Splitting the Ninth Circuit: Why Chief Judge Schroeder and Split Opponents Should Swap a Broad Circuit for a Broader Perspective

*By Diarmuid F. O'Scannlain**

One month after the opening article[1] in this series appeared in the October 2005 issue of *Engage*, the U.S. House of Representatives passed legislation to split the Ninth Circuit.[2] More recently, Senator Arlen Specter, Chairman of the Senate Judiciary Committee, scheduled for "markup" a Senate version[3] to be reported to the Senate floor for action, possibly before this rebuttal article appears in print.[4]

Objective observers recognize that the Ninth Circuit is an anomaly in the federal court system. Although but one of twelve circuits, its jurisdiction subsumes nearly one-quarter of the nation's population and one-fifth of all federal cases.[5] An objective witness to this staggering reality will find unsatisfactory the arguments expressed by Chief Judge Schroeder and joined by thirty-two of my colleagues in the March 2006 issue of *Engage*.[6] Chief Judge Schroeder fails to offer any persuasive reason for maintaining such disparity. An objective witness will appreciate that even the strongest convictions of thirty-three judges of the Ninth Circuit cannot lighten the staggering caseload of this Court nor diminish its unequal apportionment within the federal judicial system.

The arguments of Chief Judge Schroeder and many of my colleagues lack grounding in relevant facts. Accusing me of "selective use of statistics," they argue that no split is necessary because the Ninth Circuit functions with exceptional efficiency and "people and institutions [can] adapt to inevitable changes in a complex world."[7] While I share my colleagues' view that our Circuit does the best it can given its relentlessly increasing caseload, these efforts cannot compensate litigants for the extreme costs imposed by an overburdened Circuit. Statistics bear out these costs.[8] In citing them, I select no more than one must when confronted with a body of supporting evidence too voluminous to repeat in whole. The fact remains that claims of unusual efficiency are cold comfort to litigants who must prosecute their appeals in the slowest circuit in the nation.[9]

I. Congress Has Regularly Realigned Federal Circuits To Address Demographic Strains

Circuit splits historically have been used in response to demographic expansion and shifts.[10] The process should be careful and deliberative, and the record indicates that Congress's approach to this issue has been just that, until now. Chief Judge Schroeder argues against a split of the current Ninth Circuit based on a tempting but ultimately dangerous claim. She argues that Congress never has split a circuit contrary to the wishes of that circuit's judges. Not only does she fail to cite any situation where circuit judges opposed a split effectively, but she seems to suggest that judicial preference should guide Congress's response to the extreme demographic strains our Circuit now endures. I disagree. Mere judicial resistance does not constrict the authority and duty of Congress to create an adequate system of federal courts.

Chief Judge Schroeder's argument is unprecedented and does not reflect the separation of powers embodied in our Constitution. According to Article III, Congress has the authority to "ordain and establish" inferior federal courts.[11] There is no requirement that Congress give recalcitrant judges the right to "advise and consent" or to submit the plan for the judiciary's approval. For judges to presume to demand congressional action or inaction, in my view, is inconsistent with our system of government. Alexander Hamilton in his first *Federalist* paper warned of the natural tendency for government officials "to resist all changes which may hazard a diminution of the power, emolument, and consequence of the offices they hold."[12]

For two centuries, Congress has consistently relied upon circuit realignment to ensure that the federal judiciary is not overwhelmed by population growth and caseload increases. Congress should respond to the long manifest demographic shift in the West by dividing the overburdened Ninth Circuit into smaller circuits, more proportional to the circuits in the rest of the country, that will be able to administer justice more effectively.

II. Congressional Commissions Have Called for Ninth Circuit Restructuring To Achieve Judicial Effectiveness and Legal Consistency

Although splits of the Ninth Circuit were proposed as early as 1955,[13] the Ninth Circuit received most congressional attention when scrutinized by two commissions to study the federal courts, led by Senator Roman Hruska in 1973 and retired Supreme Court Justice Byron White in 1998. The Hruska Commission ultimately recommended splitting both the Ninth and the Fifth Circuits.[14] The Fifth Circuit was split, but the Ninth Circuit resisted change and continued to suffer from its size. In 1997, Congress authorized the White Commission to take another look.[15] The White Commission recommended reorganizing the Ninth Circuit into three semi-autonomous divisional courts comprised of seven to eleven active circuit judges (with California apportioned between two such divisions).[16]

Curiously, split opponents such as Chief Judge Schroeder emphasize that the White Commission stopped short of recommending a Circuit split. They ignore that the White Commission considered restructuring *mandatory*. Indeed, the White Commission's proposed structural changes

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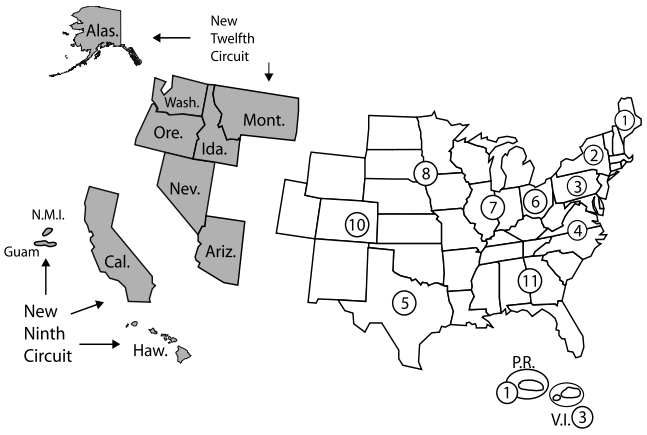
were intended to *avoid* the necessity of a split. Despite this critical message, the Ninth Circuit's leadership rejected the entire proposal and did nothing.

Indeed, split opponents attempt to use the White Commission's call for restructuring to argue against the more dramatic—and effective—remedy of a formal split into two or three circuits. They act like someone who receives a report from her doctor that she does not need immediate open heart surgery, but that she *must* make serious lifestyle changes to avoid surgery in the future. Rather than change her lifestyle, this person celebrates that immediate surgery is unnecessary. When reminded to make the prescribed changes to her lifestyle, she contentedly responds that she does not need open heart surgery. Such an approach would be extremely foolish. Yet that is essentially the tack taken by my colleagues. The 1998 White Commission's report, like the 1973 Hruska Commission's, diagnosed certain problems with the Ninth Circuit, but split opponents ignore them, focusing instead on the almost irrelevant fact that the Commission stopped short of recommending an outright split. As the health of the Circuit deteriorates, this false confidence undermines its prospect of rejuvenation.

EXHIBIT 1: HOUSE-PASSED, SENATE-PENDING SPLIT CONFIGURATION



III. THE NINTH CIRCUIT'S LIMITED EN BANC PROCESS CREATES INCONSISTENT LAW

The problems illuminated by the White Commission have grown worse with the population increases in this Circuit and the spike in immigration appeals.[17] For example, when the White Report was issued, the Ninth Circuit's population was 51.5 million[18] and its caseload approximately 8,600 filings;[19] today the population is near 59 million with approximately 16,000 filings.[20] Especially problematic remains the en banc process, originally intended to enable a panel of *all* judges of the Circuit to meet and harmonize the Circuit's law.

In response to the impracticality of convening all judges of our massive Circuit, our en banc process was limited in 1980 to require only eleven (now fifteen) judges.[21] Unfortunately, under this streamlined approach, an en banc panel still does not represent the court as a whole. Witnessing the failings of the limited en banc system seventeen years after it was established, the White Commission concluded: "[T]he law-declaring function of appellate courts requires groups of judges smaller than the present Ninth Circuit Court of Appeals . . . ."[22] Supported by the reports of the White Commission and the Hruska Commission before it, I argue that only a realignment into two or three smaller circuits can achieve the consistency our federal system requires.

IV. OUR COURT HAS BEGUN TO RESEMBLE A LEGISLATIVE BODY

In addition to hindering legal consistency, the Ninth Circuit's vast size creates the danger that its deliberations will resemble those of a legislative—rather than a judicial—body.

The numbers bear out this concern. While the average state senate consists of thirty-nine senators,[23] the Ninth Circuit contains *fifty-one* total judgeships (twenty-eight authorized judgeships and twenty-three senior judgeships).[24] With seven additional judgeships slated for addition to the Circuit, the number of judges deciding cases soon could rise to sixty (and thirty-five in the en banc pool—including active judges only). A court of such size begins to look astonishingly like a legislative body, and has little choice but to act like one.

A court of appeals is not a legislature. Legislators promote the interests of their parties and their constituents; appellate judges, on the other hand, serve the non-partisan commands of justice. Guided not by their own interests but by circuit law, judges attempt to discern the applicable legal principles and to reach fair and faithful determinations based on the facts of each case. In this endeavor, the critiques of differently-minded colleagues can help check judges whose analyses of the law might become influenced—consciously or unconsciously—by personal preferences. Frequent contact among circuit colleagues keeps judges focused on the circuit's law, rather than their isolated interests. Smaller circuits keep judges from becoming like legislators by enabling colleagues to monitor one another's work more closely and to remain attuned to circuit precedents.[25]

V. A CIRCUIT SPLIT WOULD ENHANCE COLLEGIALITY AND HARMONIZE DECISIONS

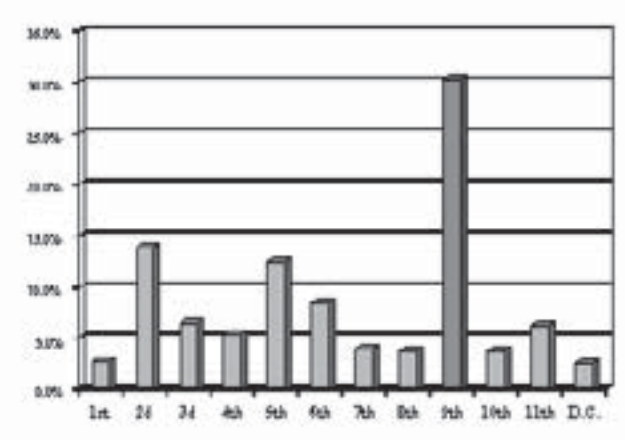
Less expansive courts foster closer working relationships and personal contact among judges. Frequent panel deliberation can help reduce the potential for misunderstandings based upon unfamiliarity among judges. The White Commission stated: "One reason judges in larger decisional units have difficulty maintaining consistent law is that as the size of the unit increases, the opportunities the court's judges have to sit together decrease."[26] Even in an internet age, panel deliberations remain essential to collegiality and consistency.

Chief Judge Schroeder appears to mistake my desire for collegiality and consistency with a prediction of homogeneity in smaller circuits. On the contrary, neither I

nor the White Commission has suggested that judges would be more disposed to group-think if placed in smaller circuits. Rather, I argue that circuits produce more doctrinal consistency when judges are familiar with the perspectives of their diverse colleagues. Lack of familiarity—and not difference of views—is the core problem with a large circuit.

My colleagues argue that the small size of the Supreme Court during the past eleven years undercuts my argument. According to this riposte, disagreements among the nine justices of the Supreme Court during Chief Justice Rehnquist's tenure should have been rare. But this again misstates my argument. I do not claim that a smaller court will always be unanimous or will always agree, only that it will be less likely to suffer from misinformation and misunderstandings. The members of the Rehnquist Court were, without question, intimately familiar with one another's reasoning, and I would wager that misinformation and misunderstanding were rare occurrences during the past eleven years.

Exhibit 2: Backlog of Pending Appeals—All Circuits

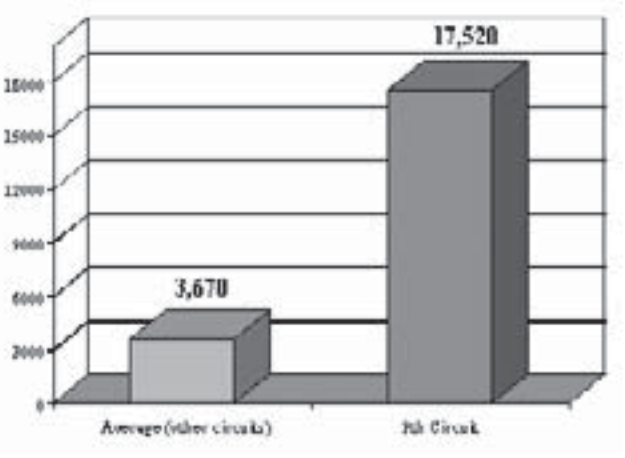


VI. A Bearable and Proportional Caseload Would Not Be a "Luxury"

The caseload numbers also weigh in favor of splitting the Ninth Circuit. During 2005, litigants filed over 16,000 cases in the Ninth Circuit, more than triple the average of all other circuits.[27] Bogged down by this overload, the Ninth Circuit is the slowest circuit in the disposition of appeals; it now takes over sixteen months from the filing of a notice of appeal until the appeal is resolved.[28] No end is in sight: The Ninth Circuit's backlog is nearly five times larger than that of the average circuit,[29] and now comprises thirty percent of all pending federal appeals.[30] My colleagues point out that we are prompt in deciding a case once it is submitted to the judges. But the only measure *litigants* care about is the total length of time it takes to have *their* appeals resolved.

Opponents argue that a split would give judges in the new Twelfth Circuit "the luxury of a reduced caseload," while requiring the addition of many more California-based judgeships to the new Ninth.[31] Yet a reduction would hardly

Exhibit 3: Backlog: Average Circuit Compared to Ninth Circuit



be a luxury. Under the currently pending proposal, S. 1845, circuit judges in the new Twelfth would bear a caseload larger than that of their counterparts in the First, Third, Sixth, Tenth, and D.C. Circuits. Any reduction would simply alleviate the strain on court procedures and resources. Such restructing would aid judges on the new, smaller Ninth Circuit as well. With the proposed additional judgeships those judges who continue in the Ninth would enjoy smaller workloads than those handled by judges on the Second, Fifth, and Eleventh Circuits. They too would be able to function with greater resources and less strained procedures. Indeed, the redistributed workloads would be an improvement for everyone involved—most importantly for the litigants, who would benefit from judges with more time to dedicate to prompt disposition of their cases.

Chief Judge Schroeder and my colleagues blame judicial vacancies for the delays. Yet the mere two new judges[32] who would fill the remaining vacancies, added to our current forty-nine total judges, cannot tackle the staggering backlog or stem the tide of cases inundating this Court. More drastic change is necessary.

VII. Efforts To Lessen the Burden of Immigration Appeals Have Met Neither Enthusiasm Nor Success

One more drastic change would be to reduce the influx of immigration appeals into the Ninth Circuit. In the past five years, due to the U.S. Department of Justice's decision to streamline its Board of Immigration Appeals ("BIA") process, the number of immigration appeals explosively rose to forty percent of the Ninth Circuit's docket.[33] Even my colleagues who oppose a split recognize that Congress should consider "providing a more effective administrative appeal process" for immigration cases.[34]

Yet my colleagues have not translated their concerns into action. They have not supported actual proposals to reduce immigration appeals. For example, when Majority Leader Frist offered a bill that would have transferred all immigration appeals to the Federal Circuit, following a GAO recommendation,[35] Chief Judge Schroeder rejected Majority

Leader Frist's proposal out of hand, without offering any alternative. It is time for the Ninth Circuit's leadership to join in productive efforts to strengthen the Circuit and re-balance the federal judicial system to improve the administration of justice in the West, rather than intransigently resist all suggestions for change.[36]

VIII. "A Number of Ninth Circuit Judges" Cannot Speak for the Federal Judiciary as a Whole

A substantial number of federal judges support restructuring the Ninth Circuit. Eight other Ninth Circuit judges join me in publicly supporting a circuit split: Judges Sneed, Hall, and Fernandez from California, Beezer and Tallman from Washington, T.G. Nelson and Trott from Idaho, and Kleinfeld from Alaska. Thirteen district court judges from states throughout the Circuit joined Ninth Circuit appellate judges in a letter of support to Chairman Specter. 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.

But these numbers are not dispositive. Indeed, no number of Ninth Circuit judges should dictate the future well-being of our larger federal judicial system. As former Justice Sandra Day O'Connor said in writing to the White Commission in 1998 in support of a circuit split, "[i]t is human nature that no circuit is readily amenable to changes in boundary or personnel. We are always most comfortable with what we know, and it is unrealistic to expect much sentiment for change from within any circuit."[37] More persuasive than the views of circuit judges are the views of the Supreme Court justices, who enjoy a broader perspective of the court system. Importantly, Justices Stevens, O'Connor, Scalia, and Kennedy each wrote to the White Commission, stating that they were, as the White Commission summarized, "all of the opinion that it is time for a change."[38] The justices shared no common judicial philosophy: They merely recognized the harms caused by the Ninth Circuit's unmanageable size. The White Commission reported:

> [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.[39]

In addition, the late Chief Justice Rehnquist endorsed the White Commission's restructuring proposal, stating that he shared the concerns of the other justices. Among the justices who favor a change in the Ninth Circuit's configuration are two from the West: Retired Justice O'Connor from Arizona and Justice Kennedy, who served on the Ninth Circuit from California. The other five justices are also familiar with the Ninth Circuit's problems: The Supreme Court has reversed the Ninth Circuit in written opinions *fifty times* in the past three years.[40] Over thirty of the reversals were unanimous and, in all but one case, these decisions were never reviewed en banc.[41]

Chief Judge Schroeder suggests that a split could harm the Supreme Court by requiring it to reconcile additional circuit splits. However, avoiding circuit splits would not remedy the erroneous decisions that stem from a sprawling and inconsistent court—decisions that also require Supreme Court attention and correction—particularly in light of the failure of the limited en banc process to correct the circuit's errors on its own.

CONCLUSION

As the preceding arguments demonstrate, support for a Ninth Circuit split depends neither on partisan politics nor on unhappiness with the decisions of this Court. Rather, the argument for a split is grounded in the need for effective judicial administration and consistent caselaw.

Almost every conceivable split configuration has been offered, including a number of bills in this congressional session. The onus falls now upon split opponents. My colleagues must offer something more productive than sheer resistance to any form of change. So far they have offered no judicially devised remedy that removes the need for a congressionally designed split.

Opposition to a split simply prolongs the life of a circuit that has long since exceeded its capacity, imposing unacceptable and unnecessary burdens on our federal system and on litigants before our Court.

I surmise that Chief Judge Schroeder and some of my colleagues will never be willing to split the Ninth Circuit. They will never be willing to admit that the Circuit can be out of proportion with the rest of the twelve regional circuits in the federal judicial system. But with Congress carefully addressing our Court's problems, even a majority of the judges of the Ninth Circuit should not impede these timely and constructive legislative efforts.

Footnotes

[1] *See* Diarmuid F. O'Scannlain, *Ten Reasons Why the Ninth Circuit Should Be Split*, 6 Engage: J. Federalist Soc'y's Prac. Groups 58 (2005).

[2] Deficit Reduction Act of 2005, H.R. 4241, 109th Cong. §§ 5401-13 (as passed by House, Nov. 18, 2005).

[3] The Circuit Court of Appeals Restructuring and Modernization Act of 2005, S. 1845, 109th Cong. (2005). For a map of the configuration of circuits proposed in S. 1845 and earlier passed in H.R. 4241, see Exhibit 1.

[4] *See* S. Judiciary Comm., Executive Business Meeting: Official Business Meeting Notice and Agenda (July 27, 2006), *available at* http://judiciary.senate.gov/meeting_notice.cfm?id=801.

[5] *See* H.R. Rep. No. 109-373, at 15 (2006) ("The Ninth's enormity dominates over the other regional circuits. The Ninth is 25 times larger than the smallest of the circuits, the First. The Committee believes that a regional court of appeals system that places one in five Americans and 40 percent of the Nation's geographic area in a single regional circuit with the ten remaining regional courts of appeals

dividing 60 percent of the Nation's land mass is unwieldy and inefficient."); *see also id.* at 17 (discussing the number of appeals filed per circuit for the 12-month period ending September 2004).

[6] *See* Mary M. Schroeder et al., *A Court United: A Statement of a Number of Ninth Circuit Judges*, 7 ENGAGE: J. FEDERALIST SOC'Y'S PRAC. GROUPS 63 (2006).

[7] *Id.* at 63.

[8] *See* Exhibit 2 (showing each circuit's portion of the backlog of federal cases).

[9] *See* discussion *infra* note 29 and accompanying text.

[10] The first revision of circuit lines occurred in 1802 and has continued regularly ever since. *See* RUSSELL R. WHEELER & CYNTHIA HARRISON, FED. JUDICIAL CTR., CREATING THE FEDERAL JUDICIAL SYSTEM 9-10 (2d ed. 1994). In 1925, the American Bar Association called for circuit realignment because changes in population and economic conditions, as well as in jurisdiction and volume of litigation, had resulted in unequal burdens among the several circuits. Congress answered the call in 1929 when it carved the Tenth Circuit out of the Eighth. *See* COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FED. COURTS OF APPEALS, FINAL REPORT 17-18 (1998) [hereinafter WHITE COMMISSION REPORT]. The Hruska Commission sounded another alarm nearly fifty years later when it called in 1973 for creating the Eleventh Circuit out of the Fifth and the Twelfth Circuit out of the Ninth. *See id*. at 20; *see also* COMM'N ON REVISION OF THE FED. COURT APPELLATE SYSTEM, 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]. Congress acted on the Fifth in 1981, *see* WHEELER & HARRISON, *supra*, at 26, and hopefully will finally act on the Ninth later this year.

[11] U.S. CONST. art III, § 1.

[12] THE FEDERALIST NO. 1, at 28 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[13] In 1955, Senator Warren Magnuson and Senator Henry Jackson introduced S. 2174, 84th Cong. (1955), which would have split the Ninth Circuit into a Pacific Northwest Circuit and a Pacific Southwest Circuit.

[14] The Hruska Commission believed that this restructuring could diminish the delays in resolving appeals, the unwieldy number of Ninth Circuit judges (even at that time), and the inconsistent resolution of appeals by different Ninth Circuit panels. *See* HRUSKA COMMISSION REPORT, *supra* note 10, at 234-35.

[15] Congress authorized the Commission in late 1997, but the report was not completed until 1998. WHITE COMMISSION REPORT, *supra* note 10, at ix.

[16] *Id.* at iii, 41.

[17] *See infra* Part VII.

[18] *See* WHITE COMMISSION REPORT, *supra* note 10, at 27 tbl.2-9.

[19] *See id.* at 32.

[20] Current statistics for the Ninth Circuit were obtained from the Ninth Circuit AIMS database and are on file with the author.

[21] Congress authorized the use of limited en banc procedures in the Act of Oct. 20, 1978, Pub. L. No. 95-486, § 6, 92 Stat. 1629, 1633. Pursuant to that congressional authorization, the Ninth Circuit adopted Circuit Rule 35-3, which now requires en banc panels to include the Chief Judge and fourteen other judges.

[22] WHITE COMMISSION REPORT, *supra* note 10, at 47.

[23] Six states have fewer than thirty senators, and twenty-two states have thirty-five or fewer. Forty-five states have fewer state senators than the Ninth Circuit has total judges. *See* National Conference of State Legislatures, *Current Number of Legislators, Terms of Office and Next Election Year* (Dec. 2003), *at* http://www.ncsl.org/programs/legman/about/numoflegis.htm.

[24] *See* 28 U.S.C. § 44 (2000). The Federal Judicial Center maintains a list of the active and senior judges currently serving on the Ninth Circuit. *See* Federal Judicial Center, *History of the Federal Judiciary: Courts of the Federal Judiciary*, *at* http://www.fjc.gov/history/home.nsf (last visited Sept. 14, 2006).

[25] Indeed, the White Commission found that "[t]he volume of opinions produced by the Ninth Circuit's Court of Appeals and the judges' overall workload combine to make it impossible for all the court's judges to read all the court's published opinions when they are issued." WHITE COMMISSION REPORT, *supra* note 10, at 47. The Commission added: "[C]oherence and consistency suffer when judges are unable to monitor the law of their entire decisional unit or correct misstatements of the court's decisional law." *Id.*

[26] *Id*.

[27] *See supra* note 20.

[28] *See id.*

[29] *See id.*; *see also* Exhibit 3.

[30] *See supra* note 20; *see also* Exhibit 2.

[31] Schroeder, *supra* note 6, at 63.

[32] At the time Chief Judge Schroeder wrote her article, four vacancies remained. On June 30, 2006, Judge Milan D. Smith, Jr., was appointed to our Court. On June 23, 2006, Judge Sandra S. Ikuta joined the Court as well, bringing the number of active judges to twenty-six of twenty-eight authorized judgeships and the number of total judges (including senior judges) to forty-nine of fifty-one authorized judgeships.

[33] *See supra* note 20.

[34] Schroeder, *supra* note 6, at 66.

[35] *See* S. 2454, 109th Cong., § 501(b)(1) (introduced March 16, 2006) (deflecting immigration appeals to the Federal Circuit).

[36] History reveals a strange, counterproductive resistance by the chief judges of this Circuit to congressional remedies: chief judges of the Ninth Circuit rejected the recommendations of the Hruska Commission (1973) and the White Commission (1998), which were designed to limit and to equalize the burdens of the circuit courts. Chief Judge Schroeder rejected Chairman Specter's solution (2006), which would have spared us the immigration appeals that have grown to dominate our docket. Remedies have been rejected one by one; unsurprisingly, the problems of this Circuit have continued to grow.

[37] Letter from Justice Sandra Day O'Connor to Retired Justice Byron R. White (June 23, 1998) (copy on file with author).

[38] WHITE COMMISSION REPORT, *supra* note 10, at 38; *see also id.* at 38 n.90.

[39] *See id.* at 38; *see also* O'Scannlain, *supra* note 2, at 62.

[40] *See supra* note 20. The Supreme Court reversed the Ninth Circuit fifteen times in 2005-2006; sixteen times in 2004-2005; and nineteen times in 2003-2004. *See id*.

[41] *See id*. Supreme Court votes were tallied by reference to the slip opinions.