

United States Senate Committee on the Judiciary
Subcommittee on Privacy, Technology and the Law

Committee Field Hearing
entitled:

“Rebooting the Ninth Circuit:
Why Technology Cannot Solve Its Problems”

Thursday, August 24, 2017 at 10:00 a.m.
Sandra Day O’Connor United States Courthouse
Ceremonial Courtroom
401 West Washington Street
Phoenix, Arizona 85003

Written Testimony of
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Good morning and welcome to the Sandra Day O'Connor United States Courthouse. My name is Mary Schroeder and I am now a senior judge on the United States Court of Appeals for the Ninth Circuit. Prior to my appointment to this court I was a judge on the Arizona Court of Appeals (where, upon my departure to the federal bench in 1979, my seat was filled by Sandra Day O'Connor). I was appointed and confirmed with the support of Senator Goldwater and of Senator DeConcini, who was a member of the Judiciary Committee at the time. Arizona has had a Senator on that Committee virtually ever since, including, Senator Kyl and Senator Flake.

It was my honor to serve as Chief Judge of the Ninth Circuit from 2000 to 2007. I was the second Arizona judge to have served as Chief Judge of the Ninth Circuit during my professional career, the first having been Richard Chambers of Tucson, for whom our courthouse in Pasadena is named. The next Judge in line to succeed the current Chief Judge of the Circuit is also an Arizonan, Judge Mary Murguia of Phoenix. I appear today to express my views, however, and do not speak on behalf of any other judges.

During the period when I was Chief Judge, we experienced the most recent serious discussions about dividing the Circuit. The proposals died in the Senate in the face of opposition to division by an overwhelming majority of the affected circuit, district and bankruptcy judges, as well as many state, local and national bar associations and hundreds of professors of law. I testified at that time, and it remains even more true today, that technology and communication have made the business of court administration much easier. For example, during the period that I was Chief, the courts of our Circuit moved from paper to electronic filing, so that judges now have with them the entire record of a major case on a device that can be carried in their pocket or purse.

I am therefore hopeful that this hearing will help Congress focus on the overwhelmingly positive impact of technology on judicial administration, led by the Ninth Circuit. So I am very happy to appear here with my good friend and respected colleague, Chief Judge Sidney Thomas of Montana. He describes in his written testimony the many technological innovations that have made our Circuit the national leader. He documents the progress we have made because of the resources and innovative skill available in a large and diverse circuit.

Fragmenting those resources and talents could only hinder that progress. None of our chiefs, and few of our judges, have ever favored dividing the Circuit. This is so for a variety of reasons, and Chief Judge Thomas more fully explains

many of them in his statement. I will briefly discuss only three that to me are key, because they bear on issues of technology and judicial administration with which I am very familiar.

First, we want to have judges sitting where they are needed. Presently all of the district and bankruptcy judges in the Circuit, because they are bound by the same circuit law, can be sent temporarily to sit anywhere within the Circuit where the need is greatest. For example, the 2011 murder of Chief District Judge John Roll in Tucson created a huge need that the Circuit was able to meet by moving judges from other parts of our Circuit to sit in Arizona on a temporary basis. Creating a new circuit would mean creating different law and would thus destroy that flexibility. Division would result in a much smaller pool of judges available to assist one another when the need arises. This is a serious issue here in Arizona since the need for additional judges to assist on a temporary basis has recently been most acute in border districts like ours. Border law enforcement is an important part of the Circuit's work. Putting Arizona and California in different circuits could well make enforcement more complicated. For example, differences in circuit law could spawn disputes over where, in that barren desert region north of the border, the contraband was actually intercepted.

Second, circuit division would be expensive and time consuming. The administrative structure of the offices of the Circuit Executive, Court of Appeals, Clerk's Office, Office of Staff Attorneys and Library would have to be replicated and new courthouses and courtrooms established. Costs for lawyers and litigants must be considered as well. San Francisco is a major hub. A circuit stretching from Arizona to Alaska but without California, as some of the present proposals envision, would have no central hub. Lawyers and litigants would have to fly from one end to the other. As a sports fan I am quite familiar with the Pacific 12 Conference, the conference in the West that covers territory quite similar to the Ninth Circuit. It is no coincidence that the headquarters of the Pac-12 is in San Francisco, California, a few blocks from the San Francisco headquarters of the Ninth Circuit.

Third, and certainly not least, technology has enabled all courts to handle cases, emergency motions, and life or death decisions in an informed and collegial way. The so-called overwhelming case load that led to the division of the Fifth Circuit in the 1970s amounted to about 97 cases per judge per year. Now every circuit handles hundreds of case per judge. The Ninth Circuit has led the way in innovative technology, as is appropriate for the home of Silicon Valley and Microsoft. We are fortunate to have a Chief Judge who is a whiz at computer stuff.

He has taught the other Circuits a thing or two about harnessing technology to help the courts do their work in an efficient manner. Our Circuit can identify issues early on, see that similar cases are decided together, and conference with judges in different parts of the Circuit quickly to decide emergency matters.

Our three-judge panels dispose of cases promptly. We also get priority cases to the panels soon after briefing. The Circuit continually works to reduce the median time it takes all cases to get to three-judge panels after cases are briefed, and I would like to explain the reason why there was some upward fluctuation in that median length of time in the 2000s.

During my tenure as Chief Judge the executive branch decided to short cut the handling of cases in the immigration tribunals by giving cases less administrative review. As the court where 50% of all of those cases landed, our load increased from about 600 to 6,000 immigration cases in one year. Our judges determined at the time to treat those cases the same way we treated all immigration cases and not adopt special expedited treatment to short-circuit their handling in our Court. As a result the statistics reflect that the median time for disposal of all cases is higher than it would have otherwise been.

Legislation dividing the Circuit, even if it added more judgeships for the larger circuit, would make no difference because as a result of our improved use of technology and case administration methods, the backlog would be gone by the time the costly legislation could take effect.

Technology has helped us inform the bar and the public about what we are doing as well. We remain the only circuit to live video stream all of our arguments, and we work routinely with national and local television and radio networks to further enhance access. Additionally, we also livestream training programs for attorneys on various topics, including immigration and habeas. This allows people even in the most remote locations in the Circuit to have real-time access to all we do.

In sum, if there were any way to divide the Circuit equitably and efficiently, so as to improve the administration of justice, it would have happened long ago. No one has yet identified a problem of judicial administration in the Circuit that division of the Circuit would solve, and no one has identified a way to divide the Circuit that would avoid the costs and splintering of resources I have discussed. There would be no discernable benefit to Arizona. The various efforts to divide the Circuit that I have observed during nearly 40 years have originated, not in issues of

administration, but in unhappiness about particular decisions. Our Constitution in Article III says that Congress can't punish judges for decisions by diminishing their salaries. Neither should Congress break up courts because of their decisions.

Thank you for your attention.