Department of Justice

STATEMENT

OF

RACHEL L. BRAND
ASSISTANT ATTORNEY GENERAL FOR LEGAL POLICY
DEPARTMENT OF JUSTICE

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

LEGISLATIVE PROPOSALS TO SPLIT THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PRESENTED ON

SEPTEMBER 20, 2006

Statement of
Rachel L. Brand
Assistant Attorney General for Legal Policy
Department of Justice

Before the
Committee on the Judiciary
United States Senate

Concerning
Legislative Proposals to Split the United States Court of Appeals for the Ninth Circuit

September 20, 2006

Chairman Specter, Senator Leahy, and members of the Committee, thank you for the opportunity to testify on this important issue. From time to time, Congress has acted to improve the administration of justice by adding or splitting United States Courts of Appeals. For example, more than 25 years ago, Congress split the Fifth Circuit into the new Fifth Circuit and what is now the Eleventh Circuit. Today, the Ninth Circuit bears a strong resemblance to the pre-split Fifth Circuit. As a frequent litigant in the federal system and in the Ninth Circuit, the Department of Justice is directly affected by the Ninth Circuit's ability to function efficiently. Furthermore, the Department has a strong interest in the efficient administration of justice generally. The Department therefore supports legislation providing for additional federal judgeships and for a split of the United States Court of Appeals for the Ninth Circuit.

The Department of Justice believes that dividing the Ninth Circuit would benefit the administration of justice at the federal level in the states located within the circuit. One factor favoring dividing the circuit is its sheer size. By any measure, whether geography, caseload, or number of authorized judgeships, the Ninth Circuit is the largest federal appellate court. The 11 states and territories within the circuit extend over more than 1.3 million square miles, which is nearly 40 percent of the entire United States. The circuit encompasses more states than any other circuit, and with over 58 million people in its jurisdiction, its population is almost double that of the Sixth Circuit, which, with a population of 31 million, is the second most populous circuit. The Ninth Circuit binds nearly twenty percent of the nation's population; thus, decisions by a three-judge panel in the circuit bind almost one in every five Americans. The population of the states within the Ninth Circuit grew far faster than the population of any other circuit over the past two decades. The United States Census Bureau projects that it will grow even more, both in absolute terms and relative to the other circuits, between 2000 and 2030. Notably, the Ninth Circuit includes the first-, second-, and sixth-fastest growing states: Nevada, Arizona, and Idaho.

The Ninth Circuit is also the largest circuit when measured by caseload. For the year ending in September 2005, 16,037 appeals were filed in the Ninth Circuit, a 12.4 percent increase from the year before. This was significantly more than the

number of appeals filed in any other circuit and accounted for over 23 percent of the total number of appeals filed in the country. Between 2000 and 2005, the Ninth Circuit's caseload increased by over 70 percent, almost five times the average increase of the other circuits. The Ninth Circuit is disproportionately large in terms of judgeships, as well. The circuit has 28 authorized judgeships, which is 11 more than the next-largest circuit. Moreover, the circuit has 23 senior-status judges, some of whom handle the same large caseload as the active judges. Even with the large number of judges, it is often necessary to ask judges from other courts to hear cases in the Ninth Circuit by designation.

The Ninth Circuit's size has led to administrative difficulties that have adversely affected its ability to operate effectively. As of September 2005, the Ninth Circuit was the slowest circuit in resolving cases. During the 12-month time period ending September 30, 2005, the median time from filing of notice of appeal to final disposition of a case was over 16 months, which is over four months longer than the national average of 11.8 months. The delay in resolving cases has increased since the 12-month time period ending September 30, 2004, when it took a median time of 14 months from filing of notice of appeal to final disposition of a case. Additionally, the Ninth Circuit had the most cases pending for more than three months and for more than six months in September 2005. This inefficiency impacts negatively on both the Department of Justice, as a frequent litigant in the

Ninth Circuit, and other parties waiting for their cases to be resolved. For example, aliens who are detained during the appellate review of their petitions but are ultimately granted legal status in the United States face an extended loss of freedom in the Ninth Circuit. The Government, on the other hand, faces increased detention costs. Similarly, in situations where an alien is challenging a removal order, the delay in resolving the case allows aliens who are subject to removal to remain in the United States for a longer period of time, while non-detained aliens who are ultimately found to be not subject to removal can face challenges in finding employment or traveling during the pendency of their appeal.

As Judges Tallman and O'Scannlain have noted, the number of appeals the court hears makes it virtually impossible for the judges of the Ninth Circuit to read all of the opinions issued by their own court. Judge Tallman has testified that there are "simply not enough hours in the day for even the most conscientious and hardworking judge to remain current" by reading other Ninth Circuit opinions. Judge O'Scannlain has echoed that concern, noting that Ninth Circuit judges are "losing the ability to keep track of the legal field in general and [their] own precedents in particular." Even the most diligent Ninth Circuit judge will be unable to monitor every opinion issued by the court, especially considering the large number of unpublished opinions, which account for over 80 percent of the circuit's terminated cases. This can lead to intra-circuit inconsistencies, which

make it difficult for citizens, organizations, and government agencies within the Ninth Circuit to conform their actions to the law. For example, in *United States v. Juvenile*,[1] one panel of the Ninth Circuit limited district courts' authority to consider issues beyond rehabilitation when sentencing under the Federal Juvenile Delinquency Act. In cases decided after *United States v. Juvenile*, however, different panels reached precisely the opposite conclusion, holding that district courts are allowed to consider other issues besides rehabilitation under the Federal Juvenile Delinquency Act.[2] This type of inconsistency also presents unique challenges to lawyers, including those employed by the Department of Justice, litigating before that court. As Justice Kennedy has pointed out, the size of the circuit creates an "unacceptably large risk of intra-circuit conflicts or, at the least, unnecessary ambiguities."

When a circuit is faced with an intra-circuit conflict or a panel decision that conflicts with Supreme Court precedent or raises a serious legal question, a majority of the active judges on the court can vote to hear the case *en banc*. In every circuit but the Ninth, all active, non-recused judges sit for an *en banc* proceeding. The number of active judges on the Ninth Circuit makes a traditional *en banc* proceeding impracticable. The Ninth Circuit has adopted a unique and

[1] 347 F.3d 778, 787 (9th Cir. 2003).

[2] *See United States v. D.R.L.*, 2003 WL 22735846, at *1 (9th Cir. 2003) (unpublished); *United States v. Juvenile #1 (LWQ)*, 38 F.3d 470, 472 (9th Cir. 1994); *United States v. J.L.B.*, 141 F.3d 1181, 1998 WL 101716 at *3 (9th Cir. 1998) (unpublished).

frequently criticized *en banc* procedure. Rather than having all active judges hear a case *en banc* as all other federal courts of appeals do, only 15 out of 28 active judges participate when the Ninth Circuit hears a case *en banc*. This number used to be even lower, but the circuit increased the number of participating judges from 11 to 15 in 2006 in response to criticism of the procedure. This means that a majority of the *en banc* panel is eight judges, less than a third of the active court. In a close eight-to-seven vote, eight judges will speak for the entire court, deciding cases for almost 20 percent of the American population. Judges who hold a minority view on the court might easily be the majority in the *en banc* proceeding, subverting the purpose of the *en banc* rehearing. The court cannot effectively reconsider its decisions with these *en banc* procedures, and, because of its size, a full *en banc* hearing with all 28 judges is not feasible on a regular basis. Although the Ninth Circuit may consider a case with a full *en banc* hearing, the judges have never voted in favor of such a review. With the limited *en banc* review, judges who participated in the panel decision might not be selected for the *en banc* review at all. For example, in the California recall election case, the original panel unanimously made one decision and then the *en banc* panel unanimously came to the opposite conclusion. The *en banc* panel did not include any members of the original panel.

Even the truncated *en banc* procedure is invoked rarely. Accordingly, intra-circuit inconsistencies that could be solved through *en banc* procedures are not. On a number of occasions, the Department of Justice has sought *en banc* review without success on issues the Solicitor General has deemed to be of great legal significance pursuant to Rule 35(a) of the Federal Rules of Appellate Procedure (where *en banc* review is necessary to "secure or maintain uniformity of the court's decisions" or "the proceeding involves a question of exceptional importance"). For example, in *United States v. Olabanji,*[3] the Government's request for rehearing *en banc* was denied, despite the existence of an intra-circuit conflict. In *Olabanji,* the Ninth Circuit held that district judges must consider policy statements and the sentencing guidelines for the underlying offense when calculating a sentence after revoking probation. As Judge Graber pointed out in her dissent from denial of rehearing *en banc*, this decision conflicted with the Ninth Circuit panel decision in *United States v. George,*[4] which held that when sentencing for probation violations, district court judges should consider policy statements and sentencing guidelines for probation violations, not the guidelines applicable to the original offense.[5] As another example, a Ninth Circuit panel held in *United States v. Patterson*[6] that Double Jeopardy attached when the district court accepted the defendant's guilty

[3] 268 F.3d 636, 639 (9th Cir. 2001).
[4] 184 F.3d 1119 (9th Cir. 1999).
[5] *United States v. Olabanji,* 286 F.3d 1114, 1117-18 (9th Cir. 2002) (Graber, J., dissenting from denial of rehearing en banc).
[6] 381 F.3d 859, 864-65 (9th Cir. 2004).

plea, thus precluding the Government from prosecuting Patterson for a greater offense, even though Patterson only pled guilty to the lesser included offense. The Government petitioned for rehearing *en banc*, citing a Supreme Court case[7] that held that prosecution on remaining charges that are greater or lesser included offenses does not violate the Double Jeopardy Clause. Despite this inconsistency, the Government's petition was denied. The lack of clarity in the law that results from intra-circuit splits and Ninth Circuit decisions that are inconsistent with the opinions of the Supreme Court makes it difficult for all individuals in the Ninth Circuit, including law enforcement, to structure their primary conduct.

Caseloads indicate that the conditions described above will only intensify with time. For example, there has been a marked growth in immigration appeals over the past three years. This problem is particularly prevalent in the Ninth Circuit, which includes much of the southwest border of the United States. In fact, appeals from the Board of Immigration Appeals to the Ninth Circuit increased by an astounding 575 percent from 2002 to 2006.

Previous judicial reorganizations, and particularly the split of the former Fifth Circuit into the current Fifth Circuit and Eleventh Circuits, were undertaken in circumstances similar to those in the Ninth Circuit today. In 1973, the Commission on Revision of the Federal Court Appellate System, the Hruska

---

[7] *Ohio v. Johnson*, 467 U.S. 493 (1984).

Commission, recommended that the Fifth and Ninth Circuits be split. The Fifth Circuit was split in 1980 primarily because of its size and yet, today, the Ninth Circuit is nearly the same size in terms of geography and judgeships as the current Fifth and Eleventh Circuits combined. The relative size of the Ninth Circuit and the former Fifth Circuit is also seen by comparing the caseloads of those courts. During the 12-month time period ending on June 30, 1980, the number of appeals commenced in the former Fifth Circuit accounted for over 18 percent of the total filings in the country. Currently, however, the number of appeals filed in the Ninth Circuit in the 12-month period ending on September 30, 2005, represents over 23 percent of the total number of appeals filed nationwide, which is up from 16 percent in 1980 and nearly 18 percent in 2001. These percentages show that the Ninth Circuit is dealing with a higher share of the courts' appellate caseload than the former Fifth Circuit dealt with when Congress split that circuit, and that the volume of cases in the Ninth Circuit, as compared to the other circuits, continues to increase. Judge Tjoflat, an active judge on the former Fifth Circuit at the time of its split and now a senior judge on the Eleventh Circuit, has stated that the split was an unequivocal success in terms of improving efficiency, consistency, and collegiality.

The Department also supports legislation providing for additional judgeships in the Ninth Circuit; specifically, we expressed our support in November 2005 for

legislation that would create five new judgeships and two temporary judgeships for the new Ninth Circuit. These additional judgeships would bring the new Ninth Circuit's caseload per judge down to approximately 518 and from second-highest to fourth-highest nationally. Although the new Twelfth Circuit would initially have a caseload below that of the new Ninth Circuit, the new Twelfth Circuit would include Nevada, Arizona, and Idaho, which are projected to be the first-, second-, and sixth-fastest between 2000 and 2030. With that population growth inevitably will come a growth in caseload per judge for that new circuit.

Thank you for the opportunity to present our views. The Department looks forward to working with Congress and the Judiciary on the important issues of splitting the Ninth Circuit and providing additional federal judgeships.