

## BREAK UP THE NINTH CIRCUIT

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### INTRODUCTION

In early 2017, President Donald Trump indicated that he would “absolutely” consider proposals to “break up” the U.S. Court of Appeals for the Ninth Circuit.<sup>1</sup> The President has insisted that “every case” that goes through the circuit court results in “an automatic loss” for his administration.<sup>2</sup> These comments followed a defeat in federal district court concerning an executive order purporting to end federal funding to “sanctuary cities,” a decision the Ninth Circuit shortly thereafter affirmed.<sup>3</sup> The Ninth Circuit was also responsible for blocking the Trump administration’s proposed travel ban, prohibition on transgender servicemen in the military, and efforts to end the Deferred Action for Childhood Arrivals immigration program.<sup>4</sup> To be sure, the Ninth Circuit has long been a thorn in conservatives’ sides,<sup>5</sup> for example ruling against the phrase “under God” in the Pledge of Allegiance and the “Don’t

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<sup>1</sup> Sarah Westwood, *Exclusive Interview: Trump ‘Absolutely’ Looking at Breaking Up 9th Circuit*, WASH. EXAMINER (Apr. 26, 2017, 5:00 PM), <https://www.washingtonexaminer.com/exclusive-interview-trump-absolutely-looking-at-breaking-up-9th-circuit>.

<sup>2</sup> Jeremy Diamond & Ariane de Vogue, *Trump Rails Against 9th Circuit Court of Appeals in Wake of Asylum Ruling*, CNN (Nov. 20, 2018, 5:02 PM), <https://www.cnn.com/2018/11/20/politics/donald-trump-9th-circuit-court-of-appeals/index.html>.

<sup>3</sup> See *City & County of San Francisco v. Trump*, 897 F.3d 1225, 1231 (9th Cir. 2018). The term “sanctuary city” is not defined by federal law, but it is often used to refer to localities that have adopted policies designed to limit cooperation with federal immigration requests and enforcement actions. See generally MICHAEL JOHN GARCIA, CONG. RES. SERV., RS22773, “SANCTUARY CITIES”: LEGAL ISSUES (2009), <https://fas.org/sgp/crs/homsec/RS22773.pdf>.

<sup>4</sup> See *Hawaii v. Trump*, 859 F.3d 741, 755 (9th Cir. 2017), *rev’d*, 138 S. Ct. 2392, 2423 (2018) (travel ban); *Karnoski v. Trump*, No. 18-35347, 2018 U.S. App. LEXIS 19912 (9th Cir. July 18, 2018) (transgender military ban); *Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 908 F.3d 476, 520 (9th Cir. 2018) (Deferred Action for Childhood Arrivals).

<sup>5</sup> In November 2018, President Trump said during a conference call that “[w]e get a lot of bad court decisions from the Ninth Circuit, which has become a big thorn in our side. It’s a terrible thing when judges take over your protective services, when they tell you how to protect your border. It’s a disgrace.” Jonathan Allen, *After Rare Rebuke, Trump Rips into Chief Justice John Roberts*, NBC NEWS (Nov. 22, 2018, 8:24 AM), <https://www.nbcnews.com/politics/politics-news/trump-ripping-roberts-says-judges-make-our-country-unsafe-n939286>.

Ask, Don't Tell" policy regarding gays in the military.<sup>6</sup> In response, lawmakers have put forward various proposals over the years to finally divide the "liberal" Ninth, but have faced intense criticism from those who view any circuit-splitting scheme to be politically motivated.<sup>7</sup> A division of the Ninth Circuit would indeed be in the nation's best interest, but for reasons that are much more prosaic than political—and in a way that wouldn't necessarily fix whatever ideological problems the court's opponents now identify (which can be solved only by nominating and confirming judges with different jurisprudential approaches).<sup>8</sup>

Many nonpolitical reasons exist for splitting up the most outsized federal appellate court. Chief among them are the circuit's unwieldy size, procedural inefficiencies, jurisprudential unpredictability, and unusual en banc process. The Ninth Circuit is by far the largest circuit in terms of the number of judgeships, geographic size, and population served. As a result, and as we discuss in detail below, it suffers from a myriad of procedural inefficiencies, including a massive backlog that accounts for nearly one-third of all pending federal appeals.<sup>9</sup> According to data from 2017, the median time from notice of appeal to a last opinion or final order in civil appeals was an astounding 22.8 months (and that is just the median time, so more than half of appeals take over two years).<sup>10</sup> As we discuss below, these numbers are significantly higher than in any other circuit. The Ninth Circuit's current structure also makes its jurisprudential direction unpredictable for lawyers, judges, and litigants. With more than 3,600 combinations of three-judge panels and hundreds of opinions published each year, lawyers and district court judges are particularly hard-pressed to understand what the court will do in any given case. Most alarmingly, the circuit's expansive jurisdiction, as well as the large number of opinions it publishes each year, makes it exceptionally difficult for the court's own judges to stay informed about developments in circuit law, adding yet another dimension of jurisprudential uncertainty. Finally,

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<sup>6</sup> See *Newdow v. U.S. Cong.*, 292 F.3d 597, 612 (9th Cir. 2002), *amended on denial of reh'g en banc*, 328 F.3d 466, 468 (9th Cir. 2003), *rev'd sub nom.* Elk Grove Unified Sch. Dist. V. *Newdow*, 542 U.S. 1, 4–5 (2004) (finding lack of standing); *Log Cabin Republicans v. United States*, 658 F.3d 1162, 1168 (9th Cir. 2011).

<sup>7</sup> Paul Gordon, *GOP Efforts to Break Up the Ninth Circuit Would Harm Justice*, PEOPLE FOR THE AM. WAY (Aug. 23, 2017), <http://www.pfaw.org/blog-posts/gop-efforts-to-break-up-the-ninth-circuit-would-harm-justice/>.

<sup>8</sup> See Mark Brnovich & Ilya Shapiro, *Split Up the Ninth Circuit—but Not Because It's Liberal*, WALL ST. J. (Jan. 11, 2018, 7:05 PM), <https://www.wsj.com/articles/split-up-the-ninth-circuit-but-not-because-its-liberal-1515715542>.

<sup>9</sup> U.S. COURTS, *U.S. Court of Appeals Summary – 12-Month Period Ending Sept. 30, 2018*, STATISTICS AND REPORTS, CASELOAD STATISTICS AND DATA TABLES, FEDERAL COURT MANAGEMENT STATISTICS (2018) [hereinafter *Court of Appeals Management Statistics*], [http://www.uscourts.gov/sites/default/files/data\\_tables/fcms\\_na\\_appsummary0930.2018.pdf](http://www.uscourts.gov/sites/default/files/data_tables/fcms_na_appsummary0930.2018.pdf).

<sup>10</sup> U.S. COURTS, *U.S. Courts of Appeals Judicial Business: Median Times for Civil and Criminal Cases Terminated on the Merits* (2017) [hereinafter *Courts of Appeals Median Times*] [http://www.uscourts.gov/sites/default/files/data\\_tables/jb\\_b4a\\_0930.2017.pdf](http://www.uscourts.gov/sites/default/files/data_tables/jb_b4a_0930.2017.pdf).

the Ninth Circuit is the only circuit court that employs “limited” en banc (with only a subset of judges participating), which often results in hearings with disproportionate ideological or geographic concentrations of judges. This step defeats the purpose of en banc, which aims to give litigants the full court’s attention and arguably contributes to the circuit consistently having among the highest reversal rates before the Supreme Court.

Although proponents of splitting the Ninth Circuit often point to the court’s reputation as a liberal and erratic federal circuit, any ideological tilt is more a function of history than geography. After all, both Republican and Democratic presidents appoint judges in all states, regardless of how “blue” or “red” a state voted in the last election. As it happens, however, it was in 1978, after decades of rapidly growing population and caseload in the western states, that Congress added ten Ninth Circuit judgeships.<sup>11</sup> These seats were thus filled by Democratic President Jimmy Carter, with people who were generally quite liberal. While some of those judges, upon death or retirement, have been replaced by more moderate appointees, most judges still aim to retire when a president of the same party as the one who appointed them is in power. Accordingly, most of those “Carter judges” are now “Clinton judges” and “Obama judges.”<sup>12</sup> No circuit-split proposal could superficially propel the Ninth Circuit’s jurisprudence in a conservative direction because the same judges would fill the seats. Judicial vacancies, or new judgeships, would still be filled through the normal process of appointment and confirmation, whereby control of the White House (and sufficient votes in the Senate) are what matters.

Opponents of splitting the Ninth Circuit often contend that new technology will alleviate the court’s problems. Although technology may speed up the resolution of cases, it cannot, by itself, fix the circuit’s inherent structural issues. Large circuits impose substantial information costs on judges, requiring them to set aside time to learn the law of their own circuit and determine what other judges are writing. Indeed, the Ninth Circuit’s enormous size and expansive jurisdiction make it nearly impossible for even the most conscientious judges to stay abreast of the court’s output. Information costs also effect lawyers and litigants who must invest time in determining obscure circuit law and navigating the court’s administrative labyrinth. Such heavy costs substantially reduce any “economies of scale” that may result from the Ninth Circuit’s size and use of technology.

Moreover, splitting up a circuit court when it becomes too large and overworked is in no way a novel concept. Federal circuits have habitually expanded in number and split in response to the addition of new states and

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<sup>11</sup> Omnibus Judgeship Act of 1978, Pub. L. No. 95-486, § 3, 92 Stat. 1629, 1632 (1979) (codified at 28 U.S.C. § 44(a) (2012)).

<sup>12</sup> Adam Liptak, *Trump Takes Aim at Appeals Court, Calling It a ‘Disgrace’*, N.Y. TIMES (Nov. 20, 2018), <https://www.nytimes.com/2018/11/20/us/politics/trump-appeals-court-ninth-circuit.html> (describing President Trump’s use of the term “Obama Judges”).

territories, or when population growth and ever-expanding dockets have pressured Congress to create new circuits. Indeed, Congress has twice split circuits to create smaller courts of appeals that would be more effective.<sup>13</sup> The most recent such division occurred in 1980, when Congress split the Fifth Circuit in response to many of the same issues currently facing the Ninth Circuit.<sup>14</sup> The common myths surrounding a division of the Ninth Circuit are therefore overblown and discursive.

This Article aims to provide a balanced and apolitical contribution to the ongoing debate over whether the Ninth Circuit should be split. It proceeds on the premise that policy decisions concerning the organization of the judiciary should be based on objective principles of sound judicial administration. Such decisions should not be made in response to specific judicial rulings or about the perceived ideological leanings of individual judges currently serving on a court. We focus instead on the policy and administrative concerns surrounding the Ninth Circuit as currently structured. This Article maintains that the circuit should be divided into more manageable and reasonably sized circuits that are consistent with the rest of the nation's judicial system. The first Part provides a brief historical overview of the expansion of the federal circuit courts. Next, we outline the four main arguments in support of a circuit split: the circuit's unwieldy size, procedural inefficiencies, jurisprudential unpredictability, and unusual en banc process. The following Part dispels the common myths associated with proposals to split up the circuit. In closing, this Article reviews reasonable proposals that have been offered for splitting up the Ninth Circuit and offers a way forward.

## I. THE HISTORY AND EXPANSION OF THE FEDERAL CIRCUIT COURTS<sup>15</sup>

The judicial system has changed drastically since the nation's founding. Article III of the Constitution prescribes that the "judicial power of the United States, shall be vested in one Supreme Court, and such inferior courts as the Congress may from time to time ordain and establish."<sup>16</sup> Section 1 leaves to the legislative branch the authority to create such lower federal trial and appellate courts as needed. The Constitution also allows Congress to fix most of the rules regarding the size, scope, and makeup of the courts.<sup>17</sup> The

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<sup>13</sup> COMM'N ON STRUCTURAL ALTS. FOR THE FED. COURTS OF APPEALS, FINAL REPORT 17 (Dec. 18, 1998) [hereinafter WHITE COMM'N REPORT].

<sup>14</sup> Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994 (1980).

<sup>15</sup> Except where otherwise noted, this history is taken from the WHITE COMMISSION REPORT, *supra* note 13, and the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, 111 Stat. 2439 (1997). Further citations to specific legislation are provided as needed.

<sup>16</sup> U.S. CONST. art. III, § 1.

<sup>17</sup> See 28 U.S.C. §§ 41-49.

judicial rules were first implemented through the Judiciary Act of 1789, which created a federal judicial district and several one-judge district courts, one in each of the then-eleven states.<sup>18</sup> The Act also created eastern, middle, and southern judicial circuits. The existing states were organized into these three circuits, with two Supreme Court justices and a district court judge holding court in each district within these circuits.<sup>19</sup> Initially, Congress required Supreme Court Justices to travel to each circuit—to “ride” circuit—and convene circuit courts with the respective district court judges. In this way, justices would assist in presiding over the chief trial courts of the time, the circuit courts. By 1802, Congress had rearranged the three circuits into six, with a separate Justice serving each circuit. As the nation grew, Congress added more circuits and steadily enlarged the Supreme Court to provide new justices for those courts.

From the passage of the Judiciary Act of 1789 until 1866, Congress altered the circuit courts thirteen times. In 1855, the number of circuits hit a high point when Congress added a separate California circuit in response to western growth. Nearly a decade later, an 1866 statute redrew most of the then-existing circuit boundaries, creating boundaries that are for the most part still in existence today.<sup>20</sup> Since 1866, congressional practice has been to add new states and territories to existing circuits instead of creating new ones. The statute also reduced the number of justices from ten to eight. In 1869, Congress created nine new circuit judgeships—one for each circuit existing at the time. Even though the judicial system’s geographic limits were more or less established by 1866, it took Congress more than twenty-five years to create separate intermediate appellate courts for each circuit. Meanwhile, the Judiciary Act of 1875 allowed general federal-question jurisdiction, so long as the case involved a controversy of over \$500.<sup>21</sup> The addition of federal question jurisdiction substantially increased the workload of the federal district courts. This large increase in caseload, without additional judgeships to manage the added work, resulted in a need for intermediate appellate courts. Congress considered numerous proposals to expand federal appellate capacity, ultimately settling on the Circuit Court of Appeals Act of 1891.<sup>22</sup> This legislation created new intermediate appellate courts—the circuit courts of appeals—in each of the nine circuits. It also transferred the vast majority of the Supreme Court’s appellate caseload to these new circuit courts. Simultaneously, the Act made the federal district courts the primary trial courts of the judicial system. Further, it eliminated the practice of circuit boundaries demarcating a Supreme Court justices’ trial court duty. Instead, the new

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<sup>18</sup> Judiciary Act of September 24, 1789, 1 Stat. 73, 92 (1789) (codified as amended at 28 U.S.C. § 1652 (1982)).

<sup>19</sup> See Erwin C. Surrency, *A History of Federal Courts*, 28 MO. L. REV. 214, 215 (1963).

<sup>20</sup> Act of July 23, 1866, ch. 210, 14 Stat. 209.

<sup>21</sup> Act of Mar. 3, 1875, ch. 137, 18 Stat. 470.

<sup>22</sup> Act of Mar. 3, 1891, ch. 517, 26 Stat. 826.

circuit boundaries established the territorial reach of the circuit courts' appellate jurisdiction. The old circuit courts were eventually abolished in 1911.<sup>23</sup>

When the circuit courts were originally created in 1891, Congress authorized a total of nineteen judgeships.<sup>24</sup> In the decades that followed, the number of judgeships expanded significantly. In 1930, there were fifty-five judgeships. By 1950, that number had risen to seventy-five. This trend continued over the following decades, reaching a high of 179 circuit judgeships in 1990, where the number remains to this day.<sup>25</sup> The work assigned to the circuit courts, however, has increased disproportionately to the increase in the number judgeships. Circuit judges have been faced with a persistent increase in cases, particularly since the beginning of the upswing in appeals in the 1960s. While judges in 1930 had a caseload of only about forty-six cases per judge, by 1990 that number increased to about 228 cases per judge.<sup>26</sup> As of 2017, federal appellate judges handled, on average, 282 cases each year. In other words, over the last century, the caseload per judge has increased by a factor of nearly six. The circuit courts now handle a greater workload than any of their predecessor courts. Constant pressure from increasing appellate filings have required circuits to adapt their administrative procedures to meet the heightened demand. Some have coped through the use of technology, but by most accounts the resolution of appellate cases has become a prolonged endeavor for judges, lawyers, and litigants.

The circuit courts of today are far different both structurally and functionally than when they were created nearly 130 years ago. The growth and development of the Ninth Circuit has been particularly noteworthy. In 1891, when the Evarts Act created the Ninth Circuit, between two and three million people inhabited the area that now composes the circuit.<sup>27</sup> At the time, the circuit covered six sparsely populated western states: California, Idaho, Montana, Nevada, Oregon, and Washington. As new states and territories were added throughout the 20th century, many of those in the western United States were placed in the Ninth Circuit. These include Alaska and Hawaii in 1900, Arizona in 1912, Guam in 1951, and the Commonwealth of the Northern Mariana Islands in 1977.<sup>28</sup> When the Ninth Circuit was originally formed, it only had appellate jurisdiction over about 3 percent of the country's total

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<sup>23</sup> Act of Mar. 3, 1911, ch. 231, 36 Stat. 1087, 1167, § 289.

<sup>24</sup> WHITE COMM'N REPORT, *supra* note 13, at 13.

<sup>25</sup> *Id.*; see also U.S. COURTS, *Authorized Judgeships*, <http://www.uscourts.gov/sites/default/files/al-lauth.pdf>.

<sup>26</sup> *Caseloads: U.S. Courts of Appeals, 1892-2017*, FED. JUDICIAL CTR., <https://www.fjc.gov/history/courts/caseloads-us-courts-appeals-1892-2017>.

<sup>27</sup> See Act of Mar. 3, 1891, ch. 517, 26 Stat. 826; U.S. CENSUS BUREAU, THIRTEENTH CENSUS OF THE UNITED STATES TAKEN IN THE YEAR 1910, vol. 1, ch. 1, at 30, <http://www2.census.gov/prod2/decennial/documents/36894832v1ch02.pdf>.

<sup>28</sup> See *U.S. Court of Appeals for the Ninth Circuit: Legislative History*, FED. JUDICIAL CTR., <https://www.fjc.gov/history/courts/u.s.-court-appeals-ninth-circuit-legislative-history>.

population. Today, some 65 million people (or about 20 percent of the nation) reside within the Ninth Circuit, nearly double the number of people in the next-largest circuit.<sup>29</sup> Not counting the Ninth Circuit, the average federal geographical circuit has a population of about 22 million people. Demographic trends suggest the population of the Ninth Circuit will continue to grow in years to come. As a result of the circuit's weighty caseload and structural limitations, there has been a growing consensus among policymakers that the Ninth Circuit should be split into more manageable and reasonably sized circuits in a fashion consistent with the federal judiciary's historical development.

## II. WHY SPLITTING UP THE NINTH CIRCUIT MAKES SENSE

### A. *Unwieldy Size*

The most obvious reason the Ninth Circuit should be split is due to its sheer size. As it exists today, the Ninth Circuit is by far the largest circuit in terms of geographic size, population served, number of judgeships, and caseload. It covers a region that spans most of the western United States, an area containing fifteen federal judicial districts.<sup>30</sup> The Ninth Circuit has jurisdiction over cases originating in Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, and Washington.<sup>31</sup> Originally serving a mere 3 percent of the nation's population, demographic trends have increased the population under its jurisdiction to include roughly one-fifth of the nation.<sup>32</sup> The Ninth Circuit also has a disproportionate number of judges. The circuit is currently authorized twenty-nine judgeships, of which there is one vacancy as of this writing, one more opening up at the end of the year, and one judge who will take senior status upon a confirmation of his successor.<sup>33</sup> This far exceeds the next closest circuit, the Fifth, with only seventeen judgeships. In fact, the Ninth Circuit has double the average number of active judgeships in all circuit courts. Beyond the twenty-nine active seats, the circuit utilizes a number of senior judges, bringing the potential total to forty-nine judges altogether and further increasing

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<sup>29</sup> *Quick Facts: Population Estimates, July 1, 2018*, U.S. CENSUS BUREAU [hereinafter *Census Data*], <https://www.census.gov/quickfacts/geo/chart/US/PST045218> (indicating the population for each state within the Ninth Circuit). Simple arithmetic indicates that the total figure is over 65 million people, and this is 20 percent of more than 300 million people in the United States.

<sup>30</sup> *What Is the Ninth Circuit?*, U.S. COURTS FOR THE NINTH CIRCUIT, [https://www.ca9.uscourts.gov/judicial\\_council/what\\_is\\_the\\_ninth\\_circuit.php](https://www.ca9.uscourts.gov/judicial_council/what_is_the_ninth_circuit.php).

<sup>31</sup> *Id.*

<sup>32</sup> *Census Data*, *supra* note 29.

<sup>33</sup> President Trump has appointed seven judges to the Ninth Circuit as of August 2019. See *Judicial Vacancies and Nominations*, U.S. COURTS FOR THE NINTH CIRCUIT (Aug. 1, 2019), [https://www.ca9.uscourts.gov/content/view\\_db.php?pk\\_id=0000000899](https://www.ca9.uscourts.gov/content/view_db.php?pk_id=0000000899).

the margin over the next-largest circuit.<sup>34</sup> The Ninth Circuit also decides an extraordinary number of appeals. As of September 2018, there were over 11,000 appeals pending.<sup>35</sup> The most recent data from 2018 show that over 21 percent of all federal appeals were filed in the Ninth Circuit.<sup>36</sup> The circuit generally handles more than 11,000 cases a year, triple the average for the other regional circuits.<sup>37</sup> Although the Ninth Circuit is merely one of twelve regional circuits in theory, it is unfathomable to consider a judicial body spanning nine states, 40 percent of the nation's land mass, and nearly 65 million people as a typical court of appeals.

Many federal appellate judges (including about a third of the appellate judges in the Ninth Circuit) agree that the Ninth Circuit is simply too large to function effectively. In 1998, Supreme Court Justice Anthony Kennedy submitted a letter to the White Commission—headed by retired Justice Byron White and charged by Congress with evaluating circuit structure—supporting a division of the Ninth Circuit.<sup>38</sup> Justice Kennedy, who served on the Ninth Circuit before his elevation, wrote that the Ninth Circuit was simply too big. He concluded that “the large Circuit has yielded no discernible advantages over smaller ones.”<sup>39</sup> Ninth Circuit Judge Andrew Kleinfeld reaffirmed that position during remarks before the House Judiciary Committee in 2017, stating that the circuit’s “size has severe negative consequences.”<sup>40</sup> Both Justice Kennedy’s and Judge Kleinfeld’s sentiments echo the outcome of the study conducted by the White Commission two decades ago, which determined that circuit courts with too many judges lack the ability to render clear, timely, and uniform decisions. Back in 1998, the Commission found that the Ninth Circuit could not function effectively with so many judges and that “the maximum number of judges for an effective appellate court functioning as a single decisional unit is somewhere between eleven and seventeen.”<sup>41</sup> That recommended maximum is far less than the twenty-nine

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<sup>34</sup> *Senior Judges of the United States Court of Appeals for the Ninth Circuit*, U.S. COURTS FOR THE NINTH CIRCUIT (2018), [https://www.ca9.uscourts.gov/content/view\\_active\\_senior\\_judges.php](https://www.ca9.uscourts.gov/content/view_active_senior_judges.php).

<sup>35</sup> *Court of Appeals Management Statistics*, *supra* note 9.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Letter from Anthony M. Kennedy, Associate Justice, United States Supreme Court, to Hon. Byron R. White, Chair, White Commission 1 (Aug. 17, 1998) [hereinafter Justice Kennedy Letter], <http://www.library.unt.edu/gpo/csafca/hearings/submitted/pdf/kennedy.pdf>.

<sup>39</sup> *Id.* at 2.

<sup>40</sup> *Bringing Justice Closer to the People: Examining Ideas for Restructuring the 9th Circuit: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 115th Cong. 1 (2017) [hereinafter *Kleinfeld Testimony*] (statement of Hon. Andrew J. Kleinfeld, Circuit J., U.S. Court of Appeals for the Ninth Circuit).

<sup>41</sup> WHITE COMM’N REPORT, *supra* note 13, at 29. The Commission also conducted a survey of 205 circuit judges who expressed an opinion about how many judges a court of appeals can have and still function well. Of those judges, 74 percent reported that the maximum number is between ten and eighteen, while only 22 percent believed that number is higher or that there is no natural limit on the size of an effective court. *Id.* at 29 n.72.

judgeships currently authorized for the Ninth Circuit. The Commission concluded that “an appellate court of that size, attempting to function as a single decisional entity, encounters special difficulties that will worsen with continued growth.”<sup>42</sup>

Empirical studies provide further evidence that the Ninth Circuit as currently composed is too large to function effectively. In 2000—long before any of the current controversies—then-Chief Judge Richard Posner of the Seventh Circuit conducted a study that found the quality of judicial output declines as the number of judges on an appellate court grows.<sup>43</sup> Controlling for judicial ideology, the study demonstrated that the Ninth Circuit had the highest rate of reversal of any federal appeals court in the nation during the period 1985–97.<sup>44</sup> This finding becomes particularly relevant when considering that, during the same period, the combined reversal rate of the Fifth and Eleventh Circuits was significantly lower than the reversal rate of the pre-split Fifth.<sup>45</sup> Thus, as Judge Posner concluded, “adding judgeships tends to reduce the quality of a court’s output” and increase the probability of summary reversal.<sup>46</sup> The size of a court matters, and the Ninth Circuit as currently structured is too large to function properly.

In addition to judicial output, the numerical composition of an appellate court affects judicial collegiality. Unlike trial courts, appellate courts require groups of judges to decide cases together. As Senior Judge Harry Edwards of the D.C. Circuit has suggested, collegiality is the manner in which “appellate judges overcome their individual predilections in decision making.”<sup>47</sup> According to Judge Edwards, “judges have a common interest, as members of the judiciary, in getting the law right, and . . . as a result, we are willing to listen, persuade, and be persuaded, all in an atmosphere of civility and respect.”<sup>48</sup> Collegiality enhances understanding of each judge’s legal reasoning while decreasing misunderstandings or imputations of bad faith.<sup>49</sup> This

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<sup>42</sup> *Final Report of the Commission on Structural Alternatives for the Federal Courts of Appeals: Hearing Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary*, 106th Cong. 112 (1999) (statement of Hon. Byron R. White, Chair, White Commission).

<sup>43</sup> Richard A. Posner, *Is the Ninth Circuit Too Large? A Statistical Study of Judicial Quality*, 29 J. LEGAL STUD. 711, 711 (2000).

<sup>44</sup> *Id.* at 714–15.

<sup>45</sup> *Id.* at 714–17; see also *Bringing Justice Closer to the People: Examining Ideas for Restructuring the 9th Circuit: Hearing Before the Subcomm. on Courts, Intellectual Prop. & the Internet*, 115th Cong. 8–9 (2017) (statement of Dr. John C. Eastman, Professor of Law, Chapman University Fowler School of Law) [hereinafter *Eastman Testimony*].

<sup>46</sup> Posner, *supra* note 43, at 719.

<sup>47</sup> Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1639 (2003).

<sup>48</sup> *Id.* at 1645 (footnote omitted).

<sup>49</sup> *Rebooting the Ninth Circuit: Why Technology Cannot Solve Its Problems: Hearing Before the Subcomm. on Privacy, Tech. & the Law of the S. Comm. on the Judiciary*, 115th Cong. 13 (2017) [hereinafter *O’Scannlain 2017 Testimony*] (statement of Hon. Diarmuid F. O’Scannlain, Circuit J., U.S. Court of Appeals for the Ninth Circuit).

allows judges to accommodate differences of opinion in order to produce a coherent body of law. Even Justices of the Supreme Court have regularly noted the utmost importance of collegiality in judicial decision-making.<sup>50</sup>

Oversized circuits can undercut collegiality by limiting the interactions of the entire circuit as a collective whole.<sup>51</sup> The Ninth Circuit strives to sit each active judge with every other active and senior judge the same number of times over a two-year period, a policy that even when observed still results in infrequent interactions between judges.<sup>52</sup> In summer 2017, in testimony prepared for a Senate Judiciary Committee hearing, Judge Diarmuid O’Scannlain, a senior judge on the Ninth Circuit, recalled that when he was an active judge it was common for him “to go *years* without ever sitting with some of [his] colleagues.”<sup>53</sup> He observed that “an active Ninth Circuit judge may sit with fewer than twenty colleagues on three-judge panels over the course of a year,” which is less than half the total number of active and senior judges sitting on the court.<sup>54</sup> Similarly, Judge Richard Tallman, a Clinton appointee on the Ninth Circuit who favors a split, testified that after four years on the bench he had yet to sit on a panel with all of his active colleagues and that it “took a full seven years” to do so.<sup>55</sup> He further claimed that “the

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<sup>50</sup> Anthony M. Kennedy, *Judicial Ethics and the Rule of Law*, 40 ST. LOUIS U. L.J. 1067, 1072 (1996) (“[J]udicial etiquette [is] a means of maintaining the collegiality requisite to a great court.”); Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 141, 148 (1990) (discussing the effect of collegiality on the number of dissents and concurrences by members of a federal appellate court).

<sup>51</sup> Diarmuid F. O’Scannlain, *A Ninth Circuit Split Study Commission: Now What?*, 57 MONT. L. REV. 313, 315 (1996) (“As a court of appeals becomes increasingly larger, it loses the collegiality among judges that is a fundamental ingredient in [the] effective administration of justice . . .”).

<sup>52</sup> See Laural Hooper, Dean Miletich & Angelia Levy, *Case Management Procedures in the Federal Courts of Appeals*, FED. JUDICIAL CTR. 174 (2011), <https://www.fjc.gov/sites/default/files/2012/Case-Man2.pdf>.

<sup>53</sup> *The Case for Restructuring the Ninth Circuit: An Inevitable Response to an Unavoidable Problem: Hearing Before the Subcomm. on Privacy, Tech. & the Law of the S. Comm. on the Judiciary*, 115th Cong. 13 (2018) [hereinafter *O’Scannlain 2018 Testimony*] (statement of Hon. Diarmuid F. O’Scannlain, Circuit J., U.S. Court of Appeals for the Ninth Circuit). As described *infra*, the twenty-nine active judge-ships make for over 3,600 possible three-judge panel combinations. (If the circuit’s twenty senior judges are included in the analysis, that number increases to over 17,000 possible three-judge panels.) Basic combinatorics suggests that a judge could indeed go years without sitting with a colleague.

<sup>54</sup> *Id.*; see also *Questions for the Record from Senator Charles Grassley: Judge O’Scannlain Responses: Hearing on “Oversight of the Structure of the Federal Courts” Before the Subcomm. on Oversight, Agency Action, Fed. Rights & Fed. Courts of the S. Comm. on the Judiciary*, 115th Cong. 4 (2018) (statement of Hon. Diarmuid F. O’Scannlain, Circuit J., U.S. Court of Appeals for the Ninth Circuit) (“I further agree with Justice Kennedy that the Ninth Circuit’s extreme size disrupts our ability to foster the sort of close, collegial relationships that ought to exist on an appellate court.”).

<sup>55</sup> *Rebooting the Ninth Circuit: Why Technology Cannot Solve Its Problems: Hearing Before the Subcomm. on Privacy, Tech. & the Law of the S. Comm. on the Judiciary*, 115th Cong. 13 (2017) [hereinafter *Tallman Testimony*] (statement of Hon. Richard C. Tallman, Circuit J., U.S. Court of Appeals for the Ninth Circuit).

irregular membership on [the] panels comes at a cost; it fails to foster strong personal relationships, and makes for inconsistent opinions.”<sup>56</sup>

Adding 136 visiting judges into a mix of forty-nine active and senior judges creates an endless mishmash of three-judge panels that further undercuts the court’s collegiality. As the White Commission stated back in 1998, “a court of appeals, being a court whose members must work collegially over time to develop a consistent and coherent body of law, functions more effectively with fewer judges than are currently authorized for the Ninth Circuit.”<sup>57</sup> It should come as no surprise, given the Ninth Circuit’s size, that the court has seen increased incidences of intracircuit conflicts. Several Supreme Court Justices have previously noted the heightened risk of intracircuit conflicts on a court that publishes as many opinions as the Ninth Circuit.<sup>58</sup> After all, a circuit court as large as the Ninth’s precludes close, regular, and frequent contact in joint decision-making.

Moreover, the Ninth Circuit’s far-reaching jurisdiction poses serious questions about the nature of federalism. The circuit’s enormous size affords it immense power in determining the direction of the nation’s jurisprudence. Since very few cases receive further review, nearly every Ninth Circuit case is decided by a three-judge panel—and that panel decides the law for 65 million people.<sup>59</sup> In 1998, Justice Kennedy wrote that any circuit claiming the “authority 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.”<sup>60</sup> Under the current regime, judges sitting in the Ninth Circuit simply have too much power over too many people. And when these judges err, the consequences of their error can be great. As Judge Kleinfeld has pointed out, “[o]ur size causes errors, and gives us too much power. When we make a mistake, the impact is colossal, and we do make mistakes.”<sup>61</sup>

In other words, the Ninth Circuit’s immense size prevents effective function, undermines collegiality and familiarity among its judges, and poses serious federalism concerns.

## B. *Procedural Inefficiencies*

The Ninth Circuit’s sizable caseload has led to considerable procedural inefficiencies. As it stands, the circuit’s active judges, even when augmented

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<sup>56</sup> *Id.*

<sup>57</sup> WHITE COMM’N REPORT, *supra* note 13, at 29.

<sup>58</sup> *Id.* at 38. Five members of the Supreme Court wrote the Commission’s chair before the report was released. Four justices expressed general “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.” *Id.*

<sup>59</sup> *See Census Data*, *supra* note 29.

<sup>60</sup> Justice Kennedy Letter, *supra* note 38, at 2.

<sup>61</sup> *Kleinfeld Testimony*, *supra* note 40, at 1.

by senior judges and designated visitors from elsewhere, are badly overworked and unable to manage the constant influx of cases effectively. The circuit currently has an astonishing backlog, accounting for nearly a third of all pending federal appeals.<sup>62</sup> The most recent statistics (through September 2018) show that the circuits have over 38,000 appeals pending.<sup>63</sup> Of those, the Ninth Circuit has more than 11,000 appeals outstanding.<sup>64</sup> As of September 2018, over one-fifth of all federal appeals filed came from the Ninth Circuit.<sup>65</sup> The circuit had 3,000 more new filings in the past year than the next busiest circuit.<sup>66</sup> Given the substantial number of appeals the Ninth Circuit processes, it should be no surprise that it takes the circuit longer than any other to resolve an appeal. Statistics from 2017 show that the median Ninth Circuit appeal took 14.9 months to resolve.<sup>67</sup> This amounts to 50 percent higher than the average circuit and five months more than the national median.<sup>68</sup> For civil appeals, the median case required 22.8 months from the notice of appeal to the last opinion or final order, a drastic difference from the national median of 12.1 months.<sup>69</sup>

A primary reason for the Ninth Circuit's procedural inefficiencies is that its judges are badly overworked. The most recent data (through September 2018) show that the court terminated 7,386 cases on the merits in the preceding twelve months, amounting to 550 cases per judge.<sup>70</sup> To keep up with all this output, the circuit's judges would be required to read twenty decisions every single day (assuming it was plausible for judges to work seven days out of every week, and 365 days a year). Even if fully staffed with its authorized maximum of twenty-nine judges, the court would still have approximately 460 pending appeals per active judgeship. That amounts to over 100 more appeals per judge than the next closest circuit, and about "four times the number of appeals per active judge on the Tenth Circuit."<sup>71</sup> As it stands, the Ninth Circuit is not fully staffed, meaning that each active judge is required to handle closer to 533 appeals.<sup>72</sup> In addition to the large number of appeals filed in the Ninth Circuit, the court regularly receives around 800

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<sup>62</sup> See *Court of Appeals Management Statistics*, *supra* note 9.

<sup>63</sup> *See id.*

<sup>64</sup> *Id.*

<sup>65</sup> *See id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Courts of Appeals Median Times*, *supra* note 10.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> See *Court of Appeals Management Statistics*, *supra* note 9.

<sup>71</sup> *Tallman Testimony*, *supra* note 55, at 6.

<sup>72</sup> *Id.*

petitions for en banc review each year.<sup>73</sup> As a result, each judge has more than fifteen new en banc petitions to consider every week.

The procedural inefficiencies the Ninth Circuit faces has practical implications for judges, lawyers, and litigants. Because cases take so long to process, by the time legal documents reach the judges' desks, they can be outdated. As Judge Tallman told the Senate Judiciary Committee, a legal brief in a pending appeal "is frequently years old and contains stale case law, by the time we can get to it."<sup>74</sup> In addition, the court's significant "backlog increases the pressure on [judges] to dispose of cases quickly for the sake of the litigants"; a practice that can serve only to "inflate the chance of error and inconsistency."<sup>75</sup> Some have proposed adding additional judgeships to assist with the heavy caseload, but procedural inefficiencies can't be remedied simply by adding more judges.<sup>76</sup> The circuit is already authorized twenty-nine judgeships, more than twice as many as the average circuit. Even with double the average number of judgeships, the Ninth Circuit continues to be flooded with cases and incapable of efficiently handling its constant caseload, resulting in the incredible amount of time it takes to dispose of each case. Additional judgeships would obviously help alleviate the workload, but they would only exacerbate the inefficiencies and inequities of the circuit's inordinate size.

### C. *Jurisprudential Unpredictability*

The Ninth Circuit's size and structure make it markedly unpredictable. District judges, litigants, and parties seeking to conform their conduct to circuit law have encountered serious obstacles to assessing what the law is. For one, the court's enormous jurisdictional scope contributes to erratic outcomes. The Ninth Circuit is responsible for a vast geographic area consisting of eleven different states and territories, each with its own system of laws and legal precedent. As Judge Tallman expressed in testimony before the Senate Judiciary Committee, the Ninth Circuit's geographic diversity "requires great breadth of legal knowledge that I fear comes at the expense of a

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<sup>73</sup> See, e.g., U.S. COURTS FOR THE NINTH CIRCUIT, 2017 ANNUAL REPORT 43 [hereinafter 2017 NINTH CIRCUIT ANNUAL REPORT], [https://www.ca9.uscourts.gov/judicial\\_council/publications/AnnualReport2017.pdf](https://www.ca9.uscourts.gov/judicial_council/publications/AnnualReport2017.pdf).

<sup>74</sup> Tallman Testimony, *supra* note 55, at 7.

<sup>75</sup> O'Scannlain 2017 Testimony, *supra* note 49, at 21.

<sup>76</sup> In 2017, the Judicial Conference of the United States recommended to Congress the creation of fifty-seven new Article III judgeships in the courts of appeals and district courts, including the addition of five new appellate judgeships for the Ninth Circuit. U.S. COURTS, ADDITIONAL JUDGESHIPS OR CONVERSION OF EXISTING JUDGESHIPS RECOMMENDED BY THE JUDICIAL CONFERENCE 2017, [http://www.uscourts.gov/sites/default/files/2017\\_judicial\\_conference\\_judgeship\\_recommendations\\_0.pdf](http://www.uscourts.gov/sites/default/files/2017_judicial_conference_judgeship_recommendations_0.pdf).

shallow understanding of the applicable local law.”<sup>77</sup> The problem of providing consistent, predictable outcomes for litigants is further compounded by the court’s heavy reliance on visiting judges, who tend to be less informed about relevant local law and less sensitive to the individual needs of different communities.

The vast number of possible panel combinations on the current Ninth Circuit provides good indication of the uncertainty that results from such a large circuit. The Ninth Circuit is currently authorized twenty-nine active judges, making for over 3,600 possible three-judge panel combinations.<sup>78</sup> If the circuit’s senior judges are included in the analysis, that number increases to over 17,000 possible three-judge panels.<sup>79</sup> In terms of en banc panels—see below for a discussion of the Ninth Circuit’s unique “limited en banc” procedure—there are well over 13 million possible eleven-judge combinations.<sup>80</sup> With so many possible combinations of judges, it is virtually impossible to maintain any degree of coherence or predictability in case law.

The White Commission conducted a survey asking district court judges and lawyers in the Ninth Circuit for their views and experiences. While district judges reported finding the law “insufficiently clear to give them confidence in their decisions on questions of law about as often as their counterparts in other circuits,” they were more likely to report difficulties resulting from inconsistencies between published and unpublished opinions.<sup>81</sup> Lawyers, meanwhile, reported “somewhat more difficulty discerning circuit law and predicting outcomes of appeals than lawyers elsewhere.”<sup>82</sup> More often than other lawyers, those who practice before the Ninth Circuit “reported as a ‘large’ or ‘grave’ problem the difficulty of discerning circuit law due to conflicting precedents,” and that they “‘frequently’ have trouble predicting the outcome of an appeal.”<sup>83</sup> Further evidence bearing on the validity of these criticisms can be found in a another survey of lawyers who litigated cases in the various federal courts of appeals. In that survey, 30 percent of

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<sup>77</sup> Tallman Testimony, *supra* note 55, at 15.

<sup>78</sup> *Rebooting the Ninth Circuit: Why Technology Cannot Solve Its Problems: Hearing Before the Subcomm. on Privacy, Tech. & the Law of the S. Comm. on the Judiciary*, 115th Cong. 3 (2017) [hereinafter *Roysden Testimony*] (statement of Brunn (Beau) W. Roysden III, Deputy Division Chief of the Civil Litigation Division of the Arizona Attorney General’s Office); see also *Responding to the Growing Need for Federal Judgeships: The Federal Judgeship Act of 2009: Hearing Before the Subcomm. on Admin. Oversight & the Courts of the S. Comm. on the Judiciary*, 111th Cong. 9 (2009) (statement of Hon. Gerald Bard Tjoflat, Circuit J., United States Court of Appeals for the Eleventh Circuit).

<sup>79</sup> See *Eastman Testimony*, *supra* note 45, at 7.

<sup>80</sup> *Roysden Testimony*, *supra* note 78, at 3 n.6. This number comes from choosing ten out of the twenty-eight judges besides the Chief, a method resulting in 13,123,110 combinations.

<sup>81</sup> WHITE COMM’N REPORT, *supra* note 13, at 39.

<sup>82</sup> *Id.* at 39–40.

<sup>83</sup> *Id.* at 40.

experienced litigators found it difficult to predict how the Ninth Circuit would decide an appeal, more than for any other circuit.<sup>84</sup>

To complicate matters further, the Ninth Circuit generates more than 550 published opinions each year and many more unpublished opinions. The most recent data show that each circuit judge authored an average of 170 decisions (13 signed, 157 unsigned).<sup>85</sup> According to Judge Kleinfeld, “[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. Even if the decisions could be read, there are over 3,000 combinations of judges who may wind up on panels, so the exercise would not be worth the time.”<sup>86</sup> He further stated that “[j]udges on the same court should read each other’s decisions. We are so big that we cannot and do not. That has the practical effect that we do not know what judges on other panels are deciding.”<sup>87</sup>

The Ninth Circuit’s size and workload make it virtually impossible for any one judge to maintain familiarity with the relevant substantive law and local precedent of nine states and two territories. With the court generating so many opinions, judges face many challenges in staying adequately informed about the court’s own output. Back in 1995, Third Circuit Judge Edward Becker compared the size and workload of his circuit to that of the Ninth, noting that the Third Circuit published 353 opinions, equating to approximately 8,500 pages of material.<sup>88</sup> In explaining that due to such a large amount of reading, coupled with an appellate judge’s other duties of “writing, thinking, conferring, and administering,” Judge Becker observed that “it takes me seven days a week to do my job.”<sup>89</sup> The Ninth Circuit, meanwhile, published 927 opinions during the same period.<sup>90</sup> Judge Becker maintained that “there is no conceivable way that any judge of that court can read, or even meaningfully scan and digest, anywhere near that number of opinions so as to be abreast of circuit law.”<sup>91</sup> In 1998, then-Justice John Paul Stevens made a similar observation, noting that the Ninth Circuit was “so large that even the most conscientious judge probably cannot keep abreast of her own

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<sup>84</sup> Posner, *supra* note 43, at 717 n.12.

<sup>85</sup> See *Court of Appeals Management Statistics*, *supra* note 9.

<sup>86</sup> *Kleinfeld Testimony*, *supra* note 40, at 7.

<sup>87</sup> *Id.* at 4.

<sup>88</sup> William H. Rehnquist et al., *Symposium: The Future of the Federal Courts*, 46 AM. U. L. REV. 263, 285 (1996) [hereinafter *Symposium*].

<sup>89</sup> *Id.*

<sup>90</sup> See LEONIDAS RALPH MECHAM, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 1995 REPORT OF THE DIRECTOR 50 tbl.S-3 (1995) (demonstrating that during the twelve-month period ending Sept. 30, 1995, the Third Circuit published 346 written and signed opinions and seven written, reasoned, and unsigned opinions; meanwhile, during the twelve-month period ending Sept. 30, 1995, the Ninth Circuit published 909 written and signed opinions and eighteen written, reasoned, and unsigned opinions).

<sup>91</sup> *Symposium*, *supra* note 88, at 285.

court's output."<sup>92</sup> Ninth Circuit Judge Pamela Ann Rymer told a Senate Judiciary subcommittee in 1999 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."<sup>93</sup> Since Judge Rymer offered this testimony almost twenty years ago, the Ninth Circuit's caseload has, of course, only increased.

As noted by lawyers, multiple appellate judges from different circuits, and Supreme Court justices, the size of the Ninth Circuit creates significant and detrimental unpredictability for its litigants and arbiters. Any tribunal whose law cannot be clearly stated or deciphered requires reform.

#### D. *Unusual En Banc Process*

The incredible size and workload of the Ninth Circuit has necessitated the use of an unusual en banc process. As it stands, the Ninth Circuit is the only circuit in the nation that never sits with all judges together at once. Federal law permits circuits with more than fifteen active judges to use a limited form of en banc.<sup>94</sup> Under this unique procedure, en banc review is handled by a subset of the active judges, as opposed to all the active judges. The Fourth (fifteen authorized judgeships), Fifth (seventeen), and Sixth (sixteen) Circuits are the only courts aside from the Ninth that have at least fifteen authorized judgeships. But the Ninth is the only one that relies upon a randomly selected subset en banc panel. The limited en banc court traditionally consists of eleven judges (the chief judge and ten others) that are selected by lot for each case. The circuit's limited en banc process has faced severe criticism for its apparent inability to act as an effective substitute for full en banc review.<sup>95</sup> For example, Supreme Court Justice Sandra Day O'Connor, in a 1998 letter to the White Commission, 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

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<sup>92</sup> Letter from John Paul Stevens, Associate Justice, United States Supreme Court, to Hon. Byron R. White, Chair, White Commission 1 (Aug. 24, 1998).

<sup>93</sup> *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: Hearing on S. 253 Before the Subcomm. on Admin. Oversight & the Courts of the S. Comm. on the Judiciary*, 106th Cong. 60 (July 16, 1999) (statement of Hon. Pamela Ann Rymer, former Circuit J., U.S. Court of Appeals for the Ninth Circuit).

<sup>94</sup> See Pub. L. No. 95-486, § 6, 92 Stat. 1629, 1633 (1978).

<sup>95</sup> See Pamela Ann Rymer, *The "Limited" En Banc: Half Full, or Half Empty?*, 48 ARIZ. L. REV. 317, 320 (2006).

other circuits.”<sup>96</sup> In truth, using a panel only slightly larger than a third of the court’s full complement of judges contravenes the very concept of an “en banc” court.<sup>97</sup>

Under the limited en banc procedure, a mere six of the twenty-nine Ninth Circuit judges may speak for the entire court. This wasn’t as big of a concern twenty years ago, when the White Commission noted that, “very few en banc decisions are closely divided, so it is unlikely a full court en banc would produce different results.”<sup>98</sup> A study conducted just after the White Commission’s report, however, looked at the number of closely divided en banc decisions during the period from 1998 to 2005 and found that nearly one-third of the cases decided en banc by the Ninth Circuit were by “close” votes (6–5 or 7–4).<sup>99</sup> The late Judge Stephen Reinhardt, often described as the lion of the liberal Carter appointees, conceded that, “occasionally, the en banc vote does not reflect the true sentiment of the majority of the court.”<sup>100</sup> There have even been occasions when *none* of the three-judge panel members who decided a case were on the en banc panel.

Furthermore, due to the high threshold for rehearing en banc (a majority of active judges voting in favor), many cases are never reheard despite having many votes in favor.<sup>101</sup> The court’s rules do provide that a judge dissatisfied with the decision of the limited en banc may call for a vote on whether the full court should convene to reconsider the case.<sup>102</sup> Since the court adopted its limited en banc procedure in 1980, however, such a vote for a “true” or “super” en banc has seldom been requested and never been successful. Judge O’Scannlain recently lamented that the court will “forego meritorious en banc calls because there simply isn’t enough time to pursue every case that ought to be reheard en banc. What follows is that only a small fraction of our published opinions receive meaningful en banc consideration—let alone actual en banc review.”<sup>103</sup> The result is that in a typical year only about thirty

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<sup>96</sup> Letter from Sandra Day O’Connor, Associate Justice, United State Supreme Court to Hon. Byron R. White, Chair, White Commission 2 (June 23, 1998), <http://www.library.unt.edu/gpo/csafca/hearings/submitted/pdf/oconnor.pdf>.

<sup>97</sup> Judge Rymer, who served on the White Commission, has stated that a “‘limited’ en banc is an oxymoron, because ‘en banc’ means ‘full bench.’” Rymer, *supra* note 95, at 317.

<sup>98</sup> WHITE COMM’N REPORT, *supra* note 13, at 35.

<sup>99</sup> See, e.g., John M. Roll, *Split the Ninth Circuit: It’s Time* (2005), [https://www.myazbar.org/AZAttorney/PDF\\_Articles/0905procon3.pdf](https://www.myazbar.org/AZAttorney/PDF_Articles/0905procon3.pdf). While we were unable to find any studies covering the period since 2005, given that there have been no procedural alterations to the en banc process and that the ratio of Democratic to Republican appointees hasn’t shifted significantly, we surmise that the proportion of “close” en banc decisions is no different today.

<sup>100</sup> *Nunes v. Ashcroft*, 375 F.3d 810, 818 (9th Cir. 2004) (Reinhardt, J., dissenting).

<sup>101</sup> Roll, *supra* note 99, at 38.

<sup>102</sup> U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, FEDERAL RULES OF APPELLATE PROCEDURE: NINTH CIRCUIT RULES: CIRCUIT ADVISORY COMMITTEE NOTES, at 149–50, Cir. R. 35-3 (2018).

<sup>103</sup> *Questions for the Record from Senator Ben Sasse: Judge O’Scannlain Responses: Hearing on “Oversight of the Structure of the Federal Courts” Before the Subcomm. on Oversight, Agency Action,*

cases receive an en banc vote, and fewer than twenty of those cases are actually reheard en banc.<sup>104</sup>

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 *any* of the judges who voted for en banc review will be selected to hear the case.<sup>105</sup> Judge Rymer further acknowledged that when no panel member is drawn to hear the case on “limited en banc,” the 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 prior work would bring a different perspective to en banc deliberations.”<sup>106</sup> Conversely, the luck of the draw may result in an en banc panel’s being dominated by the original panel’s members and their allies, even though the probability that an en banc panel will include the same three judges as the original panel is only about 5 percent.<sup>107</sup> In one highly publicized case, a unanimous three-judge panel was unanimously reversed 11–0 by a limited en banc court that had no members of the original panel.<sup>108</sup> In another case, in which a three-judge panel reached a conclusion contrary to that arrived at by five other circuits, nine active Ninth Circuit judges unsuccessfully voted for rehearing en banc.<sup>109</sup> In yet another case, on two occasions en banc review was denied, and both times the Supreme Court granted review.<sup>110</sup>

The Ninth Circuit’s selection process for en banc review “is susceptible to the same occasional non-representativeness as the randomly selected three-judge panels that cause the need for going en banc in the first place.”<sup>111</sup> For example, in one case the en banc panel comprised ten Democratic appointees and one Republican appointee.<sup>112</sup> While “the Ninth Circuit has long had more Democrats on it, it has never had ten times” the number of judges appointed by Republican Presidents.<sup>113</sup> But, as a result of the limited en banc

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*Fed. Rights & Fed. Courts of the S. Comm. on the Judiciary*, 115th Cong. 5 (2018) (statement of Hon. Diarmuid F. O’Scannlain, Circuit J., U.S. Court of Appeals for the Ninth Circuit).

<sup>104</sup> *Id.*; see also 2017 NINTH CIRCUIT ANNUAL REPORT, *supra* note 73, at 43.

<sup>105</sup> Rymer, *supra* note 95, at 322–23.

<sup>106</sup> *Id.* at 323.

<sup>107</sup> Posner, *supra* note 43, at 712.

<sup>108</sup> *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 882, 888 (9th Cir. 2003), *rev’d en banc*, 344 F.3d 914, 915–16, 920 (9th Cir. 2003) (addressing the California gubernatorial recall procedure).

<sup>109</sup> *Bockting v. Bayer*, 418 F.3d 1055, 1055–56, 1061 (9th Cir. 2005).

<sup>110</sup> *Belmontes v. Woodford*, 359 F.3d 1079, 1079–80 (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).

<sup>111</sup> *Bringing Justice Closer to the People: Examining Ideas for Restructuring the 9th Circuit: Hearing Before the Subcomm. on Courts, Intellectual Prop. & the Internet of the H. Comm. on the Judiciary*, 115th Cong. 8 (2017) [hereinafter *Fitzpatrick Testimony*] (statement of Brian Fitzpatrick, Professor of Law at Vanderbilt Law School).

<sup>112</sup> *Id.*; see also *Cramer v. Consol. Freightways, Inc.*, 255 F.3d 683, 687 (9th Cir. 2001).

<sup>113</sup> *Fitzpatrick Testimony*, *supra* note 111, at 8.

process, there is a very real possibility that the court will have a highly disproportionate number of Democratic appointees on some en banc panels.

The limited en banc process is also problematic because it arguably causes the Ninth Circuit to be frequently reversed by the Supreme Court. One contributing factor is that the court convenes en banc proceedings infrequently, which helps explain its high reversal rate in the Supreme Court.<sup>114</sup> The relative infrequency of en banc rehearings in the Ninth Circuit deprives judges and lawyers of sufficient guidance as to circuit law. Justice Antonin Scalia summarized the thrust of this argument when he said that there is a “disproportionate segment of [the Supreme] Court’s discretionary docket that is consistently devoted to reviewing Ninth Circuit judgments, and to reversing them by lop-sided margins, [which] suggests that [the limited en banc] error reduction function is not being performed effectively.”<sup>115</sup> The adoption of the limited en banc has thus arguably increased the court’s reversal rate. Error correction is one of the primary functions of en banc, but the circuit’s unusual limited en banc has, as Justice Scalia suggested, failed to accomplish this task effectively. The Ninth Circuit’s en banc procedure systematically fails to provide its litigants with the same access to justice that litigants from other circuits receive.

In sum, the Ninth Circuit’s vast and uncontrollable size, procedural ineffectiveness, unpredictability, and unusual en banc review, prevent justice for all who live under its jurisdiction. To ensure fair resolution of each litigant’s dispute, equal justice under the law, and effective judicial decision making, Congress must use its Article III power to carve one or more new circuits out of the Ninth.

### III. DISPELLING THE MYTHS

#### A. *Not a Partisan Agenda*

Perhaps the most pervasive myth surrounding modern plans to split the Ninth Circuit is that they are merely political ploys by conservatives to undermine the court’s liberal composition.<sup>116</sup> To be sure, the Ninth Circuit has

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<sup>114</sup> From 2006 to 2015, for example, the Supreme Court heard 160 cases from the Ninth Circuit, reversing 106 decisions and vacating 24. See Timothy B. Dyk, *Thoughts on the Relationship Between the Supreme Court and the Federal Circuit*, 16 CHI.-KENT J. INTELL. PROP. 67, 72 (2016).

<sup>115</sup> Letter from Antonin Scalia, Associate Justice, United States Supreme Court, to Hon. Byron R. White, Chair, White Commission I (Aug. 21, 1998), <http://www.library.unt.edu/gpo/csafca/hearings/submitted/pdf/scalia1.pdf>.

<sup>116</sup> See Press Release, Sen. Dianne Feinstein, Senator Feinstein Fights Back Effort to Split Ninth Circuit Court of Appeals (Apr. 19, 2007), <https://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=0BA37422-F9AF-C888-C132-66DB0833DD80> (“I [Senator Feinstein] am concerned that recent attempts to split the Ninth Circuit are part of an assault on the independence of the judiciary by those who disagree with some of the court’s rulings.”).

long enjoyed a reputation as a bastion of liberal jurisprudence. Since the San Francisco–based circuit consists notably of Democratic supermajority states like California, Hawaii, and Oregon, it’s no surprise that many conservatives have attributed the court’s ideology to its geography. But the court’s ideological tilt is more a product of history—and it’s actually “better” now (from a conservative perspective) than it was before. Professor Arthur Hellman, a federal courts scholar at University of Pittsburgh Law School, has noted that the court’s “reputation is certainly deserved based on the history of the last 40 years or so,” but that it’s “less of an outlier now than it was.”<sup>117</sup> University of Richmond Law School Professor Carl Tobias called the notion that the Ninth Circuit is liberal “dated.”<sup>118</sup> This shift becomes clearer when looking to the history of the circuit’s appointments—which also shows that a split won’t have any effect, one way or the other, on the court’s (or post-split courts’) partisan or jurisprudential composition.

The circuit’s leftward tilt occurred mostly during Jimmy Carter’s presidency. In the late 1970s, Congress substantially increased the number of judgeships in the Ninth Circuit, nearly doubling the size of the court.<sup>119</sup> President Carter, who never got a chance to make any Supreme Court appointments, was then able to fill these open seats, with little opposition in a Democrat-controlled Senate. But the court has shifted in recent years as those appointees, who were considered extremely liberal, took “senior” status or passed away. While most of the Carter appointees were eventually replaced by nominees of Presidents Clinton and Obama—many judges want to keep their seats in the same party—the court, believe it or not, has become more moderate. A 2007 study found that the Ninth Circuit was among the most liberal appellate courts, a distinction shared with the Second Circuit; had a number of influential conservative judges with national reputations; and grew sharply less liberal as a result of both Presidents Ronald Reagan and George H.W. Bush’s judicial appointments.<sup>120</sup> The circuit’s ideological composition shifted further under President George W. Bush, who appointed seven judges. Although President Obama also appointed seven judges during his two terms, those judges have generally been considered moderates, with more radical nominees like Goodwin Liu (now on the California Supreme Court), failing to be confirmed. As of this writing, the Ninth Circuit consists of sixteen judges appointed by Presidents Clinton or Obama, twelve appointed by Presidents George W. Bush or Trump, and one vacancy. The

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<sup>117</sup> Gene Johnson, *How “Liberal” Reputation of 9th Circuit Court of Appeals Is Overblown*, *Scholars Say*, MERCURY NEWS (Feb. 7, 2017, 7:35 AM), <https://www.mercurynews.com/2017/02/07/how-liberal-reputation-of-9th-circuit-court-of-appeals-is-overblown-scholars-say>.

<sup>118</sup> *Id.*

<sup>119</sup> 28 U.S.C. § 44 (Supp. III 1979).

<sup>120</sup> Lee Epstein et al., *The Judicial Common Space*, 23 J.L. ECON. ORG. 303, 312 (2007), <http://www.jstor.org/stable/40058180>.

resulting ratio of Democratic to Republican appointees is lower than in the First, Fourth, Tenth, D.C., and Federal Circuits.

Perhaps one reason the Ninth Circuit has been so hated by conservatives is its rendering of high-profile decisions that conservatives tend to find objectionable. But it's no surprise, given the circuit's vast size and disproportionate caseload, that this court would be more likely to decide a larger share of controversial cases. Indeed, the Ninth Circuit issues a substantial number of conservative decisions in addition to the liberal ones—at a greater rate than any other circuit (though they often then get reversed en banc).<sup>121</sup> This may again be attributable to the court's size, which increases the prospect of generating outlier panel decisions that do not accurately reflect the court's median jurisprudence.

Despite the court's relative moderation in recent years—compare its treatment of the “travel ban” litigation, for example, with the Fourth Circuit's “judicial resistance”<sup>122</sup>—conservatives have continued to express a desire to finally “break up” the Ninth Circuit. Yet efforts to divide the court have been repeatedly met with resistance from those who believe this move is just a politically motivated scheme to dilute the court's ideological composition.

Ironically, both sides miss the point that splitting a court doesn't affect any sort of ideological bias. Moving Arizona into a new circuit won't suddenly turn its two Obama appointees into originalists. Having California in its own circuit with only one or two states won't make its four Bush appointees into devotees of the living Constitution. The same judges would fill the seats of any new circuit that Congress creates—and judicial vacancies would still be filled through the political process of appointment and confirmation by presidents and senators of both parties.

The only way for one party to shift the long-term balance of a given court is to maintain sustained control of the White House—or to create new judgeships as happened under President Carter. Neither of these possibilities has anything to do with how big a circuit is in terms of size, population, or caseload. Circuit-splitting proposals thus cannot, and should not, be conflated with advocacy for partisan advantage. Instead, they are natural and appropriate reactions to the changing circumstances of the nation's judiciary.

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<sup>121</sup> Kevin M. Scott, *Supreme Court Reversals of the Ninth Circuit*, 48 ARIZ. L. REV. 341, 351 (2006).

<sup>122</sup> The Fourth Circuit struck down President Trump's ninety-day travel ban on foreign nationals from six majority Muslim countries, stating that the text had to be read in the context of Trump campaign speeches that “drip[ped] with religious intolerance, animus, and discrimination.” *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 572 (4th Cir. 2017). Many news commentators viewed the biting decision as evidence that the Fourth Circuit had joined the “judicial resistance” against the President. See David B. Rivkin Jr. & Lee A. Casey, *The Fourth Circuit Joins the 'Resistance'*, WALL ST. J. (May 29, 2017, 11:30 AM), <https://www.wsj.com/articles/the-fourth-circuit-joins-the-resistance-1496071859>; see also F.H. Buckley, *The Federal Courts Just Joined 'the Resistance'*, N.Y. POST (May 31, 2017, 8:51 PM), <https://nypost.com/2017/05/31/the-federal-courts-just-joined-the-resistance/>.

### B. *Technology Can't Fix Everything*

Another commonly advanced argument against splitting the Ninth Circuit is that technology alone can solve the court's problems. Chief Judge Sidney Thomas has claimed that the court "leads the judiciary in technology and innovative case management."<sup>123</sup> He explained that its e-filing and inventory management systems have allowed the court to overcome or prioritize many of its caseload issues.<sup>124</sup> On the other hand, his colleague Judge Richard Tallman has argued that the use of technology has not been able to meaningfully address the court's backlog: "The Ninth Circuit is already a leader among all circuits in promoting new technology," but its problems are not ones "that can be solved, or even greatly improved, by new computer systems or additional electronic communications equipment."<sup>125</sup>

The idea that technology can solve the Ninth Circuit's problems is premised on the concept of "economies of scale." Judge Alex Kozinski, a Reagan appointee who served as the Ninth Circuit's chief judge from 2007 to 2014, contended that there are "economies of scale" by having a large circuit.<sup>126</sup> Judge Thomas has similarly contended that the Ninth Circuit is "well administered, demonstrating the benefits of economies of scale, critical mass of resources, and consolidation of services."<sup>127</sup> While technology may improve judicial efficiency, it cannot solve inherent structural issues caused by circuit size. Large circuits impose both substantial information and administrative costs on courts, including the time it takes judges to learn the law of their own circuit and find out what other judges are writing. These costs affect lawyers and litigants who must also invest time in determining obscure circuit law and navigating the circuit's administrative labyrinth. Such heavy costs substantially reduce any "economies of scale" that may result from the Ninth Circuit's large size.

To argue that the Ninth Circuit is a glowing example of judicial efficiency ignores both common sense and the relevant facts. As described in detail above, the circuit remains the slowest federal appeals court in the nation. This is despite the fact that the Ninth Circuit purports to be a leader in the judiciary in harnessing new technologies.

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<sup>123</sup> *Rebooting the Ninth Circuit: Why Technology Cannot Solve Its Problems: Hearing Before the Subcomm. on Privacy, Tech. & the Law of the S. Comm. on the Judiciary*, 115th Cong. 1 (2017) [hereinafter *Thomas Testimony*] (statement of Hon. Sidney R. Thomas, Chief Circuit J., United States Courts of Appeals for the Ninth Circuit).

<sup>124</sup> *Id.* at 1–2.

<sup>125</sup> *Tallman Testimony*, *supra* note 55, at 3.

<sup>126</sup> See Gary L. Stuart, *Viewpoints: Why Splitting the 9th Circuit Is a Bad Idea*, AZ CENTRAL (Mar. 19, 2017, 10:03 AM), <https://www.azcentral.com/story/opinion/op-ed/2017/03/19/split-ninth-circuit-court-stuart/99150992/>.

<sup>127</sup> *Thomas Testimony*, *supra* note 123, at 1.

C. *More Intercircuit Conflict Is a Feature, Not a Bug*

While dividing the Ninth Circuit into two or three smaller circuits might increase the potential for intercircuit conflicts (also commonly referred to as “circuit splits”), this shouldn’t cause any more concern now than it did any time in our history a new circuit was created. A basic tenet of our system of federalism is that it permits each state to “serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”<sup>128</sup> Similarly, regional circuits allow courts to apply their own approaches to difficult questions of law. As Judge O’Scannlain puts it, “Courts might analyze a legal question differently, and the resulting diversity of views may in fact inform and *improve* the national understanding of that question.”<sup>129</sup> Although we want courts to eventually reach the same conclusions concerning important questions of law—so long as they’re the correct ones!—national uniformity is not the only goal of the circuit system. If it were, we could simply reorganize the circuits into one national court of appeals, or at least consolidate them into three or so supercircuits. But nobody has suggested this, as it defeats the purpose of having an orderly appellate process that feeds into the Supreme Court.

Besides, even if there were an increase in intercircuit conflicts, the Supreme Court is still able to resolve them. After all, one of the primary functions of the Court’s discretionary certiorari process is to resolve conflicts among the circuits.<sup>130</sup> Circuit splits are by far the most important consideration in deciding whether the Court grants review in a case.<sup>131</sup> Although the number of petitions accepted by the Court has dwindled in recent years, this is not due to a lack of capacity. Chief Justice John Roberts has indicated that the Court could easily hear “100 cases without any stress or strain, but the cases just aren’t there.”<sup>132</sup> His remarks suggest that the Court could grant review in more cases if it were presented with consequential intercircuit conflicts. Thus, any increase in the number of intercircuit conflicts would pose

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<sup>128</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

<sup>129</sup> *Oversight of the Structure of the Federal Courts: Hearing Before the Subcomm. on Oversight, Agency Action, Fed. Rights & Fed. Courts of the S. Comm. on the Judiciary*, 115th Cong. 10–11 (2018) [hereinafter *O’Scannlain Responses to Sasse*] (responses of Diarmuid F. O’Scannlain, Circuit Judge, U.S. Courts of Appeals for the Ninth Circuit).

<sup>130</sup> *See, e.g.*, SUP. CT. R. 10 (listing the need to resolve conflicting circuit decisions among the considerations when deciding whether to grant a petition for certiorari).

<sup>131</sup> *See, e.g.*, H.W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* 246 (1991) (“Without a doubt, the single most important generalizable factor in assessing certworthiness is the existence of a conflict or ‘split’ in the circuits.”).

<sup>132</sup> *See* Evan Bernick, *Federalism and the Separation of Powers: The Circuit Splits Are Out There—and the Court Should Resolve Them*, *ENGAGE*, July 2015, at 36.

no real burden on the High Court. If anything, it would provide more incentive for the Court to take more cases involving important questions of law.

Moreover, intercircuit conflict is significantly less worrisome than the possibility of *intracircuit* conflict. This occurs when two panels in the same circuit reach contradictory conclusions concerning the same question of law. And the larger a circuit grows the more likely that it will develop intracircuit conflicts. Judge O’Scannlain again provides the apt conclusion that “even if restructuring the Ninth Circuit might marginally increase the chance for new *intercircuit* conflict, such restructuring would likely reduce the far more troubling risk of *intracircuit* conflicts in a court of our size.”<sup>133</sup> Accordingly, any peripheral increase in intercircuit conflict as a result of splitting the Ninth Circuit is no real cause for concern but merely a consequence of having a larger country that requires more courts.

#### D. *Splitting Circuits Isn’t Radical*

The notion of splitting a circuit court into several smaller circuits is hardly a new one. Until recently, it was considered a regular function of Congress, which habitually expanded and split the federal courts of appeals in response to the addition of new states and territories. Indeed, since the passage of the Judiciary Act of 1789, Congress has restructured the federal appellate courts a total of thirteen times.<sup>134</sup> And since the Evarts Act created the circuit courts of appeals in 1891, there have been four occasions in which entirely new circuits were added or carved out of existing circuits.<sup>135</sup> Congress twice broke up circuits to create smaller courts in the interest of efficiency and better administration of justice.<sup>136</sup> These actions reflected a view that the only way to deal with a court of appeals deemed to have grown too large was to reconfigure the circuit of which it was a part. One of those divisions occurred just a few decades ago in response to many of the same logistical challenges now facing the Ninth Circuit.

The split of the Fifth Circuit and the creation of the Eleventh Circuit should serve as good precedent for a division of the Ninth Circuit. In 1971, the Judicial Conference recommended and Congress established the Commission on Revision of the Federal Court Appellate System—commonly

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<sup>133</sup> O’Scannlain Responses to Sasse, *supra* note 129, at 11.

<sup>134</sup> Congress restructured the federal judiciary in 1801, 1807, 1837, 1842, 1855, 1862, 1863, 1866, 1891, 1893, 1929, 1981, and 1982. *See generally* Russell R. Wheeler & Cynthia Harrison, *Creating the Federal Judicial System*, FED. JUDICIAL CTR. 10–26 (3d ed. 2005), <https://www.fjc.gov/sites/default/files/2012/Creat3ed.pdf>; Tallman Testimony, *supra* note 55, at 20.

<sup>135</sup> *See* Act of Mar. 3, 1891, ch. 517, 26 Stat. 826; O’Scannlain 2018 Testimony, *supra* note 53, at 29.

<sup>136</sup> WHITE COMM’N REPORT, *supra* note 13, at 17.

known as the Hruska Commission—to examine possible changes in the structure of the nation’s federal appellate courts.<sup>137</sup> The commission primarily sought to decrease caseloads and increase judicial efficiency. In 1973, it recommended that Congress split both the Fifth Circuit and the Ninth Circuit.<sup>138</sup> Congress declined to enact the proposals but, as part of a compromise in 1978 to secure passage of an omnibus judgeship bill adding judgeships in the Fifth and Ninth Circuits, authorized the limited en banc procedures discussed above and allowed those large circuits to organize themselves into administrative divisions.<sup>139</sup>

The debate over whether the Fifth Circuit should be split rested in part on the issue of circuit size: the inefficient operation of a twenty-four-judge en banc session proved to be the catalyst.<sup>140</sup> After the newly enlarged Fifth Circuit held its first en banc hearing—having declined to use the limited en banc function—the judges found it too difficult to stay current with circuit law. They themselves petitioned Congress to create a new Eleventh Circuit consisting of Alabama, Florida, and Georgia, leaving the Fifth Circuit with Texas, Louisiana, and Mississippi.<sup>141</sup> The proposal, aptly named the Fifth Circuit Court of Appeals Reorganization Act of 1980, attracted wide support, with Congress ultimately adopting it and President Carter signing the bill to create the Eleventh Circuit on October 15, 1980.<sup>142</sup>

Since that time, the drumbeat for splitting the Ninth Circuit has only increased. Despite the Ninth Circuit’s rapid population boom and corresponding docket surge, it continues to falter under the status quo. Throughout the past forty years, more judgeships have been added to deal with the circuit’s massive caseload, which continues to grow at an alarming rate. Since the 1980 split of the Fifth Circuit, the Ninth Circuit has grown to nearly the size of the total population of the Fifth and Eleventh Circuits—the next two largest circuits by population—combined.<sup>143</sup> The same justifications that endorsed their division support a similar split of the Ninth Circuit today.

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<sup>137</sup> See Act of Oct. 13, 1972, Pub. L. No. 92-489, 86 Stat. 807 (1972). See generally COMMISSION ON REVISION OF THE FED. COURT APPELLATE SYS., THE GEOGRAPHICAL BOUNDARIES OF THE SEVERAL JUDICIAL CIRCUITS: RECOMMENDATIONS FOR CHANGE 2 (1973) [hereinafter HRUSKA COMM’N REPORT].

<sup>138</sup> See HRUSKA COMM’N REPORT, *supra* note 137, at 4.

<sup>139</sup> Omnibus Judgeship Act of 1978, Pub. L. No. 95-486, § 6, 92 Stat. 1629, 1633.

<sup>140</sup> Deborah J. Barrow & Thomas G. Walker, A COURT DIVIDED: THE FIFTH CIRCUIT COURT OF APPEALS AND THE POLITICS OF JUDICIAL REFORM 230–37 (1988).

<sup>141</sup> See Robert A. Ainsworth, Jr., *Fifth Circuit Court of Appeals Reorganization Act of 1980*, 1981 BYU L. REV. 523, 524 n.6 (1981) (quoting Resolution of the Fifth Circuit (May 5, 1980) (on file with the Fifth Circuit Clerk of Court)).

<sup>142</sup> Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994 (1980).

<sup>143</sup> See *O’Scannlain 2018 Testimony*, *supra* note 53, exhibit 9.

#### IV. PROPOSALS TO SPLIT UP THE NINTH CIRCUIT

As discussed above, a division of the Ninth Circuit is long overdue. Members of Congress have been talking about restructuring it for over forty years, ever since the Hruska Commission of 1973.<sup>144</sup> There have been countless studies and congressional hearings conducted, including the 1998 White Commission Report. In the years following the White Commission, Congress introduced a plethora of circuit splitting bills. Such proposals have included:

- \* various configurations that divide California, with resulting new northern and southern circuits in the west (what we call the “California split”);<sup>145</sup>

- \* a California-only Ninth Circuit, with the remaining states and territories into a new Twelfth Circuit (or vice versa) (the “California circuit”);<sup>146</sup>

- \* leaving California and Nevada in the Ninth Circuit and putting the remaining states and territories into a new Twelfth Circuit;<sup>147</sup>

- \* same as the above, but also keeping Arizona in the Ninth Circuit (the “desert split”);<sup>148</sup>

- \* leaving California, Hawaii, Guam and the Northern Mariana Islands in the Ninth Circuit and putting the remaining states and territories into a new Twelfth Circuit (the “island split”);<sup>149</sup>

- \* keeping California, Hawaii, Oregon, Washington, Guam, and the Northern Mariana Islands in the Ninth Circuit and putting Alaska, Arizona, Idaho, Montana, and Nevada into a new Twelfth Circuit (so that the Twelfth “hopscoches” over the Ninth);<sup>150</sup>

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<sup>144</sup> See generally HRUSKA COMM’N REPORT, *supra* note 137, at 4.

<sup>145</sup> The California split plan was introduced at the end of the 102nd session of Congress by Representative Michael Kopetski of Oregon as House Bill 3654, but it was not revived at the next session. See H.R. 3654, 103d Cong. (1993); HRUSKA COMM’N REPORT, *supra* note 137, at 13.

<sup>146</sup> See H.R. 1598, 115th Cong. (2017).

<sup>147</sup> See S. 562, 108th Cong. (2003).

<sup>148</sup> See H.R. 212, 109th Cong. (2005); H.R. 2723, 108th Cong. (2003); H.R. 1203, 107th Cong. (2001).

<sup>149</sup> See S. 1296, 109th Cong. (2005); H.R. 3125, 109th Cong. (2005); H.R. 4093, 109th Cong. (2005); S. 1845, 109th Cong. (2005).

<sup>150</sup> See H.R. 250, 115th Cong. (2017).

\* leaving California and Nevada in the Ninth Circuit, moving Arizona to the Tenth Circuit (to maintain geographic contiguity, and also because the Tenth Circuit is the third-smallest by population), and putting the remaining states and territories into a new Twelfth Circuit;<sup>151</sup> and

\* a three-way division with a Ninth Circuit consisting of California, Hawaii, Guam, and the Northern Mariana Islands; a Twelfth Circuit consisting of Arizona, Nevada, Idaho, and Montana; and a Thirteenth Circuit consisting of Oregon, Washington, and Alaska.<sup>152</sup>

Despite an abundance of reasonable proposals, Congress has yet to adopt or endorse any particular one. Within the last few years there has been a growing movement in Congress to finally split the Ninth Circuit. Yet, the question remains: how should the Ninth Circuit be split? Decades of studies, commissions, and expert testimony reveal several factors that should be considered in any circuit-splitting plan. Such factors include the distribution of judgeships and caseloads, the geographic size of any newly created circuits, whether the states in all post-split circuits are contiguous, and other logistical concerns. This section reviews the most commonly proposed circuit-splitting plans that have been offered and uses these factors as guideposts for assessing their feasibility.<sup>153</sup>

#### A. *The California Split*

The Hruska Commission initially concluded that the only logical way to split the Ninth Circuit was to divide the state of California itself, placing Northern California in one circuit and Southern California in another.<sup>154</sup> More recent commentators have agreed that dividing California between two new circuits is the only viable solution because of California's disproportionately large caseload relative to the other states in the circuit.<sup>155</sup> California presently accounts for just over 65 percent of the Ninth Circuit's caseload.<sup>156</sup> Without dividing California in half, the bulk of the Ninth Circuit's cases would thus remain in the new Ninth Circuit. In other words, any circuit-splitting plan that does not also split California would ensure that far more than 70 percent of the caseload in the new Ninth Circuit would come from one state (more

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<sup>151</sup> See H.R. 1033, 108th Cong. (2003).

<sup>152</sup> See S. 1301, 109th Cong. (2005); see also H.R. 211, 109th Cong. (2005); S. 2278, 108th Cong. (2004); H.R. 4247, 108th Cong. (2004).

<sup>153</sup> For an excellent summary of most if not all the active proposals, see *O'Scannlain 2018 Testimony*, *supra* note 53, exhibits 20–23.

<sup>154</sup> HRUSKA COMM'N REPORT, *supra* note 137, at 13.

<sup>155</sup> See, e.g., Eric J. Gribbin, Note, *California Split: A Plan to Divide the Ninth Circuit*, 47 DUKE L.J. 351, 354 (1997).

<sup>156</sup> *Thomas Testimony*, *supra* note 123, at 66.

than 80 percent without Arizona and Washington). That's not necessarily a problem—we see large imbalances in the Second (New York), Fifth (Texas), Seventh (Illinois), and Eleventh (Florida) Circuits—but it does mean we shouldn't reject the “California split” offhand.

Still, this “logical” idea is probably too clever by half, creating as many problems as it solves. While dividing California in half would more evenly spread the caseload, the new circuits would eventually diverge—even if only on the margins—on questions of federal and even state law within one state. Such a development would pose a significant problem for California litigators and lawmakers, because Northern California and Southern California federal circuit courts would employ different legal standards and tests—plus federal questions involving state-based initiatives could be tested in two circuits. A state law or practice could be legal in San Francisco but not Los Angeles! As it stands, the jurisdictional and jurisprudential headaches that would be created by dividing California has ensured that all the Ninth Circuit-split proposals pending in the House and Senate call for keeping California within one federal circuit.

#### B. *The California Circuit*

Also known as the “Horsecollar” proposal, the California-only split plan would place all states and territories except California in a new Twelfth Circuit. Such a proposal, the Ninth Circuit Court Modernization and Twelfth Circuit Court Creation Act of 2017, was recently introduced in the U.S. House of Representatives.<sup>157</sup> This is the only way to more-or-less evenly split the Ninth Circuit in terms of population, caseload, and judgeships without splitting California. The problem, however, is that circuits are meant to include more than one state—to get balanced perspectives and uniform application of federal law across states in a particular region. Still, there is precedent for a one-state circuit—and it involves California, from 1855 (a few years after statehood) until 1866 (when Nevada and Oregon were added to this Ninth Circuit).<sup>158</sup> And we have of course had the D.C. Circuit on its own since 1948—though most of its cases involve federal agencies rather than civil or criminal cases that happen to originate in the territory of the District of Columbia.

Moreover, any concern that a California Circuit would evolve a jurisprudence that's completely divorced from the rest of the country is overblown—at least in terms of ideological extremism—because, again, Republican and Democratic presidents alike would be appointing judges to this court. Of the sixteen Ninth Circuit judgeships based in California, eight are occupied by Democratic appointees and seven by Republican, with one vacancy. In short, a Ninth Circuit split that involves a California-only circuit

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<sup>157</sup> H.R. 1598, 115th Cong. (2017).

<sup>158</sup> Act of Mar. 2, 1855, 10 Stat. 631.

would be much more practical than a split of California itself. The more significant problem would be an isolation of Hawaii and the Pacific territories from the state that's closest to them (geographically, demographically, and culturally).

### C. “String Bean” Proposals

The so-called “string bean” bills essentially reconfigure the Ninth Circuit into two new collections of states: one relatively large circuit (in terms of land mass) and the other relatively small. For example, two recent bills that we’ve called the “island split” would place Alaska, Arizona, Idaho, Montana, Nevada, Oregon, and Washington in a new Twelfth Circuit, with California, Hawaii, Guam and the Northern Mariana Islands remaining in the Ninth Circuit.<sup>159</sup> As the proposal’s nickname suggests, a “string bean” proposal would result in a disproportionate division of land mass, with only about 12 percent retained in the new Ninth, and the remaining 88 percent or so allocated to the Twelfth.<sup>160</sup> Caseload allocation would be disproportionate the other way, with only about a third of the cases transferred to the new Twelfth Circuit. Under either of the two proposed bills the new Ninth Circuit would still have the largest number of circuit judges in the nation.<sup>161</sup> Having more than the minimally required fifteen judges, the new Ninth Circuit could, in theory, continue its practice of relying on its limited en banc procedure—although, like the other three circuits in that boat, it would be unlikely to do so. Still, this plan allows all states in the newly created circuits to remain contiguous and represents an improvement over the currently oversized, overworked Ninth Circuit.

### D. “Hopscotch” Proposals

The term “hopscotch” describes proposals that would create new circuit boundaries that are not necessarily geographically contiguous—essentially allowing newly created circuits to “hopscotch” over bordering (or next-closest) states. A bill introduced in 2017, for example, would keep California, Hawaii, Oregon, Washington, Guam, and the Northern Mariana Islands in the Ninth Circuit and put Alaska, Arizona, Idaho, Montana, and Nevada into a new Twelfth Circuit.<sup>162</sup> The new Twelfth Circuit would thus “hopscotch”

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<sup>159</sup> See H.R. 196, 115th Cong. (2017); S. 295, 115th Cong. (2017).

<sup>160</sup> *Thomas Testimony*, *supra* note 123, at 69.

<sup>161</sup> S. 295 would provide the new Ninth with twenty circuit judges, while H.R. 196 would provide twenty-five circuit judges. Both plans would impact caseloads. “S. 295 would overburden the ‘new’ Ninth with 377 cases per judgeship. H.R. 196 would significantly overburden the new Twelfth with 418 cases per judgeship.” *Thomas Testimony*, *supra* note 123, at 68.

<sup>162</sup> H.R. 250, 115th Cong. (2017).

over Washington and Oregon. Although under this plan the new Ninth would retain almost 80 percent of the new caseload, the Twelfth would assume over 75 percent of the land mass.<sup>163</sup> This plan would also lack geographic coherence, because Alaska would be separate from its closest (and fellow Pacific) states. Additionally, some national parks and geographic landmarks would fall under multiple jurisdictions. For example, Lake Tahoe and the Rogue River-Siskiyou, Klamath, Wallowa-Whitman, and Colville National Forests would all fall under the jurisdiction of two circuits.<sup>164</sup>

Other “hopscotch” proposals have suggested that Nevada also remain in the Ninth Circuit. But that configuration would leave Arizona without a border with any other state in the circuit—a more drastic change than isolating Alaska, which, of course, has always been noncontiguous and isolated anyway.

#### E. *Flake Proposal*

In early 2017, Arizona Senator Jeff Flake proposed creating a new Twelfth Circuit comprising Alaska, Arizona, Idaho, Montana, Nevada, and Washington, and a new Ninth Circuit containing California, Hawaii, Oregon, and the Pacific island territories.<sup>165</sup> In other words, this would be the “island split” plus Oregon. Under this proposal, the two newly created circuits would have population distributions largely “in line with the average size of the smallest six circuits, and the new Ninth Circuit would be far closer to the sizes of the next-largest four circuits.”<sup>166</sup> The new Ninth Circuit would have approximately 30 percent fewer appeals and population, as well as “a more manageable geographical area.”<sup>167</sup> In terms of judges, the proposal would keep nineteen judgeships in the Ninth Circuit, in proportion with its caseload. The caseload of the new Twelfth Circuit would place it squarely within the normal operating range of the other existing circuits. While the new Ninth Circuit would continue to be the largest circuit in terms of judges, population, and case filings, it would be significantly closer to the normal distribution.

The main downside to this proposal is that it puts Washington and Oregon into different circuits. Still, that kind of split seems less jarring—culturally, politically, and geographically—than many of the allocations in the various “string bean” or “hopscotch” proposals.

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<sup>163</sup> *Thomas Testimony*, *supra* note 123, at 70–71.

<sup>164</sup> *Id.* at 71.

<sup>165</sup> S. 276, 115th Cong. (2017).

<sup>166</sup> *O’Scannlain 2017 Testimony*, *supra* note 49, at 25.

<sup>167</sup> *Id.* at 26.

#### F. *Summary*

While this Article does not endorse any particular circuit-splitting proposal, we do think that the nation's judicial system would greatly benefit from a fundamental restructuring of the Ninth Circuit. Any of the currently pending restructure bills offer necessary changes and improvements to the status quo. As to the specifics, we are content to leave it to the vagaries of the political process to settle on one of the proposed circuit-splitting plans, or to come up with an entirely new compromise. We welcome any legislation that creates logical groupings of states consistent with the rest of the nation's circuits, balances the workload of judges, prioritizes smaller decision-making units, and eliminates the need for a limited en banc process. Such changes would surely foster greater judicial efficiency, consistency, accountability, and collegiality. All the proposals described above effectuate these necessary changes and offer circuit reconfigurations that are far superior to the current structure.

#### CONCLUSION

The debate over whether to divide the Ninth Circuit has been ongoing for nearly three quarters of a century. During that time, the problems facing the nation's largest circuit court have been exhaustively detailed. Still, the Ninth Circuit's boundaries remain intact. Mounting concerns about the administration of justice in the West have once again propelled policymakers to put forward numerous proposals to finally split up the outsized circuit into smaller, more manageable jurisdictions. Unfortunately, these proposals face resistance from those who view any circuit-splitting plan as a political ploy designed to undermine the independence of the judiciary and dilute the court's ideological salience. But proposals to split the Ninth Circuit cannot be so easily dismissed as mere partisan gamesmanship—and we must reiterate that none of the splits we've described or that have been proposed necessarily advantage any party or judicial methodology. Instead, they represent genuine attempts to return to a federal judiciary with regional circuits of reasonably comparable size, population, and caseload. While it would surely be mistaken to realign the circuits (or not realign them) because of particular judicial decisions or individual judges, it's only salutary to consider circuit-splitting proposals when the objective evidence weighs in favor of restructuring the circuits.

After years of study and commentary, it's clear the Ninth Circuit has simply become too large and cumbersome to effectively and efficiently administer justice. The circuit's unwieldy size, procedural inefficiencies, jurisprudential unpredictability, and unusual en banc process all contribute to the Ninth Circuit's unmanageable state. Notwithstanding the best efforts of its judges and administrative staff, the Ninth Circuit, as structured, does not and

cannot function properly—and justice is suffering as a result. Indeed, if new boundaries were appropriately drawn, each of the states and territories served by the Ninth Circuit—and the administration of justice nationwide—would be better served.

This Article has sought to bring a greater focus to the policy concerns surrounding the Ninth Circuit as currently configured. Reasons for a split has been discussed in earnest for four decades, all while the circuit's problems have only grown worse. It's time that the oversized court be divided into more manageable and reasonably sized circuits that are consistent with the rest of the nation's judicial system.

The need to break up the Ninth Circuit is urgent—and it transcends politics.