Federalism and Separation of Powers

Ten Reasons Why the Ninth Circuit Should Be Split

*By Diarmuid F. O'Scannlain**

Editor's Note: This article is the first installment of a series entitled "Ninth Circuit Split: Point/Counterpoint." Judge O'Scannlain's article will be followed by a rebuttal from Judge Alex Kozinski, also of the Ninth Circuit, in the next issue of Engage.

I have had the privilege of serving as a judge on the Ninth Circuit Court of Appeals for nearly two decades. Needless to say, I feel a deep attachment to the court on which I sit and a sincere admiration for its leaders. Nevertheless, since completing an LL.M. in Judicial Process with the Graduate Program for Appellate Judges in the early 1990s, I have been convinced that the Ninth Circuit must be restructured into at least two smaller circuits. Such a realignment is the only means of ensuring the effective administration of justice for the nearly sixty million Americans[1] who reside within the nine states and two territories that comprise the Ninth Circuit.[2]

The administrative considerations that compelled me to reach that troubling conclusion more than a decade ago have grown significantly more urgent in recent years. Ultimately, the Ninth Circuit simply has too many judges, encompasses too vast an expanse of territory, and is burdened with too large a volume of filings to operate effectively.

An increasing number of lawmakers share my concerns, and there are currently five bills to split the circuit pending in Congress. Indeed, it is no longer a question of *whether* the Ninth Circuit will be split but of *when* the split will take place and *which* realignment proposal will be adopted.

I set forth below ten reasons—rooted in history, empirical evidence, and my own judicial experience—supporting the conclusion that the Ninth Circuit should be split. In light of these considerations and the growing congressional momentum in favor of realignment, the split's opponents must now bear the heavy burden of establishing that the status quo should be maintained.

I. The Boundaries of the Federal Judicial Circuits Have Been Repeatedly Redrawn Since the Founding

Contrary to the impression that some split opponents seek to convey, the boundaries of the federal judicial circuits are not set in stone. Throughout our nation's history, Congress has repeatedly redrawn the circuits' boundaries to accommodate territorial expansion and population changes. Splitting the Ninth Circuit in response to the Western states' burgeoning population is simply the next logical step in this historical progression.

The steady, evolutionary process of circuit realignment began shortly after the Founding. The Judiciary Act of 1789 created three circuits: the Eastern, Middle, and Southern.[3] In 1802—a mere thirteen years later—Congress doubled the number of circuits to six.[4] As part of that development, the Eastern Circuit, which encompassed New York and New England, was divided in two by separating New York, Vermont, and Connecticut from Massachusetts, New Hampshire, and Rhode Island.[5]

As the United States expanded throughout the early nineteenth century, Congress created three more circuits and then continuously reconfigured their boundaries in response to the nation's rapid growth.[6] Indeed, Congress realigned the circuits *thirteen* times between the Founding and the end of the Civil War.[7] In 1866, Congress created the precursor to the present-day Ninth Circuit when it grouped the sparsely populated states of California, Oregon, and Nevada into a single judicial circuit.[8] In 1891, the Evarts Act[9] added Washington, Idaho, Montana, and Alaska to the Ninth Circuit.[10] With the exception of the later additions of Hawaii, Arizona, Guam, and the Northern Mariana Islands,[11] the Ninth Circuit's boundaries have since remained unchanged.

Notwithstanding the Ninth Circuit's stasis, the unrelenting process of circuit realignment continued elsewhere throughout the twentieth century. In 1929, the Tenth Circuit was split from the vast Eighth Circuit, which, until then, had encompassed together with the Ninth Circuit nearly all of the United States west of the Mississippi.[12] Similarly, in 1948, the District of Columbia Circuit was carved out of the Fourth Circuit.[13]

Although bills to split the Ninth Circuit were introduced as early as the 1940s,[14] it was during the 1970s that Congress first began to consider seriously whether the Ninth Circuit should be restructured to accommodate California's rapidly growing population. The congressionally appointed Hruska Commission issued a report in 1973 that recommended splitting both the Fifth and Ninth Circuits.[15] While the Ninth Circuit's leadership rejected this realignment proposal, the Fifth Circuit's judges requested implementation of the Commission's recommendation, and in 1981, the Eleventh Circuit was created by splitting the Fifth Circuit in two.[16]

It is evident that circuit realignment has played an exceedingly important role in the historical development of the federal court system. For two centuries, Congress has consistently relied upon this well-established mechanism to ensure that the federal judiciary is not overwhelmed by population growth and caseload increases. The Ninth Circuit, however, has resisted this evolutionary process. Today, this judicial vestige of the sparsely populated western frontier is home to nearly one in five Americans. As Congress has repeatedly done with other circuits, it should respond to this demographic shift by dividing the overburdened Ninth Circuit into smaller units that will be better able to administer justice effectively.

II. Two Congressionally Appointed Commissions Have Recommended That the Ninth Circuit Be Restructured

In 1972, Congress created the Commission on Revision of the Federal Court Appellate System to study the circuits' configuration and the appellate courts' internal operating procedures.[17] The Commission, which was chaired by Senator Roman Hruska and thus popularly known as the Hruska Commission, submitted a report a year later that recommended splitting the Ninth Circuit by dividing California and creating a northwest and southwest circuit.[18] The Commission concluded that a restructuring was necessary because of frequent delays in the Ninth Circuit's disposition of appeals, the unwieldy number of Ninth Circuit judges,[19] and inconsistent resolution of appeals by different Ninth Circuit panels.[20]

The Ninth Circuit's leadership rejected the Hruska Commission's recommendation, and it was, of course, never implemented. Time only exacerbated the Ninth Circuit's operational difficulties, however, and in 1997, the Senate unanimously passed a bill that would have created a "new" Ninth Circuit comprised of California, Nevada, and two territories and a Twelfth Circuit encompassing the remaining states of the current circuit.[21] The House requested further study of the realignment issue, and Congress accordingly created the Commission on Structural Alternatives for the Federal Courts of Appeals.[22] The Commission, which was commonly known as the "White Commission" after its chairman, retired Supreme Court Justice Byron R. White, included among its members Ninth Circuit Judge Pamela Ann Rymer.[23]

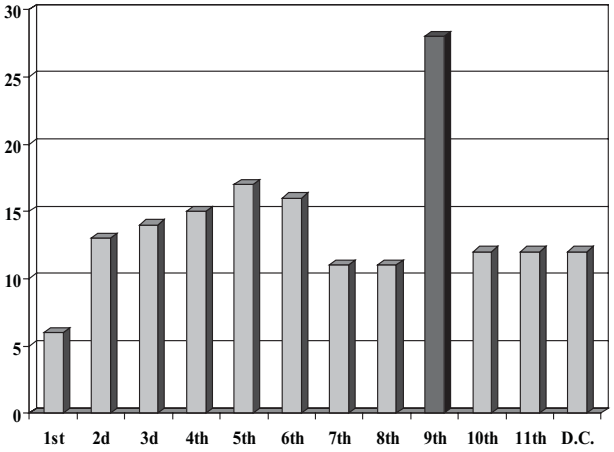
The White Commission recommended reorganizing the Ninth Circuit into three semi-autonomous units comprised of seven to eleven active circuit judges.[24] It endorsed this restructuring because growth in the number of Ninth Circuit judges had impeded the effectiveness of the circuit's en banc process.[25] The Commission specifically concluded that "the law-declaring function of appellate courts requires groups of judges smaller than the present Ninth Circuit Court of Appeals."[26] Although the White Commission stopped short of recommending a formal "split" of the Ninth Circuit, the circuit's leadership was unwilling to countenance any change to the status quo and resoundingly rejected the Commission's report.

The Hruska and White Commissions together expended thousands of hours studying the Ninth Circuit's operations. In light of their collective expertise on matters of judicial administration, the onus rests upon the split's opponents to rebut the conclusion of both Commissions that the Ninth Circuit must be reconfigured.

III. The Large Number of Ninth Circuit Judges Inhibits Collegiality

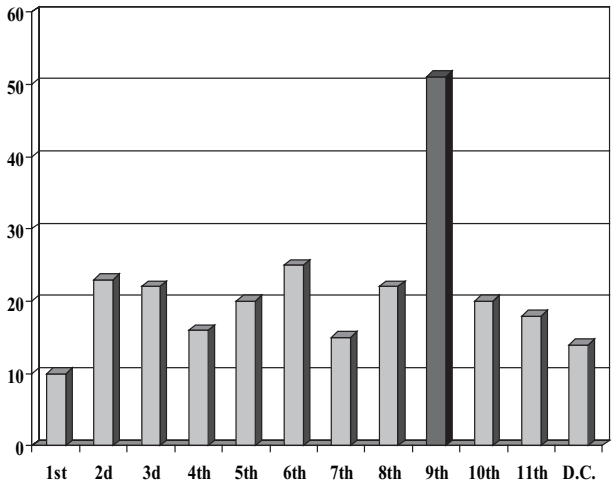
The Ninth Circuit has twenty-eight authorized judgeships, which is more than double the average of all other circuits.[27] Indeed, the Ninth Circuit has eleven more judgeships than the next-largest circuit, the Fifth, and nearly *five* times more than the smallest circuit, the First, which has only six authorized judgeships. (See Exhibit 1).[28]

Exhibit 1: *Number of Authorized Judgships by Circuit*



This intercircuit disparity is exacerbated by the fact that there are also twenty-three senior judges serving on the Ninth Circuit, most of whom continue to hear cases regularly.[29] The total number of Ninth Circuit judgeships (authorized and senior) therefore stands at fifty-one.[30] No other circuit has more than twenty-five total judgeships, and the average among all other circuits is nineteen. (See Exhibit 2).[31]

Exhibit 2: *Number of Authorized Judges (authorized + Senior) by Circuit*



The Ninth Circuit's lengthy judicial roster has a detrimental effect on the court's decision-making process because it inhibits the development of collegiality and fosters fractiousness. The Ninth Circuit's judges typically participate in eight, week-long three-judge panel sittings per year. Thus, assuming that we sit with no visiting judges and no district judges—a mighty assumption in the Ninth Circuit, where we often enlist such extra-circuit help to deal with the overwhelming workload—we might sit with approximately twenty of our colleagues on three-judge panels over the course of a year. That is less than half of the total number of judges on the court. Because the frequency with which any set of judges hears cases together is therefore quite low, it becomes difficult to establish effective working relationships

in developing the law. As the White Commission perceptively observed, "One reason judges in larger decisional units have difficulty maintaining consistent law is that as the size of the unit increases, the opportunities the court's judges have to sit together decrease."[32]

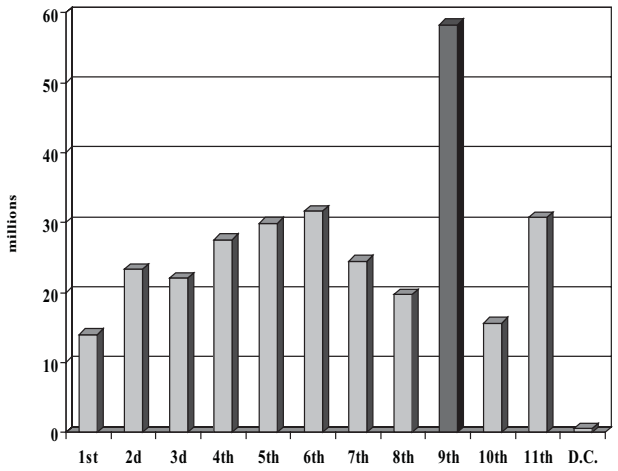
Consistency of law in the appellate context requires an environment in which a reasonably small body of judges has the opportunity to sit and to conference together frequently. Such interaction enhances understanding of one another's reasoning and decreases the possibility of misinformation and misunderstandings. Unlike a legislature, a court is expected to speak with one consistent, authoritative voice in declaring the law. But the Ninth Circuit's vast size hinders this process and encourages disparity, creating the danger that its deliberations will resemble those of a legislative—rather than a judicial—body.

IV. The Ninth Circuit Encompasses Nearly Forty Percent of the Total Land Mass of the United States

The Ninth Circuit stretches from the Rocky Mountains and the Great Plains along its eastern border to the Philippine Sea and the rainforests of Kauai in the west, from the Mexican Border and the Sonoran Desert in the south to the Bering Strait and the Arctic Ocean in the north. Because most cases are heard in Pasadena and San Francisco, the circuit's vast geographic reach creates significant travel costs (and inefficiency) for those judges who must routinely travel to California from such distant locations as Billings, Montana, and Fairbanks, Alaska.

More than 58 million Americans—nearly one-fifth of the nation's population—live within the Ninth Circuit's expansive borders, which represents nearly three times the average population of all other circuits. (See Exhibit 3).[33]

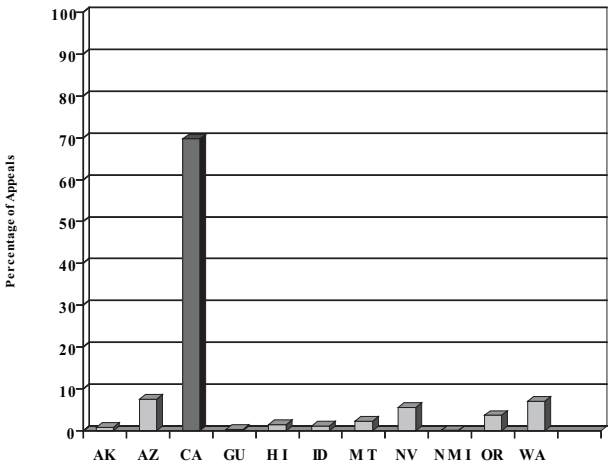
Exhibit 3: ***Population By Circuit***



This already substantial gap between the Ninth Circuit's population and that of its counterparts is steadily increasing: Of the ten fastest-growing cities of over 100,000 residents, seven are located in the Ninth Circuit.[34]

There are few discernible geographic, economic, or social features that bind together the circuit's diverse states and territories. The northwestern states of Oregon, Washington, and Alaska, for example, have much more in common with each other than they do with Arizona and Nevada. Moreover, despite its diversity, the Ninth Circuit is dominated, for all intents and purposes, by one state: California. The Golden State accounts for nearly seventy percent of all appeals filed within the circuit; no other state contributes even ten percent of the circuit's filings. (See Exhibit 4).[35]

Exhibit 4: ***Origin of Ninth Circuit Cases By State/Territory***



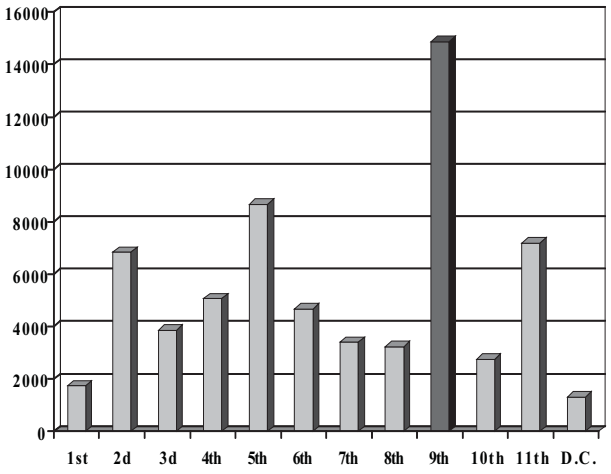
Because the court's docket is dominated by cases that originate in California, Ninth Circuit judges are much more familiar with California law than with that of, say, Montana or Idaho. The division of the Ninth Circuit into two or three smaller circuits would create cohesive judicial units where judges would be able to become intimately familiar with the laws of all states from which they receive filings.

V. The Ninth Circuit's Caseload Has Become Unmanageable

During 2004, there were 14,876 appeals filed in the Ninth Circuit.[36] To provide some perspective, the Ninth Circuit received 6,000 more filings than the next-busiest circuit, the Fifth, and more than triple the average of all other circuits. (See Exhibit 5).[37] Because of this staggering workload, the Ninth Circuit has become the second-slowest circuit in the disposition of appeals.[38] Indeed, I am aware of several recent cases where there was a delay of a year or more between the conclusion of briefing and the oral argument date.[39] During that period of stagnation, aggrieved parties could only wait patiently for the opportunity to seek judicial vindication of their rights.

The vast numbers of cases being decided by the Ninth Circuit compromises judges' ability to keep current on the law of the circuit. In addition to handling his or her own share of nearly 15,000 annual cases, each Ninth Circuit judge is faced with the daunting task of reviewing all of his or her colleagues' opinions—not to mention all the opinions issued

Exhibit 5: ***Filings By Circuit***



by the Supreme Court along with the relevant public and academic commentary. This endeavor strains the capacity of even the most efficient judges. Moreover, if we heard fewer cases, three-judge panels could circulate opinions to the entire court *before* publication, which is the practice of many other appellate courts. Pre-circulation not only prevents intra-circuit conflicts, it also fosters a greater awareness of the body of law created by the court. As it now stands, I read the full opinions of my court no earlier than the public does—and frequently later, which can lead to some unpleasant surprises.

The near impossibility of comprehensively monitoring the law of the circuit greatly increases the likelihood that different panels of Ninth Circuit judges will reach divergent conclusions about the same legal issue. As the White Commission observed in recommending restructuring of the Ninth Circuit:

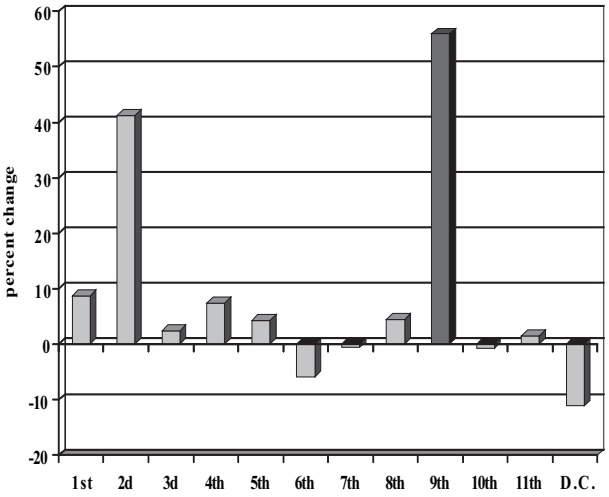
> The inability of judges to monitor all the decisions the entire court of appeals renders . . . confirms our own judgment, based on experience, that large appellate units have difficulty developing and maintaining consistent and coherent law. We believe that judges operating in the smaller decisional units we propose—the regional divisions—will find it easier to monitor the law in their respective divisions and that those smaller decisional units will thus promote greater consistency.[40]

The overriding interest in the timely disposition of appeals and the consistent resolution of recurring legal issues therefore weighs strongly in favor of restructuring the Ninth Circuit.

VI. The Ninth Circuit's Caseload Is Increasing More Rapidly Than Any Other Circuit's

Since 2000, the Ninth Circuit's caseload has increased 55.9%! The eleven other regional circuits experienced an average increase of only 4.7% during that period, which means that the Ninth Circuit's caseload is increasing nearly *twelve* times faster than its counterparts.' (See Exhibit 6).[41]

Exhibit 6: ***Increase In Caseload Between 2000-2004 by Circuit***



This rapid increase in case filings is attributable not only to the Ninth Circuit's steady population growth but also to the Board of Immigration Appeals' decision to streamline its appellate process, which has drastically multiplied the number of petitions for review filed in the Ninth Circuit.[42] As a result, 40% of the Ninth Circuit's docket is now comprised of immigration cases.[43]

Because it is impossible for the Ninth Circuit to accommodate the present rate of near-geometric growth, the operational shortcomings occasioned by the court's already oppressive workload will only grow worse in the next few years. Indeed, if the current rate of growth in Ninth Circuit filings continues, the court will be burdened with more than 23,000 annual appeals by 2010, which would represent nearly a thousand appeals for each active judge currently on the court. Such an overwhelming number of filings would truly bring the wheels of justice to a halt in the Ninth Circuit.

VII. The Ninth Circuit Is Using Questionable Procedural Shortcuts to Ease Its Caseload Crisis

In response to the Ninth Circuit's burgeoning caseload, the court has developed a number of procedural innovations to facilitate the efficient resolution of appeals. While I commend our Chief Judge and Clerk of Court for instituting these measures, there are limitations—both practical and constitutional—to what such innovations can accomplish.

An excessive reliance upon procedural shortcuts creates the possibility that important judicial decisions will be taken out of Article III judges' hands and delegated to court staff who lack a constitutional mandate. For example, one of the circuit's principal procedural innovations is the use of oral and written screening panels to dispose of uncomplicated appeals on the basis of dispositions prepared by staff attorneys. I have the utmost confidence in the legal abilities of our staff attorneys and endorse the judicious use of such screening panels. I worry, however, that—in an effort to cope with our unmanageable workload—the circuit may

soon ask staff attorneys to undertake responsibilities that properly rest with Article III judges appointed by the President and confirmed by the Senate.

Moreover, as the Ninth Circuit's filings have increased, the court has begun to resort more frequently to the use of unpublished memorandum dispositions. Indeed, the circuit issued 867 published opinions in 2001, but only 724 in 2004, even though the court's caseload increased by several thousand appeals during that period.[44] There is, of course, nothing wrong with resolving a straightforward case through a memorandum disposition. It is possible, however, that the court is beginning to place too much reliance upon such unpublished dispositions and that—as a result of recent caseload pressures—the court is more regularly issuing memorandum dispositions in cases that warrant a reasoned, published opinion.

VIII. The Ninth Circuit's Limited *En Banc* Process Inhibits the Resolution of Intracircuit Conflicts

Because it was deemed impractical for all twenty-eight active judges to sit together to rehear cases *en banc*, the Ninth Circuit uses a limited *en banc* procedure whereby a randomly selected panel of eleven judges decides cases taken *en banc*.[45] No other circuit uses such a nontraditional *en banc* procedure.

The Ninth Circuit's limited *en banc* process enables a minority of circuit judges to make law for the entire circuit and leads to unrepresentative results. Judge Tallman eloquently decried this problem in his recent dissent in *Payton v. Woodford*, a six-to-five *en banc* decision:

> Today, six judges of this court announce that the legal conclusion reached by *seven* of their colleagues (*plus* five Justices of the California Supreme Court) is not only wrong, but *objectively unreasonable* in light of clearly established federal law. According to the six judges in the majority, those twelve judges were so off-the-mark in their analyses of United States Supreme Court precedent that their shared legal conclusion . . . must be deemed objectively unreasonable.[46]

If a different group of Ninth Circuit judges had been randomly selected to hear that case, it is likely that it would have been resolved differently. Indeed, the shortcomings of the limited *en banc* process are underscored by the fact that the Supreme Court subsequently granted *certiorari* in *Payton* and reversed the *en banc* court's decision.[47]

Dividing the Ninth Circuit would create smaller circuits that—like all other circuits—could more readily convene *en banc* courts comprised of all active judges. Use of that traditional procedure would enable the reconfigured circuits to issue *en banc* decisions that truly represent the views of the entire court.

IX. A Significant Number of Federal Judges Support Splitting the Ninth Circuit

Notwithstanding the powerful pressures typically exerted by the status quo, there is substantial support among federal judges for a restructuring of the Ninth Circuit. Including myself, there are nine Ninth Circuit judges who publicly support splitting the circuit: Judges Sneed (California), Beezer (Washington), Hall (California), Trott (Idaho), Fernandez (California), T.G. Nelson (Idaho), Kleinfeld (Alaska), and Tallman (Washington). Moreover, Judge Rymer (California), who served on the White Commission, is on record as stating that our Court of Appeals is too large to function effectively.

Four Supreme Court Justices have publicly endorsed restructuring of the circuit. Justices Stevens, O'Connor, Scalia, and Kennedy each wrote to the White Commission in support of a realignment of the Ninth Circuit.

> [T]he Justices expressed concern about the ability of judges on the Ninth Circuit Court of Appeals to keep abreast of the court's jurisprudence and about the risk of intracircuit conflicts in a court with an output as large as that court's. Some expressed concern about the adequacy of the Ninth Circuit's *en banc* process to resolve intracircuit conflicts.[48]

The views of these federal judges, among many others, are based upon years of collective judicial experience, and they should not be lightly discounted.

X. There Are Five Viable Split Bills Pending in Congress

Many members of Congress, including Representative F. James Sensenbrenner, Chairman of the House Judiciary Committee, have publicly expressed concerns about the Ninth Circuit's ability to operate effectively, and there are now five split bills pending in Congress.[49] These bills offer a comprehensive solution to the Ninth Circuit's difficulties. Not only would the bills realign the circuit into smaller units, but they would also create new judgeships for California, which is the source of the vast majority of the Ninth Circuit's caseload.

H.R. 211[50] and S. 1301[51] would create a "new" Ninth Circuit comprised of California, Hawaii, Guam, and the North Mariana Islands. The bills would also establish a Twelfth Circuit made up of Montana, Idaho, Nevada, and Arizona, as well as a Thirteenth Circuit encompassing Oregon, Washington, and Alaska. The bills would also create five permanent and two temporary circuit court judgeships for California. This proposal was passed by the House during the last session of Congress, but the Senate adjourned before it had an opportunity to vote on the measure.

H.R. 212 would create a "new" Ninth Circuit comprised of California, Nevada, and Arizona, and a Twelfth Circuit made up of Oregon, Washington, Idaho, Montana, Alaska, Guam, Hawaii, and the Northern Mariana Islands.[52] Like H.R. 211

and S. 1301, it would create five permanent and two temporary judgeships for the "new" Ninth Circuit.

H.R. 3125[53] and S. 1296[54] would create a "new" Ninth Circuit encompassing California, Hawaii, Guam, and the Northern Mariana Islands. The remaining states of the current Ninth Circuit would become part of a new Twelfth Circuit. These two bills contain judgeship provisions similar to those in H.R. 211, H.R. 212, and S. 1301.[55]

My principal concern is the urgent need to divide the Ninth Circuit into at least two smaller circuits, and I thus do not have a preference among these various restructuring proposals. All five bills promise to improve immeasurably the administration of justice in the Western United States and to remedy many of the operational shortcomings that currently plague my court. Each bill therefore warrants serious consideration.

Because the Ninth Circuit can no longer withstand the pressures being exerted upon it by unrelenting caseload growth, a restructuring of the circuit is now inevitable. It is my hope that those Ninth Circuit judges who have previously opposed a split will henceforth participate in planning the circuit's future by sharing their insights into the most effective means of implementing the impending split. Without the input of all Ninth Circuit judges, the split we get may be less than ideal.

* Diarmuid F. O'Scannlain is a United States Circuit Judge, United States Court of Appeals for the Ninth Circuit. The views expressed herein are my own and do not necessarily reflect the views of my colleagues or of the United States Court of Appeals for the Ninth Circuit. ("I would like to acknowledge, with thanks, the assistance of Amir Cameron Tayrani, my law clerk, in helping to prepare this article.").

Footnotes

[1] *See* U.S. Census Bureau, *United States, Regions, States and Puerto Rico Population Estimates and Population Change*, U.S. Dep't of Commerce, *at* http://www.census.gov/Press-Release/www/releases/archives/CB04-246.pdf (last visited Aug. 29, 2005). Population estimates for the territories can be found at Central Intelligence Agency, *The World Factbook*, *at* http://www.cia.gov/cia/publications/factbook (last visited Aug. 29, 2005).

[2] 28 U.S.C. § 41 (2000); *see also* Admin. Office of the U.S. Courts, *Geographic Boundaries of United States Court of Appeals and United States District Courts*, U.S. Courts, *at* http://www.uscourts.gov/images/CircuitMap.pdf (last visited Aug. 23, 2005). The nine states and two territories are: Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, and Washington.

[3] Russell R. Wheeler & Cynthia Harrison, Fed. Judicial Ctr., Creating the Federal Judicial System 4 (2d ed. 1994).

[4] *See id.* at 10.

[5] *See id.* at 5, 10.

[6] *Id.* at 10-11, 13-14.

[7] Comm'n on Structural Alternatives for the Fed. Courts of Appeals, Final Report 8 (1998)[hereinafter White Commission Report].

[8] Wheeler & Harrison, *supra* note 3, at 19.

[9] Act of Mar. 3, 1891, ch. 517, 26 Stat. 826. The Act is sometimes also referred to as the Circuit Court of Appeals Act of 1891.

[10] Wheeler & Harrison, *supra* note 3, at 18, 20.

[11] *See id.* at 26.

[12] *Id.* at 20-21.

[13] *Id.* at 21-22.

[14] White Commission Report, *supra* note 7, at 33.

[15] *Id.*; *see also* Comm'n on Revision of the Fed. Court Appellate Sys., The Geographical Boundaries of the Several Judicial Circuits: Recommendations for Change (1973), *reprinted in* 62 F.R.D. 223, 228 (1973) [hereinafter Hruska Commission Report].

[16] White Commission Report, *supra* note 7, at 21.

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

[18] Hruska Commission Report, *supra* note 15, at 235.

[19] The Hruska Commission was concerned that the Ninth Circuit could not operate effectively with the thirteen judgeships it was then authorized. *Id.* at 234-35. Today, the Ninth Circuit has twenty-eight authorized judgeships. 28 U.S.C. § 44 (2000).

[20] Specifically, the Commission noted:

> Delays in the disposition of civil cases, often of two years or more, have seriously concerned both judges and members of the bar. The size of the court (13 authorized judgeships since 1968) and the extensive reliance it has been required to place on the assistance of district and visiting judges have threatened its institutional unity. Attorneys and judges have been troubled by apparently inconsistent decisions by different panels of the large court; they are concerned that conflicts within the circuit may remain unresolved.

Hruska Commission Report, *supra* note 15, at 234-35.

[21] Ninth Circuit Court of Appeals Reorganization Act of 1997, S. 1022, 105th Cong. § 305.

[22] Act of Nov. 26, 1997, Pub. L. No. 105-119, § 305, 111 Stat. 2440, 2491.

[23] White Commission Report, *supra* note 7, at i.

[24] *Id.* at x, 40-45.

[25] *Id.* at 48.

[26] *Id.* at 47.

[27] 28 U.S.C. § 44 (2000). The average number of judges per circuit, if the Ninth Circuit is excluded, is about 13 judges.

[28] The information in Exhibit 1 was obtained from 28 U.S.C. § 44.

[29] U.S. Court of Appeals for the Ninth Circuit, *9th Circuit in the News: List of 9th Circuit Judges*, *at* http://www.ca9.uscourts.gov/ca9/Documents.nsf/174376a6245fda7888256ce5007d5470/0dbdee40d48f66408825683c0058477e?OpenDocument (last visited Aug. 26, 2005).

[30] At the time this article went to press, there were four vacancies among the Ninth Circuit's active judges, for a total of forty-seven active and senior judges serving on the court.

[31] The information in Exhibit 2 was obtained from 28 U.S.C. § 44 and the Administrative Office of the United States Courts, whose website links to the various circuit court websites. *See* Admin. Office of the U.S. Courts, *Court Links*, U.S. Courts, *at* http://www.uscourts.gov/allinks.html (last visited Aug. 26, 2005).

[32] White Commission Report, *supra* note 7, at 47.

[33] The information in Exhibit 3 was derived from the 2004 population estimates that can be found at U.S. Dep't of Commerce, *United States, Regions, States and Puerto Rico Population Estimates and Population Change*, U.S. Census Bureau, *at* http://www.census.gov/Press-Release/www/releases/archives/CB04-246.pdf (last visited Aug. 29, 2005). Population estimates for the territories can be found at Central Intelligence Agency, *The World Factbook*, *at* http://www.cia.gov/cia/publications/factbook (last visited Aug. 29, 2005).

[34] Press Release, U.S. Census Bureau, Port St. Lucie, Fla., is Fastest-Growing City, Census Bureau Says (June 30, 2005), *available at* http://www.census.gov/Press-Release/www/releases/archives/population/005268.html.

[35] The information in Exhibit 4 was obtained from the Ninth Circuit AIMS database for the period commencing January 1, 2004 and ending December 31, 2004 and is on file with the author.

[36] Admin. Office of the U.S. Courts, *Statistical Tables for the Federal Judiciary: Table B-1 Appeals Commenced, Terminated, and Pending, by Circuit*, U.S. Courts, *at* http://www.uscourts.gov/judbus2004/appendices/b1.pdf (last visited Aug. 31, 2005).

[37] The information in Exhibit 5 was obtained from statistical tables maintained by the Administrative Office of the U.S. Courts. *See supra* note 36.

[38] Admin. Office of the U.S. Courts, *Judicial Business of the United States Courts: Table B-4 Median Time Intervals in Cases Terminated After Hearing or Submission, by Circuit*, U.S. Courts, *at* http://www.uscourts.gov/judbus2004/appendices/b4.pdf (last visited Aug. 29, 2005). This statistic represents the median time from filing of the notice of appeal to final disposition.

[39] Metro. Life Ins. Co. v. Parker, No. 03-16620 (briefing completed: April 26, 2004; oral argument: June 15, 2005); White v. Digex, Inc., No. 03-17400 (briefing completed: June 25, 2004; oral argument: June 16, 2005); Gen. Components, Inc. v. H.T. Components U.S.A., Inc., No. 03-17070 (briefing completed: June 30, 2004; oral argument: June 13, 2005); Nocera, Inc. v. ASI Acquisition Corp., No. 03-17290 (briefing completed: July 27, 2004; oral argument: July 14, 2005).

[40] White Commission Report, *supra* note 7, at 47.

[41] The information in Exhibit 6 was derived from statistical tables maintained by the Administrative Office of the U.S. Courts. *See* Admin. Office of the U.S. Courts, U.S. Courts, Statistical Tables for the Federal Judiciary: Table B-3 Sources of Appeals and Original Proceedings Commenced, by Circuit, 2000 Through 2004 (2005) (on file with the author).

[42] *See* Falcon Carriche v. Ashcroft, 350 F.3d 845 (9th Cir. 2003) (upholding the constitutionality of the Board of Immigration Appeals' streamlining procedures).

[43] The information in this sentence was obtained from the Ninth Circuit AIMS database and is on file with the author.

[44] *See supra* note 43.

[45] The Ninth Circuit derives its authority to use a limited en banc procedure from Act of Oct. 20, 1978, Pub. L. No. 95-486, § 6, 92 Stat. 1629, 1633. A bill currently pending in Congress would remove that authority and require the Ninth Circuit to convene en banc panels comprised of all active judges. H.R. 1064, 109th Cong. (2005).

[46] Payton v. Woodford, 346 F.3d 1204, 1219 (9th Cir. 2003) (en banc) (footnote omitted) (Tallman, J., dissenting).

[47] Brown v. Payton, 125 S. Ct. 1432 (2005).

[48] White Commission Report, *supra* note 7, at 38 & n.90.

[49] *See* Jonathan D. Glater, *Lawmakers Trying Again To Divide Ninth Circuit*, N.Y. Times, June 19, 2005, at 16.

[50] Ninth Circuit Judgeship and Reorganization Act of 2005, H.R. 211, 109th Cong.

[51] Ninth Circuit Judgeship and Reorganization Act of 2005, S. 1301, 109th Cong.

[52] Ninth Circuit Court of Appeals Judgeship and Reorganization Act of 2005, H.R. 212, 109th Cong.

[53] Ninth Circuit Court of Appeals Judgeship and Reorganization Act of 2005, H.R. 3125, 109th Cong.

[54] Ninth Circuit Judgeship and Reorganization Act of 2005, S. 1296, 109th Cong.

[55] As this article goes to press, H.R. 3125 provides that four of the bill's seven new judgeships may be allocated to Arizona, California, or Nevada. I have been informed that this is a drafting oversight and that Representative Simpson, who sponsored H.R. 3125, intends to amend the bill so that all of the additional judgeships are situated in the "new" Ninth Circuit.