Testimony of Brunn (Beau) W. Roysden III before the U.S. Senate Committee on the Judiciary Subcommittee on Privacy, Technology & the Law

Hearing Topic: "Rebooting the Ninth Circuit: Why Technology Cannot Solve Its Problems"

Hearing Date: August 24, 2017 at 10:00 a.m.

Chairman Flake, Ranking Member Franken, and Members of the Committee,

It is an honor to appear before the Senate Judiciary Subcommittee on Privacy, Technology & the Law to testify about whether technology can solve some of the widely identified problems with the current size and scope of the Ninth Circuit.

I am currently the Deputy Division Chief of the Civil Litigation Division at the Arizona Attorney General's Office. The purpose of my written testimony is to provide the perspective of a practitioner working at a state attorney general's office in a state within the Ninth Circuit. It has been the experience of attorneys in my office and other attorneys I have spoken with that at times the sheer size of the Circuit, the high volume of cases it must decide, and the procedural responses taken by the Circuit have resulted in delays in achieving justice, unpredictability (both at the panel and *en banc* stages), and lack of adequate representation for states other than California. This is certainly understandable given that the Court's jurisdiction encompasses 20% of the nation's population and 40% of its land mass. It is also understandable given that (once all vacancies are filled) there will be 29 active circuit judges in the circuit, each of which must address a high volume of cases. These problems cannot be solved by technology alone. Rather, as I will describe in more detail below, creating a new Twelfth Circuit would best address the problems of delay, unpredictability, and uneven regional representation. Moreover, the benefits of economy of scale and uniform federal law in the western states do not outweigh the drawbacks of the current, overly large circuit, especially given that the current circuit structures do not generate the wished-for uniformity.[1]

Before testifying further, I would like to briefly expand on my background. I have worked at the Attorney General's Office for approximately two years. In that role, I and the attorneys I oversee regularly practice in federal court. I worked for approximately six years at two large national law firms—in Phoenix and Los Angeles. I began my career as a law clerk to a Justice on the Arizona Supreme Court. I work in the area of civil litigation, with a particular focus on consumer fraud and constitutional matters. The Civil Litigation Division, in which I work, also has responsibility for civil rights, environmental enforcement, bankruptcy, and antitrust. We also interact frequently with our office's Solicitor General.

[1] My opinions are not based on the particular personnel who currently constitute the court, or how any particular case was decided. These should not be the criteria that guide Congress in addressing this important question.

Throughout my various jobs, my practice has included working on appellate matters at the U.S. Supreme Court, the federal courts of appeals, and the Arizona appellate courts.

Delay

The first widely recognized problem with the current size and scope of the Ninth Circuit is that the circuit takes longer to decide cases than other courts of appeals.[2] There is a bedrock principle of swift access to justice that all of us strive for, whether as judges, prosecutors, or private attorneys. As you are well aware, there is a commonly repeated statistic that the Ninth Circuit takes an average of 14 months to decide a case, and this is the longest of any circuit. It is also 5.5 months slower than the national median. I would like to provide a few concrete examples of a case where state attorneys general offices have experienced delay. One example is *Arizona ex rel. Darwin v. United States Environmental Protection Agency*.[3] This case involved a challenge to the EPA's partial disapproval of Arizona's regional haze SIP submission. The court's decision came approximately ***twenty-three months*** after the briefing was completed.[4] While this was a complicated case, the delay directly impacts the ability of the state to achieve swift resolution of an important matter, and in the meantime the parties are left in legal limbo.

A second case is *Sierra Club v. McCarthy*.[5] In this case, states appealed the District Court's adoption of an EPA settlement with environmental organizations that set deadlines for designating areas in attainment for sulfur dioxide under Clean Air Act. The States sought tighter timeframes for EPA determinations and appealed to Ninth Circuit. The briefing at the Ninth Circuit was completed in late-November 2015, and oral argument was not held until March 2017—approximately fifteen months later. A decision has not yet been rendered.

I am not seeking to criticize the court's handling of any particular case. Rather, these are but a few examples to illustrate the kinds of actual cases that make up the statistics regarding delay described above.

Although technology can certainly result in improvements in the prompt resolution of cases, another more obvious solution—adding more judges—is hampered by the Ninth Circuit's already large size. If the court were split, then this would make it possible to add judges to each of the new circuits, without exacerbating the problem of the Court being too large to function as a single en banc whole.

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[2] *See, e.g.*, Sara Randazzo, Under New Bill, Federal Appellate Court Based in California Could be Split Up, Wall Street Journal (Feb. 2, 2017).
[3] 815 F.3d 519 (9th Cir. 2016).
[4] Oral argument was held on March 9, 2015, approximately one year after briefing was complete.
[5] Case No. 3:13-CV-03953.

Unpredictability

A second widely recognized problem with the current size of the Ninth Circuit is the unpredictability of which judges will hear a particular case—especially at the *en banc* stage, where the Ninth Circuit is unique in that it does not sit as a true en banc court. This unpredictability brings with it the risk of inconsistency. This is simply a function of the fact that the Court is so large. With 29 active judges, there are over 3600 combinations of three-judge panels. But more strikingly, there are millions of combinations of eleven-judge en banc courts.[6]

Beyond the mere mathematical combinations, many experienced jurists have in the past expressed concern about inconsistency. A recent article in the Arizona Attorney Magazine collected quotes from several jurists.[7] I will repeat just two examples from that article here. Former Supreme Court Justice John Paul Stevens stated in 1999 that the Ninth Circuit was "so large that even the most conscientious judge cannot keep abreast of her own court's output." And Justice Anthony Kennedy stated at the same time that the Ninth Circuit's large size was a hindrance to the achievement of consistency in the circuit's case law.[8]

This is most glaringly a problem in the en banc process. Because of its large size, the Ninth Circuit does not sit as a full en banc court. Rather it has a random sample of judges sit en banc. This by definition risks exacerbating inconsistency and unpredictability. It also means that as a practical matter, the Ninth Circuit already has been split. It is just a split that changes with each particular grouping of en banc judges. In an earlier Arizona Attorney article, former District Judge John Roll noted that the Ninth Circuit was the only circuit court to adopt a limited en banc procedure.[9] I believe that is still true, and I am unaware of any other circuit that is considering adopting this procedure.

A new Twelfth Circuit, as proposed in S. 276, would consist of a smaller number of judges and a smaller caseload per judge. The benefits of smaller number of active judges would be substantial. That would allow the full court to sit en banc and speak on important matters as one court, ensuring uniformity. It would foster collegiality by definition. And just as a matter of math, judges in a smaller circuit could more easily keep track of cases decided by their colleagues. Similarly, if the new Ninth Circuit consisted of nineteen judges, this would still be a manageable

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[6] The first number is based on choosing 3 judges from 29, with the order not mattering. The second is based on choosing 10 judges from the 28 judges other than the Chief Judge, again with the order not mattering, which results in 13,123,110 combinations.

[7] Arizona Deserves A Fair Deal: Split the Ninth Circuit, Arizona Attorney (July/August 2017).

[8] *Id.* at notes 28-29 (citations omitted).

[9] Hon. John M. Roll, Splitting the Ninth Circuit, Arizona Attorney (September 2005).

number to sit en banc. As a comparison, the Fifth Circuit consists of seventeen active judges (once all vacancies are filled).

Again, the issue of a large number of judges in a single circuit is a problem that technology alone cannot solve—the large number creates unique problems. Therefore, there are concrete benefits from structural changes.

Lack of Adequate Representation for States other than California

A third common complaint with the Ninth Circuit is that it is dominated by judges from California. Seventeen of the twenty-nine active judges (almost 60%) come from that state. In contrast, the states with the next greatest representation are Arizona (with three judges) and Washington and Nevada (with two judges each). The remaining five states each have only a single active circuit judge on the court.

Home rule—which I define here as stronger local, regional, and cultural ties within a circuit—is a benefit in and of itself. The new Twelfth Circuit proposed in S. 276 would create a Mountain Circuit. This Circuit would allow the common issues of Western states (from those in the Southwest, Mountain West, and Pacific Northwest) to be at the forefront. This is important—I have practiced in California as well as Arizona and there is certainly a difference in legal culture. Another example is the importance of Native American issues to Arizona and other states in the West.[10]

And a Mountain Circuit would help raise important issues to the Supreme Court. With the Supreme Court taking fewer cases than it used to,[11] there are two detrimental results that come from an overly large single circuit sprawled across a huge geographic area. The first is simply less opportunity for a particular case to get to the Supreme Court. This means that for all intents and purposes the Ninth Circuit is the last stop for all but a handful of federal cases filed here.[12] But circuit splits are an important factor in getting Supreme Court review. A Mountain Circuit might be more likely to highlight issues of importance to the non-California states that are currently lost in the mix because of the size, caseload, and novel en banc process of the existing Ninth Circuit. Without this focus, important issues may not be getting flagged for the attention from the Supreme Court that they might otherwise receive—leaving Mountain states out in the cold. (And dissents from denial of en banc review can hardly be said to be a substitute to en banc review, particularly

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[10] *See* note 7, *supra*.

[11] *See, e.g.*, Erwin Chemerinsky, 10 Lessons from Chief Justice Roberts' first 10 years, abajournal.com (Sept. 30, 2015) (noting that recent terms of the Court have decided about 70 cases each, while for much of the 20th Century, the Court was deciding 200 cases a year and as recently as the 1980s it was deciding more than 160 cases per year).

[12] As defenders of the court have noted, the Supreme Court generally grants certiorari on fewer than twenty out of the Ninth Circuit's 11,500 cases per year.

when individual states are regularly unrepresented in particular en banc groupings).

Second, each of the smaller states would dramatically improve its relative strength in the new Twelfth Circuit; no single state would dominate; and of particular importance, every state in the circuit would be guaranteed to have representation in the en banc court. Arizona would go from having 3 of 29 active circuit judges (10%) to 3 of 10 (30%); Washington and Nevada would go from 2 of 29 (7%) to 2 of 10 (20%). And for the states with a single active judge, there would be a large benefit because not only would their relative representation increase, but their state's judge would be guaranteed to be on the en banc court. (Right now, based on simple math, California is the only state to be permanently guaranteed representation on the en banc court.)[13] A final advantage of a new Twelfth Circuit is that no one state would dominate the new twelfth circuit. If the current number of judges were kept, Arizona as the largest would only have thirty percent of the active judgeships. In contrast, California currently has a substantial majority (60%).

As with the other two issues identified above (delay and unpredictability), the issue of one state dominating and lack of adequate representation is not something that can simply be cured by technology. Rather, structural change is needed.

Economies of Scale Do Not Outweigh the Benefits of A Smaller Circuit

Proponents of retaining the status quo have emphasized the efficiencies of economy of scale from a large circuit.[14] However, that argument proves too much. If larger were inherently better, then we would not have the circuits that we do. And one would expect to see other parts of the country advocating for consolidation of their circuits. I am not aware of anyone making that argument.

It is also worth noting that the Ninth Circuit is twice as big as the next biggest circuit both in terms of the population within its jurisdiction (61 million vs. 33 million) and the number of states and territories within its jurisdiction (11 vs. 6).[15] It also has double the number of pending cases.[16]

Finally, as I discussed above, bigger is not necessarily better when it comes to Supreme Court review. This is another reason why it would not make sense to consolidate circuits (and why no one is proposing doing so).

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[13] Montana is also currently guaranteed representation because Chief Judge Thomas is from that state. However, that guaranteed representation lasts only as long as the term of the current Chief Judge.

[14] *See, e.g.*, Patricia Lee Refo, Retain the Ninth!, Arizona Attorney (July/August 2017).

[15] *See* note 7, *supra*.

[16] *See* note 2, *supra*.

The Concern of Hampering Business Interests in Adjacent States Seems Overblown.

A second main argument by proponents of the status quo is that Arizona benefits from the uniformity of law that the Ninth Circuit provides. Proponents of this argument often emphasize business law and intellectual property matters in particular.[17] But this argument seems overblown—if not wrong—for multiple reasons. First, as noted above, there isn't really the hoped-for uniformity. Second, for patent cases, all appeals already go to a single circuit—the Federal Circuit based in Washington, D.C. Third, for other types of IP cases (*e.g.*, copyright, trademark, and trade secret), the new Twelfth Circuit proposed in S. 276 would include judges from Washington State, which is home to Microsoft and Amazon, among others. There is also a strong technology presence of Intel and other hi-tech companies right here in Arizona. Finally, it is generally understood that competition is good, not bad. We discourage monopolies as a policy matter. If anything, the prospect of competition would seem to support more pro-business decisions arising out of both the new Ninth and Twelfth circuits, not fewer.

Conclusion

The importance of the Ninth Circuit to the life of the law in Arizona simply cannot be overstated. So much of the caselaw that is applied in cases affecting Arizonans—by the Ninth Circuit itself, by federal District Courts, and as persuasive authority by the Arizona State Courts—is made at the circuit court level. I recently had the privilege of arguing in front of the Ninth Circuit in a case where the Arizona Attorney General's Office served as the lead office for fourteen state attorneys general. It was truly an honor to appear before the Court. But that doesn't mean that things can't be made even better from a structural perspective. That is the duty of Congress under Article 1, Section 8 of the Constitution, which vests in Congress the power "[t]o constitute Tribunals inferior to the supreme Court." For the reasons outlined above, I believe that the ways to improve the current Ninth Circuit are not simply a matter of technology, but rather also creating a more nimble Twelfth Circuit that can sit as a full en banc court, deliver more uniform and timely results, and better represent the Mountain states that are currently a minority in the existing Ninth Circuit.

It was an honor to be invited to testify before you and I look forward to any questions you might have.

[17] See note 14, *supra* (noting that "Technology companies in Arizona enjoy the same intellectual property law as their competitors in California and Washington, and these companies do not face the unwelcome prospect of differing law governing their IP in California versus Arizona).