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THE 115 YEAR-OLD NINTH CIRCUIT— WHY A SPLIT IS NECESSARY AND INEVITABLE

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Twelve geographic United States Courts of Appeals exercise jurisdiction over the entire country. While some federal circuits have jurisdiction over somewhat larger geographic areas than others, only one circuit stands out as aberrational. Although in theory it is merely one of twelve, the Ninth Circuit dwarfs its fellow circuit courts in caseload, population, number of states, and number of judges. Five Supreme Court justices and two national commissions have concluded that the Ninth Circuit is too big to function properly as a decisional unit.

Thirty percent of all federal appeals are pending in the Ninth Circuit. In addressing this enormous caseload, the Ninth Circuit produces an unmanageable number of decisions. Not surprisingly, the Ninth Circuit is the slowest circuit in decisional time.

Nearly sixty million people—one fifth of the nation's population—reside in the Ninth Circuit. The Ninth Circuit, with nine states, a territory, and a commonwealth (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam, and the Northern Mariana Islands, respectively) contains more states than any of the other eleven geographic circuits. Not only is the number of states in the Ninth Circuit extraordinary, but the states themselves

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are far from average—the Ninth Circuit contains the nation’s mega-state¹ and two fastest growing states,² as well as six other states.

The number of judges on the Ninth Circuit—twenty-eight authorized active circuit judges—is also aberrational. The high number of judges diminishes collegiality. The mere numerosity of judges has serious adverse consequences, including a structurally flawed limited en banc procedure. The Ninth Circuit’s size also results in under-representation in the U.S. Judicial Conference, the policy-making body for the federal courts. All circuits are designated the same number of representatives. Thus, the Ninth Circuit is allotted the same number of Judicial Conference representatives as the tiniest of circuits.

National Impact

The negative effects of the Ninth Circuit’s disproportionate size are not limited to the circuit itself; the nation as a whole suffers. Having thirty percent of all current federal appeals pending in the Ninth Circuit undermines the concept of shared responsibility among the twelve regional circuit courts. Indeed, the very idea of regional circuits is frustrated by the current configuration. Although the Ninth Circuit is in theory merely one of twelve regional circuits, it contains California—with a population of thirty-six million³—and eight other states. It is unfathomable to classify nine states, forty percent of the nation’s land mass, and nearly sixty million people—as “a region.”⁴ The disproportionate number of judges requires the Ninth Circuit to use a structurally flawed limited en banc procedure. The enormous caseload prevents the entire court from keeping abreast of all the court’s work product and offering revision where needed, which in turn undermines the overall quality of federal appellate precedent. A circuit of such vast proportions is likely to be viewed by many as the dominant circuit. When one of twelve regional circuits is viewed as dominant because of its unimpeded, happenstance growth relative to other circuits, the other circuits are deprived of their appropriate status.

¹ California. See Press Release, U.S. Census Bureau, U.S. Dep’t of Comm. (Dec. 22, 2005), <http://www.census.gov/Press-Release/www/releases/archives/population/006142.html> [hereinafter Press Release].

² Arizona and Nevada. See *id.*; U.S. Census Bureau, U.S. Dep’t of Comm., Population Change and Distribution 1990 to 2000: Census 2000 Brief (Apr. 2001), available at <http://www.census.gov/prod/2001pubs/c2kbr01-2.pdf>.

³ See Press Release, *supra* note 1. See also U.S. Census Bureau, U.S. Dep’t of Comm., File 1: Annual Projections of Total Population (2005), available at <http://www.census.gov/population/www/projections/projectionsagesex.html> (under III. Downloadable Files) [hereinafter Population Projections].

⁴ Letter from Justice Anthony M. Kennedy to Hon. Byron R. White, Chair, White Commission (Aug. 17, 1998) at 4, available at <http://www.library.unt.edu/gpo/csafca/hearings/submitted/pdf/kennedy.pdf> [hereinafter Justice Kennedy Letter].

If new boundaries were appropriately drawn, such as is provided for in legislation recently proposed in Congress, all nine states of the Ninth Circuit—and the administration of justice nationwide—would be well-served. Those who advocate against a split make the demonstrably inaccurate claim that the Ninth Circuit Court of Appeals is functioning well, and identify various reasons why a split should not occur. These arguments are easily dispatched. None of the arguments posed by split opponents—and they have been creative, imaginative, and many—justifies retaining the Ninth Circuit in its current configuration. On the other hand, objective analysis demonstrates the compelling need for a split of the Ninth Circuit.

In this Article, Part I describes the history of the structure of the Ninth Circuit and proposals to split it; Part II sets forth the current dimensions of the Ninth Circuit and discusses the impact of passage of pending legislation; Part III explains the several adverse consequences of continuation of the current configuration of the Ninth Circuit, one of which is the need to resort to a structurally-flawed limited en banc procedure; and Part IV summarizes and responds to various objections raised by those who oppose a split.

I. A BRIEF HISTORY

How to divide the Ninth Circuit has been a subject of debate for over a century—and in earnest, over the past fifty years. Numerous congressional hearings have been held. Two national commissions created by Congress have recommended drastic action. Nevertheless, the boundaries of the Ninth Circuit have not been diminished for 115 years.

Early Proposals

In 1891, the Evarts Act⁵ created a circuit court for each of the nine then-existing circuits.⁶ At that time, the Ninth Circuit contained only six states:⁷ California,⁸

⁵ Circuit Court of Appeals Act, ch. 517, 26 Stat. 826 (1891). The act was referred to as the Evarts Act, after Senator William M. Evarts (R-NY), Chairman of the Senate Committee on the Judiciary and sponsor of the bill. WHITE REPORT, *infra* note 25, at 11.

⁶ *Id.* Congress created the nine geographic circuits in 1866. Act of July 23, 1866, ch. 210, 14 Stat. 209. At that time, the Ninth Circuit consisted of California, Oregon, and Nevada. Other states were added to the circuit over time. See *infra* notes 8-13 and accompanying text.

⁷ Alaska, Arizona, and Hawaii were added later. See *infra* notes 17-19 and accompanying text.

⁸ California was part of the original Ninth Circuit created by the Judicial Circuits Act of 1866. Act of July 23, 1866, ch. 210, 14 Stat. 209. Prior to its inclusion in the Ninth Circuit in 1866, the state of California had been designated as a separate circuit for eight years. Act of Mar. 2, 1855, ch. 142, 10 Stat. 631. In 1863, the California Circuit was abolished, and California was placed in the Tenth Circuit for a short time. Act of Mar. 3,

Idaho,⁹ Montana,¹⁰ Nevada,¹¹ Oregon,¹² and Washington.¹³ Even then, there was some disagreement as to whether these states should be assigned to a single circuit. During debate on the Evarts Act, it was suggested that the far west be divided into two circuits, rather than one.¹⁴ Then, as now, much of the debate centered on California. One senator noted, “[t]he Senator from Oregon states that he does not want California included in the Pacific coast circuit. Very well, but where is it to go?”¹⁵ Ultimately, only one circuit was formed from the six states and the vast expanse of land in the far western United States. At that time, the population of the Ninth Circuit was less than three million people.¹⁶ The Ninth Circuit later

1863, ch. 100, 12 Stat. 794. When Congress eliminated the Tenth Circuit in the Judicial Circuits Act of 1866, California was placed in the Ninth Circuit. Act of July 23, 1866, ch. 210, 14 Stat. 209.

⁹ Idaho was added to the Ninth Circuit upon its admission as a state in 1890. Act of July 3, 1890, ch. 656, § 16, 26 Stat. 215, 217.

¹⁰ Congress added Montana to the Ninth Circuit in the Enabling Act of 1889, shortly before its admission as a state on November 8, 1889. Act of Feb. 22, 1889, ch. 180, § 21, 25 Stat. 676, 682. *See* Proclamation of Nov. 8, 1889, No. 7, 26 Stat. 1551 (formally admitting Montana as a state).

¹¹ Nevada had been placed in the Ninth Circuit—along with California and Oregon—in the Judicial Circuits Act of 1866. Act of July 23, 1866, ch. 210, 14 Stat. 209. Prior to that, Nevada was part of the Tenth Circuit. *See* Act of Feb. 27, 1865, ch. 64, 13 Stat. 440.

¹² Oregon was originally placed in the Tenth Circuit with California. Act of Mar. 3, 1863, ch. 100, 12 Stat. 794. Congress moved Oregon to the Ninth Circuit in 1866. Act of July 23, 1866, ch. 210, 14 Stat. 209.

¹³ Like Montana, Washington was placed in the Ninth Circuit by the Enabling Act of 1889. Act of Feb 22, 1889, ch. 180, § 21, 25 Stat. 676, 682.

¹⁴ 21 CONG. REC. 10283 (1890) (statement of Sen. Joseph N. Dolph (R-OR)).

¹⁵ 21 CONG. REC. 10285 (1890) (statement of Sen. John James Ingalls (R-KS)).

¹⁶ U.S. CENSUS BUREAU, DEP’T OF COM., THIRTEENTH CENSUS OF THE UNITED STATES TAKEN IN THE YEAR 1910 vol. 1, ch. 2, at 30, *available at* <http://www2.census.gov/prod2/decennial/documents/36894832v1ch02.pdf> [hereinafter 1910 CENSUS].

expanded to include three more states—Alaska,¹⁷ Arizona,¹⁸ and Hawaii¹⁹—a territory,²⁰ and a commonwealth.²¹

As Ninth Circuit Judge Andrew J. Kleinfeld has observed, “it is entirely an accident that the Ninth Circuit Court of Appeals is as big as it is. The court was created for a jurisdiction that consisted of California, San Francisco mainly, and empty space. The space is filled in.”²²

By the 1940s and 1950s, members of both houses of Congress attempted to address the size of the Ninth Circuit, and formal circuit-splitting bills began to appear with regularity.²³ In 1941, both houses of the 77th Congress considered

¹⁷ The Circuit Court of Appeals Act granted the United States Supreme Court the authority to assign U.S. territories to particular circuits. Act of Mar. 3, 1891, ch. 517, § 15, 26 Stat. 826, 830. Pursuant to that authority, the Supreme Court assigned the territory of Alaska to the Ninth Circuit in 1891. Order Assigning Territories, 139 U.S. 707 (May 11, 1891). In 1900, Congress granted the Ninth Circuit appellate jurisdiction over the territory of Alaska. Act of June 6, 1900, ch. 786, § 504-05, 31 Stat. 321, 414-15. The state of Alaska was assigned to the Ninth Circuit in 1958. Act of July 7, 1958, Pub. L. No. 85-508, § 14-15, 72 Stat. 339, 349.

¹⁸ The Supreme Court assigned the territory of Arizona to the Ninth Circuit in 1891. Order Assigning Territories, 139 U.S. 707 (May 11, 1891). Congress assigned Arizona to the Ninth Circuit upon its admission as a state in 1912. Act of June 16, 1906, ch. 3335, § 37, 34 Stat. 267, 283. See Proclamation of Feb. 14, 1912, 37 Stat. 1728 (formally admitting Arizona as a state).

¹⁹ In 1900, Congress granted the Ninth Circuit appellate jurisdiction over the territory of Hawaii. Act of Apr. 30, 1900, ch. 339, § 86, 31 Stat. 141, 158. In 1901, the Supreme Court assigned the territory of Hawaii to the Ninth Circuit. Order Assigning Hawaii, 181 U.S. 625 (Apr. 15, 1901). The state of Hawaii was assigned to the Ninth Circuit in 1959. Act of Mar. 18, 1959, Pub. L. No. 86-3, § 13, 73 Stat. 4, 10.

²⁰ Guam was added in 1951. Act of Oct. 31, 1951, 65 Stat. 723.

²¹ The Northern Mariana Islands were added in 1977. Act of Nov. 8, 1977, Pub. L. No. 95-157, 91 Stat. 1265. The Northern Mariana Islands are placed in the same circuit as Guam.

²² *Review of the Report by the Commission on Structural Alternatives for the Federal Courts of Appeals Regarding the Ninth Circuit and the Ninth Circuit Reorganization Act Before the Subcomm. on Administrative Oversight and the Courts of the S. Comm. on the Judiciary*, 106th Cong. 82 (July 16, 1999), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_senate_hearings&docid=f:66528.pdf [hereinafter 1999 Sen. Subcomm. Hearing] (oral statement of Hon. Andrew J. Kleinfeld, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit).

²³ See S. 1793, 77th Cong. (1941) (sponsored by Sen. Homer Truett Bone (D-WA)); H.R. 5489, 77th Cong. (1941) (sponsored by Rep. Warren Magnuson (D-WA)). These bills would have divided the Ninth Circuit into a new Ninth Circuit consisting of Arizona, California, Hawaii, and Nevada, and a new Eleventh Circuit consisting of Idaho, Montana, Oregon, and Washington.

legislation which would have divided the Ninth Circuit by creating a new Eleventh Circuit consisting of four of the Ninth Circuit's states: Idaho, Montana, Oregon, and Washington. In 1953, Democrats in the 83rd Congress introduced proposals to split the Ninth Circuit along the same lines, with the addition of Alaska to the new Eleventh Circuit.²⁴

In 1954, the Ninth Circuit itself voted to split, and the U.S. Judicial Conference endorsed a split of the Ninth Circuit later that year.²⁵ The Ninth Circuit later retracted its vote, and the Judicial Conference followed suit by withdrawing its support of a split.²⁶ Nevertheless, circuit splitting bills continued to appear thereafter in both houses of Congress throughout the 1950s and 1960s,²⁷ proposed by Democrats and Republicans alike.

Hruska Commission

In 1972, Congress established the Commission on Revision of the Federal Court Appellate System²⁸—commonly referred to as the “Hruska Commission”²⁹—to study and make recommendations for “changes in the geographical boundaries of the circuits as may be most appropriate for the expeditious and effective disposition of judicial business.”³⁰ At that time, the Ninth Circuit had a caseload

²⁴ S. 2579, 83rd Cong. (1953) (sponsored by Sen. Wayne Morse (I-OR)); H.R. 8727, 83rd Cong. (1954) (sponsored by Rep. Pat Hillings (R-CA)); S. 3314, 83rd Cong. (1954) (sponsored by Sen. Warren G. Magnuson (D-WA) and Sen. Henry M. Jackson (D-WA), and Sen. Wayne Morse (I-OR)).

²⁵ COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, FINAL REPORT 33 (1998), available at <http://www.library.unt.edu/gpo/csafca/final/appstruc.pdf> [hereinafter WHITE REPORT].

²⁶ *Id.* at 33 n.80. See also 1999 Sen. Subcomm. Hearing, *supra* note 22, at 127-28 (oral statement of Hon. William D. Browning, District Judge, U.S. District Court for the District of Arizona).

²⁷ In 1955, Sen. Warren G. Magnuson (D-WA) and Sen. Henry M. Jackson (D-WA) introduced a bill that would have divided the Ninth Circuit and created a new Pacific Northwest circuit consisting of Alaska, Idaho, Montana, Oregon, and Washington. S. 2174, 84th Cong. (1955). See also H.R. 6967, 84th Cong. (1955) (sponsored by Rep. Alfred John Westland (R-WA)) & H.R. 7063, 84th Cong. (1955) (sponsored by Rep. Donald H. Magnuson (D-WA)). Similar bills followed. H.R. 9458, 83rd Cong. (1954) (sponsored by Rep. Donald H. Magnuson (D-WA)); H.R. 5677, 85th Cong. (1957) (sponsored by Rep. Donald H. Magnuson (R-WA)); S. 1876, 88th Cong. (1963) (sponsored by Sen. Olin D. Johnston (D-SC) and Sen. Warren G. Magnuson (D-WA)).

²⁸ Act of Oct. 13, 1972, Pub. L. No. 92-489, 86 Stat. 807.

²⁹ The commission was chaired by Senator Roman L. Hruska (R-NE). COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, THE GEOGRAPHIC BOUNDARIES OF THE SEVERAL JUDICIAL CIRCUITS: RECOMMENDATION FOR CHANGE, 62 F.R.D. 223, 224 (1973) [hereinafter HRUSKA REPORT].

³⁰ Act of Oct. 13, 1972, Pub. L. No. 92-489, § 1(a), 86 Stat. 807.

second only to the Fifth Circuit,³¹ and the Hruska Commission recommended that both circuits be split,³² noting that “the vast majority of the witnesses recognized that some change in the structure of the [Ninth Circuit] is necessary.”³³ The Hruska Commission recommended that the Ninth Circuit be divided into two circuits: a new Ninth Circuit consisting of Alaska, Washington, Oregon, Idaho, Montana, Hawaii, Guam, and the Eastern and Northern Districts of California; and a new Twelfth Circuit consisting of Arizona, Nevada, and the Southern and Central Districts of California.³⁴ California quickly and vehemently opposed this recommendation.³⁵

Authorization of Limited En Banc Panels

Congress did not enact the Hruska Commission proposals. Five years later, however, Congress authorized a procedure that unquestionably extended the lifespan of the current configuration of the Ninth Circuit—the use of limited en banc panels, permitting any court of appeals with more than fifteen active circuit judges to conduct en banc hearings with fewer than all active circuit judges.³⁶ At the same time, Congress increased the number of judgeships for both the Fifth and the Ninth Circuits.³⁷ After the Fifth Circuit conducted its first full en banc hearing with twenty-six active circuit judges, the judges agreed that a division was

³¹ HRUSKA REPORT, *supra* note 29, at 227-28.

³² *Id.* at 228.

³³ *Id.* at 235.

³⁴ *Id.*

³⁵ See WHITE REPORT, *supra* note 25, at 57 (noting the “strong objections” to the Hruska recommendations); Arthur D. Hellman, *Legal Problems of Dividing a State Between Federal Judicial Circuits*, 122 U. PA. L. REV. 1188 (1974). This position has not changed. See COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, PUBLIC HEARING IN SAN FRANCISCO, CALIFORNIA 351 (May 29, 1998) [hereinafter WHITE COMMISSION HEARING] (statement of Michael Traynor and Joseph P. Russoniello, California Attorneys). See also Letter from Sen. Dianne Feinstein (D-CA) to Hon. Byron R. White, Chair, White Commission (Dec. 3, 1998), available at <http://www.ce9.uscourts.gov/Web/restructure.nsf/Impacts?OpenPage> [hereinafter Sen. Feinstein Letter] (explaining her opposition to the division of California). Sen. Feinstein has continued to voice her opposition to any division of California. *Examining the Proposal to Restructure the Ninth Circuit: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (Sep. 20, 2006), available at <http://judiciary.senate.gov/hearing.cfm?id=2071> [hereinafter 2006 Sen. Hearing] (statement of Sen. Dianne Feinstein (D-CA)).

³⁶ The Omnibus Judgeship Act of 1978, Pub. L. No. 95-486, § 6, 92 Stat. 1629 (1978). Only three circuits qualify for limited en banc hearings: the Fifth Circuit, the Sixth Circuit, and the Ninth Circuit. 28 U.S.C. § 44.

³⁷ The Omnibus Judgeship Act of 1978, § 3.

necessary,³⁸ and in 1980, the Fifth Circuit was divided into a new Fifth Circuit and an Eleventh Circuit.³⁹

The Ninth Circuit, however, opted to conduct limited en banc hearings rather than have the circuit be divided. It adopted the limited en banc procedure in 1979, and has been the only circuit court to use it.⁴⁰ While the limited en banc procedure has congressional authorization, it is viewed by many—including some members of the Supreme Court and the Ninth Circuit—as inherently structurally flawed.⁴¹ An important intermediate step toward division of the Ninth Circuit would be congressional revocation of authority to conduct limited en banc hearings.⁴²

Post-Hruska Developments

After the Hruska Commission's report and the Ninth Circuit's adoption of the limited en banc procedure, the circuit-split controversy only intensified, and proposals to split the Ninth Circuit were once again introduced with regularity. Typically, though not always, these proposals suggested that a new northwest circuit be carved from the existing Ninth Circuit. In 1989, one such bill⁴³ was introduced by nine senators, including Senator Max Baucus (D-MT).⁴⁴ In 1995,

³⁸ WHITE REPORT, *supra* note 25, at 21.

³⁹ Act of Oct. 14, 1980, Pub. L. No. 96-452, 94 Stat. 1994. *See generally* DEBORAH J. BARROW & THOMAS G. WALKER, A COURT DIVIDED: THE FIFTH CIRCUIT COURT OF APPEALS AND THE POLITICS OF JUDICIAL REFORM (1998).

⁴⁰ U.S. Ct. of App. 9th Cir. R. 35-3 (1979) (amended 2006). Chief Judge Mary M. Schroeder has testified that the limited en banc was the lynchpin of the Ninth Circuit not being divided. WHITE COMMISSION HEARING, *supra* note 35, at 73 (statement of Hon. Mary M. Schroeder, Chief Judge, U.S. Court of Appeals for the Ninth Circuit).

⁴¹ *See infra* notes 149-54 and accompanying text.

⁴² In 2005, Rep. Michael K. Simpson (R-ID) introduced a bill to revoke this authority. H.R. 1064, 109th Cong. (2005).

⁴³ S. 948, 101st Cong. (1989). Under S. 948, the new Ninth Circuit would consist of Arizona, California, and Nevada, and the Twelfth Circuit would consist of Alaska, Hawaii, Montana, Oregon, Washington, Guam, and the Northern Mariana Islands. *See* 135 CONG. REC. S4979-02, S5026 (1989) (statement of Sen. Slade Gorton (R-WA)). The bill was reported out of the Judiciary Committee in 1995 but was not passed by the full Senate. Ninth Circuit Court of Appeals Reorganization Act of 1995, S. 956, 104th Cong. (1995).

⁴⁴ Senator Baucus recently spoke out against the split proposed in S. 1845. 2006 Sen. Hearing, *supra* note 35. The other eight sponsors of the 1989 bill were Sen. Slade Gorton (R-WA), Sen. Conrad R. Burns (R-MT), Sen. Mark O. Hatfield (R-OR), Sen. James A. McClure (R-ID), Sen. Frank H. Murkowski (R-AK), Sen. Bob Packwood (R-OR), Sen. Ted Stevens (R-AK), and Sen. Stephen Symms (R-ID). S. 948, 101st Cong. (1989).

at a hearing before the Senate Committee on the Judiciary, Ninth Circuit Judge Diarmuid F. O'Scannlain testified regarding pending proposals to split the Ninth Circuit, at which time he stated: "First, I believe that Congress should make legislative findings that there is a limit on the size of any federal court of appeals, and that no court of appeals should continue to expand indefinitely."⁴⁵ In 1997, Senator Judd Gregg (R-NH) proposed dividing the Ninth Circuit into two circuits: a new Ninth Circuit consisting of California, and a new Twelfth Circuit consisting of the remaining Ninth Circuit states.⁴⁶

White Commission

In response to the mounting controversy over the possible restructuring of the Ninth Circuit, in 1997, Congress created the Commission on Structural Alternatives for the Federal Courts of Appeals.⁴⁷ It was chaired by former United States Supreme Court Justice Byron R. White and became known as the White Commission.⁴⁸ The other four distinguished members appointed to the White Commission were Ninth Circuit Judge Pamela Ann Rymer, former Chief District Judge for the District of Arizona William D. Browning, Sixth Circuit Judge Gilbert S. Merritt, and attorney N. Lee Cooper, former president of the American Bar Association.⁴⁹ Professor Daniel J. Meador was selected as the executive director of the Commission.⁵⁰

In its final report, the White Commission concluded that adjudicatively—but not administratively—the Ninth Circuit Court of Appeals required restructuring. To accomplish the necessary adjudicative restructuring, the White Commission recommended that the Ninth Circuit be subdivided into three semi-autonomous divisions: a Northern Division consisting of Alaska, Idaho, Montana, Oregon, and Washington; a Middle Division consisting of the Eastern District of California, the Northern District of California, Guam, Hawaii, Nevada, and the Northern Mariana Islands; and a Southern Division consisting of Arizona, the Southern District of California, and the Central District of California.⁵¹ The White Commission concluded that it is preferable to have smaller decisional units of active circuit judges. To effectuate this goal in the Ninth Circuit, it recommended

⁴⁵ *The Ninth Circuit Split: Hearing Before the S. Comm. on the Judiciary*, 104th Cong., 1995 WL 544471 (Sep. 13, 1995) (statement of Hon. Diarmuid F. O'Scannlain, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit).

⁴⁶ Frank J. Murray, *Senate Panel Passes Measure to Split Up Appeals Court*, THE WASHINGTON TIMES (D.C.), July 16, 1997, at A6.

⁴⁷ Act of November 26, 1997, Pub. L. No. 105-119, § 305, 111 Stat. 2440.

⁴⁸ WHITE REPORT, *supra* note 25, at 1.

⁴⁹ *Id.*

⁵⁰ At its first meeting, the Commission voted to ask Professor Meador to serve as Executive Director, and he accepted. *Id.* at 1-2.

⁵¹ *Id.* at 43.

that each of the three semi-autonomous divisions conduct full en banc hearings.⁵² The decisions of any division were not to be binding on the other two divisions.⁵³ Only in the event of intra-circuit “substantial and square conflict,” would a limited en banc panel (consisting of the Chief Judge of the Ninth Circuit and four active circuit judges from each of the three semi-autonomous divisions) entertain further review.⁵⁴ In the words of Judge Kleinfeld, the White Commission recommended that “as a decisional body, the Ninth Circuit should be divided . . . [a]lthough as an administrative body, it should not be divided.”⁵⁵

The Commission offered several reasons as to why restructuring was necessary.⁵⁶ Restructuring would result in smaller decisional units, which are preferable to a court of twenty-eight active circuit judges.⁵⁷ It would also reduce the number of opinions for which judges of the decisional units would be responsible, enabling judges to keep up with all opinions.⁵⁸ The White Commission believed that the much smaller decisional units would likely both improve collegiality and largely eliminate the need for limited en banc hearings.⁵⁹

On July 16, 1999, a Senate subcommittee held a hearing on S. 253, a bill that would have implemented the recommendations of the White Commission.⁶⁰ Opposition to the White Commission’s recommendations was fierce.

Then-Ninth Circuit Chief Judge Procter Hug, Jr., characterized the White Commission’s Report as recommending a “de facto split”⁶¹ and said that its proposals were “seriously flawed.”⁶² He dismissed the White Commission’s rec-

⁵² *Id.* at 43, 62, 94.

⁵³ *Id.* at 43.

⁵⁴ Hon. Pamela Ann Rymer, *How Big Is Too Big?*, 15 J.L. & POL. 383, 384 (1999); WHITE REPORT, *supra* note 25, at 45.

⁵⁵ 1999 Sen. Subcomm. Hearing, *supra* note 22, at 80 (statement of Hon. Andrew J. Kleinfeld, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit).

⁵⁶ WHITE REPORT, *supra* note 25, at 40.

⁵⁷ *Id.* at 47. Smaller decisional units promote consistency and predictability. *Id.*

⁵⁸ The Ninth Circuit labored under a staggering caseload at the time, and the number of cases has only increased since the White Commission made its recommendation. In fiscal year 1997, 8,692 appeals were filed in the Ninth Circuit Court of Appeals. WHITE REPORT, *supra* note 25, at 32. By September 30, 2006, that number has grown to a staggering 14,636 appeals filed per year. *Table B: U.S. Courts of Appeals, Appeals Commenced, Terminated, and Pending, by Circuit, during the Twelve Month Periods Ending Sept. 30, 2005 and 2006*, U.S. COURTS CASELOAD STATISTICS 1 (2006), <http://jnet.ao.dcn/img/assets/4647/AppealsSept2006.pdf> [hereinafter *2006 Caseload Statistics*].

⁵⁹ WHITE REPORT, *supra* note 25, at 47-50.

⁶⁰ Federal Ninth Circuit Reorganization Act, S. 253, 106th Cong. (1999) (sponsored by Sen. Frank H. Murkowski (R-AK) and Sen. Slade Gorton (R-WA)).

⁶¹ Hon. Procter Hug, Jr., *Potential Effects of the White Commission’s Recommendations on the Operation of the Ninth Circuit*, 34 U.C. DAVIS L. REV. 325, 330 (2000).

⁶² 1999 Sen. Subcomm. Hearing, *supra* note 22, at 43, 47.

ommendations as “radical” and “untested,” providing for a divisional approach that “abrogates circuit-wide stare decisis,” thereby jeopardizing “uniformity, coherence, and predictability.”⁶³ Chief Judge Hug also wrote that the White Commission’s proposal would cause the law of the Ninth Circuit to “steadily drift apart.”⁶⁴ At a House subcommittee hearing, Chief Judge Hug testified in opposition to the White Report’s recommendations, and noted that his “view that the disadvantages far outweigh any advantages of the proposed restructurings is shared by a great majority of the judges on the Ninth Circuit Court of Appeals”⁶⁵ The American Bar Association and the Federal Bar Association opposed the White Commission’s recommendation of three semi-autonomous divisions,⁶⁶ as did the Department of Justice.⁶⁷ Senator Dianne Feinstein (D-CA) expressed her adamant opposition to the division of California.⁶⁸

Judges O’Scannlain and Kleinfeld were among the witnesses who testified in support of S. 253. Judge O’Scannlain stated that “there is nothing sinister, immoral, fattening, politically incorrect, or unconstitutional about the restructuring of judicial circuits.”⁶⁹ He further stated: “No Court, not even mine, . . . has a God-given right to an exemption from the laws of nature. There is nothing sacred about the Ninth Circuit keeping essentially the same boundaries for over 100 years.”⁷⁰

The White Commission’s recommendations were not enacted into law.

Recent Proposals, Including S. 1845

Every Congress since the release of the White Report has seen the introduction of bills to split the Ninth Circuit. The proposals have included the following: (1) a circuit split placing California and Nevada in a new Ninth Circuit and the

⁶³ Hon. Procter Hug, Jr. & Carl Tobias, *A Split by Any Other Name . . .*, 15 J.L. & POL. 397, 407-08 (1999).

⁶⁴ Hon. Procter Hug, Jr., *supra* note 61, at 330.

⁶⁵ 1999 Sen. Subcomm. Hearing, *supra* note 22, at 45.

⁶⁶ Elizabeth Rogers, *ABA Opposes Plan to Restructure 9th Circuit Court of Appeals*, 85 A.B.A. J. 101 (Nov. 1999); Bruce Moyer, *FBA Opposes Ninth Circuit Division Proposal*, 46 FED. LAW. 8 (Aug. 1999).

⁶⁷ 1999 Sen. Subcomm. Hearing, *supra* note 22, at 122 (statement of Eleanor D. Acheson, Assistant Attorney General, representing the U.S. Department of Justice). Interesting in light of the Department of Justice’s current position in support of a split, 2006 Sen. Hearing, *supra* note 35, were repeated statements from opponents of the White Commission’s recommendations that the position of the Department of Justice merited significant weight. *See, e.g.*, 1999 Sen. Subcomm. Hearing, *supra* note 22, at 5-6 (statement of Sen. Dianne Feinstein (D-CA)). *See also id.* at 46-47 (statement of Hon. Procter Hug, Jr., Chief Judge, U.S. Court of Appeals for the Ninth Circuit).

⁶⁸ *See* Sen. Feinstein Letter, *supra* note 35.

⁶⁹ 1999 Sen. Subcomm. Hearing, *supra* note 22, at 88.

⁷⁰ *Id.* at 88.

remaining states in a new Twelfth Circuit;⁷¹ (2) a three-way division of the Ninth Circuit consisting of a new Ninth Circuit of California, Hawaii, Guam, and the Northern Mariana Islands, a new Twelfth Circuit of Arizona, Nevada, Idaho, and Montana, and a new Thirteenth Circuit of Oregon, Washington, and Alaska;⁷² (3) a circuit split placing California, Nevada, and Arizona in a new Ninth Circuit, and the remaining states in a new Twelfth Circuit;⁷³ (4) a circuit split placing California and Hawaii in a new Ninth Circuit and the remaining states in a new Twelfth Circuit;⁷⁴ and (5) a configuration that would have moved Arizona to the Tenth Circuit and created a new Ninth Circuit of California and Nevada and a new Twelfth Circuit of the remaining states.⁷⁵

Numerous hearings have also been held. In 2002, Judge O'Scannlain testified before a House subcommittee in favor of a split, and Ninth Circuit Chief Judge Mary M. Schroeder and Ninth Circuit Judge Sidney R. Thomas testified in opposition to a split.⁷⁶ Judge O'Scannlain also testified in favor of a split at a 2003 House hearing, at which Chief Judge Schroeder and Ninth Circuit Judge Alex Kozinski—who is next in line to become chief judge—testified in opposition to a split.⁷⁷ At a Senate subcommittee hearing in 2004, Judge O'Scannlain, joined by

⁷¹ S. 562, 108th Cong. (2003) (sponsored by Sen. Lisa Murkowski (R-AK), Sen. Ted Stevens (R-AK), Sen. Conrad Burns (R-MT), Sen. Larry E. Craig (R-ID), Sen. Mike Crapo (R-ID), Sen. James M. Inhofe (R-OK), Sen. Gordon H. Smith (R-OR)).

⁷² S. 1301, 109th Cong. (2005) (sponsored by Sen. John Ensign (R-NV), Sen. Larry E. Craig (R-ID), Sen. John Cornyn (R-TX), Sen. Tom Coburn (R-OK), and Sen. James M. Inhofe (R-OK)); H.R. 211, 109th Cong. (2005) (sponsored by Rep. Mike Simpson (R-ID) and Rep. Tom DeLay (R-TX)); S. 2278, 108th Cong. (2004) (sponsored by Sen. John Ensign (R-NV) and Sen. Larry E. Craig (R-ID)); H.R. 4247, 108th Cong. (2004) (sponsored by Rep. Rick Renzi (R-AZ) and Rep. Jon Porter (R-NV)).

⁷³ H.R. 212, 109th Cong. (2005) (sponsored by Sen. Mike Simpson (R-ID)); H.R. 2723, 108th Cong. (2003) (sponsored by Rep. Mike Simpson (R-ID)); H.R. 1203, 107th Cong. (2001) (sponsored by Rep. Mike Simpson (R-ID)); S. 2184, 106th Cong. (2000) (sponsored by Sen. Frank Murkowski (R-AK), Sen. Orrin Hatch (R-UT), Sen. Larry E. Craig (R-ID), Sen. Mike Crapo (R-ID), Sen. James M. Inhofe (R-OK), Sen. Gordon H. Smith (R-OR), and Sen. Ted Stevens (R-AK)).

⁷⁴ S. 1296, 109th Cong. (2005) (sponsored by Sen. Lisa Murkowski (R-AK), Sen. Ted Stevens (R-AK), Sen. Conrad Burns (R-MT), Sen. Larry E. Craig (R-ID), Sen. Mike Crapo (R-ID), Sen. Jon Kyl (R-AZ), and Sen. Gordon H. Smith (R-OR)); H.R. 3125, 109th Cong. (2005) (sponsored by Rep. Mike Simpson (R-ID)).

⁷⁵ H.R. 1033, 108th Cong. (2003) (sponsored by Rep. Mike Simpson (R-ID), Rep. Greg Walden (R-OR), Rep. George Nethercutt (R-WA), and Rep. C.L. "Butch" Otter (R-ID)).

⁷⁶ *The Breakup of the Ninth U.S. Circuit Court: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 107th Cong. (July 23, 2002).

⁷⁷ *The Ninth Circuit Court of Appeals Judgeship and Reorganization Act of 2003: Hearing on H.R. 2723 Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 108th Cong. (Oct. 21, 2003).

Ninth Circuit Judge Richard C. Tallman and Eleventh Circuit Judge Gerald Bard Tjoflat, testified in support of a split, and Chief Judge Schroeder, former Ninth Circuit Chief Judge J. Clifford Wallace, and District Judge John C. Coughenour of the Western District of Washington testified in opposition.⁷⁸

On March 4, 2005, James F. Sensenbrenner, Jr., Chairman of the House Committee on the Judiciary, traveled to San Francisco to meet with judges concerning the future of the Ninth Circuit.⁷⁹ He met with seventeen circuit and district judges, six of whom openly supported a split.⁸⁰

Two weeks later, Chairman Sensenbrenner addressed the U.S. Judicial Conference. In part, he stated:

It is misleading for critics to assert that split opponents are motivated for the worst of reasons; that is, to change the Ninth's case law or dilute its effect . . . The Ninth is too big in so many ways. It leads all circuits in total appeals filed and pending. It represents too many people and too many litigants over too large an expanse of geography . . . It is not a question of *if* the Ninth will be split, but *when*.⁸¹

Chairman Sensenbrenner also linked the addition of any new judgeships in the federal judiciary to a division of the Ninth Circuit.⁸²

Chief Judge Schroeder attributed efforts to split the Ninth Circuit to "dissatisfaction in some areas with some of our decisions."⁸³ She said: "This has a long historic basis, beginning with some fishing-rights decisions in the '60s and going forward to the Pledge of Allegiance case and . . . some of the immigration decisions."⁸⁴

⁷⁸ *Improving the Administration of Justice: A Proposal to Split the Ninth Circuit: Hearing Before the Subcomm. on Administrative Oversight and the Courts of the S. Comm. on the Judiciary*, 108th Cong. (Apr. 7, 2004) [hereinafter 2004 Sen. Subcomm. Hearing].

⁷⁹ Jeff Chorney, *Circuit Split Meeting Proves Divisive*, RECORDER (San Francisco), Mar. 17, 2005, at 1.

⁸⁰ *Id.* The six judges who openly supported a split were Ninth Circuit Judges Diarmuid F. O'Scannlain, Richard C. Tallman, and Cynthia Holcomb Hall, and U.S. District Judges William Fremming Nielsen (E.D. Wash.), Sam E. Haddon (D. Mont.), and John M. Roll (D. Ariz.).

⁸¹ Sen. James F. Sensenbrenner, Jr., Chairman, House Committee on the Judiciary, Speech Before the U.S. Judicial Conference (Mar. 15, 2005), available at <http://judiciary.house.gov/newscenter.aspx?A=459> (emphasis added).

⁸² Jonathon D. Glater, *Lawmakers Trying Again to Divide Ninth Circuit*, N.Y. TIMES, June 19, 2005, at 116.

⁸³ *Id.*

⁸⁴ *Id.*

On October 26, 2005, a subcommittee of the Senate Committee on the Judiciary held a hearing regarding proposals to split the Ninth Circuit.⁸⁵ Proponents testifying in support of a split included Ninth Circuit Judges O'Scannlain, Kleinfeld, and Tallman, as well as the author. Split opponents who testified included Chief Judge Schroeder, Judge Kozinski, Judge Thomas, and District Judge Marilyn L. Huff of the Southern District of California. On November 14, 2005, the Department of Justice, in a letter to Chairman Sensenbrenner, announced its support of a circuit split, although it did not announce support for any particular configuration.⁸⁶

In October of 2005, a House bill—H.R. 4093—was introduced which would have divided the Ninth Circuit into two circuits, with California and Hawaii, Guam, and the Northern Mariana Islands being placed in a new Ninth Circuit and the other seven states of the current Ninth Circuit being placed in a new Twelfth Circuit.⁸⁷ Also in October of 2005, nine senators co-sponsored S. 1845, a bill that provided for a split identical to H.R. 4093.⁸⁸ Both bills would have created seven additional judgeships for the new Ninth Circuit. Ultimately, in 2006, H.R. 4093 was reported out of the House Committee on the Judiciary.

During the fall of 2005, *Engage*, the official publication of the Federalist Society, published an article by Judge O'Scannlain in support of a split.⁸⁹ In the spring of 2006, Chief Judge Schroeder, joined by thirty-two active and senior circuit judges of the Ninth Circuit, co-authored a response.⁹⁰

⁸⁵ *Revisiting Proposals to Split the Ninth Circuit: An Inevitable Solution to a Growing Problem: Hearing Before the Subcomm. on Administrative Oversight and the Courts of the S. Comm. on the Judiciary*, 109th Cong. (Oct. 26, 2005) [hereinafter 2005 Sen. Subcomm. Hearing].

⁸⁶ Letter from William E. Moschella, Assistant Attorney General, U.S. Department of Justice, to Rep. James Sensenbrenner, Chair, House Committee on the Judiciary (Nov. 14, 2005); Congressional Research Service, *CRS Report for Congress: Proposals in the 109th Congress to Split the Ninth Circuit Court of Appeals*, (Dec. 14, 2005), at 12; 2006 Sen. Hearing, *supra* note 35 (statement of Rachel Brand, Assistant Attorney General, U.S. Department of Justice).

⁸⁷ H.R. 4093, 109th Cong. (2005) (Rep. James Sensenbrenner (R-WI), Rep. Mike Simpson (R-ID), Rep. Tom Feeney (R-FL), Rep. C.L. "Butch" Otter (R-ID), Rep. Ric Keller (R-FL), Rep. John Coble (R-NC), Rep. Spencer Bachus (R-AL), Rep. Brown-Waite (R-FL), Rep. Doc Hastings (R-WA), Rep. Thaddeus G. McCotter (R-MI), Rep. Patrick T. McHenry (R-NC)).

⁸⁸ S. 1845, 109th Cong. (2005) (sponsored by Sen. John Ensign (R-NV), Sen. Lisa Murkowski (R-AK), Sen. Conrad Burns (R-MT), Sen. Larry E. Craig (R-ID), Sen. Mike Crapo (R-ID), Sen. James M. Inhofe (R-OK), Sen. Jon Kyl (R-AZ), Sen. Gordon H. Smith (R-OR), and Sen. Ted Stevens (R-AK)).

⁸⁹ Hon. Diarmuid F. O'Scannlain, *Ten Reasons Why the Ninth Circuit Should Be Split*, 6(2) ENGAGE 58 (Oct. 2005).

⁹⁰ Hon. Mary M. Schroeder, et al., *A Court United: A Statement of a Number of Ninth Circuit Judges*, 7(1) ENGAGE 63 (Mar. 2006). The thirty-two Ninth Circuit judges who

On September 20, 2006, the Senate Committee on the Judiciary held a hearing on S. 1845. Senate proponents speaking in favor of the bill included Senators John Ensign (R-NV) and Lisa Murkowski (R-AK). Other witnesses who testified in favor of a circuit split were Judges O’Scannlain and Tallman, the author, Assistant United States Attorney General Rachel L. Brand, and Professor John C. Eastman. Senators Dianne Feinstein (D-CA), Max Baucus (D-MT), and Barbara Boxer (D-CA) made statements opposing S. 1845. Witnesses who testified in opposition included Chief Judge Schroeder and Judge Thomas, as well as William H. Neukom, President-Elect of the American Bar Association and former California senator and governor Pete Wilson. During the hearing, Senator Feinstein commented that no split of California would be acceptable.⁹¹

II. THE CURRENT PREDICAMENT OF THE NINTH CIRCUIT AND WHY THE CONFIGURATION PROPOSED IN S. 1845 IS THE ANSWER

The Ninth Circuit: A Failed Experiment

In 1998, United States Supreme Court Justice Anthony M. Kennedy wrote to the White Commission in support of a circuit split.⁹² Speaking from the unique perspective of having served on the Ninth Circuit before his appointment to the Supreme Court, he wrote that the Ninth Circuit was too big.⁹³ He pointed out that having a circuit of the Ninth Circuit’s size was an experiment—a view he has held since 1975.⁹⁴ He has concluded that “the large circuit has yielded no discernible advantages over smaller ones.”⁹⁵ The “relative absence of persuasive, specific justifications for retaining [the Ninth Circuit’s] large size” is striking.⁹⁶ “What began as an experiment should not become the status quo when it has not yielded real success. In my view, the judicial system would be better served if the states of the present Ninth Circuit were to comprise more circuits than one.”⁹⁷ No matter what metric is used—caseload, population, the number of states, or the number of authorized judges—the Ninth Circuit is simply too large.

joined Chief Judge Schroeder in co-authoring the article were Judges James R. Browning, Alfred T. Goodwin, J Clifford Wallace, Procter Hug, Jr., Otto R. Skopil, Betty B. Fletcher, Jerome Farris, Harry Pregerson, Warren J. Ferguson, Dorothy W. Nelson, William C. Canby, Jr., Robert Boochever, Stephen R. Reinhardt, Melvin Brunetti, Alex Kozinski, John T. Noonan, Jr., David R. Thompson, Michael D. Hawkins, A. Wallace Tashima, Sidney R. Thomas, Barry G. Silverman, Susan P. Graber, M. Margaret McKeown, Kim M. Wardlaw, William A. Fletcher, Raymond C. Fisher, Richard A. Paez, Marsha S. Berzon, Johnnie B. Rawlinson, Richard R. Clifton, Consuelo M. Callahan, and Carlos T. Bea.

⁹¹ Sen. Feinstein Letter, *supra* note 35.

⁹² Justice Kennedy Letter, *supra* note 4.

⁹³ *Id.* at 2-4.

⁹⁴ *Id.* at 1.

⁹⁵ *Id.* at 2.

⁹⁶ *Id.*

⁹⁷ *Id.* at 5.

A. Disproportionate Caseload

Recent statistics show that the Ninth Circuit has 17,299 appeals pending.⁹⁸ This represents over thirty percent of all pending federal appeals⁹⁹—almost five times the average pending caseload for the other eleven geographic circuits.¹⁰⁰ As of September 30, 2006, it ranked first in case filings by a margin of 5,157 filings.¹⁰¹

On July 16, 1999, Judge Rymer told a Senate subcommittee that “the court’s output is too large to read, let alone for each judge personally to keep abreast of, think about, digest or influence,” with a resulting toll, over time, “on coherence and consistency, predictability, and accountability.”¹⁰² Since Judge Rymer offered this testimony, the Ninth Circuit’s caseload has doubled.¹⁰³

The current Ninth Circuit’s disproportionate caseload is due in large part, if not in whole, to the caseload of California, as demonstrated by a comparison of the filings of the individual Ninth Circuit states to those of the Eighth Circuit’s seven states and the Tenth Circuit’s six states.¹⁰⁴

⁹⁸ 2006 Caseload Statistics, *supra* note 58, at 1. Through September 30, 2006. *Id.* The statistics for September 2006 indicate a slight drop from the June 2006 numbers. Nonetheless, despite decrease in filings nationwide, and an 8.7% decrease in filings in the Ninth Circuit over the past year, the number of pending cases in the Ninth Circuit has increased 7.5% since September 2005. The Ninth Circuit continues to have thirty percent of all pending appeals. *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² 1999 Senate Subcomm. Hearing, *supra* note 22, at 60 (statement of Hon. Pamela Ann Rymer, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit, and Member, White Commission).

¹⁰³ U.S. Court of Appeals for the Ninth Circuit Filings by State during the Twelve Month Period Ending March 30, 2006, AIMS Database (2006) (table on file with author) [hereinafter AIMS] 2006 Caseload Statistics, *supra* note 58. At the time of the White Report, the Ninth Circuit’s caseload was about 8,500 cases. WHITE REPORT, *supra* note 25, at 32. As of September 30, 2006, there were 17,299 cases pending in the Ninth Circuit. 2006 Caseload Statistics, *supra* note 58, at 1.

¹⁰⁴ Ninth Circuit Judge A. Wallace Tashima recently noted that more than half of the Ninth Circuit’s caseload comes from a single California district—the Central District of California. Kenneth Ofgang, *Ninth Circuit Split Inevitable, Tashima Tells Gathering*, METROPOLITAN NEWS-ENTERPRISE (Los Angeles), Oct. 30, 2006, available at <http://www.metnews.com/articles/2006/tash103006.htm>.

8th Circuit Filings

State	Filings
AR	493
IA	434
MN	474
MO	1,068
NE	297
ND	58
SD	151

9th Circuit Filings

State	Filings
AK	168
AZ	1,245
CA	11,050
HI	290
ID	171
MT	323
NV	782
OR	649
WA	1,227

10th Circuit Filings

State	Filings
CO	507
KS	412
NM	354
OK	674
UT	322
WY	120

If the Ninth Circuit were to be divided in the manner suggested by S. 1845, the new Ninth Circuit would continue to have the largest caseload in the nation and the new Twelfth Circuit would have a caseload larger than five other circuits (D.C., First, Seventh, Eighth, and Tenth Circuits).

Case Filings—Before Split

Circuit	Filings
D.C.	1,354
1st	1,927
2nd	7,338
3rd	4,677
4th	5,556
5th	8,965
6th	5,354
7th	3,801
8th	3,426
9th	15,317
10th	2,818
11th	7,786

Case Filings—After Split

Circuit	Filings
D.C.	1,354
1st	1,927
2nd	7,338
3rd	4,677
4th	5,556
5th	8,965
6th	5,354
7th	3,801
8th	3,426
9th	10,887
10th	2,818
11th	7,786
12th	4,430

A split such as suggested in S. 1845, in addition to dividing the highest caseload in the country between two circuits, would also reduce the caseload per judge by adding seven judges to the new Ninth Circuit. The Ninth Circuit currently has the third highest number of cases per active judge (547 cases) and, with the addition of seven new judgeships, would drop to the fourth highest (494 cases). The caseload per judge of the new Twelfth Circuit would be seventh of the thirteen circuits.

*Case Filings per
Active Circuit Judge—
Before Split*

Circuit	Filings Per Judge
D.C.	113
1st	321
2nd	564
3rd	334
4th	370
5th	527
6th	334
7th	346
8th	311
9th	547
10th	234
11th	648

*Case Filings per
Active Circuit Judge—
After Split*

Circuit	Filings Per Judge
D.C.	113
1st	321
2nd	564
3rd	334
4th	370
5th	527
6th	334
7th	346
8th	311
9th	494
10th	234
11th	648
12th	340

The new Ninth Circuit would also benefit from the assistance of thirteen senior circuit judges.

B. Disproportionate Population

In 1891, when the Ninth Circuit Court of Appeals was created by the Evarts Act,¹⁰⁵ fewer than three million people inhabited the area that now comprises the Ninth Circuit.¹⁰⁶ Today, nearly sixty million people reside within the boundaries

¹⁰⁵ Circuit Court of Appeals Act, ch. 517, 26 Stat. 826 (1891).

¹⁰⁶ 1910 CENSUS, *supra* note 16, at 30.

of the Ninth Circuit¹⁰⁷—twenty-seven million more than the next largest circuit.¹⁰⁸ Not counting the Ninth Circuit, the average federal geographical circuit has a population of just over twenty-two million people.¹⁰⁹ A new Twelfth Circuit, such as proposed in S. 1845, would have a population of 21.3 million people.¹¹⁰

Circuit Population—Before Split

Circuit	Population
D.C.	546,944
1st	14,223,876
2nd	23,460,010
3rd	22,220,386
4th	28,240,059
5th	30,628,590
6th	31,958,785
7th	24,616,453
8th	19,960,650
9th	59,363,495
10th	15,841,602
11th	31,445,636

Circuit Population—After Split

Circuit	Population
D.C.	546,944
1st	14,223,876
2nd	23,460,010
3rd	22,220,386
4th	28,240,059
5th	30,628,590
6th	31,958,785
7th	24,616,453
8th	19,960,650
9th	37,993,842
10th	15,841,602
11th	31,445,636
12th	21,369,653

Because very few cases receive any en banc review, three-judge panels end up deciding the law for nearly sixty million people. In 1998, Justice Kennedy wrote that any circuit claiming the right “to bind nearly one fifth of the people of the United States by decisions of its three-judge panels . . . must meet a heavy burden of persuasion.”¹¹¹

¹⁰⁷ U.S. CENSUS BUREAU, U.S. DEP’T OF COMM., TABLE 1: ANNUAL ESTIMATES OF THE POPULATION FOR THE U.S. AND PUERTO RICO: APRIL 1, 2000 TO JULY 1, 2005, <http://www.census.gov/popest/states/NST-ann-est.html> [hereinafter 2005 STATE POPULATION ESTIMATES] (2005 population estimates for all fifty states); CENTRAL INTELLIGENCE AGENCY, THE WORLD FACT BOOK, <http://www.cia.gov/cia/publications/factbook/index.html> (2006 population estimates for Guam and the Northern Mariana Islands); see also Population Projections, *supra* note 3 (2006 population projections for all fifty states).

¹⁰⁸ 2005 STATE POPULATION ESTIMATES, *supra* note 107.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*; Population Projections, *supra* note 3.

¹¹¹ Justice Kennedy Letter, *supra* note 4, at 2.

C. Disproportionate Number of States

The current Ninth Circuit contains nine states, a commonwealth, and a territory.¹¹² Excluding the Ninth Circuit, the average circuit has fewer than four states. The nine states of the Ninth Circuit include the most populous state in the country¹¹³ and the two fastest growing states.¹¹⁴

The new Twelfth Circuit, consisting of seven states, would be tied with the Eighth Circuit for the most states within a circuit.

Of course, since California has thirty-six million people—thirteen million more than the next largest state (Texas)—the new Ninth Circuit would have the largest population of any circuit, even after being reduced by twenty-one million people.

D. Disproportionate Number of Judges

The Ninth Circuit has twenty-eight authorized active circuit judgeships and twenty-three senior circuit judges.¹¹⁵ It has requested and is clearly in need of seven more active circuit judgeships,¹¹⁶ which would result in the Ninth Circuit having a staggering total of thirty-five active circuit judges. The other circuits

¹¹² Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam, and the Northern Mariana Islands.

¹¹³ California. See Press Release, *supra* note 1.

¹¹⁴ Nevada and Arizona. *Id.* Ninth Circuit Judge Tashima recently observed “The Ninth Circuit is going to have to be split” because the western states are growing too fast. Ofgang, *supra* note 104.

¹¹⁵ *U.S. Courts of Appeals Additional Authorized Judgeships: 2005*, U.S. COURTS JUDGESHIP STATISTICS, http://jnet.ao.dcn/img/assets/5151/authorized_appeals_05.pdf [hereinafter *2005 Judgeship Statistics*]; United States Court of Appeals for the Ninth Circuit: The Judges of This Court in Order of Seniority (July 9, 2006), [http://www.ca9.uscourts.gov/ca9/Documents.nsf/174376a6245fda7888256ce5007d5470/0dbdee40d48f66408825683c0058477e/\\$FILE/judgeWeb.pdf](http://www.ca9.uscourts.gov/ca9/Documents.nsf/174376a6245fda7888256ce5007d5470/0dbdee40d48f66408825683c0058477e/$FILE/judgeWeb.pdf) [hereinafter *Ninth Circuit Judge List*].

¹¹⁶ Justice Byron R. White, Chair of the White Commission, in a 1999 statement to a subcommittee of the House Judiciary Committee, noted that the Ninth Circuit “has 28 authorized judgeships and has requested more; it will undoubtedly need still more judges in the years ahead.” *Final Report of the Commission on Structural Alternatives for the Federal Courts of Appeals Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary*. 106th Cong. 220 (July 22, 1999) (prepared statement of Hon. Byron R. White, Chair, White Commission). The U.S. Judicial Conference has since requested seven additional judgeships. See Press Release, U.S. Judicial Conference, Federal Courts Seek Congressional Action on 68 New Judgeships (Nov. 17, 2005), available at http://www.uscourts.gov/Press_Releases/newjudgeshipsprint.html; U.S. Judicial Conference, Additional Judgeships or Conversion of Existing Judgeships Recommended by the

average fewer than fourteen active circuit judges.¹¹⁷ The next largest circuit has seventeen authorized active circuit judgeships.¹¹⁸

In 1999, Judge Rymer observed that “[t]wo-thirds of the circuit judges throughout the country (including one-third of my colleagues on the Court of Appeals for the Ninth Circuit) believe that the maximum number of judges for an appellate court to function well lies somewhere between eleven and seventeen. Beyond this range there are too many judges”¹¹⁹ Judge O’Scannlain has estimated that a court of fifty circuit judges, active and senior, results in 19,600 possible three-judge panel combinations.¹²⁰

Both the Hruska and White Commissions discussed complaints by practitioners and judges that inconsistent decisions result from such a large pool of judges.¹²¹ The White Report stated that more than lawyers elsewhere, Ninth Circuit practitioners reported that appellate results were unpredictable until the identity of the panel was known.¹²² In 1999, Judge Kleinfeld told a Senate subcommittee that “[n]o district judge and no lawyer can, by reading even a few hundred of our decisions, predict what our court will do in the next case When a circuit grows to a size such that its judges cannot read and correct other panels’ decisions, district judges and lawyers trying to figure out what the law is are compelled to say that it depends on who is on the panel.”¹²³ Ninth Circuit Judge Stephen R. Reinhardt has written in two specific cases that panel composition determined the result.¹²⁴ With the addition of seven new circuit judges such as provided for

Judicial Conference 2005, available at <http://www.uscourts.gov/SummaryJudicialConferenceRecommendations.pdf>. See also Judge Royal Furgeson, *Statement Before the Subcomm. on Administrative Oversight and the Courts of the S. Comm on the Judiciary*, 109th Cong. (2005), available at http://www.uscourts.gov/Press_Releases/newjudgeshipsprint.html.

¹¹⁷ *Id.*

¹¹⁸ 2005 *Judgeship Statistics*, *supra* note 115.

¹¹⁹ Rymer, *supra* note 54, at 384.

¹²⁰ Howard Bashman, How Appealing’s 20 Questions Site: Interview with Hon. Diarmuid F. O’Scannlain, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit, (Mar. 3, 2003) at Question 7, http://20q-appellateblog.blogspot.com/2003_03_01_20q-appellateblog_archive.html.

¹²¹ HRUSKA REPORT, *supra* note 29, at 234-35; WHITE REPORT, *supra* note 25, at 40.

¹²² WHITE REPORT, *supra* note 25, at 40.

¹²³ 1999 Sen. Subcomm. Hearing, *supra* note 22, at 85 (prepared statement of Hon. Andrew J. Kleinfeld, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit). In his written submission to the Senate Committee on the Judiciary, Chief Judge Roll provided an “incomplete” list of twenty-six recent Ninth Circuit decisions which are unclear or in conflict with precedent. 2006 Sen. Hearing, *supra* note 35 (follow up questions for the Hon. John M. Roll, Chief District Judge, U.S. District Court for the District of Arizona).

¹²⁴ *U.S. v. Barona*, 56 F.3d 1087, 1105 (9th Cir. 1995) (Reinhardt, J., dissenting); *Garcia v. Spun Steak Co.*, 13 F.3d 296, 301 (9th Cir. 1993) (Reinhardt, J., dissenting from denial of rehearing en banc).

in S. 1845, the new Ninth Circuit would have twenty-two active circuit judges, in addition to thirteen senior circuit judges. The new Twelfth Circuit would have thirteen active circuit judges, which is average for the other circuit courts.

The new Ninth Circuit would have a caseload reduced by 4,500 cases and would be the beneficiary of seven new circuit judgeships. The new Twelfth Circuit would look like the prototypical federal circuit court.

A circuit split such as proposed in S. 1845 would serve well all nine states of the current Ninth Circuit.

III. ADVERSE CONSEQUENCES OF THE NINTH CIRCUIT'S DISPROPORTIONATE SIZE

In his written statement in support of 1999 legislation, which would have enacted the recommendations of the White Report, Justice White pointed out that although “the Commission found no administrative malfunctions in the Ninth Circuit sufficient to call for a division or realignment of the circuit . . . , the *court of appeals* in the Ninth Circuit presents a different picture.”¹²⁵ Justice White said that as an adjudicative body, the Ninth Circuit “encounters special difficulties” due to size, “that will worsen with continued growth.”¹²⁶ He said that “[u]nder the circumstances, doing nothing would be irresponsible.”¹²⁷

White Commission member Judge Rymer testified that “the Court of Appeals for the Ninth Circuit is broke and should be fixed, but cannot be fixed without structural change.”¹²⁸ She said that Justice White had a “strong conviction” that the Commission’s recommendations should be enacted.¹²⁹ Judge Rymer pointed out that the Ninth Circuit has too many judges to function as a court, stating that “[t]he problem with the Ninth Circuit’s Court of Appeals has nothing to do with good will or good administration.”¹³⁰ Judge Rymer added that the court’s output was too voluminous to read.¹³¹ She testified that “a majority of the justices of the U.S. Supreme Court unequivocally say that it is time for change.”¹³²

¹²⁵ 1999 Sen. Subcomm. Hearing, *supra* note 22, at 4 (prepared statement of Hon. Byron R. White, Chair, White Commission) (emphasis added).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 60 (statement of Hon. Pamela Ann Rymer, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit, and Member, White Commission).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ 1999 Sen. Subcomm. Hearing, *supra* note 22, at 60 (statement of Hon. Pamela Ann Rymer, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit, and Member, White Commission).

¹³² *Id.*

To be sure, a majority of the Supreme Court raised multiple concerns regarding the shortcomings of the Ninth Circuit. In 1998, Chief Justice William H. Rehnquist¹³³ and four other justices all informed the White Commission—in individual letters—that the Ninth Circuit was too big.¹³⁴

Chief Justice Rehnquist wrote that “some change in structure” is needed and that the Ninth Circuit’s limited en banc is problematic.¹³⁵ Justice Sandra Day O’Connor added that the Ninth Circuit “is simply too large,” and “some division or restructuring of the Ninth Circuit seems appropriate and desirable.”¹³⁶ Justice John Paul Stevens wrote that the arguments for dividing the Ninth Circuit into two or three circuits far outweigh arguments against a split.¹³⁷ Justice Antonin Scalia wrote to the Commission twice, first emphasizing the “incomplete and random nature of its en banc panel” as well as its untoward reversal rate,¹³⁸ then citing statistical evidence of the Ninth Circuit’s high reversal rate.¹³⁹ Justice Scalia concluded with the observation that the Ninth Circuit has a “singularly (and I had thought notoriously) poor record on appeal.”¹⁴⁰ Justice Kennedy said that the experiment of having an extremely large court had failed.¹⁴¹

In 1999, Professor Meador, who served as Executive Director of the White Commission, provided a prescient written statement to a House subcommittee, in support of legislation to enact the White Commission’s recommendations. He

¹³³ Letter from Chief Justice William H. Rehnquist to Hon. Byron R. White, Chair, White Commission (Oct. 22, 1998), *available at* <http://www.library.unt.edu/gpo/csafca/report/comments/chiefj.pdf> [hereinafter Chief Justice Rehnquist Letter].

¹³⁴ 1999 Sen. Subcomm. Hearing, *supra* note 22, at 60 (statement of Hon. Pamela Ann Rymer, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit, and Member, White Commission). *See also* Chief Justice Rehnquist Letter, *supra* note 133, at 1; Justice O’Connor Letter, *infra* note 136, at 1-2; Justice Stevens Letter, *infra* note 137, at 1-2; Justice Scalia Letter 1, *infra* note 142, at 1; Justice Scalia Letter 2, *infra* note 143, at 2; Justice Kennedy Letter, *supra* note 4, at 2-5.

¹³⁵ Chief Justice Rehnquist Letter, *supra* note 133, at 1.

¹³⁶ Letter from Justice Sandra Day O’Connor to Hon. Byron R. White, Chair, White Commission 2 (June 23, 1998), *available at* <http://www.library.unt.edu/gpo/csafca/hearings/submitted/pdf/oconnor.pdf> [hereinafter Justice O’Connor Letter].

¹³⁷ Letter from Justice John Paul Stevens to Hon. Byron R. White, Chair, White Commission 1 (Aug. 24, 1998), *available at* <http://www.library.unt.edu/gpo/csafca/hearings/submitted/pdf/stevens.pdf> [hereinafter Justice Stevens Letter].

¹³⁸ Letter from Justice Antonin Scalia to Hon. Byron R. White, Chair, White Commission 1 (Aug. 21, 1998), *available at* <http://www.library.unt.edu/gpo/csafca/hearings/submitted/pdf/Scalia1.pdf> [hereinafter Justice Scalia Letter 1].

¹³⁹ The Ninth Circuit’s reversal rate was 81% while the other circuits’ reversal rate was 57%. Letter from Justice Antonin Scalia to Hon. Byron R. White, Chair, White Commission 2 (Sep. 9, 1998), *available at* <http://www.library.unt.edu/gpo/csafca/hearings/submitted/pdf/Scalia2.pdf> [hereinafter Justice Scalia Letter 2].

¹⁴⁰ *Id.* at 2.

¹⁴¹ Justice Kennedy Letter, *supra* note 4, at 1, 5.

reasoned that unless Congress acts, the “controversy over the Ninth Circuit will continue to fester, with . . . debilitating consequences”¹⁴²

The Ninth Circuit’s enormously disproportionate dimensions have resulted in several serious and adverse consequences. A non-exhaustive summary of these consequences is set forth below.

A. A Structurally Flawed Limited En Banc Procedure

Because it has so many judges, since 1980 the Ninth Circuit has (with congressional authorization¹⁴³) heard cases en banc with fewer than all active circuit judges.¹⁴⁴ It is the only circuit court of appeals to do so. Until very recently, limited en banc panels in the Ninth Circuit consisted of eleven active judges;¹⁴⁵ as of January 2006, fifteen active circuit judges now sit on limited en banc panels.¹⁴⁶ Since adopting the limited en banc procedure, the Ninth Circuit has never conducted a full en banc hearing with all active circuit judges participating.¹⁴⁷

A Widely Criticized Procedure

The Ninth Circuit’s utilization of the limited en banc has been widely criticized by members of the federal judiciary. White Commission member Judge Rymer has said that a “‘limited’ en banc is an oxymoron, because ‘en banc’ means ‘full bench.’”¹⁴⁸ In her 1998 letter to the White Commission, Justice O’Connor said that the Ninth Circuit’s limited en banc hearings “cannot serve the purposes of en banc hearings as effectively as do the en banc panels consisting of all active judges that are used in the other circuits.”¹⁴⁹ Justices Kennedy and Scalia, in their letters, also referred to the Ninth Circuit’s limited en banc process.¹⁵⁰ Former Seventh Circuit Chief Judge Richard A. Posner has criticized what he refers to as the Ninth Circuit’s “bob-tailed en banc procedure.”¹⁵¹

¹⁴² 1999 Sen. Subcomm. Hearing, *supra* note 22, at 184 (prepared statement of Prof. Daniel J. Meador, Executive Director, White Commission).

¹⁴³ This act authorizes circuits with more than fifteen active circuit judges to hear cases en banc with fewer than all active circuit judges. Act of Oct. 20, 1978, Pub. L. No. 95-486, section 6, 92 Stat. 1629 (1978).

¹⁴⁴ U.S. CT. OF APPEALS, 9TH CIR. R. 35-3 (1979) (amended 2006).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ WHITE REPORT, *supra* note 25, at 32.

¹⁴⁸ Hon. Pamela Ann Rymer, *The ‘Limited’ En banc: Half Full, or Half Empty?*, 48 ARIZ. L. REV. 317, 317 (2006).

¹⁴⁹ Justice O’Connor Letter, *supra* note 136, at 2.

¹⁵⁰ Justice Kennedy Letter, *supra* note 4; Justice Scalia Letter 1, *supra* note 138.

¹⁵¹ Hon. Richard A. Posner, *Is the Ninth Circuit Too Large? A Statistical Study of Judicial Quality*, 29 J. LEGAL STUD. 711, 712 (2000).

Although in 2006 the Ninth Circuit increased the number of active circuit judges participating in its limited en banc hearings from eleven to fifteen,¹⁵² the addition of four judges is cosmetic only. When the Ninth Circuit is at full strength, this will still result in only fifteen of twenty-eight active judges of the court participating in limited en banc hearings. Judge Rymer has pointed out that “the limited en banc means that the views of off-panel judges are not necessarily known or taken into account in the collaborative effort to craft an opinion.”¹⁵³

Fifteen Votes Required for Limited En Banc Rehearing

In order for a case to be reheard en banc, a majority of the active circuit judges must vote in favor of rehearing.¹⁵⁴ In the Ninth Circuit, when the Court is at full strength, at least fifteen judges must vote for rehearing en banc. This is more judges than sit on most of the other circuit courts.¹⁵⁵ Since the White Report was issued in 1998, six or more Ninth Circuit judges have unsuccessfully voted for rehearing en banc thirty-four times.¹⁵⁶ The Supreme Court granted review in nine of these thirty-four cases; eight were reversed and one is still pending.¹⁵⁷

In one recent case in which a three-judge panel reached a conclusion contrary to that arrived at by five other circuits, nine Ninth Circuit judges unsuccessfully voted for rehearing en banc.¹⁵⁸ In another recent case, on two occasions en banc review was denied and both times the Supreme Court granted review.¹⁵⁹

¹⁵² Press Release, U.S. Courts for the Ninth Circuit, Ninth Circuit to Increase Size of *En Banc* Courts (Oct. 1, 2005), available at [http://www.ca9.uscourts.gov/ca9/Documents.nsf/54dbe3fb372dcb6c88256ce50065fcb8/2c6819f99f6bc7038825708f006aa2d7/\\$FILE/9thCircuitEnBanc.pdf](http://www.ca9.uscourts.gov/ca9/Documents.nsf/54dbe3fb372dcb6c88256ce50065fcb8/2c6819f99f6bc7038825708f006aa2d7/$FILE/9thCircuitEnBanc.pdf); see also U.S. CT. OF APPEALS, 9TH CIR. R. 35-3 (1979) (amended 2006).

¹⁵³ Rymer, *supra* note 148, at 323.

¹⁵⁴ FED. R. APP. P. 35.

¹⁵⁵ 2005 *Judgeship Statistics*, *supra* note 115.

¹⁵⁶ 2006 Sen. Hearing, *supra* note 35 (prepared statement of Hon. John M. Roll, Chief Judge, U.S. District Court for the District of Arizona, Attachment I: Ninth Circuit, Recent Unsuccessful Votes for Rehearing En Banc, 1998-2006).

¹⁵⁷ *Id.* (prepared statement of Hon. John M. Roll, Chief Judge, U.S. District Court for the District of Arizona, Attachment I: Ninth Circuit—Recent Unsuccessful Votes for Rehearing En Banc: 1998-2006). Chief Judge Roll’s testimony cites two cases still pending before the Supreme Court. However, the Supreme Court has since ruled on one of the cases, reversing the Ninth Circuit. *Ayers v. Belmontes*, 127 S. Ct. 469, 2006 WL 3257143 (Nov. 13, 2006).

¹⁵⁸ *Bockting v. Bayer*, 418 F.3d 1055 (9th Cir. 2005).

¹⁵⁹ *Belmontes v. Woodford*, 359 F.3d 1079 (9th Cir. 2004) (denying en banc review), *vacated sub nom.* *Brown v. Belmontes*, 544 U.S. 945 (2005), *en banc reh’g denied*, 427 F.3d 663 (9th Cir. 2005), *cert. granted sub nom.* *Ornaski v. Belmontes*, 126 S. Ct. 1909 (2006).

Finally, as Judge Rymer has pointed out, even if a majority of active circuit judges vote to rehear a case “limited en banc,” since not all active circuit judges will be drawn to hear the case en banc, there is no assurance that all of the active circuit judges who vote for en banc review will be selected to hear the case.¹⁶⁰

Close Votes Are Now Common in Limited En Banc Rehearings

In its December 1998 report, the White Commission stated that the Ninth Circuit’s limited en banc procedure was not problematic because the limited en banc votes were seldom close.¹⁶¹ This is no longer true. Since 1998, thirty-three percent (42 of 127) of the Ninth Circuit’s limited en banc rulings have been by 6-5 or 7-4 votes.¹⁶²

Although fifteen active circuit judges now participate in limited en banc hearings,¹⁶³ this does nothing to change the fact that far fewer than all active circuit judges will continue to participate in the Ninth Circuit’s unique en banc procedure. The only likely change will be close votes of 8-7 or 9-6, with eight or nine judges speaking for a court of twenty-eight.¹⁶⁴ It is demonstrably incorrect to argue that in all forty-two cases with close votes, participation by the other active circuit judges would have made no difference.¹⁶⁵

Three-judge Panel Members Frequently Are Not Picked for Limited En Banc Hearings

Since the limited en banc panels do not include all active circuit judges, there have been occasions when none of the three-judge panel members who decided a case was picked to hear the case en banc.¹⁶⁶ In one highly publicized case, a unanimous three-judge panel was unanimously reversed 11-0 by a limited en

¹⁶⁰ Rymer, *supra* note 148, at 321.

¹⁶¹ WHITE REPORT, *supra* note 25, at 35.

¹⁶² 2006 Sen. Hearing, *supra* note 35 (prepared statement of Hon. John M. Roll, Chief Judge, U.S. District Court for the District of Arizona, Attachment J: Ninth Circuit En Banc Votes, 1999-2006).

¹⁶³ U.S. CT. OF APPEALS, 9TH CIR. R. 35-3 (1979) (amended 2006).

¹⁶⁴ See, e.g., Perez-Enriquez v. Gonzales, 463 F.3d 1007 (9th Cir. 2006) (8-7 vote, with three concurring in part, dissenting in part; four dissenting).

¹⁶⁵ For example, in *Payton v. Woodford*, 346 F.3d 1204 (9th Cir. 2003) (en banc), six of the eleven judges on the en banc panel granted habeas relief to a death row inmate. At least seven active judges on the Ninth Circuit would have denied relief—the five judges on the en banc panel, and two of the judges on the original panel. See *Payton v. Woodford*, 258 F.3d 905, 910 (9th Cir. 2001). For a more in-depth discussion of this phenomenon, see 2006 Sen. Hearing, *supra* note 35 (follow up questions for the Hon. Richard C. Tallman, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit).

¹⁶⁶ See Rymer, *supra* note 148, 322. See also *Payton v. Woodford*, 346 F.3d 1204 (9th Cir. 2003) (en banc); *Cooper v. Woodford*, 358 F.3d 1117 (9th Cir. 2004) (en banc).

banc court.¹⁶⁷ None of the three judges who participated in the panel decision was selected to rehear the case en banc.¹⁶⁸

Judge Rymer has pointed out that when no panel member is drawn to hear the case on “limited en banc” (something that occurred in twenty-two of ninety-five limited en banc cases between 1999-2005),¹⁶⁹ the limited en banc panel “lacks the benefit of input from colleagues who are well-versed in the record and law applicable to the case, and whose work would bring a different perspective to en banc deliberations.”¹⁷⁰

Solutions

Enactment of legislation producing a circuit split such as that provided for in S. 1845 would enable the seven states of the new Twelfth Circuit—with its thirteen active circuit judges—to experience the benefits of full en banc review of cases now enjoyed by all other circuits except the current Ninth Circuit. The new Ninth Circuit might choose to continue conducting limited en banc hearings, particularly with the addition of seven new judges. However, even with the addition of seven judges such as provided for in S. 1845, these limited en banc panels would consist of fifteen of the court’s twenty-two active judges—more than two thirds of the court.¹⁷¹ If the Ninth Circuit remains structurally unchanged and the seven requested judgeships are authorized, only fifteen of thirty-five active circuit judges will participate in limited en banc hearings.

Alternatively, Congress could revoke authorization for the largest courts to conduct the structurally-flawed limited en banc hearings.¹⁷²

B. Most Reversed Circuit

The Ninth Circuit is the most reversed circuit. Even more extraordinary, however, is the fact that since the White Report was issued in 1998, the Ninth Circuit has been reversed at least sixty-two times *unanimously*, i.e., with no dissent.¹⁷³

¹⁶⁷ *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 882 (9th Cir.), *reh’g en banc*, 344 F.3d 914 (9th Cir. 2003) (addressing the California gubernatorial recall procedure).

¹⁶⁸ *Id.*

¹⁶⁹ Rymer, *supra* note 148, at 322.

¹⁷⁰ *Id.* at 323.

¹⁷¹ S. 1845, 109th Cong. (2005).

¹⁷² This has recently been proposed by Rep. Mike Simpson (R-ID). H.R. 1064, 109th Cong. (2005).

¹⁷³ 2006 Sen. Hearing, *supra* note 35 (prepared statement of Hon. John M. Roll, Chief Judge, U.S. District Court for the District of Arizona, Attachment K: List of Ninth Circuit Cases Unanimously Reversed by the Supreme Court, 1998-1999 Term Through 2005-2006 Term).

No other circuit is close to having so many unanimous reversals. In only two of these sixty-two cases had the Ninth Circuit heard the matter en banc; the other sixty unanimous reversals were of three-judge panel decisions.¹⁷⁴ In the Supreme Court term recently completed, eighteen Ninth Circuit cases were reviewed and fifteen were reversed, most of them unanimously.¹⁷⁵ In effect, the Supreme Court is performing review of Ninth Circuit panel decisions that should be addressed by the Ninth Circuit in full en banc hearings. Since the Supreme Court only hears a limited number of cases per year, the Ninth Circuit, with its extraordinary reversal rate, is placing disproportionate demands on the Supreme Court's limited time.

C. Slowest Circuit in Decisional Time

The Ninth Circuit is the slowest circuit in decisional time when measured from the time of filing of notice of appeal to disposition.¹⁷⁶ Recent statistics indicate that the Ninth Circuit takes 15.9 months per case.¹⁷⁷ The Ninth Circuit is more than two months slower than the next slowest circuit and almost four months slower than the average circuit.¹⁷⁸ The Ninth Circuit now takes two months longer per case than it did when the White Report was issued in 1998.¹⁷⁹

D. Under-representation in Judicial Conference

Every circuit is entitled to two representatives to the U.S. Judicial Conference, the policy-making body for the federal courts.¹⁸⁰ Nine states with a combined population of nearly sixty million people and accounting for thirty percent of all pending federal appeals should have two to three times the Judicial Conference representation received by the current Ninth Circuit. Splitting the Ninth Circuit would give better representation to all nine states.

¹⁷⁴ *Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005) (en banc), *vacated by* 126 S.Ct. 1613 (2006); *Rucker v. Davis*, 237 F.3d 1113 (9th Cir. 2001) (en banc), *rev'd sub nom.* *Department of Housing and Urban Development v. Rucker*, 535 U.S. 125 (2002) (Justice Breyer took no part in the decision.).

¹⁷⁵ 2006 Sen. Hearing, *supra* note 35 (prepared statement of Hon. John M. Roll, Chief Judge, U.S. District Court for the District of Arizona, Attachment K: Summary of the Ninth Circuit's Reversal Rate by the Supreme Court & List of Ninth Circuit Cases Unanimously Reversed by the Supreme Court, 1998-1999 Term Through 2005-2006 Term).

¹⁷⁶ *Table B4: U.S. Courts of Appeals, Median Time Intervals in Months for Cases Terminated After Hearing or Submission, By Circuit, During the Twelve Month Periods Ending Sept. 30, 2005 and 2006*, U.S. COURTS CASELOAD STATISTICS 21 (2006), <http://jnet.ao.dcn/img/assets/46471/AppealsSept2006.pdf> [hereinafter *2006 Decisional Time Statistics*].

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ WHITE REPORT, *supra* note 25, at 32.

¹⁸⁰ 28 U.S.C. § 331 (2006).

IV. SPLIT OPPONENTS FAIL TO CARRY THE “HEAVY BURDEN”¹⁸¹ THEY BEAR, AS THE OBJECTIONS TO A SPLIT CANNOT WITHSTAND SCRUTINY

In 1998, Justice Kennedy wrote that split opponents bear a “heavy burden of persuasion”¹⁸² Split opponents woefully fail to meet this burden.

A. “It Would Cost Too Much to Split the Ninth Circuit.”

Split opponents incorrectly claim that a circuit split would break the bank.¹⁸³ Existing facilities requiring modest modifications with relatively small price tags would meet the immediate needs for a new Twelfth Circuit headquarters in Phoenix, Arizona.¹⁸⁴

It has been suggested that the immediate cost of a split of the Ninth Circuit is \$100 to \$125 million for a new circuit headquarters in Phoenix.¹⁸⁵ However, either of two existing Phoenix locations—the Sandra Day O’Connor U.S. Courthouse at 401 W. Washington (“401”) or the 230 N. 1st Ave U.S. Courthouse (“230”)—has adequate space to fully serve as a circuit headquarters for the midterm.¹⁸⁶ Executive summaries, courthouse floor plans and conceptual estimates developed by HBJL Collaborative, LLC (“HBJL”), and a letter from former Chief District Judge Robert C. Broomfield of the District of Arizona—submitted to a Senate subcommittee in 2005—show that either of the two existing courthouses in Phoenix can initially house a new Twelfth Circuit headquarters at a cost of approximately \$5,821,282.76 or \$9,683,697.29, respectively.¹⁸⁷ Judge Broomfield concurs with

¹⁸¹ See *supra* note 111 and accompanying text.

¹⁸² Justice Kennedy Letter, *supra* note 4, at 2.

¹⁸³ 2006 Sen. Hearing, *supra* note 35 (prepared testimony of Hon. Mary M. Schroeder, Chief Judge, U.S. Court of Appeals for the Ninth Circuit). See also *id.* (statement of the American Bar Association); Letter from William N. LaForge, President, Federal Bar Association, to Sen. Arlen Specter, Chair, Senate Committee on the Judiciary (Sept. 18, 2006), at 2 [hereinafter FBA Letter].

¹⁸⁴ 2005 Sen. Subcomm. Hearing, *supra* note 85, at 126-27 (prepared statement of Hon. John M. Roll, District Judge, U.S. District Court for the District of Arizona).

¹⁸⁵ *The Breakup of the 9th U.S. Circuit Court Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 107th Cong. (July 23, 2002) [hereinafter 2002 House Subcomm. Hearing] (statement of Hon. Mary M. Schroeder, Chief Judge, U.S. Court of Appeals for the Ninth Circuit).

¹⁸⁶ Letter from Hon. Robert C. Broomfield, Senior District Judge, U.S. District Court for the District of Arizona, to Sen. Jeff Sessions, Chairman, Subcomm. on Administrative Oversight of the S. Comm. on the Judiciary (Oct. 19, 2005) [hereinafter Judge Broomfield Letter].

¹⁸⁷ HBJL Collaborative LLC, *Initial Housing Plan Alternatives for the Proposed New 12th Circuit Headquarters to Be Located in Phoenix, AZ Consisting of 14 Judges* (Oct. 14, 2005); Judge Broomfield Letter, *supra* note 186.

HBJL's conclusion that adequate space exists at both 401 and 230.¹⁸⁸ As the HBJL study and Judge Broomfield's letter reflect, a Twelfth Circuit headquarters can be attained in Phoenix now without a new circuit headquarters building.

In the past, the cost of additional circuit judgeships was sometimes included as a significant part of the cost of a circuit split. However, the reality is that seven new judgeships are needed, with or without a circuit split.¹⁸⁹

B. "The Ninth Circuit Doesn't Want a Split."

Split opponents emphasize that most Ninth Circuit judges do not want a split.¹⁹⁰ Initially, it should be noted that a significant number of Ninth Circuit judges support a split of the circuit. Ninth Circuit Judges O'Scannlain, Tallman, and Kleinfeld have testified in support of a split of the Ninth Circuit.¹⁹¹

¹⁸⁸ Judge Broomfield Letter, *supra* note 186. Judge Broomfield's evaluation of the HBJL analysis is deserving of great weight because of his extraordinary credentials. He served as a judge for thirty-six years, including fourteen years (eleven as presiding judge) on the Superior Court of Arizona in Maricopa County—then one of the nation's largest general jurisdiction trial courts—and twenty-one years (five as chief judge) on the U.S. District Court in Arizona. He has also been involved in the planning, design, and oversight of the construction of several state and federal courthouses, serving on the Space and Facilities Committee of the U.S. Judicial Conference from 1987-95 and serving as chair from 1989-95. In addition, in 1997, Judge Broomfield was appointed to the Judiciary's Budget Committee and chaired its Economy Subcommittee for several years. 2006 Sen. Hearing, *supra* note 35 (prepared statement of Hon. John M. Roll, Chief Judge, U.S. District Court for the District of Arizona). Judge Broomfield continues to serve on the Committee on the Budget.

¹⁸⁹ See Press Release, U.S. Judicial Conference, Federal Courts Seek Congressional Action on 68 New Judgeships (Nov. 17, 2005), *available at* http://www.uscourts.gov/Press_Releases/newjudgeshipsprint.html; U.S. Judicial Conference, Additional Judgeships or Conversion of Existing Judgeships Recommended by the Judicial Conference 2005, *available at* <http://www.uscourts.gov/SummaryJudicialConferenceRecommendations.pdf>. See also Judge Royal Furgeson, *Statement Before the Subcomm. on Administrative Oversight and the Courts of the S. Comm on the Judiciary*, 109th Cong. (2005), *available at* http://www.uscourts.gov/Press_Releases/newjudgeshipsprint.html.

¹⁹⁰ 2006 Sen. Hearing, *supra* note 35 (prepared statement of Hon. Mary M. Schroeder, Chief Judge, U.S. Court of Appeals for the Ninth Circuit); *id.* (statement of American Bar Association).

¹⁹¹ 2005 Sen. Subcomm. Hearing, *supra* note 85, at 13, 89 (oral and prepared statements of Hon. Diarmuid F. O'Scannlain, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit); *id.* at 15, 149 (oral and prepared statements of Hon. Richard C. Tallman, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit); *id.* at 36, 57 (oral and prepared statements of Hon. Andrew J. Kleinfeld, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit).

The fact that a strong majority of Ninth Circuit judges opposes a split of the circuit—as evidenced by thirty-three of forty-seven Ninth Circuit judges recently “co-authoring” a Federalist Society magazine piece in opposition of a split¹⁹²—should not be given undue weight. In its final report, the White Commission did not “regard the preferences of judges as dispositive.”¹⁹³

In expressing her support of a circuit split to the White Commission in 1998, Justice O’Connor said that “[i]t is human nature that no circuit is readily amenable to changes in boundary or personnel” and observed that “it is unrealistic to expect much sentiment for change from within any circuit.”¹⁹⁴ Despite this institutional bias against change referred to by Justice O’Connor, twenty-four federal judges who sit in the Ninth Circuit recently signed a letter sent to the Senate Committee on the Judiciary in support of S. 1845.¹⁹⁵

Although hundreds of law professors and many judges of the Ninth Circuit recently wrote to the Senate Committee on the Judiciary in opposition to a circuit split, far more significant are the 1998 opinions of a majority of the Supreme Court—the ultimate evaluators of the handiwork of all circuits—that the Ninth Circuit is too big. Judge Rymer, shortly after the White Commission issued its report, wrote that “many circuit judges, lawyers who practice within the [Ninth

¹⁹² Schroeder, et al., *supra* note 90. Even among those who oppose a split, some recognize that a split is inevitable. Ofgang, *supra* note 104 (quoting Ninth Circuit Judge A. Wallace Tashima). In addition, two opposition letters were submitted to the Senate Committee on the Judiciary by federal judges in the Ninth Circuit—one letter signed by forty-nine bankruptcy judges in the Ninth Circuit (thirty-one from California), and one signed by sixty-eight district judges in the Ninth Circuit (forty-three from California). Letter from Hon. Gregg W. Zive, Chief Nevada Bankruptcy Judge, to Hon. Arlen Specter, Chairman, Senate Committee on the Judiciary (July 27, 2006); Letter from Hon. Robert S. Lasnik, Chief Judge, U.S. District Court for the Western District of Washington, to Hon. Arlen Specter, Chairman, Senate Committee on the Judiciary (Sep. 19, 2006).

¹⁹³ WHITE REPORT, *supra* note 25, at 5.

¹⁹⁴ Justice O’Connor Letter, *supra* note 136, at 2.

¹⁹⁵ Letter from Hon. Richard C. Tallman, et al., to Sen. Arlen Specter, Chairman, Senate Committee on the Judiciary (June 29, 2006), *available at* http://ensign.senate.gov/static_media/062906_9thcircuit_letter.pdf. The other twenty-three judges who signed the letter were Ninth Circuit Judges Andrew J. Kleinfeld and Diarmuid F. O’Scannlain; Senior Ninth Circuit Judges Robert R. Beezer, Ferdinand F. Fernandez, Cynthia Holcomb Hall, Thomas G. Nelson, Joseph T. Sneed, and Steven S. Trott; Chief District Judge John M. Roll and District Judges David C. Bury, Frederick J. Martone, and James A. Teillborg, and Senior District Judge Robert C. Broomfield of the District of Arizona; Senior District Judge Howard B. Turrentine of the Southern District of California; District Judges Richard F. Cebull and Sam E. Haddon, and Senior District Judge Jack D. Shanstrom of the District of Montana; District Judge Robert C. Jones and Senior District Judge Lloyd D. George of the District of Nevada; Senior District Judges Malcolm F. Marsh and Owen M. Panner of the District of Oregon; District Judge Fred Van Sickle and Senior District Judge Wm. Fremming Nielson of the Eastern District of Washington. *Id.*

Circuit], and a majority of justices on the United States Supreme Court question how well the court of appeals performs its adjudicative functions.”¹⁹⁶

C. “There Is a Need for a Unified Law of the West.”

Although split opponents have argued that the law of the west should be decided by a single circuit,¹⁹⁷ no other circuit spans an entire border or coast.¹⁹⁸ The eastern seaboard, for example, is subdivided into five circuits.¹⁹⁹ Justice Kennedy has pointed out the value to federalism of circuit courts being regional courts.²⁰⁰

D. “California Can’t Be Separated from the Other Eight States of the Ninth Circuit.”

Split opponents argue that because of close historic and economic ties, the other eight states must remain with California.²⁰¹ However, on the east coast, New Jersey and New York are in different circuits, as are Massachusetts and Connecticut, Delaware and Maryland, and South Carolina and Georgia.²⁰² Without any apparent difficulty, intellectual property cases as well as maritime law cases are distributed among multiple circuits on the eastern seaboard.²⁰³

E. “California and Arizona are Border Courts and Should Remain in the Same Circuit.”

Split opponents argue that the Ninth Circuit should not be split because two of the five southwest border districts are in the Ninth Circuit.²⁰⁴ However, the

¹⁹⁶ Rymer, *supra* note 54, at 386.

¹⁹⁷ *See, e.g.*, 2006 Sen. Subcomm. Hearing, *supra* note 35 (prepared statement of Hon. Mary M. Schroeder, Chief Justice, U.S. Court of Appeals for the Ninth Circuit); 2005 Sen. Subcomm. Hearing, *supra* note 85 (Nov. 1, 2005 supplemental statement of Hon. Mary M. Schroeder, Chief Judge, U.S. Court of Appeals for the Ninth Circuit).

¹⁹⁸ Judge O’Scannlain notes: “There is no corresponding ‘Law of the South’ or ‘Law of the East.’” 2005 Sen. Subcomm. Hearing, *supra* note 85, at 100 (statement of Hon. Diarmuid F. O’Scannlain, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit).

¹⁹⁹ 28 U.S.C. § 41 (2006).

²⁰⁰ Justice Kennedy Letter, *supra* note 4, at 4.

²⁰¹ 2005 Sen. Subcomm. Hearing, *supra* note 85 (statement of Hon. Mary M. Schroeder, Chief Judge, U.S. Court of Appeals for the Ninth Circuit); *id.* (statement of Hon. Marilyn L. Huff, former Chief Judge, U.S. District Court for the Southern District of California); 2002 House Subcomm. Hearing, *supra* note 189 (statement of Hon. Sidney R. Thomas, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit).

²⁰² 28 U.S.C. § 41 (2006).

²⁰³ 2005 Sen. Subcomm. Hearing, *supra* note 85, at 100 (prepared statement of Hon. Diarmuid F. O’Scannlain, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit).

²⁰⁴ *See, e.g., id.* at 55-56 (statement of Hon. Marilyn L. Huff, former Chief Judge, U.S. District Court for the Southern District of California).

five southwest border districts are already separated into three circuits: the Ninth (S.D. Cal. and D. Ariz.), Fifth (S.D. Tex. and W.D. Tex.) and Tenth (D. N.M) Circuits.²⁰⁵

F. “As a Result of Technological Advances and Creative Case Processing, the Ninth Circuit Is Able to Cope with its Large Number of Judges and Vast Caseload.”

Split opponents argue that as a result of technological advances (e.g., e-mail, teleconferences, blackberries), and creative case processing techniques (e.g., the widespread use of screening panels, commissioners, and staff attorneys), the Ninth Circuit is able to cope with its vast caseload and disproportionate number of judges.²⁰⁶

It is not clear, however, that the Ninth Circuit is, in fact, able to cope with its staggering caseload. Ninth Circuit Judge Stephen R. Reinhardt, a split opponent, recently observed, “We work more [than we used to] but there just isn’t time to give cases the attention they deserve [The judges will] all be dead long before we make any progress on [the hundreds of death penalty cases].”²⁰⁷ Even where the Ninth Circuit is “coping,” the case processing techniques employed pose additional problems. For example, according to Ninth Circuit Judge Arthur L. Alarcon, a Ninth Circuit screening panel recently disposed of 500 cases—most involving disabled persons, immigrants, or criminal defendants—in three days.²⁰⁸ While this is a laudable accomplishment from an administrative standpoint, it is no wonder that Judge Alarcon said that others may find it “troubling.”²⁰⁹ Ninth Circuit Judge O’Scannlain, recently questioned whether shortcuts used by the Ninth Circuit may ultimately deprive litigants of Article III review of their cases.²¹⁰

²⁰⁵ 28 U.S.C. § 41 (2006).

²⁰⁶ 2006 Sen. Hearing, *supra* note 85, at 18 (statement of Hon. Mary M. Schroeder, Chief Judge, U.S. Court of Appeals for the Ninth Circuit); 2006 Sen. Hearing, *supra* note 35 (statement of the American Bar Association). *See also* Ofgang, *supra* note 104. The Ninth Circuit publishes only fifteen percent of its opinions, and usually does not grant oral argument. *Id.* (quoting Ninth Circuit Judge Stephen R. Reinhardt).

²⁰⁷ Ofgang, *supra* note 104. Judge Reinhardt co-authored the 2006 *Engage* article discussed above. *See* Hon. Mary M. Schroeder et al., *supra* note 90.

²⁰⁸ Ofgang, *supra* note 104.

²⁰⁹ *Id.* (quoting Ninth Circuit Judge Arthur Alarcon).

²¹⁰ Hon. Diarmuid F. O’Scannlain, *supra* note 89, at 61-62.

G. "Rather than Reduce the Size of the Ninth Circuit,
Other Circuits Should Be Bigger."

Some Ninth Circuit judges have argued that other federal circuits should be consolidated and have larger caseloads so as to follow the lead of the Ninth Circuit.²¹¹ However, no other circuit has expressed an interest in becoming more like the Ninth Circuit.

Seventh Circuit Judge Richard A. Posner has said: "The Ninth Circuit is performing badly, a case reinforced by the impressions that almost everyone has who appears before the Ninth Circuit or reads its opinions."²¹²

When the White Commission was conducting its study, Commission member and Judge William D. Browning repeatedly asked those who opposed a split, "How big is too big?" He never received a response.²¹³ Judge Browning noted that "those who support the current Ninth Circuit" do not believe "that there is such a thing as it being too big."²¹⁴ In 2004, he submitted a letter to a Senate subcommittee urging that if more judges are added to the Ninth Circuit, it should be divided.²¹⁵

How big *is* too big? When the White Report was issued, the Ninth Circuit's caseload was about 8,500 cases²¹⁶ (of a national total of 52,271)²¹⁷ and it had a population of 51,450,000 people²¹⁸ (of a national total of over 271 million).²¹⁹

²¹¹ 2005 Sen. Subcomm. Hearing, *supra* note 85 (Nov. 1, 2005 supplemental statement of Hon. Mary M. Schroeder, Chief Judge, U.S. Court of Appeals for the Ninth Circuit); 2004 Sen. Subcomm. Hearing, *supra* note 78 (statement of Hon. J. Clifford Wallace, Senior Judge, U.S. Court of Appeals for the Ninth Circuit).

²¹² Howard Bashman, How Appealing's 20 Question Site: Interview with Hon. Richard A. Posner, Circuit Judge, U.S. Court of Appeals for the Seventh Circuit (Dec. 1, 2003) at Question 9, http://20q-appellateblog.blogspot.com/2003_12_01_20q-appellate-blog_archive.html.

²¹³ 1999 Senate Subcomm. Hearing, *supra* note 22, at 127 (statement of Hon. William D. Browning, Senior District Judge, U.S. District Court for the District of Arizona, and Member, White Commission).

²¹⁴ *Id.* Judge Tashima has acknowledged that the caseload of the Ninth Circuit may someday require an astronomical 100 judges. Ofgang, *supra* note 104.

²¹⁵ Letter from Hon. William D. Browning, Senior District Judge, U.S. District Court for the District of Arizona, and Member, White Commission, to Sen. Jeff Sessions, Chair, Subcommittee on Administrative Oversight and the Courts of the Senate Committee on the Judiciary (Apr. 29, 2004). The letter was also signed by Judge Broomfield and then-District Judge John M. Roll.

²¹⁶ WHITE REPORT, *supra* note 25, at 32.

²¹⁷ *Id.* at 16.

²¹⁸ *Id.* at 27.

²¹⁹ *Id.*

In the interim, the Ninth Circuit's caseload has doubled (17,229 pending cases as of September 30, 2006)²²⁰ and the population has increased by eight million people.²²¹

H. "The Ninth Circuit Is a National Beacon and Cutting-edge Innovator."

Although the Ninth Circuit sometimes depicts itself as a national beacon for the other federal courts and a cutting edge innovator,²²² it is actually just one of twelve regional circuit courts. It is not entitled to a position of preeminence over all other circuits.

I. "Before the Ninth Circuit Is Divided, More Studies Are Needed."

Some split opponents have urged that more hearings and studies are required.²²³ Whether to divide the Ninth Circuit has been the subject of countless hearings, the most recent having been held on September 20, 2006, before the Senate Committee on the Judiciary.²²⁴

In a little more than three decades, two national commissions, the Hruska Commission (1973)²²⁵ and the White Commission (1998),²²⁶ studied the Ninth Circuit and made recommendations. The Hruska Commission recommended that both the Fifth and Ninth Circuits be divided.²²⁷ The White Commission recommended what has been described as a "de facto split"²²⁸ of the Ninth Circuit Court of Appeals, proposing that the Ninth Circuit be subdivided into three semi-autonomous divisions.²²⁹ Prior to issuance of the White Report, the White Commission held several hearings in the Ninth Circuit.²³⁰ This issue has been

²²⁰ 2006 Caseload Statistics, *supra* note 58, at 1.

²²¹ 2005 STATE POPULATION ESTIMATES, *supra* note 107; CENTRAL INTELLIGENCE AGENCY, THE WORLD FACT BOOK <http://www.cia.gov/cia/publications/factbook/index.html> (2006 population estimates for Guam and the Northern Mariana Islands); Population Projections, *supra* note 3.

²²² 2006 Sen. Hearing, *supra* note 35 (statement of Hon. Mary M. Schroeder, Chief Judge, U.S. Court of Appeals for the Ninth Circuit).

²²³ Carl Tobias, *A Divisional Arrangement for the Federal Appeals Courts*, 43 ARIZ. L. REV. 633, 661-64 (2001). *See also* 2006 Sen. Hearing, *supra* note 35 (statement of Sen. Dianne Feinstein (D-CA)).

²²⁴ 2006 Sen. Hearing, *supra* note 35.

²²⁵ HRUSKA REPORT, *supra* note 29.

²²⁶ WHITE REPORT, *supra* note 25.

²²⁷ HRUSKA REPORT, *supra* note 29, at 228-29.

²²⁸ Hon. Procter Hug, Jr., *supra* note 61, at 330.

²²⁹ WHITE REPORT, *supra* note 25, at 40-41.

²³⁰ *Id.* at 2-3. *See also* White Commission, Public Hearings and Testimony, *available at* <http://www.library.unt.edu/gpo/csafca/schedule.htm>.

studied to distraction. No further studies or hearings are warranted; they would only delay the necessary and the inevitable.

J. “The White Commission’s Recommendations Are an Attractive Alternative to a Split of the Ninth Circuit.”

When the White Report’s recommendations were announced, the Ninth Circuit Court of Appeals’ opposition to them was vociferous.²³¹ The White Commission’s recommendations represent a valiant, extraordinary and unprecedented effort to prevent the division of a circuit that has simply grown to unworkable dimensions from an adjudicative standpoint. Since the White Report was issued, the population in the nine states of the Ninth Circuit has increased by eight million people and the caseload has doubled.²³² Even assuming that today’s split opponents have reversed themselves and now believe the White Report’s key recommendations are appropriate (i.e., three semi-autonomous divisions with full divisional en banc review, nonbinding interdivisional caselaw, and circuit-wide limited en banc restricted to “substantial and square conflicts”), an actual split of the circuit is the best solution.

K. “Disparity in Caseload Between a New Circuit with California and a New Circuit of the Remaining States Is Unfair.”

Opponents of a split have suggested that the various splits proposed would create unfair disparity in caseload between the new Ninth Circuit and the new Twelfth Circuit.²³³ The Ninth Circuit currently ranks third in caseload, with 547 cases per active circuit judge.²³⁴

Under legislation such as S. 1845, with its addition of seven new judgeships, the new Ninth Circuit’s caseload would be significantly reduced—dropping from 547 cases per active circuit judge to 494 cases per active circuit judge.²³⁵ The new

²³¹ See *supra* notes 60-68 and accompanying text.

²³² See *supra* notes 216-21 and accompanying text.

²³³ 2006 Sen. Hearing, *supra* note 35 (statement of Hon. Mary M. Schroeder, Chief Judge, U.S. Court of Appeals for the Ninth Circuit); FBA Letter, *supra* note 187, at 2; Ofgang, *supra* note 104 (quoting Ninth Circuit Judge A. Wallace Tashima). However, as Judge Tashima noted, the bulk of Ninth Circuit cases originate in California—more than fifty percent come from the Central District of California alone. *Id.* Absent a division of California—which is adamantly opposed by that state, see *supra* notes 35, 68—it is not possible to divide the Ninth Circuit into two circuits with equal caseloads.

²³⁴ 2006 Caseload Statistics, *supra* note 58; 2005 Judgeship Statistics, *supra* note 115. Only the Eleventh and Second Circuits have a higher caseload per judge. *Id.*

²³⁵ 2006 Caseload Statistics, *supra* note 58; 2005 Judgeship Statistics, *supra* note 115; AIMS, *supra* note 103.

Ninth Circuit would also have thirteen senior circuit judges to assist with this caseload.²³⁶ Overall, the caseload of the new Ninth Circuit judges would be less than three other circuits.²³⁷ In addition, although the new Twelfth Circuit would have a caseload of 340 cases per active circuit judge, a number significantly smaller than the caseload of the new Ninth Circuit, its caseload would be larger than that of six other circuits.²³⁸ Split opponents continue to invoke the mantra that any split must be even, but California cannot be divided between two circuits. Therefore, since any circuit split that does not divide California would not be “even,” no circuit split is possible. This reasoning cannot continue to prevail.

L. “A New Twelfth Circuit Would Have No Bankruptcy Appellate Panel.”

Some split opponents have said that the new Twelfth Circuit would not have a Bankruptcy Appellate Panel.²³⁹ However, the much smaller Tenth Circuit has a bankruptcy appellate panel. Former Chief District Judge Lloyd D. George of the District of Nevada, an organizer of the Ninth Circuit Bankruptcy Appellate Panel and a former chief bankruptcy judge, sees no impediment to a bankruptcy appellate panel in the new Twelfth Circuit.²⁴⁰

M. “The Problems Associated with the Ninth Circuit Will Be Alleviated Once Current Vacancies Are Filled.”

Split opponents suggest that filling vacant judgeships is the solution to the Ninth Circuit Court of Appeals’ problems.²⁴¹ More judges, however, will not solve the insurmountable difficulties caused by the massive caseload, population, and number of judges. Judge Rymer, in testifying before a Senate subcommittee nine

²³⁶ Ninth Circuit Judge List, *supra* note 116; S. 1845, 109th Cong. (2005).

²³⁷ The Eleventh, Second, and Fifth Circuits would have higher caseloads. *2006 Caseload Statistics*, *supra* note 58; *2005 Judgeship Statistics*, *supra* note 115.

²³⁸ The new Twelfth Circuit would have a caseload higher than the D.C., First, Third, Sixth, Eighth, and Tenth Circuits. *2006 Caseload Statistics*, *supra* note 58; *2005 Judgeship Statistics*, *supra* note 115.

²³⁹ 2005 Sen. Subcomm. Hearing, *supra* note 85, at 174 (statement of Hon. Sidney R. Thomas, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit).

²⁴⁰ 2006 Sen. Hearing, *supra* note 35 (statement of Hon. John M. Roll, Chief Judge, U.S. District Court for the District of Arizona). Judge George has extensive expertise in the area of bankruptcy courts. He has served as both a bankruptcy and district court judge, has published several articles dealing with bankruptcy practice, and served as chair of the Bankruptcy Rules Committee of the U.S. Judicial Conference. Valerie Stewart, *Hon. Lloyd D. George and Hon. Edward C. Reed, Jr., Senior U.S. District Judges for the District of Nevada*, 53 *FED. LAW.* 33, 33-34 (Aug. 2006).

²⁴¹ See 2006 Sen. Hearing, *supra* note 35 (statement of Hon. Mary M. Schroeder, Chief Judge, U.S. Court of Appeals for the Ninth Circuit); *id.* (statement of the American Bar Association).

years ago, said that “no amount of [good will or good administration] can make it possible for 30, 40, or 50 or more judges to decide cases together. It simply cannot be done, and that is the problem.”²⁴²

N. “The Composition of the Judges on the New Twelfth Circuit Would Lack Ethnic Diversity.”

Opponents have even suggested that no split can occur because the new Twelfth Circuit would have no Hispanic circuit judges.²⁴³ The composition of circuit judges on any circuit is a transitory feature. Little wonder that the White Commission stated in its final report: “There is one principle that we regard as undebatable: it is wrong to realign circuits (or not realign them) and to restructure courts (or leave them alone) because of particular judicial decisions or particular judges.”²⁴⁴

The new Twelfth Circuit would have a relatively small number (thirteen) of active circuit judges, of which one would be African-American. The ethnic composition of a court—or a proposed court—at a particular point in time is not a compelling reason to fail to split the Ninth Circuit.²⁴⁵

O. “Attempts to Split the Ninth Circuit Are Politically Motivated.”

Despite the overwhelming and compelling evidence in support of a circuit split, some split opponents continue to rely upon the unfounded claim that attempts to split the Ninth Circuit are simply politically motivated.²⁴⁶ However, judges who support a split have consistently focused on the impracticality of having a single circuit court of such enormous proportions. Circuit-splitting bills have been sponsored by Democrats, Republicans, and independents alike.²⁴⁷ While there is little or no evidence of pro-split judges and lawyers articulating

²⁴² 1999 Senate Subcomm. Hearing, *supra* note 22, at 60 (statement of Hon. Pamela Ann Rymer, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit, and Member, White Commission).

²⁴³ Pamela A. MacLean, *New Circuit with No Hispanics Draws Fire: A 9th Circuit Judge Protests Current Proposal for a New 12th Circuit*, NAT'L L.J. 4 (Oct. 2, 2006).

²⁴⁴ WHITE REPORT, *supra* note 25, at 6.

²⁴⁵ Ninth Circuit Judge Stephen R. Reinhardt, who opposes a split of the Ninth Circuit, recently stated, “I don’t think [race or gender] is what counts,” as it does not seem to affect rulings. Ofgang, *supra* note 104.

²⁴⁶ Glater, *supra* note 82, at 116; Ofgang, *supra* note 104.

²⁴⁷ See *supra* notes 23-91 and accompanying text. Moreover, the political effects of a split are unclear, as the current members of the court would continue to serve, the Ninth Circuit precedent to date would remain intact, and the proportion of Republican and Democratic nominees in both new circuits would be roughly comparable.

political reasons for a division of the circuit, this has not been true of all split opponents.²⁴⁸ The reasons a split is necessary far transcend politics. No one can seriously maintain that the Ninth Circuit is proportionate to the other geographic circuit courts or that it adjudicates well despite its enormous caseload and number of judges.

V. CONCLUSION

The administration of justice is not well-served by having one of twelve federal circuit courts entertain thirty percent of the nation's federal appeals, house one-fifth of the nation's population, and contain nearly one-fifth of the nation's states (including the most populous state). The consequences of having a single circuit encompass so many states and hear so many cases resonate in many ways, including too many judges, lengthy dispositional time, utilization of a structurally flawed limited en banc process, an extraordinary unanimous reversal rate, and gross under-representation in the U.S. Judicial Conference.

For 115 years there has been no diminution in the boundaries of the Ninth Circuit despite a more than twenty-fold increase in population. The need for a split has been discussed in earnest for over three decades, including studies by two national commissions. The situation has become exacerbated and, without a division of the Ninth Circuit, will continue to deteriorate. This issue will not go away.

For Congress to divide the Ninth Circuit is not an attack upon judicial independence; it is the wise exercise of authority expressly entrusted to Congress by the Constitution.

²⁴⁸ See Justin Scheck, *Circuit Breakers Attack Overload*, RECORDER (San Francisco), July 14, 2006, at 1; Lawrence Hurley, *Environmentalists Ask Senate to Leave the 9th Circuit Alone*, THE DAILY JOURNAL, Aug. 4, 2006. Ofgang, *supra* note 104 (quoting Ninth Circuit Judge Stephen R. Reinhardt: “[T]he issue of a circuit split [will] be dead for at least two years if the Democrats win control of either house.”).