ninth Circuit, where we often enlist such extra-circuit help to deal with the overwhelming workload—an active Ninth Circuit judge may sit with fewer than twenty colleagues on three-judge panels over the course of a year. That is less than half of the total number of judges on my court. A senior judge, like myself, might sit with fewer than ten. Even during active status, it was not uncommon for me to go years without ever sitting with some of my colleagues. And the frequency with which any pair of judges hears multiple cases together is especially low. New judges who come on the court regularly report that it takes several years before they have sat at least once with each of their colleagues. It should be no surprise that it becomes difficult to establish effective working relationships in discerning the law when we sit together so rarely.

The problem is exacerbated by our need to rely extensively on visiting judges to help handle our overwhelming caseload. Indeed, we rely on visiting judges to a degree far beyond any other circuit.[4] Although we deeply appreciate the

[4] According to the Administrative Office of the United States Courts, from June 2017 through June 2018, visiting judges participated in a total of 3,770 appeals that were decided in all federal Courts of Appeals combined. *See* Administrative Office of the U.S. Courts, Table B-11, *U.S. Courts of Appeals—Judge Participation in Cases Terminated on the Merits, by Circuit, During the 12-Month Period Ending June 30, 2018*, http://jnet.ao.dcn/sites/default/files/statistics/caseloads/Appeals_Tables_June2018.pdf (last visited Aug. 20, 2018). Of those 3,770 cases, 1,815 were in the Ninth Circuit. *Id.* In other words, the Ninth Circuit

contributions of visiting judges, they simply cannot replicate the sort of close, collegial relationships that befit an appellate court. Quite obviously, we do not have the level of familiarity with visiting judges that we do with our regular colleagues. More often than not, there is at least one visiting judge sitting with us, often a jurist with whom the other judges have never worked before, and may never work again. Indeed, I will frequently serve on a panel with a visiting judge with whom I had never spoken, let alone had developed a professional relationship.

From the perspective of the visiting judge, the problem is compounded. A visiting judge will often be unfamiliar both with the members of the panel on which he or she is to serve and moreover with the procedures of our court. Thus, each visiting judge must get up to speed not only with the cases to be heard and the colleagues with whom he or she is to sit, but much more basically with the particular mechanisms of our court's work—all while maintaining one's home-court docket. As great of a service as visiting judges offer to our court, one should expect substantial inefficiencies to result from our extreme reliance on judges for whom service on the Ninth Circuit is not a regular assignment.

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alone accounted for nearly half of the federal appeals in which a visiting judge participated.

3. The 9th Circuit averages about four months longer than the other circuits in disposing of the cases that come before it. What solutions would you suggest to help address this problem?

Although I agree that the length of time our circuit takes to dispose of cases is alarming, I must insist that the judges of my court are not slothful. Indeed, my colleagues and I are veritable workaholics. The problem, of course, is the sheer number of cases that we must resolve. Once a case is actually sent to oral argument, the median time from oral argument to a final decision in our circuit is only 1.3 months—the third-fastest in the country![5] Yet we have so many cases to hear, we simply cannot schedule them fast enough to keep up.

The most obvious solution to help dispose of cases more quickly is to add more judges to our court. Today, seven of our allotted twenty-nine active seats sit vacant—and by standard metrics, we should likely have even more judgeships to accommodate the size of our docket. Certainly, more judges to help share in the work would likely help speed up some of our backlog.

But, as much as we need more judges to help us manage our sizeable caseload, we cannot solve the deep structural problems of the Ninth Circuit simply by adding <u>even more</u> judges to the mix. That might help speed up some of the work,

[5] *See* Administrative Office of the U.S. Courts, Table B-4, *U.S. Courts of Appeals—Median Time Intervals in Months for Cases Terminated on the Merits, by Circuit, During the 12-Month Period Ending June 30, 2018,* http://jnet.ao.dcn/sites/default/files/statistics/caseloads/Appeals_Tables_June2018.pdf (last visited Aug. 20, 2018).

but not without further exacerbating the many other problems inherent in a court of our tremendous size. Because of the circuit's size, I see no way to address the concerns over our backlog or the time it takes for our court to decide an appeal without further amplifying some other deleterious effect of our overly large court. Simply put, I believe the circuit must be restructured into smaller, more manageable circuits, each of which may then approach the problem of delay or inefficiency through an appropriate number of sitting judges.

U.S. Senate Committee on the Judiciary

Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts

Hearing on "Oversight of the Structure of the Federal Courts"

July 31, 2018

Questions for the Record

Senator Ben Sasse

Questions for Judge O'Scannlain

1. **How can a small minority of a court sitting as a limited en banc panel ever give the same certainty and uniformity as an en banc panel constituting the whole court? Doesn't a limited en banc procedure defeat the entire purpose of en banc review by reducing the representativeness of an en banc court's decision and therefore the stability and predictability of the law?**

The en banc process is crucial to ensuring uniformity of circuit law where three-judge panel decisions conflict, resolving conflicts with other courts, and addressing questions of exceptional importance.[1]

One of the principal shortcomings of the Ninth Circuit's current configuration is our unwillingness to sit together as an entire court en banc, as every other circuit in the country does. The Ninth Circuit, alone among all circuits, has elected to hold "limited" en banc proceedings,[2] which means that we sit as a panel of 11 judges—

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one in Pasadena, which have tiered benches with 29 seats. And that is hardly surprising; accommodating 29 voices at a single hearing is a challenging, if not practically impossible, endeavor. Indeed, Congress's decision in 1980 to split the then-Fifth Circuit was motivated in substantial part by similar concerns over its 26-judge en banc procedures, which were likewise wholly impractical.[3] Hopefully Congress will recognize the very same practical difficulties in the Ninth Circuit today and will take the sensible response to restructure the circuit.

Smaller circuits would allow the entire court to sit together, which would allow for more representative opinions from the entire pool of judges in active service. That would significantly increase the consistent development of circuit case law and promote certainty and stability to guide lawyers in advising their clients in conducting their affairs in conformance with the law.

2. Is it your view that the Ninth Circuit is not hearing as many en banc cases as it should because of the overwhelming volume of decisions and petitions generated?

Yes. There is simply too much law coming out of our circuit for judges to keep up—often to the tune of more than 500 precedential opinions each year.[4] That

[3] *See* Robert A. Ainsworth, Jr., *Fifth Circuit Court of Appeals Reorganization Act of 1980,* 1981 BYU L. Rev. 523, 526–27 (1981).

[4] *See, e.g.*, U.S. Court of Appeals for the Ninth Circuit, Office of the Circuit Executive, 2017 Ninth Circuit Annual Report 45; U.S. Court of Appeals for the Ninth Circuit, Office of the Circuit Executive, 2016 Ninth Circuit Annual Report 44; U.S. Court of Appeals for the Ninth Circuit, Office of the Circuit Executive,

means, in addition to handling his or her own share of our 11,000 new appeals and the nation's largest backlog, each judge is faced with the Sisyphean task of reading 10 new published opinions every week, just to keep up with what the rest of our court is doing. This does not even account for the thousands of additional non-precedential opinions issued by our court. Moreover, each year our court regularly receives around 800 petitions for en banc review, filed by parties themselves.[5] Thus, along with attempting to keep track of one's own cases, each judge also receives more than 15 new en banc petitions every week to review.

Such a system affords hardly enough time for Ninth Circuit judges even to stay informed about developments in our law, let alone to ensure consistency in those developments. There is quite a difference between keeping an eye on newly published opinions and reading those opinions closely enough to know whether they might merit the intensive process of en banc review. Splits of authority within our own circuit, for instance, are pernicious and often difficult to catch, as they lie hidden in unstated implication or in issues that might not have demanded a panel's full attention. Thus, all judges on the court are forced to "triage" their work, meaning there is less time to devote to the significant work of calling cases en banc or

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2015 Ninth Circuit Annual Report 59; U.S. Court of Appeals for the Ninth Circuit, Office of the Circuit Executive, 2014 Ninth Circuit Annual Report 55.

[5] *See, e.g.*, 2017 Ninth Circuit Annual Report 43.

defending against en banc calls made by off-panel judges in favor of working on active cases assigned to overworked judges. We forego meritorious en banc calls because there simply isn't enough time to pursue every case that ought to be reheard en banc. What follows is that only a small fraction of our published opinions receive meaningful en banc consideration—let alone actual en banc review. In a typical year, only roughly 30 of our cases will receive an en banc vote, with fewer than 20 cases ultimately being reheard en banc.[6] Recently, the numbers have been even smaller than that, perhaps due to an increase in the number of vacancies on our court.

Such a small sliver of en banc review cannot realistically be expected to resolve the deep problems inherent in our ability to maintain the overall consistency or clarity of our law.

3. Can you tell us more about your observations of three-judge panels making sua sponte en banc requests for review of their own decisions after they uncover directly conflicting circuit precedent on a dispositive issue?

In the Ninth Circuit, a three-judge panel may not overrule a prior published decision of the circuit; only the court sitting en banc may do so. Thus, in the event that a three-judge panel discovers contradictory circuit precedent on an important issue in a case, often the only available remedy is to attempt to have the case heard

[6] *Id.*

initially en banc, so that the conflict may be reconciled and the case may be decided coherently.

It is regrettable that such sua sponte en banc requests have become anything more than an extraordinary occurrence in our court. Litigants and the public alike depend on the ability of our court to speak with a single voice when answering legal questions, and our recurrent failure to keep our law consistent speaks volumes about the need for a more manageable circuit. But judges on our circuit are neither slothful nor careless; we simply face an ever-growing and unwieldy body of case law that is virtually impossible to canvass every time we must decide a case. Even with the industrious efforts of litigants and chambers staff, important cases may be missed and intracircuit splits thereby created. Unfortunately, such splits may persist for years, until they are detected by the court and a majority of active judges determines that it is worth their time and effort to hear a case en banc to remedy the contradiction in our law.

4. Can you give us examples of how close personal relationships between judges have improved the administration of justice as well as how a lack of closeness can impede it? How do visiting judges factor into this equation?

Collegiality is extremely important in our appellate system. The genius of the appellate process is founded upon the close collaboration of jurists who combine their independent judgment, informed by their personal experiences, and apply their collective wisdom to decide the issues presented by an appeal. This collaborative

endeavor requires an environment in which a reasonably small body of judges has the opportunity to sit and to conference together frequently. Such interaction enhances understanding of one another's reasoning and decreases the possibility of misinformation and misunderstandings. Unlike a legislature, an appellate court is expected to develop one clear, authoritative voice in interpreting the law. But the Ninth Circuit's ungainly size severely hinders us in this regard and creates the danger that our deliberations will resemble those of a legislative, rather than a judicial, body.

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It should be no surprise that it becomes difficult to establish effective working relationships in discerning the law when we sit together so rarely.

The problem is exacerbated by our need to rely extensively on visiting judges to help handle our overwhelming caseload. Indeed, we rely on visiting judges to a degree far beyond any other circuit.[7] Although we deeply appreciate the contributions of visiting judges, they simply cannot replicate the sort of close, collegial relationships that befit an appellate court. Quite obviously, we do not have the level of familiarity with visiting judges that we do with our regular colleagues. More often than not, there is at least one visiting judge sitting with us, often a jurist with whom the other judges have never worked before, and may never work again. Indeed, I will frequently serve on a panel with a visiting judge with whom I had never spoken, let alone had developed a professional relationship.

From the perspective of the visiting judge, the problem is compounded. A visiting judge will often be unfamiliar both with the members of the panel on which

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5. Should we worry that an increase in the number of circuits will lead to more inter-circuit conflicts?

Anytime the number of circuits increases, there is increased potential for intercircuit conflicts (so-called "circuit splits"), due to the simple fact that there are more courts capable of disagreeing with each other. But I do not believe that we should worry about the marginal increase in the potential for circuit splits caused, for example, by dividing the Ninth Circuit into two or even three circuits.

First, although I am not aware of any data on this issue, I would suspect that the potential for circuit splits in our current system of twelve regional circuits would not be all that different than the potential for such splits in a system of thirteen regional circuits.

Second, the mere existence of a circuit split is not necessarily cause for concern. Our system of regional circuit courts anticipates that circuit splits will exist, even between states that are closely related economically or geographically.

Although there are some negative consequences to circuit splits (for example, their impact on entities which operate in multiple circuits), it is not the case that every circuit split would result in such harms. Indeed, at least one empirical study has indicated that "a substantial majority" of unresolved circuit splits "would have no impact on the legal position [even] of entities whose activities cross circuit lines."[8] Circuit splits can even be useful. Just as our federal constitutional structure allows an individual state to "serve as a laboratory" to "try novel social and economic experiments" to attempt new answers to lingering policy dilemmas,[9] so too does our system of regional circuits allow different courts independently to approach difficult questions of federal law. Courts might analyze a legal question differently, and the resulting diversity of views may in fact inform and *improve* the national understanding of that question.[10] Eventually, of course, we hope that courts will settle on a uniform interpretation of federal law (either on their own or through the action of Congress or the Supreme Court), but initial disagreement among circuits

[8] Arthur D. Hellman, *Light on a Darkling Plain: Intercircuit Conflicts in the Perspective of Time and Experience*, 1998 Sup. Ct. Rev. 247, 253 (1998); *see also* Amanda Frost, *Overvaluing Uniformity*, 94 Va. L. Rev. 1567, 1584–1606 (2008) (arguing that the practical harms of circuit splits have been overstated).

[9] *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[10] *See, e.g.*, *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., concurring in denial of certiorari) ("In my judgment it is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court.").

on a novel legal question is not necessarily a bad thing for the development of our law.

The possibility that a law will operate somewhat differently in one region of the country than it does in another region concerns me far less than the threat of *intra*circuit conflict—where two cases within the *same* circuit come to contradictory interpretations of a law. In the face of an intracircuit conflict, there is simply no answer for how individuals and organizations operating within the circuit are to follow the relevant law. As suggested in my written testimony, the larger an individual circuit and its attendant body of law grows, the more likely it is that such intracircuit conflicts will develop within it. Thus, even if restructuring the Ninth Circuit might marginally increase the chance for new *inter*circuit conflict, such restructuring would likely reduce the far more troubling risk of *intra*circuit conflicts in a court of our size.

Finally, I do not believe a slight increase in the potential for intercircuit conflict should be alarming, because the Supreme Court of the United States sits ready and able to resolve circuit splits that do arise. One of the primary functions—perhaps *the* primary function—of the Supreme Court's discretionary certiorari process is to grant review in cases to resolve conflicting law among the circuits.[11]

[11] *See, e.g.*, Supreme Court Rule 10 (listing the need to resolve conflicting circuit decisions among the considerations when deciding whether to grant a petition for certiorari).

When recently asked about the Supreme Court's dwindling annual docket, Chief Justice Roberts emphasized the importance of a circuit split when deciding whether to grant review in a case and observed that the Supreme Court could functionally hear many more cases than it does "without any stress or strain, but the cases just aren't there."[12] In other words, even if the addition of a new circuit might marginally increase the number of circuit splits, such an increase should not impair the Supreme Court's ability to oversee and to resolve intercircuit conflicts in the same way it does now.

[12] *See* Evan Bernick, *The Circuit Splits Are Out There—and the Court Should Resolve Them*, Engage: The Journal of the Federalist Society Practice Groups, Vol. 16, Issue 2 (Aug. 13, 2015), *available at* https://fedsoc.org/commentary/publications/the-circuit-splits-are-out-there-and-the-court-should-resolve-them.