NINTH CIRCUIT CONFERENCE: INTRODUCTION

Among American judicial institutions, none except the United States Supreme Court generates as much interest or controversy as the Ninth Circuit Court of Appeals. In part, this is because of the court's size. The Ninth Circuit is by far the largest of the federal regional circuits. It is the largest not only in its geographical expanse, stretching as it does from Montana to Alaska to the far reaches of the Pacific (the Northern Marianas and Guam) back to Hawaii and to Arizona, but also in the number of authorized judgeships (and the number of senior judges) and, of course, its caseload. That caseload accounts for roughly one-fifth of the total federal appellate caseload and one-fourth of the federal criminal caseload, as well as an extremely high proportion of the immigration cases heard on appeal.

Some of the controversy surrounding the Ninth Circuit Court of Appeals is related to the court's size, notably the frequent, and nearly constant, efforts to divide the circuit. Controversy also dogs the court quite apart from arguments over its size; numerous individual rulings by the court have produced strong reactions, particularly by politicians. The court's relationship with the U.S. Supreme Court has given rise to a literature of its own on whether the Ninth Circuit is (or is not) an outlier among federal appellate courts. If, as Chief Judge Mary Schroeder suggested in her keynote speech at the conference that gave rise to this issue, the Ninth Circuit Court of Appeals is the nation's most diverse and forward-looking appellate court, that too is likely to draw attention, and we might suggest that not all of that attention will be favorable.

Because of the importance of the Ninth Circuit Court of Appeals, and because of our feeling that much needs to be done to assist in understanding it, we organized a conference at which important elements of the court would be examined, analyzed, and discussed. We were clear that our emphasis was *not* to be the doctrine embodied in the court's rulings. Nor, because we wanted to reach beneath immediate issues to look at matters that had received less attention, was the focus to be the various proposals to divide the circuit, although we recognized that the subject of "splitting the circuit" comes up, unbidden, any time the Ninth Circuit is mentioned. In short, we wanted to provide some added value beyond what could be found elsewhere. We therefore determined to focus on aspects of *administration*, *process*, and *decisionmaking* matters, which generally are of low visibility because decisions on hot-button issues draw all the attention. Put differently, our intention was to provide in-depth understanding of the functioning of the court, and to focus on analysis rather than prescription, so that those evaluating proposals to change the way the court does its business would have a more solid foundation for their judgments.

The need for this basic understanding is underscored by the fact that matters of process continue to change and develop, as two developments immediately before the conference convened dramatically illustrate. In one, the Judicial Conference of the United States accepted the recommendation of the Advisory Committee on Appellate Rules that the Federal Rules of Appellate Procedure be changed to require that, beginning in 2007, every court of appeals allow citation of unpublished dispositions. Although the precedential weight to be given such dispositions remains to be determined within each circuit, the new rule, by allowing citation without restriction, will require a change in practice that the Ninth Circuit Court of Appeals has strenuously resisted. (The Rule was promulgated by the Supreme Court on April 12, 2006.)

In the other development, the Ninth Circuit Court of Appeals decided to engage in a two-year experiment with its "limited" (or "short") en banc court; in the experiment, starting with cases on which the en banc vote is held after January 1, 2006, the size of the limited en banc panel will be increased from eleven judges (the chief judge plus ten others drawn by lot) to fifteen (the chief and fourteen others drawn by lot).

The Ninth Circuit Conference, which was sponsored by The University of Arizona James E. Rogers College of Law, was held in Tucson, Arizona on September 30 to October 1, 2005. Four broad subjects were the bases for sessions at the conference. Those subjects were judicial selection; caseload and mechanisms for dealing with it; the en banc court; and Supreme Court reversals. The conference also included a roundtable on how the court of appeals is perceived by lawyers and the media. Those who made presentations or offered commentary were judges, from both the Ninth Circuit Court of Appeals and the district court; social scientists, principally political scientists; law professors; journalists who report on the court; and attorneys who have practiced before the court.

Although not the universe of presentations at the conference, the articles presented in this special issue of the *Arizona Law Review* are drawn from presentations made to the conference. They are grouped under the rubrics used at the conference.

The symposium begins with three Articles on judicial selection processes and their effects, both on composition of the bench, particularly its diversification, and on decisionmaking. Elliot Slotnick examines the processes for selecting judges, paying particular attention to the changes wrought in the system beginning with President Carter and exploring the shifts in executive–legislative relations in judicial selection over that time. Taking up the diversification of the federal judiciary begun by President Carter, Rorie Spill Solberg in turn focuses on how diversification results from selection. Then Susan Haire devotes attention to differences in judges' decisionmaking, particularly with respect to their ideology, stemming from selection.

The next two Articles deal with caseload and its processing. Cathy Catterson, the Ninth Circuit Court of Appeals' Clerk of Court, first looks at case volume and changes in its composition over time. In order to cope with its caseload, the court of appeals has long used "extra" judges, those other than the

court's own active duty judges; Sara Benesh explores the extent of the use of "extra judges," their contribution to caseload processing, and their writing of opinions.

The third set of papers is devoted to aspects of the Ninth Circuit Court of Appeals' use of a "limited" en banc court composed of less than all the court's active judges. Ninth Circuit Judge Pamela A. Rymer, who takes a skeptical view of the limited en banc panel, argues that a full bench is necessary for the court to perform its en banc function. Michael Solimine then addresses three interrelated institutional issues, which he groups under procedural due process, the refusal to disclose judges' votes on whether to grant rehearing en banc; judges' opinions concurring in, or dissenting from, denial of en banc rehearing; and the criteria for whether to hear cases en banc, and, specifically, whether judges should consider the likelihood that the Supreme Court will grant certiorari in a case.

The final topic to be examined is the Supreme Court's reversal of the Ninth Circuit's rulings, including media treatment of those reversals. Kevin Scott first looks at two types of explanations for the reversals, ideological distance of the Ninth Circuit from the Supreme Court and the appellate court's size, and finds that both play a part. Then Stephen Wermiel brings the symposium to a close by examining the mythology of the Ninth Circuit as a runaway liberal court. He feels that media commentary bandwagon is largely responsible for this belief.

As is usual in such ventures, it could not have happened without the help of many people, particularly at the University of Arizona's James Rogers College of Law. Professors Hellman and Wasby want here to extend their deepest thanks to Dean Toni Massaro for listening to, accepting, and generously supporting their proposal for the conference. All three of us wish to thank members of Dean Massaro's staff, particularly conference coordinator Donna Ream, Vicki Fleischer, Erika Lewis Bender, Sandy Davis, and Randy Wagner, who always provided quick answers to our questions and facilitated the work of all. The conference could not have happened, of course, without all the participants, including the Authors of the Articles in this issue of the *Arizona Law Review* but many others as well. They took time from their busy schedules to respond to the organizers' frequent requests and in many instances to produce "yet another draft." We are particularly thankful to the *Arizona Law Review*, and to its Editor-in-Chief, Michael Catlett, for agreeing to set aside this issue for the conference papers and for assisting the Authors in bringing their work into final form.

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